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Shadowing the Bar: Attorneys' Own Implicit Bias

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Professor Thompson examines Federal Rule of Evidence 404(a), which limits when character evidence (other than for credibility purposes) may be used against a defendant in a criminal trial.[130] Although the rule is meant to protect defendants from having unduly prejudicial evidence admitted, she suggests implicit bias combined with the transparency theory creates a different kind of character evidence not regulated by Rule 404(a): evidence of "stereotypical Blackness," which is just as prejudicial.[131] Therefore, when African Americans do not assimilate to these norms or seems unwilling to assimilate, they will face discrimination from jurors, even if those jurors have good intentions.[132] Further, a Black defendant's perceived failure to assimilate to white-specific norms can cause that defendant to fall into the category of "stereotypical Blackness," which implicitly includes evidence "that he or she has a propensity for engaging in certain behavior."[133] That behavior, based on the IAT studies discussed above, is aggressive, violent and often criminal.

D. *How Judges' Implicit Bias May Affect Rulings*

A few studies identify implicit biases in judges.[134] Judges are "just as susceptible as are jurors to three cognitive illusions that hinder accurate decision making: anchoring, hindsight bias and egocentric bias."[135] An IAT study showed:

> [T]he white judges mostly showed a white preference while black [sic] judges showed no clear overall preference. When subliminally primed with black-associated words in a hypothetical vignette, judges who expressed a white preference on the IAT were more likely to impose harsher punishments on defendants in the story than those primed with neutral words. When race of the defendant was made explicit in a hypothetical vignette, black [sic] judges were appreciably more willing to convict the white defendant rather than the defendant identified as African-American.[136]

Justice Hyman's article recalls a moment when an attorney saw an African American woman exiting the judge's chambers and exclaimed "you must be the law clerk." It turned out the woman was not the law clerk but in fact the judge.[137] The justice then questioned whether this incident would affect the way the judge viewed that attorney moving forward in the case and how the judge's rulings would be affected. If the judge's actions were somehow influenced moving forward, this incident would affect not only the attorney but ultimately the client being represented.

Even this informed judicial perspective reveals a deeper level of hidden bias. Why would the judge let a personal slight impact her rulings? Perhaps because the author's common sense tells him that some female judges would be offended by the

130. Thompson, *supra* note 7, at 323–27.

131. *Id.* at 334–35.

132. *See id.*

133. *Id.* at 332.

134. *See, e.g.*, Andrew Wistrich & Jeffrey S. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, *in* ENSURING JUSTICE: REDUCING BIAS 87 (Sarah Redfield ed., ABA 2017).

135. Eisenberg & Johnson, *supra* note 1, at 1554.

136. Hyman, *supra* note 1, at 44.

137. Hyman, *supra* note 1.

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assumption that they are not judges. Professors Kang and Banaji and others caution against the use of so-called "common sense" by judicial actors because theories and notions that were once considered common sense are less accurate now based on the literature and empirical research.[138] For instance, many may have considered it "common sense" that men on average are better drivers than women, but automobile insurance companies have studied the data and give women (especially when compared to young men) lower rates because their risk of accidents is lower.

Why would his common sense tell him the judge might be offended? Is it because of the stereotype that African American women are "unforgiving," "hard," "cold," and perhaps are more likely to hold grudges over real or perceived slights than white males or other females? Quite probably. And so, she is second-guessed when a young white male judge would get the benefit of the doubt that he would not hold any such grudge if he instead had been mistaken for the law clerk or an off-duty bailiff. Implicit bias has an impact.

Another recent study of over 200 sitting judges analyzed the strength of positive stereotypes of white people and Christians, along with both negative and positive stereotypes of Asian people and Jewish people.[139] Self-reporting using IAT tests, the study found most judges "displayed strong to moderate implicit bias against Asians relative to whites and against Jews relative to Christians."[140] The participants also completed a sentencing task—reading a file and making a sentencing decision where the race and religion of the defendant varied.[141] Other findings include: (1) State judges gave longer sentences to white defendants than to Asian defendants;[142] (2) Anti-Jewish, pro-Christian biases accurately predicted lesser sentences for Christian defendants,[143] and (3) male judges showed stronger anti-Jewish biases than female judges.[144]

The behavioral realism approach posits that judges need to keep up with empirical research if they are going to implicitly or explicitly base their decisions on theories about how people behave. Do judges even want to address the issue of implicit bias? Professor Eric Girvan argues, "the law-science gap exists and persists in significant part because judges believe they lack the ability to effectively remedy non-purposeful discrimination of the kind described by work on implicit bias and are unwilling to take steps necessary to develop ways to do so."[145] He criticizes judges for not doing a better job of "conforming their assumptions about human behavior to available social science."[146] He notes a Westlaw search he did, revealing "more examples of cases in which a majority of the judges indicating that they are aware of the concept refused to alter anti-discrimination doctrine accordingly in cases in which a majority of judges acknowledged evidence of implicit bias as justification for

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138. Kang, *supra* note 5, at 1160–63.

139. Justin D. Levison et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLORIDA L. REV. 63 (2017).

140. *Id.* at 97–98 (noting that 91.6% of the judges were non-Hispanic white, and 2% were Asian, and 11% were Jewish).

141. *Id.* at 101.

142. *Id.* at 104.

143. *Id.* at 109.

144. *Id.* at 104, 109, 106.

145. Erik J. Girvan, *When Our Reach Exceeds Our Grasp: Remedial Realism in Antidiscrimination Law* 94 OREGON L. REV. 359, 360 (2016).

146. *Id.* at 362.

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liability."[147]

In other words, despite reasoning that implicit bias played a role in allegedly discriminatory behavior, the judges declined to extend the interpretation of anti-discrimination doctrine to permit or support a finding of liability. In one recent case, the U.S. Court of Appeal for the Fourth Circuit broke from this pattern, holding that "[i]nvidious discrimination steeped in racial stereotyping is no less corrosive of the achievement of equality than invidious discrimination rooted in other mental states."[148] The court's comment explained that while the circuit had "admonished district courts, albeit in unpublished, non-precedential decisions," it is now "past the time when that admonishment should be given precedential force."[149] Recognizing the "real risk" that legitimate claims based on subtle "stereotyping or implicit bias" may be dismissed by judges substituting their own rationales, the court reversed the district court's dismissal.[150] Professor Girvan concludes, "if the antidiscrimination [sic] law-science gap is caused primarily by a lack of judicial knowledge, . . . the solution to it should be to inform judges of research supporting the psychological science of implicit bias and evidence of its applicability to the cases they are deciding."[151] Part four addresses these suggestions.

E. *Implicit Bias in the Courthouse*

In the courthouse, further research is needed on the impact of implicit bias on court personnel. Court workers may treat people differently based on what they look like and based on implicit biases. As Professor Debra Bassett notes:

> Court clerks who accept court filings may unconsciously respond differently to individuals of different races leading them to provide more help to some individuals than to others. As a mundane example, suppose a litigant presents paperwork for filing, and the paperwork lacks a required two-hole punch across the top. The court clerk may reject the paperwork when offered by some individuals but in other cases may accept the paperwork and simply punch it themselves.[152]

Differences in treatment can lead to real consequences for litigants—even impacting the outcome of their cases.

Another important facet of civil litigation is how few cases go to trial. We know that the attorney's assessments of the case and its settlement value play a large role in the recovery options for civil plaintiffs. Implicit biases of settlement judges, mediators, and other dispute resolution actors may exacerbate the prejudice to the fair

147. *Id.* at 364, n.14, app. A–C.

148. Woods v. City of Greensboro, 855 F.3d 639, 651 (4th Cir. 2017).

149. *Id.*

150. *Id.* at 25–26.

151. Girvan, *supra* note 145, at 380.

152. Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1579 (2013). She continues: "Although rejecting paperwork lacking the two-hole punch probably will have little impact on the case, it potentially impacts public perceptions of the accessibility of justice." *Id.* However, rejecting the filing could have significant consequences, if a deadline is imminent. She also notes that judicial law clerks can have a "powerful impact on how their judge approaches the case," and "this bias can influence the ultimate outcome of the case." *Id.* at 1579–80.

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administration of justice.

PART THREE: IMPLICIT BIASES OF ATTORNEYS IN CIVIL LITIGATION

A. *The Negligence Standard*

The ABA Model Rules of Professional Conduct define as misconduct when a lawyer "reasonably should know" she is discriminating on the grounds of race, gender, ethnicity, religion, and other categories, or when such actions are prejudicial to the administration of justice.[153] The word "reasonably" invokes a negligence standard. When should an attorney reasonably know that her conduct is discriminatory? Do the implicit bias studies make it reasonable for attorneys to know that their conduct may be discriminating on the basis of race, ethnicity, or other prohibited categories? IAT research suggests that the answer is yes. Because we know implicit biases exist, there can be a finding of a prima facie "claim against any facile claim of colorblindness."[154]

The ABA model rule applies broadly to "conduct related to the practice of law," and therefore can apply to how lawyers represent their clients, including which strategies they pursue and what evidence they present at trial. Strategies involve the attorneys' judgments about the facts of the case as well as the client's particular circumstances, and may be difficult to label as racially or ethnically discriminatory in an individual case. But, implicit bias in the application of certain strategies may violate the ABA rule against conduct that is "prejudicial to the administration of justice.[155]" For instance, implicit bias that takes the form of "Black male as violent" stereotyping can be prejudicial to the administration of justice, particularly when it enhances the perceived dangerousness of a person based on race; and thereby justifies lethal force against that person or uses ambiguous evidence to support a finding of dangerousness or violent conduct.[156]

California's Rules of Professional Conduct are arguably milder than the ABA model rule is for attorneys, requiring actual unlawfulness, or knowingly permitting such conduct when applied to the behavior of another attorney, or someone in the law office.[157] As Professor Girvan notes: "Legal doctrine, however stagnated. It only recognizes and targets overt, explicit bias with the accompanied understanding that

153. ABA Model Rule 8.4 states, in pertinent part, that it is "professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . . (d) engage in conduct that is prejudicial to the administration of justice; . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2009).

154. Jerry Kang & Kristin Lane, Seeing *Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 489 (2010).

155. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2009).

156. Correll, *supra* note 15, at 1325.

157. *See, e.g.*, CAL. RULES OF PROF. CONDUCT r. 2-400 (B) ("In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in: (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or (2) accepting or terminating representation of any client.").

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social desirability concerns might frequently prompt people to conceal it;"[158] however, the Fourth Circuit case *Woods v. Greenboro* suggests some movement in this area.[159] While acting on bias can constitute actionable discrimination, implicit bias generally is not seen as actionable because there is no purpose or intent motivating it. In addition, the California rule is limited to accepting and terminating client representation (as well as employment conditions not applicable to this article), and therefore would not implicate strategic decisions in the conduct of representation.[160]

Next, this article examines some of the situations in which implicit biases can impact the attorney-client relationship and be prejudicial to the fair administration of justice. Attorneys "reasonably should know" about these various opportunities for implicit bias to result in differential treatment based on race, gender, ethnicity, and other protected classifications.

B. *Implicit Bias in Communication*

Communication is often influenced by implicit bias. Clients may be hesitant to communicate based on their own culture, the lawyer's culture, or either's perceptions. "Cultural differences often cause us to attribute different meaning to the same set of facts," as law professors found in a course on cultural competence.[161] They explain:

> [E]ven in situations in which trust is established, students may experience cultural differences that significantly interfere with Lawyers' and clients' capacities to understand one another's goals, behaviors, and communications . . . . One important goal of cross-cultural training is to help students make isomorphic attributions, i.e., to attribute to behavior and communications that which is intended by the actor or speaker. Students were taught about the potential for misattribution [so they] can develop strategies for checking themselves and their interpretations.[162]

For instance, consider when a lawyer asks a client to speak up if the client wants the lawyer to explain something she does not understand or if the lawyer is not being clear, cultural barriers may preclude the client from responding truthfully. This instruction, while seeming appropriate on its face, does not necessarily take into consideration that in some cultures, it would be considered rude to suggest the lawyer is not being clear, and in others, it would be considered embarrassing to admit one

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158. Girvan, *supra* note 10, at 36. He continues, "the legal doctrine largely ignores contemporary theories of subtle, explicit, or implicit bias as a cause of discrimination." *Id.* He then discusses Charles Lawrence's unconscious racism argument and cultural meaning test analysis. Charles R. Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). He also cites Linda Hamilton Krieger's analysis of Title VII case law noting the impact of such implicit bias in judicial decision making. Girvan, *supra* note 10, at 36 (citing Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination in Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995)).

159. Woods v. City of Greenboro, 855 F.3d 639 (4th Cir. 2017).

160. *Compare* MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2009), *with* CAL. RULES OF PROF. CONDUCT r. 2-400 (B).

161. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 42 (2001).

162. *Id.* at 42–43.

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does not understand.[163] If the client is from such a culture where it is disrespectful to imply that someone in a position of power is being unclear, she does not ask for an explanation; and when asked if she understands, she answers affirmatively. But she does not understand. Later, the lawyer may ask why the client is not going along with the strategy, not realizing that the client did not understand enough to participate in the strategy in the first place.

C. *Credibility Assessments that Rely on Implicit Biases*

On the issue of substantive credibility (whether we believe the story to be true), we are more likely to believe stories that make sense to us and less likely to believe those that do not make sense.[164] Consider a case where a defendant's photo identification card is found at the scene of a crime. For those of us who carry our identification cards with us every day, it does not make sense that the card would end up at a place and time that we are not (unless we assert that the identification card was stolen). For those who do not carry an identification card each day and instead keep it in a drawer somewhere, the card could end up someplace else or be left somewhere for days without the defendant noticing. Those who carry identification cards are less likely to find the second story credible, though it may very well be true.

Similarly, cultural differences can impact the process of evaluating credibility (whether we believe the storyteller to be credible). For instance, there are people who tell stories in nonlinear ways. Some cultures have different orientations about time and space and "[l]awyers and clients who have different time and space orientations may have difficulty understanding and believing each other."[165] What will seem to an attorney to be lying or uncooperative, may be the respectful or appropriate way to provide context and background for the story in the client's culture. It is important to be cognizant of the difference between having an individualistic culture where "people are socialized to have individual goals and are praised for achieving those goals,"[166] as opposed to a collective culture where:

> [P]eople are socialized to think in terms of the group, to work for the betterment of the group, and to integrate individual and group goals. Collectivists use group membership to predict behavior. Because collectivists are accepted for who they are and accordingly feel less need to talk, silence plays a more important role in their communication style.[167]

Those silences and apparent meanderings will be interpreted by some as meaning the storyteller is less credible. This interpretation likely applies to the attorney who is deciding how to represent the client, as well as to the judges and jurors who ultimately determine what testimony to believe.[168]

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163. *Id.* at 43.

164. The author notes "in examining the credibility of a story, lawyers and judges often ask whether the story makes 'sense' as if 'sense' were neutral." *Id.* at 43–44.

165. *Id.* at 44.

166. *Id.* at 45.

167. *Id.* at 46.

168. Other researchers have noted the importance of culture on experience. For instance, "influences of cultural factors on the IAT can also explain why people often display implicit attitudes that appear more concordant with their general cultural milieu than with the experiences of their individual

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D. *Representation Strategies Developed by Implicit Bias*

Cultural competence has an impact on attorneys' strategies for representing their clients. A strategy that seems to be the best one from the attorney's perspective may be rejected by the client based on the cultural meaning of such an admission.[169] For instance, in a tort case involving the plaintiff's own potential negligence, an attorney may want to pursue a strategy that shows the plaintiff did not understand a written warning that was not verbally explained. In the plaintiff's culture, failure to understand could be a sign of lack of intelligence; and if intelligence and ability to read are highly prized in that culture, the client may be unwilling to advance that argument, even though doing so may be the most effective argument for the case. In fact, the argument might be particularly effective when jurors may apply the "unintelligent Black people" stereotype prevalent in the American media, even though the plaintiff's culture is Nigerian, where education is highly prized. "Availability bias" plays a role here, which operates when people base their assessment of how likely a particular fact is to be true on how quickly or clearly they can recall examples of that fact being true.[170] If the attorney knows a lot of educated Black people, that adjective-noun pairing makes sense and is more acceptable. If she does not know many educated Black women, then that pairing in unlikely in her mind.

Implicit bias studies show that people routinely discount the amount of pain they perceive another is feeling if that person has a darker complexion than they have. In personal injury cases, attorneys may therefore discount the amount of pain they attribute to Black clients seeking damages, while being more realistic, or even augmenting, the amount of pain they attribute to their white clients. Of course, the attorneys are not solely responsible for the valuation because they may have doctors or other expert witnesses provide an assessment of the pain levels. These experts may also be influenced by implicit bias, availability bias, confirmation bias, and others. Nevertheless, the valuation has an impact on case strategy and, for contingency fee cases, similar to the public defender triage situations described in part two above,[171] on the amount of time and other resources to be devoted to the case.

When entering a contract, some people rely upon a handshake deal and others require a written agreement. In examining what is "reasonable reliance" or what constitutes an "offer and acceptance," different cultures may have different assessments. Attorneys who are not mindful of these differences might decline to accept what could be a winning case.

In employment discrimination and wrongful termination litigation, stereotypes about certain groups being uneducated, unintelligent or untrustworthy can impact the attorney's assessment of the strength of the claim or defense.

E. *Promoting the Fair Administration of Justice*

There are many contexts in which cultural understanding enhances the attorney-client relationship and promotes the fair administration of justice. Conversely, a lack of cultural understanding undermines the attorney-client

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upbringing." Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 959 (2006).

169. *See* Bryant, *supra* note 161, at 47–48.

170. I am indebted to my colleague Singh Sukhsimranjit for highlighting this point.

171. *See* Part II.B., *supra* note 161. See also the accompanying text.

Electronic copy available at: https://ssrn.com/abstract=3189155

relationship, as well as the fair administration of justice.

Given the depth of research, Continuing Legal Education (CLE) courses, and other resources on the existence and implications of implicit bias, attorneys "reasonably should know" they may be acting in ways "prejudicial to the fair administration of justice" due to implicit biases. Attorneys who are not mindful of its potential impact in their representation may be discriminating in their "conduct related to the practice of law." Given the Fourth Circuit's recent recognition that subtle stereotyping and implicit bias can give rise to legitimate discrimination claims,[172] attorneys should abide by the ABA proposed Model Rule 8.4 and make special efforts to reduce the impact of implicit bias in the practice of law. The next section identifies specific strategies to implement this rule.

PART FOUR: REDUCING THE IMPACT OF IMPLICIT BIASES IN CIVIL CASES

There are three basic steps to reduce reliance on implicit biases. First, become more aware of one's own thought processes. Second, develop a healthy concern for the consequences of implicit bias.[173] Third, learn to replace biased reactions with non-biased ones.[174] Ways to implement each of these steps in the civil context is discussed below.

A. Notice Race

If attorneys try to be colorblind, they will fail since most people do see color. Instead, attorneys should practice mindfulness, because simple awareness is not enough to reduce bias. Attorneys should focus on thoughts outside oneself, and use:

> [E]mpathy-related techniques like perspective-taking, which prompts people to consider the experiences of individuals who are different from themselves. Colorblindness is not the answer; noticing race will help. Adopting an identity-conscious perspective (*e.g.*, accepting and considering different identities) rather than an identity-blind mindset (ignoring or denying stigmatized attributes such as race and gender) can reduce bias. Finally, deliberately setting pro-diversity goals has been found to enhance diversity-related attitudes and behaviors.[175]

Attorneys and judges alike should aim to make race salient in the courtroom when dealing with cases that raise concerns about racial bias.[176] Although parties may be hesitant to bring up race in a civil trial unless discrimination is at issue, for fear of

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172. *See supra* note 159. See also the accompanying text discussing *Woods v. Greenboro*, 855 F.3d 639 (4th Cir. 2017).

173. Casey, *supra* note 49 at 15.

174. *Id.*

175. Eden King & Kristen Jones, *Why Subtle Bias is so often Worse than Blatant Discrimination*, HARV. BUS. REV. (July 13, 2016), https://hbr.org/2016/07/why-subtle-bias-is-so-often-worse-than-blatant-discrimination.

176. Chris Chambers Goodman, *The Color of our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 Law & Inequality 1, 50–54 (2007).

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being "accused of playing the 'race card,' race," however is often relevant.[177] U.S. Supreme Court Justice Sonia Sotomayor provides a powerful example of this continuing problem in criminal cases:

> In February 2013, [Justice Sotomayor] made race painfully salient for one federal prosecutor by publicly criticizing his racially stigmatizing questioning of an African American defendant charged with participating in a drug conspiracy . . . . Justice Sotomayor made race salient by highlighting the ways in which the prosecutor's remarks relied on racial stereotypes and prejudice. Her remarks will likely encourage the prosecutor in this case and attorneys in future cases to think twice before making similar comments that draw generalizations about individuals based on their race.[178]

The effects of implicit biases are likely largely unrecognized and unacknowledged particularly due to some viewing American society as "post-racial,"[179] and thus are even more likely to be ignored in civil cases.

Present methods of addressing bias may exacerbate implicit bias because they are directed primarily at explicit bias. Judges should be cautioned against dominating the jury selection process because jurors do not want to give biased answers or admit bias to a judge, but may be more likely to do so to lawyers. Therefore, Judge Bennett proposes that "the implicit bias of jurors can be better addressed by increased lawyer participation in voir dire, while the implicit bias of lawyers can then be curbed by eliminating peremptory strikes and only allowing strikes for cause."[180] Both suggestions are provocative.

Asking a question like "Can you be fair and impartial in this case?" is unhelpful because the question "does not begin to address implicit bias, which by its nature is not consciously known to the prospective juror. Thus, a trial judge schooled in the basics of implicit bias would be delusional to assume that this question adequately solves implicit bias."[181] Judge Bennett understands that jurors are likely to give him the answer they think he wants (and he is rather surprised whenever jurors admits they cannot be fair). Moreover, sometimes the questions are posed in a way that educates the jurors about what would be an appropriate response and in these situations "the trial judge is probably the person in the courtroom least able to discover implicit bias by questioning jurors."[182]

B. Recognizing the Importance of Cross-Cultural Competency

To help attorneys and judges become more aware of the consequences of their implicit biases, some law schools offer a seminar in cross-cultural competence applying the "five habits for building cross-cultural competence" from an article by

177. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in A Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1564 (2013).

178. *Id.*

179. *Id.*

180. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 151 (2010).

181. *Id.* at 160.

182. *Id.*

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Professors Susan Bryant and Jean Koh Peters.[183] These authors made a plea to enhance clinical education by increasing the cross-cultural competence of law students.[184] They recognize that "lawyers and clients who do not share the same culture face special challenges in developing a trusting relationship in which genuine and accurate communication can occur."[185] In addition, they suggest that some version of the course curriculum[186] could be offered as a CLE course for attorneys already in practice.

For instance, the fourth habit is described as "pitfalls, red flags, and remedies," and it "encourages conscious attention to the process of communication," such as asking questions that "explore how others who were close to the client might view the problem and how they or she might resolve it."[187] This habit has four focal points: "(1) scripts, especially those describing the legal process, (2) introductory rituals, (3) client's understanding and (4) culturally specific information about the client's problem."[188] Using scripts to promote better communication would foster greater understanding on both sides, and highlighting culturally specific information would better equip the attorney to address and mitigate the impacts of implicit biases in representing clients.

The fifth habit is the "camel's back," which "proposes two ways to work with biases and stereotypes: (1) creating settings in which bias and stereotype are less likely to govern, and (2) promoting reflection and change with the goal of eliminating bias."[189] One way to put this fifth habit into practice is to align oneself with counter-stereotypes. In the criminal context, one author suggests having people close their eyes and imagine they are being attacked by a white man and a Black man comes to their rescue.[190] Just that notion of switching the "violent-Black and savior-white" stereotype to "violent-white and savior-Black" can make a big difference in subsequent decisions and deliberations.[191]

Similarly, priming with counter-stereotypical words and phrases can impact decision making. For instance, thinking about words like "educated" and "intelligent" or "hard-working" and "responsible" before considering an employment discrimination claim can activate a different part of the brain that puts a minority former employee in a better light than doing nothing, which might leave the brain to fall back upon availability bias and unstated stereotypes like "chronically unemployed" and "entitlement-seeker."

183. Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in a Multicultural World*, 62 UCLA L. REV. DISC. 140 (2014).

184. *See* Bryant, *supra* note 161.

185. *Id.* at 42.

186. The first habit is to identify the similarities and differences between themselves and their clients by analyzing degrees of separation and degrees of connection. The second habit involves the "Three Rings," an exercise designed to analyze the differences and similarities between the client, the decision-maker, and the lawyer, each representing a ring. The third habit involves brainstorming other possible reasons for behavior by thinking of multiple interpretations or parallel universes. Patel, *supra* note 183, at 146–148.

187. Bryant, *supra* note 184, at 72–74.

188. *Id.* at 73.

189. Patel, *supra* note 183, at 149. "Like the proverbial straw that breaks the camel's back, habit five recognizes innumerable factors that interact with bias and stereotype to negatively influence an attorney-client interaction. A lawyer who proactively addresses some of these factors may prevent a problematic interaction from reaching the breaking point." Bryant, *supra* note 184, at 77. This habit includes taking a break, or offering refreshments, because when students engage in "self-analysis rather than self-judgment," they are "more likely to respond to and respect the individual client." *Id.* at 78.

190. Lee, *supra* note 177, at 1599–1600.

191. *Id.*

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During trial, the court should talk about the concepts of implicit bias and the transparency theory with jurors, so they can be "trained" in this area, similarly to how police officers are "trained," to try to combat implicit bias.[192] For instance, to prepare jurors to be mindful of the consequences of their biases, Judge Bennett shows a video clip from a television show involving hidden cameras that captured bystanders' reactions to various situations with varied race and gender actors to show how people respond differently.[193] In addition, he gives a specific jury instruction on implicit biases at the beginning of each case.[194]

Judge Bennett also notes judges do not have the same resources to address implicit bias in prospective jurors and they do not have the same knowledge of the case to fully understand the impact of implicit bias in a particular situation.[195] He shows a PowerPoint presentation about implicit bias and believes providing information upfront "may mitigate the effect of the bias."[196] In addition, he recommends the use of jury instructions, though he recognizes many of his colleagues are not receptive to the idea "fearing that implicit biases will only be exacerbated if we call attention to them."[197] Judge Bennett uses the following jury instruction:

> [A]s we discussed in jury selection, growing scientific research indicates each one of us has implicit biases, or hidden feelings, perceptions, fears and stereotypes in our subconscious. These hidden thoughts often impact how we remember what we see and hear and how we make important decisions. While it is difficult to control one's subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to recognize that all of us may be affected by implicit biases in the decisions that we make. Because you're making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.[198]

Some jurors will try to follow the rules and will decline to apply racial stereotypes and generalizations if specifically asked not to do so,[199] and other studies have confirmed that noticing race actually makes a difference in race-salient cases.[200]

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192. Thompson, *supra* note 7, at 344. This author also states that combatting the bias that occurred in the Trayvon Martin trial should have been the responsibility of the prosecution. The author states that the prosecution should have rebutted the portrayal of Trayvon as an "uneducated, hostile, inarticulate, lazy thug who disliked Whites [sic]." *Id.* at 345. Although the defense did not offer explicit evidence of these traits, they still brought out evidence of Jeantel's traits and linked those to Martin, thereby circumventing the Federal Rules of Evidence. *Id.* at 346. She suggests a rule that allows the prosecution to use rebuttal evidence when the jury is presented with evidence of an individual victim's "stereotypical Blackness." *Id.*

193. Kang, *supra* note 5, at 1182 n.250 (citing Judge Mark W. Bennett, *Jury Pledge Against Implicit Bias* (2012) (unpublished manuscript on file with Professor Kang).

194. *Id.* at 1182.

195. Bennett, *supra* note 180, at 165.

196. *Id.* at 169.

197. *Id.*

198. *Id.* at 169 n.85.

199. *See* Goodman, *supra* note 176, 50–54.

200. *See* Lee, *supra* note 177. See also the accompanying text.

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Still, few courts give jury instructions to counter-stereotypes and prejudice.[201]

C. *Moving Toward More Deliberative Decisions*

As Professor Blasi and others have noted, implicit biases can be changed.[202] In order to make a conscious decision, the decision-maker has to have time to deliberate and not just react. Being overworked or rushed makes a difference in one's reliance upon the shortcut of stereotypes and unconscious bias. To combat this, courts can try to reduce time pressures. Since so few civil cases go to trial, there should be plenty of time for civil trial attorneys to assess, evaluate, and check for biases.

Professor Bassett proposes a standardized training program for all lawyers and clients, jurors and witnesses, as well as all court personnel, which integrates three approaches from prominent psychological studies: "diversity education, educating individuals about unconscious bias, and appealing to individuals' beliefs in equality and fairness."[203] The education components increase awareness, and the appeals to fairness enhance concerns about the consequences of implicit biases. She notes Professor Gary Blasi's conclusion that "if our values include fairness and treating people as individuals, then anything that increases self-awareness should decrease our application of stereotypes."[204]

Exacerbating the problem, studies note that judges "tend[] to favor intuitive rather than deliberative faculties."[205] Judges need to recognize that the decision they reach is not necessarily the right one. Others note:

> Intuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system. Today, the overwhelming majority of judges in America explicitly reject the idea that these factors should influence litigants' treatment in court but even the most egalitarian among us may harbor invidious mental associations.[206]

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201. Bennett, *supra* note 180, at 169.

202. Gary Blasi, *Advocacy against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1276–77 (2002). For instance, "implicit gender stereotypes of feminine weakness were reduced by imagining examples of counter-stereotypic (i.e., strong) women, and implicit anti-Black race attitudes were reduced by having African American experimenters administer the research procedure." Greenwald & Krieger, *supra* note 167, at 963–64.

203. Bassett, *supra* note 152, at 1581. She explains:

> The sheer number of individuals to whom this prerequisite would apply necessarily requires an approach that can easily be standardized, applied, and repeated. Accordingly, some of the more innovative and creative measures described in the psychological literature, despite their appeal, are unlikely to work effectively in this context. In particular, achieving diversity within the operating environment, mental imagery of counter-stereotypes, and exposure to actual admired exemplars who are counter-stereotypical likely require more time and more resources than are available to the courts in light of courts' limited budgets and time constraints. Instead, my proposal urges the adoption of a standardized program.

Id.

204. *Id.* at 1581–82 n.76 (citing Blasi, *supra* note 202, at 1276–77).

205. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 17 (2007).

206. *Id.* at 31

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One way to reduce implicit bias is to go back and question how a decision was reached, why it was reached, and what else might have impacted it. Having conversations with others can bring implicit biases to the foreground and judges are often constrained from using this tool except in open court. Attorneys and judges should take the time to fill in informational gaps with actual information, rather than using stereotypes and implicit biases as shortcuts.

The authors of the *Blinking on the Bench* study explain that inducing deliberation and more deliberative thought processes to judges could result in less bias. The authors conclude that:

> "[W]e believe that most judges attempt to 'reach their decisions' utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors." Despite their best efforts, however, judges, like everyone else, have two cognitive systems for making judgments—the intuitive and the deliberative—and the intuitive system appears to have a powerful effect on judges' decision making. The intuitive approach might work well in some cases, but it can lead to erroneous and unjust outcomes in others. The justice system should take what steps it can to increase the likelihood that judges will decide cases in a predominantly deliberative rather, rather than a predominantly intuitive, way.[207]

CONCLUSION

As the Fourth Circuit recently noted in *Woods*, "[i]nvidious discrimination steeped in racial stereotyping is no less corrosive of the achievement of equality than invidious discrimination rooted in other mental states."[208] While such discrimination can and does occur in the workplace, in business transactions, and in other facets of life, it is particularly pernicious when attorneys as officers of the court perpetuate this type of harm. This article analyzed the implications of attorneys' own implicit biases and how those biases impact their clients, jurors, and the fair administration of justice.

Actionable discrimination is difficult to prove because of the intent standard that the courts apply. But, using a negligence standard for attorneys' actions in and outside of the courtroom could reduce the impact of implicit bias. If attorneys comply with the ABA Model Rule of Professional Conduct that imposes a negligence standard on whether lawyers "reasonably should know" when they are discriminating on the grounds of "race, sex religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status,"[209] the rights of litigants and the responsibilities of officers of the court would better serve the interests of justice.

207. *Id.* at 43.
208. Woods v. City of Greensboro, 855 F.3d 639, 651 (4th Cir. 2017).
209. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2009).

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