SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

UNDERSTANDING IMPLICIT BIAS AND WHY IT MATTERS

FACULTY

Hon. Theresa Whelan
Erica Edwards-O'Neal
Hon. Derrick J. Robinson

PROGRAM COORDINATOR & MODERATOR: Andrea A. Amoa, Esq.

Thank You to our Sponsor:

March 19, 2019
Suffolk County Bar Association, New York

FACULTY

Hon. Theresa Whelan is the Suffolk County Surrogate's Court Judge and presides over proceedings involving wills, trusts and estates, as well as guardianship matters. Judge Whelan is also the Supervising Judge of the Suffolk County Family Court. She was first elected to the Family Court in 2007 and was re-elected to another ten year term in 2017. As a Family Court Judge, Judge Whelan heard primarily child abuse and neglect cases and presided over Family Treatment Court. She was elected Surrogate's Court Judge in 2018.

Judge Whelan was appointed Supervising Judge of the Suffolk County Family Court in February 2016. In that role, Judge Whelan supervises a court consisting of eight to ten judges, five referees and numerous support magistrates. During her tenure, she has reformed court practice to better accommodate the needs of parties and litigants.

In 2009, the Office of Court Administration appointed Judge Whelan as Lead Judge of the Suffolk County Child Welfare Court Improvement Project. This local child welfare collaborative is part of state-wide initiative to address court practices in cases where the court has removed children from their parents' care.

Judge Whelan is the Chair of the Suffolk County Attorneys for Children Advisory Committee which is responsible for considering the qualifications of new applicants to the Attorneys for Children panel, as well as reviewing the recertification applications for existing lawyers. The Advisory Committee also addresses issues that may arise with lawyers, conducts the annual training and ensures a fair and efficient rotation of lawyers available to take assignments from the Family Court.

In 2017, Chief Administrative Judge Larry Marks appointed Judge Whelan to the Family Court Advisory and Rules Committee, a statewide committee which meets monthly. That committee reviews proposed legislation and drafts its own proposals in the area of family law. More recently, Chief Judge Janet DiFiore appointed Judge Whelan to the New York State Commission on Parental Representation, which is tasked with holding public hearings throughout the state and reporting on the status and quality of lawyers representing parents in child welfare cases.

Judge Whelan began her law career in 1988 as a Suffolk County Assistant County Attorney. In 1990 she began her career in the judicial system, serving as a law clerk to three Supreme Court Justices: the Honorable Eli Wager (Nassau County), the Honorable Mary M. Werner, and the Honorable William B. Rebolini. As law clerk, she conferenced thousands of cases with attorneys and self-represented litigants, conducted legal research and drafted hundreds of decisions and orders. During her seventeen years in the Supreme Court, she worked in nearly every part of that court, including civil litigation, guardianship, tax certiorari and condemnation cases as well as matrimonial matters.

Judge Whelan is an active member of the Suffolk County Bar Association, where she was co-chair of the Family Court Committee from 2013 - 2016. She has lectured for the Law Academy and other law organizations. As a member of the Attorney for Child Task Force, she and the other members received the Suffolk County Bar Association's President's Award in 2016 for their work. Judge Whelan is also a member of and past president of the Suffolk County Women's Bar Association.

Judge Whelan received a Bachelor of Arts degree in English and a Master of Science degree in Policy Analysis and Public Management from the State University of New York at Stony Brook. She holds a Juris Doctor from Albany Law School.

FACULTY

Erica Edwards-O'Neal is the Senior Vice President for Inclusion and Diversity at a local governmental not for profit, in this role she oversees the development of policies and programs to attract, retain and foster a diverse and inclusive workforce. Erica has provided training in and presented on cultural competence and diversity related matters across the country.

Previously, as the Director of Diversity and Inclusion and Senior Career Counselor at Touro College Jacob D. Fuchsberg Law Center, Erica provided leadership and training on matters relating to valuing diversity, cultural competence, and the embedding of effective diversity and inclusion practices for the law school. In that role, she organized pipeline programming with high school and college students, coordinated diversity internships and fellowships, and collaborated with affinity groups, the law school community and legal employers to promote diversity.

Erica has a long standing commitment to diversity and public service, having previous experiences serving as the Director of a Legislative Advocacy Coalition, a legal mentor, community development liaison and an Americorp VISTA.

She is a member of the National Association of Law Placement Professionals, Suffolk County Women's Bar, New York City Bar's Committee on Recruitment and Retention of Lawyers, Metropolitan Black Bar Association, National Bar Association and both the New York State Bar Association's Committee on Diversity and Inclusion and the New York City Bar Association's diversity pipeline initiatives committee.

Erica received her Bachelor of Arts in Government and Politics from the College of William and Mary in Williamsburg, VA and her Juris Doctor from Touro Law Center.

Hon. Derrick J. Robinson is an Acting County Court Judge and Presiding Judge of the Suffolk County Drug and Mental Health Courts. He was appointed by Andrew Cuomo, as a NY Assistant Attorney General where he was a litigator in State and Federal Courts, representing State officials, institutions and agencies. He also performed community outreach presentations on internet safety, consumer protection matters, identity theft, student loans, and mortgage modification schemes.

Judge Robinson was Chief Deputy Town Attorney for the Town of Brookhaven where he was the head of the Litigation Group and responsible for the supervision of attorneys and investigators in the enforcement of town codes and ordinances. He spent 25 years in the Suffolk County Attorney's Office as a Principal Assistant County Attorney, in the General Litigation Bureau. He has argued in the United States Court of Appeals Second Circuit, the New York State Court of Appeals and the New York State Appellate Division, Second Judicial Department.

He is a member of the NY State Bar Association and a current member of the House of Delegates, the governing body of the State Bar Association. He is the 1st Vice President of the Suffolk County Bar Association, where he served as Chair of its Judicial Screening Committee, and member of the Professional Ethics Committee, Bench and Bar Committee, and Nominating Committee. He was the founding president of the Amistad Long Island Black Bar Association. He has written articles and lectured about the importance of Drug Courts and the Mental Health Courts and on; and the importance of diversity in the legal profession.

He is a graduate of Howard University and The Antioch School of Law and studied at New York Law School. He is active in his community. He mentors young students to achieve personal growth and academic excellence. He is Chairman of the Board of Directors of Keep Your Change (K.Y.C.), a Not-for-Profit academic support program. He has received numerous honors from community organizations.

Addressing Bias in Delinquency and Child Welfare Systems

Eliminating Racial and Ethnic Disparities in Juvenile and Family Courts is Critical to Creating a Fair and Equitable System of Justice for All Youth.

A. Racial and Ethnic Disparities in Juvenile Court[1]

Eliminating racial and ethnic disparities in juvenile and family courts is critical to creating a fair and equitable system of justice for all youth. While the number of youth who come into formal contact with the court system has declined in recent years, little progress has been made in reducing racial and ethnic disparities.[2]

Youth of color are disproportionately represented at every decision point of the juvenile delinquency court process.[3] They face higher arrest rates for similar conduct, fewer opportunities for diversion, and are far more likely to be detained and incarcerated.[4] For instance, in 2001, "Black youth were four times as likely as whites to be incarcerated"; today, they are five times as likely.[5] Additionally, Black youth "are at least 10 times as likely to be held in placement as white youth" in six states: New Jersey, Wisconsin, Montana, Delaware, Connecticut, and Massachusetts.[6] Native youth "were three times as likely to be incarcerated as white youth," while Latino youth "were 65 percent more likely to be detained or committed" than white youth.[7]

Youth of color face these same disparities in the child welfare system, as do their families, who are disproportionately referred into the system by institutions such as hospitals, schools, and law enforcement.[8] Where youth are dually involved in both the delinquency and child welfare systems, these disparities are exacerbated.[9] Addressing the overrepresentation of children and families of color in our juvenile courts requires careful consideration and reform of the policies and practices that drive bias and structural racism.[10]

1. Features of Adolescent Development are Consistent Across Racial Groups and Cannot Account for the Racial and Ethnic Disparities in the Court System

Developmental research shows that behaviors and characteristics common in adolescence are consistent across all races, ethnicities, and socioeconomic groups.[11] These studies, controlling for race and ethnicity, found no significant difference in key features of adolescent development, such as impulsivity, sensation seeking, susceptibility to peer influence, and a limited ability to plan ahead or anticipate consequences.[12] The disproportionate representation of youth of color in juvenile court, therefore, cannot and should not be attributed to differences in adolescent development or differences in behavior across racial and ethnic groups.[13]

Similarly, rates of child abuse and neglect are not higher in families of color; however, these families are disproportionately petitioned and brought into the court system and face greater likelihood of removal of their children than white families.[14]

2. Bias

A fundamental canon of judicial conduct states that judges must perform all duties of office fairly and impartially, without bias or prejudice;[15] avoid actual bias and the appearance of bias;[16] and be aware of and work proactively to address bias in the courtroom. To eliminate bias, we must address the structural bias of the justice system and honestly assess personally held explicit and implicit biases.

NCJFCJ
SJI State Justice Institute
NJDC National Juvenile Defender Center

a. What Is Structural Bias?

Structural, institutional, or systemic bias refers to "a set of processes that produce unfairness in the courtroom . . . [which] lock in past inequalities, reproduce them, and . . . exacerbate them . . . without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong."[17] It is the "cumulative and compounding effects of an array of factors that systemically privilege white people and disadvantage people of color."[18]

Structural bias may exist as rules, procedures, practices, or policies, and as a result of legislation, administrative decisions, or historical attitudes and practices, and may also be countermanded in the same way.[19] For example, structural biases may be embedded in criminal statutes, such as harsher penalties for certain drug use (e.g., crack cocaine versus powder cocaine), which may subject people of color to longer sentences for comparable behavior.[20] Structural bias is perpetuated by those who implement or execute policies by following existing rules or norms that promote racial differences in opportunities, outcomes, and consequences, even though they may have no consciousness of how those policies negatively impact certain groups.[21]

b. What Is Explicit Bias?

Explicit bias refers to attitudes and beliefs that are consciously held about a person or group of people.[22] Overt racism is an example of explicit bias; e.g., Black youth are denied opportunities for diversionary programs because of the belief that (1) they should be punished, and (2) they are dangerous. Racism is defined as "prejudice plus power," which combines "the concepts of prejudice and power, point[ing] out the mechanisms by which racism leads to different consequences for different groups."[23]

Explicit bias has no place in our justice system. Where expressions of explicit bias are observed, justice system stakeholders have an ethical obligation to address and/or report the person responsible.[24] Stakeholders must prevent explicit biases and prejudices from influencing decision-making in courts.

c. What Is Implicit Bias?

Implicit bias refers to subconscious feelings, attitudes, and stereotypes that affect our understanding, actions, and decision-making processes in an unconscious manner.[25] These assessments, both favorable and unfavorable, are "activated involuntarily and without an individual's awareness or intentional control."[26] "Implicit biases are not accessible through introspection" because these "associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages" in the form of "media and news programming" and other life experiences.[27]

Implicit biases result when we use cognitive shortcuts to filter information, fill in missing data, and categorize people and evidence.[28] This often occurs in fast-paced environments, such as juvenile court. Our strongly held conscious beliefs, intentions, and explicit efforts to treat people fairly do not prevent our implicit biases from affecting our perceptions and actions, even among "those [of us] who actively support equality, vehemently reject racism and discrimination, and have positive relationships with people of other races."[29]

Implicit biases may, despite our best intentions, influence decisions such as whether to remove a youth from the home, what disposition should be imposed, and other case outcomes. Each and every judicial officer, regardless of race and ethnicity, has an obligation to consciously ensure all decisions are based on the facts in evidence rather than implicitly held biases.

B. Bias in the Juvenile Courtroom

1. Bias Impacts Who is Brought to Court

Structural, explicit, and implicit biases impact which children and families enter the courtroom before judges ever consider their cases. Children of color and their families face a greater likelihood of referral to the court system[30]— in both the juvenile justice and child welfare systems.[31] Beginning as early as pre-school,[32] children of color face discriminatory application of school discipline policies and are pushed out of schools and into the juvenile and criminal justice systems.[33]

2. How Does Bias Impact How I Do My Job as a Judge?

Being aware of bias, particularly implicit bias and its role in how we process information and perceive people and events, is a first step to recognizing how our implicit biases can affect the judicial decision-making process.

Children of color and their families face a greater likelihood of referral to the court system — in both the juvenile justice and child welfare systems.

In every case, we must ensure that our perceptions of a youth's culpability and capability are not influenced by biases associated with race, class, or ethnicity, and strive to make unbiased decisions accordingly. One way to lessen the impact of bias is to begin with the viewpoint that most youth behavior is normal adolescent behavior and that the youth is amenable to redirection. We should ensure that all decisions are developmentally appropriate, strengthen the youth's likelihood for success while accounting for public safety, and are driven by an objective assessment of the youth rather than bias.[34]

3. Preventing Bias at All Stages of the Proceedings

Youth of color, particularly Black, Latino, and Native youth, are overrepresented and receive harsher treatment at every point in the court process.[35] And studies have found "evidence of bias in perceptions of culpability, risk of reoffending, and deserved punishment for adolescents when the decision maker explicitly knew the race of the offender."[36]

Judges must become cognizant of the potential for bias at each decision point. One of the ways to address our own potential biases is to stop and ask ourselves specific questions at every stage of the case. These may elicit some of our own biases we may not even be aware we hold.

a. Self-reflection inquiries can help identify what biases are impacting our decisions. For example:

The NCJFCJ Enhanced Resource Guidelines prompt judges in child welfare/removal proceedings to ask themselves at each decision point or hearing:

1. What assumptions have I made about the cultural identity, genders, and background of this family?
2. What is my understanding of this family's unique culture and circumstances?
3. How is my decision specific to this youth and this family?
4. How has the court's past contact and involvement with this family influenced (or how might it influence) my decision-making process and findings?
5. What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
6. How am I convinced that reasonable efforts (or active efforts in Indian Child Welfare Act (ICWA) cases) have been made in an individualized way to match the needs of the family?
7. Have I considered relatives as a preferred placement option as long as they can protect the youth and support the permanency plan?[37]

The following is only a sampling, and not an exhaustive list of additional questions to consider:

In a child welfare/removal proceeding:

- Is my own personal experience, culture, and background preventing me from understanding and taking the cultural issues of the child and family into account in deciding what safety issues exist and whether to remove the child from the home?

For Example:

> Disparities may be driven by the service strategy of an agency within the public child welfare system, due to lack of culturally relevant policies, procedures, practices, and decision-making.[38]

- Am I using data to identify how court recommendations and decisions may impact youth of color negatively?
- Do I believe that families of color abuse and/or neglect their children more than white families?
- Do I believe that if a parent was neglected and/or abused as a child they will be abusive parents?

At an initial appearance or detention hearing:

- Have I considered whether the youth before me has an actual history of failure to appear, or is my perception of that risk an assumption based on prior experience with other youth? Even if this youth has failed to appear, have I inquired into the reasons behind that failure? Was transportation an issue? Did they fail to receive notice? Were there factors outside of the youth's control that led to that failure?

For Example:

> Data revealed ethnic disparities within Ventura County, California's juvenile justice system, where Latino youth were arrested 2.5 times more than white youth despite the county's population of youth as 47 percent Latino and 43 percent white.[39] Ventura County contracted with the W. Haywood Burns Institute to ensure that youth appeared in court and to reduce the "attendant detentions from bench warrants for failure to appear," resulting in a 50 percent reduction in admissions for probation violations for Latino youth.[40]

- Does the youth pose a serious public safety threat? Or am I basing the detention decision on biases, such as that the youth needs "protection" because they live in a "dangerous" neighborhood?

  For Example:

  > Evidence suggests that bail judges rely on inaccurate stereotypes that "exaggerate the relative danger of releasing [B]lack defendants versus white defendants," which leads to disparities in bail determinations.[41]

- Am I considering the impact on school continuity when I decide to detain a child? How will detaining the child impact the child's ability to return to school and/or complete coursework?

  For Example:

  > Incarceration as a youth reduces the chance of high school graduation by as much as 39 percent,[42] and "youth in correctional confinement score four years below grade level on average."[43]

- Is the youth before me also involved in the child welfare system, either as a status offender or as the subject of an abuse and neglect petition? If so, do I hold biases that might impede my impartiality based on my perception of their family situation?

- What objective criteria, in addition to any assessment, am I using to decide if detention is necessary? Do those criteria have a disproportionately negative impact on youth of color? If so, what is the appropriate response to that disproportionality?

- Are there resources that can be provided to address the issues that led me to conclude detention may be necessary? If there are no resources available in the child's community but there are resources available in another community, would my decision to detain have been different?

- Is bias affecting my decision to set conditions of bond or eligibility for release in a detention decision? For example, do I have a presumption that because the child resides in a single parent home that there will be inadequate supervision? Further, have I presumed that the child does live in a single parent home based on the race of the child?

  For Example:

  > Courts often interpret the absence of a father in the home to indicate a lack of adequate parental supervision.[44]

When hearing pretrial or other motions:

- When defense attorneys file motions raising race, do I give them careful consideration or am I dismissive of the idea that any arresting, charging, or other court decision may have been racially biased?

At adjudication/transfer:

- In a battery case involving a white youth and a Black youth, do I assume the Black youth is the aggressor or more violent? Am I aware of research studies about perceptions of culpability and race?

  For Example:

  > Studies have shown that people are more likely to see weapons in the hands of unarmed Black men than white men, which is more likely to lead to systemic and predictable errors in judgments of criminality.[45]

- Do I think that a youth is more likely to be guilty because of the neighborhood or zip code they live in or the school they attend? Am I making assumptions because I have had other youth from the same neighborhood appear in front of me, or has media coverage regarding certain neighborhoods influenced my perceptions and decisions?

- Do I fail to give credibility to a youth's denial because of a belief that young people are not truthful?

- Do I believe the police's version of the facts, even though it doesn't make sense, rather than the young person's?

- Am I likely to assume a Native youth charged with driving while intoxicated is guilty because I believe Native youth have significant issues with substance abuse? Am I considering the youth individually, rather than projecting my beliefs about racial or ethnic groups the youth belongs to onto the young person in front of me?

- Does bias factor into my decisions to transfer a youth to adult court rather than keep them within the purview of juvenile court, with its more rehabilitative focus?[46]

At a disposition proceeding:

- In deciding whether to commit a youth, or in setting conditions of probation or supervision, am I treating all youth similarly for similar conduct? For example, if I am ordering curfew, is it related to the time and place of the offense charged? Or is it just a rote standard condition imposed? Do I impose it equally on youth of all races?

- Are my commitment decisions reserved to address significant public safety concerns? Have I considered whether there are less restrictive alternatives? Have I considered the potential harm caused by confinement?

- In crafting conditions of probation, am I focusing on conduct related to the offense for which the youth was adjudicated? For example, if I have ordered ankle monitoring, is it based on the specific facts of the alleged offense or are there any underlying biases regarding the "dangerousness" of youth of color?

- Have I analyzed the disposition data and results by race and ethnicity in my jurisdiction? Are harsher dispositions imposed depending upon the race or ethnicity of the offender or victim? Are there other disparities?

- Am I familiar with services or programs in the youth's community that are culturally competent to serve youth of a particular race or ethnicity?

At a violation of probation or probation revocation proceeding:

- Have I inquired whether the probation officer has instituted appropriate services and opportunities for support? Have I considered whether the reason for revocation is related to bias against the youth's race or ethnicity?

For Example:

In Travis County, Texas, Latino youth were more likely to be "securely detained for technical probation violations" for truancy, curfew violations, and substance abuse than white youth.[47]

4. Eliminating Bias Increases Success

Procedural justice — the idea of feeling as though decisions are made in a fair and impartial manner, and without regard to racial or ethnic bias — means youth and families are more likely to feel trust and confidence in the court system and to abide by court orders and recommendations.[48]

C. Strategies For Correcting Implicit Bias — An Easy Reference Guide For Judges

As outlined above, racial disproportionality poses a significant problem in the juvenile justice and child welfare systems. In order to eliminate disparities in juvenile court, we must first understand our own biases. Because implicit biases are rooted in our subconscious mind, mitigating their impact can be a challenge. Fortunately, learned implicit biases can be 'unlearned' through a variety of techniques to change or mitigate the effects of these biases.

1. Recommended Practices for Judges to Mitigate the Impact of Biases When Making Judicial Decisions

a. Recognize your own implicit bias. In order to combat the impact of bias on judicial decisions, judges and others can learn about their implicit biases by taking one or more of the Harvard Project Implicit bias tests: https://implicit.harvard.edu/implicit/takeatest.html[49]

b. Ensure that you and your judicial colleagues, stakeholders, and court staff are educated about implicit bias. Training, literature, and technical assistance are available from a range of sources. These trainings take time, effort, and continuous reinforcement. Creating a court environment where decisions are made without implicit bias requires diligence by all involved.

c. Acknowledge that each of us employs shortcuts to synthesize information. This acknowledgment provides a platform to offer opportunities to others to do the same. Change very often follows acknowledgment.[50]

d. Slow down the process. Because implicit bias is a shortcut to organize and categorize information, slow down the process of making decisions, induce deliberation, and ensure that decisions are based in fact, rather than an aggregate of biases. Schedule hearings with critical case decisions when you are most alert and least fatigued in the day (this may be different for every judge), remember that we are prone to decision fatigue, gather as much information as you can, and use checklists as reminder of what questions to ask.[51]

In order to eliminate disparities in juvenile court, we must first understand our own biases.

e. Engage in "de-biasing," a practice of developing a greater appreciation of cultural communities different from our own, through active engagement with those communities.[52]

f. Question the information you receive from others. It is not enough to correct our own biases; we must also question others' biases. (For exanple: a police report states "the juvenile had a belligerent attitude and she was uncooperative." Are there specific facts to support that conclusion, or could the officer's perception have been based on implicit or explicit biases?)

g. Consider the tools and instruments used to assess youth and their families in the juvenile justice and child welfare systems. Are the risk-assessment tools racially neutral?

h. Become familiar with data. Data is a good tool to identify trends and patterns that may suggest our decisions are based in bias rather than fact. (For example: do plea negotiations, sentencing recommendations, and imposed sentences differ along racial lines?)

i. Practice mindfulness. Mindfulness means paying attention in a special way; "on purpose, in the present moment, and non-judgmentally."[53] It is a practice of being non-judgmental about anything you notice, of not labeling things as good or bad.

j. Exercise leadership in dismantling bias. Convene meetings of juvenile court stakeholders in the delinquency and child welfare systems to develop concrete plans to address bias.

2. Systemic Considerations

In addition to the recommendations previously mentioned about self-reflection, it is critical that judges are aware of the data and systems they are operating within before they can attempt to mitigate any structural biases that exist. Some questions that judges should ask, or request data regarding, include the following:

a. Does the court or prosecutor's office in my jurisdiction maintain data by race and ethnicity regarding which youth are referred for diversion?

b. Does the diversion program in my jurisdiction provide for referrals prior to arraignment?

c. Are diversion eligibility decisions informed or limited by the nature of the offense?

d. Do I have access to data regarding the race, ethnicity, and gender of youth who are detained in my jurisdiction?

e. Am I using an assessment or other standardized tool to determine if a youth should be detained? If I am using a standardized assessment, are the criteria used neutral across racial and ethnic identities? How do I know?

f. If there are override criteria for any assessment instrument I am using, do I know if and how the criteria negatively impact youth of color?

g. What criteria are being used by the court or other agencies to conclude that removal from the home is necessary? Are those criteria neutral or do they have a disproportionate impact on youth of color?

h. Is the safety assessment tool the child welfare agency is using dependent on objective criteria? Do those criteria disproportionately impact youth of color? If so, how? And what can be done to address the disparate impact of the tools and criteria used on our decision making?

i. Do I have access to commitment data in my jurisdiction regarding race, ethnicity, and gender?

j. Do I have access to data concerning transfer or waiver rates of all youth broken down by race, ethnicity, and gender?

Addressing the overrepresentation of children and families of color in our juvenile courts requires careful consideration and reform of the policies and practices that drive bias and structural racism.

TRAINING AND TECHNICAL ASSISTANCE

This bench card provides judges with introductory principles and best practices to support the elimination of disparities in the juvenile justice and child welfare systems. Comprehensive, supplementary training is strongly recommended in conjunction with use of this card. To connect with leading experts in the field of correcting implicit bias, please contact the National Juvenile Defender Center at 202-452-0010 or by emailing inquiries@njdc.info.

Implicit Association Tests, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/takeatest.html (last visited Nov. 7, 2017).

Project Implicit created a series of Implicit Association Tests (IAT) that measure the strength of associations between concepts (e.g., Black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). Available IATs include (1) Presidents; (2) Religion; (3) Gender-Career; (4) Skin-tone; (5) Sexuality; (6) Weapons; (7) Asian; (8) Native; (9) Gender-Science; (10) Weight; (11) Age; (12) Disability; (13) Arab-Muslim; and (14) Race.

James Bell & Raquel Mariscal, Race, Ethnicity, and Ancestry in Juvenile Justice, in JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE 111–130 (2011).

This chapter identified major elements of disparities by race, ethnicity, and ancestry in the juvenile justice system. Some key decision points prior to judicial appearance include "cite and release," arrest, diversion after arrest, referral to a detention facility, and admission to detention. At each key decision point, juvenile justice professionals exercise judgments about how the young person and their family should be handled. Monitoring these decision points, pursuant to federal policy, reveals that youth of color are funneled deeper into the system for behaviors similar to their white counterparts. In response, the chapter identifies promising policies and practices for reducing racial and ethnic disparities, demonstrating that juvenile justice systems can operate with fairness and equity for all young people, including collaboratively using data to conduct critical self-examination of policies and practices and determine how they impact youth of color.

David Arnold, Will Dobbie & Crystal S. Yang, Racial Bias in Bail Decisions (Nat'l Bureau of Econ. Research, Working Paper No. 23421, 2017).

This study used Becker's model of racial bias, which predicts that rates of pre-trial misconduct will be identical for marginal white and marginal Black defendants if bail judges are racially unbiased. In contrast, marginal white defendants will have higher rates of pre-trial misconduct than marginal Black defendants if bail judges are racially biased against Blacks, whether that racial bias is driven by racial animus, inaccurate racial stereotypes, or any other form of racial bias. Evidence suggested that there was a substantial bias against Black defendants, indicating that bail judges rely on inaccurate stereotypes that exaggerate the relative danger of releasing Black defendants versus white defendants.

Additionally, this study made three findings:

- Both white and Black bail judges were racially biased against Black defendants;
- Bail judges make race-based prediction errors due to anti-Black stereotypes and representativeness-based thinking, which in turn leads to the over-detention of Black defendants; and
- Racial bias is significantly higher among both part-time and inexperienced judges.

Phillip Atiba Goff et al., The Essence of Innocence: Consequences of Dehumanizing Black Children, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014).

This study examined whether Black male youth are given equal protections of childhood as their peers.

- Three hypotheses were tested:
  - That Black male youth are seen as less "childlike" than their white peers;
  - That the characteristics associated with childhood will be applied less when thinking specifically about Black male youth relative to white male youth, and;
  - That these trends would be exacerbated in contexts where Black males are dehumanized by associating them (implicitly) with apes.
- Findings:
  - The general population sees Black children as less innocent than white children.
  - Black children are seen as older and more culpable than their counterparts.
  - Police officers are also subject to dehumanizing Black children.
  - Black children are not equally "afforded the privilege of innocence – resulting in violent inequalities."

Miles v. United States, No. 13-CF-1523, 2018 WL 1527860 (D.C. Mar. 29, 2018).

The D.C. Court of Appeals held that a tip that only identifies a suspect is insufficient, and that where the police received an anonymous tip alleging use of a firearm, the police needed to observe something that corroborated the presence of the gun before stopping the suspect. *Id.* at 2. The Court identified Miles' flight as the only potential corroborating action in this case and conducted a totality of the circumstances analysis. *Id.* at 14. The Court noted that a person "may be motivated to avoid the police by a natural fear of police brutality . . . or other legitimate personal reasons." *Id.* at 17 (citing *In re* D.J., 532 A.2d 138, 142 n.4 (D.C. 1987)). The Court also referenced the "proliferation of visually documented police shootings of African Americans . . . and the Black Lives Matter protests." *Id.* at 17. In finding the stop unlawful, the Court went on to note that the experience of being followed by a police officer on foot, blocked by a police cruiser that drove up on the sidewalk, and then told to stop "would be startling and possibly frightening to many reasonable people." *Id.* at 20-22. Moreover, unlike the cases cited by the government, "there was nothing about the character of Mr. Miles' flight that seemed particularly incriminating," as it was not unprovoked. *Id.* at 21. Thus, where Miles' flight was too "equivocal to reasonably corroborate the anonymous tip," the police lacked reasonable articulable suspicion for the *Terry* stop.

Commonwealth v. Warren, 475 Mass. 530 (2016).

The Supreme Judicial Court of Massachusetts held that the defendant's race alone was insufficient to give officers reasonable articulable suspicion that he was the suspect of an earlier crime when the description lacked any information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics separate from race. *Id.* at 339. The Court also noted that the police had no justifiable cause to arrest the defendant for running away from them in the first place; it was within the defendant's legal rights to run from the police, and the act of doing so does not imply guilt and is not grounds for arrest. *Id.* at 341-42. Black men were disproportionately targeted to the extent that flight from police should not necessarily be an admission of guilt. *Id.* at 342. Rather, Black men have "reason for flight totally unrelated to consciousness of guilt," such as the desire to avoid the recurring indignity of being racially profiled. *Id.*

United States v. Smith, 794 F.39 681 (7th. Cir. 2015).

The United States Court of Appeals for the Seventh Circuit held that officers' encounter with a Black defendant in a dark alley at night in a minority-dominated urban area was a seizure, and that the defendant was not free to leave. *Id.* at 687-88. The Court further acknowledged that race was relevant in everyday police encounters with citizens in Milwaukee and around the country, and that existing empirical data demonstrates the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system. *Id.* at 688.

Diversity & Inclusion 360 Comm'n, Am. Bar Ass'n, Hidden Injustice: Bias on the Bench (2016), https://www.americanbar.org/news/abanews/aba-news-archives/2016/02/hidden_injusticebi.html.

The American Bar Association's recently formed Diversity and Inclusion 360 Commission released a video tool to raise awareness and provide practical tips for judges in the United States on the damages caused by implicit bias and the necessary steps to combat it.

Judicial Div., Am. Bar Ass'n, Judges: 6 Strategies to Combat Implicit Bias on the Bench (2016), https://www.americanbar.org/publications/youraba/2016/september-2016/strategies-on-implicit-bias-and-de-biasing-for-judges-and-lawyer.html.

The American Bar Association's Judicial Division summarized six techniques and strategies judges can use on a weekly basis to mitigate implicit bias and successfully "de-bias," based on an original study, *Long-term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, published by Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin, and William T. L. Cox – (1) Become aware; (2) Individuation; (3) Stereotype replacement; (4) Counter-stereotypic imaging; (5) Perspective-taking; and (6) Increasing opportunities for contact.

Thomas Rudd, Kirwan Inst. for the Study of Race & Ethnicity, Racial Disproportionality in School Discipline: Implicit Bias is Heavily Implicated (2017), http://kirwaninstitute.osu.edu/racial-disproportionality-in-school-discipline-implicit-bias-is-heavily-implicated/.

Research shows that Black students are disciplined more often and receive more out-of-school suspensions and expulsions than white students. In 2010, over 70 percent of the students involved in school-related arrests or referred to law enforcement were Hispanic or

Black. Overall, Black students were three-and-a-half times more likely to be suspended or expelled than their white peers. According to the Kirwan Institute, implicit bias was heavily implicated as a contributing factor when the causes of racial disproportionality in school discipline were analyzed.

NAT'L JUVENILE DEF. CTR. ET AL., BENCH CARD: ACCESS TO JUVENILE JUSTICE IRRESPECTIVE OF SEXUAL ORIENTATION, GENDER IDENTITY, AND GENDER EXPRESSION (SOGIE) (2017), http://njdc.info/wp-content/uploads/2017/08/NJDC_SOGIE_Benchcard-1.pdf.

In partnership with the National Council of Juvenile and Family Court Judges (NCJFCJ), the National Juvenile Defender Center released *Access to Juvenile Justice Irrespective of Sexual Orientation, Gender Identity, and Expression (SOGIE)*, a bench card to promote judicial leadership in supporting Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Gender Non-Conforming (LGBTQ-GNC) Youth.

NAT'L JUVENILE DEF. CTR. ET AL., BENCH CARD: APPLYING PRINCIPLES OF ADOLESCENT DEVELOPMENT IN DELINQUENCY PROCEEDINGS (2017), http://njdc.info/wp-content/uploads/2017/08/NJDC_Adolescent-Development_Bench-Card.pdf.

In partnership with the National Council of Juvenile and Family Court Judges (NCJFCJ), the National Juvenile Defender Center released *Applying Principles of Adolescent Development in Delinquency Proceedings*, a bench card to promote judicial leadership in recognizing the developmental differences between youth and adults and integrate, at each stage of the case, applicable principles supported by the research on adolescent development.

THE SENTENCING PROJECT, FACT SHEET: BLACK DISPARITIES IN YOUTH INCARCERATION (2017), http://www.sentencingproject.org/publications/black-disparities-youth-incarceration/.

Despite long-term declines in youth incarceration, the disparity at which Black and white youth are held in juvenile facilities has grown. As of 2015, Black youth were five times as likely to be detained or committed to youth facilities. Since 2001, racial disparities have grown in 37 states, and at least doubled in five: Maryland, Montana, Connecticut, Delaware, and Wisconsin.

THE SENTENCING PROJECT, FACT SHEET: NATIVE DISPARITIES IN YOUTH INCARCERATION (2017), http://www.sentencingproject.org/publications/native-disparities-youth-incarceration/.

Despite long-term declines in youth incarceration, the disparity at which Native and white youth are held in juvenile facilities has grown. Native youth were three times as likely to be incarcerated as white youth. The disparity has increased since 2001, when Native youth were roughly two-and-a-half times as likely to be detained or committed to juvenile facilities.

THE SENTENCING PROJECT, FACT SHEET: LATINO DISPARITIES IN YOUTH INCARCERATION (2017), http://www.sentencingproject.org/publications/latino-disparities-youth-incarceration/.

Latino youth are 65 percent more likely to be detained or committed than their white peers. While this disparity is concerning, the data shows a modest improvement from 2001, when Latino youth were 73 percent more likely to be in placement. The Latino disparity is smaller than that for Black youth, who are 500 percent more likely than white youth to be detained or committed.

Disparity and Disproportionality, Am. Public Human Services Ass'n, http://aphsa.org/content/APHSA/en/pathways/Positioning-Public-Child-Welfare-Guidance-PPCWG/Disparity-and-Disproportionality.html (last visited Nov. 8, 2017) (no longer on website) (on file with NJDC).

Framing the relationship between institutional and structural racism and disparate treatment raises awareness about how and why disproportionality occurs in public child welfare and the role the system can play to eliminate disparate practices within the agency. Disparities can be produced by the service strategy of an agency within the public child welfare system, due to lack of culturally relevant policies, procedures, practices, and decision-making. Poorly resourced public education systems and inequitable parental arrests are also significant contributors to disparate treatment, which yields negative outcomes for children, youth, and families. Addressing disparities and disproportionalities begins with data assessment, and collectively belongs to all members of the agency.

CHILD WELFARE INFO. GATEWAY, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE (2016), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

Child Welfare Information Gateway compared the percentage of children by race in the general population to their percentage at various points in the child welfare continuum. They also compared a particular racial or ethnic population's representation in the child welfare system to its representation at the prior decision point (e.g., comparing a proportion of children adopted with the proportion of children of that race waiting to be adopted). Four possible explanations for racial disproportionality and disparity were identified: (1) Disproportionate and disparate needs of children and families of color due to higher rates of poverty; (2) Racial bias and discrimination exhibited by individuals (e.g., caseworkers, mandated and other reporters); (3) Child welfare system factors (e.g., lack of resources for families of color, caseworker characteristics); and (4) Geographic context, such as region, state, or neighborhood. A number of suggested strategies to address these issues were identified, but in implementation they should be specific to the disproportionality and disparities present in each jurisdiction, both in terms of the racial and ethnic populations affected and the points within the child welfare process at which those differences are apparent.

CITIZENS FOR JUVENILE JUSTICE ET AL., MISSED OPPORTUNITIES: PREVENTING YOUTH IN THE CHILD WELFARE SYSTEM FROM ENTERING THE JUVENILE JUSTICE SYSTEM (2017), https://www.cfjj.org/missed-opp.

Children pulled into the child welfare system are often not afforded stabilizing support systems, which puts them at high risk of developing reactive behaviors that lead to their entry into the juvenile justice system. Involvement in the juvenile justice system is tied to academic failure, future arrests, and other long-term consequences. Citizens for Juvenile Justice worked with the Massachusetts Department of Youth Services (DYS) and the Department of Children and Families (DCF) to examine aggregate case information for the more than 1,000 youth with open cases with both DCF and DYS in 2014. This review found that within the children welfare system, children who eventually had juvenile justice involvement had significantly different experiences than those who did not. These findings present opportunities to intervene, and incorporate different policies and programs that can prevent these children's experience with the juvenile court system.

Endnotes

[1] For the purposes of this Bench Card, Juvenile Court applies to all court proceedings affecting youth, including delinquency, child protective, and/or proceedings related to status offenses.

[2] Nat'l Research Council, *Executive Summary*, *in* REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 6-7 (2013) [hereinafter REFORMING JUVENILE JUSTICE]; BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE 143 (2017); CITIZENS FOR JUVENILE JUSTICE & MASS. BUDGET AND POL'Y CTR., MISSED OPPORTUNITIES: PREVENTING YOUTH IN THE CHILD WELFARE SYSTEM FROM ENTERING THE JUVENILE JUSTICE SYSTEM (2015), https://www.cfjj.org/missed-opp; THE SENTENCING PROJECT, FACT SHEET: BLACK DISPARITIES IN YOUTH INCARCERATION (2017) [hereinafter BLACK DISPARITIES], http://www.sentencingproject.org/publications/black-disparities-youth-incarceration/; THE SENTENCING PROJECT, FACT SHEET: NATIVE DISPARITIES IN YOUTH INCARCERATION (2017) [hereinafter NATIVE DISPARITIES], http://www.sentencingproject.org/publications/native-disparities-youth-incarceration/; THE SENTENCING PROJECT, FACT SHEET: LATINO DISPARITIES IN YOUTH INCARCERATION (2017) [hereinafter LATINO DISPARITIES], http://www.sentencingproject.org/publications/latino-disparities-youth-incarceration/.

[3] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVICES, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 4 (2016), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

[4] *See generally* SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2013 at 7 (2015), https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2013.pdf; NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 176 (2014), http://www.ncjj.org/pdf/NR2014.pdf.

[5] BLACK DISPARITIES, *supra* note 2.

[6] *Id.*

[7] See NATIVE DISPARITIES; LATINO DISPARITIES, *supra* note 2.

[8] *See* CHILDREN'S BUREAU, *supra* note 3, at 9. *See also* CTR. FOR THE STUDY OF SOCIAL POL'Y, DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH 16 (2011) [hereinafter ANALYSIS OF THE RESEARCH], https://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare_An-Analysis-of-the-Research-December-2011.pdf.

[9] Denise Herz & Joseph Ryan, *Building Multisystem Approaches in Child Welfare and Juvenile Justice*, *in* CTR. FOR JUVENILE JUSTICE REFORM & AM. PUB. HUMAN SERVICES ASS'N, BRIDGING TWO WORLDS: YOUTH INVOLVED IN THE CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS 37-39 (2008), http://cjjr.georgetown.edu/wp-content/uploads/2015/03/BridgingTwoWorlds_2008.compressed.pdf; Pam Fessler, *Report: Foster Kids Face Tough Time After Age 18*, NAT'L PUBLIC RADIO, Apr. 7, 2010, https://www.npr.org/templates/story/story.php?storyId=125594259; MARK E. COURTNEY ET AL., CHAPIN HILL CTR. FOR CHILDREN, UNIV. OF CHICAGO, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 19 (2005), https://www.chapinhall.org/wp-content/uploads/Midwest-Eval-Outcomes-at-age-19.pdf.

[10] Over sixty-years after *Brown v. Board of Education*, 347 U.S. 483 (1954), residential segregation has resulted in youth of color attending under-resourced schools which contribute to the school-to-prison pipeline. See CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION (2004).

[11] NAT'L JUVENILE DEF. CTR. ET AL., BENCH CARD: APPLYING PRINCIPLES OF ADOLESCENT DEVELOPMENT IN DELINQUENCY PROCEEDINGS (2017) [hereinafter ADOLESCENT DEVELOPMENT BENCH CARD], http://njdc.info/wp-content/uploads/2017/08/NJDC_Adolescent-Development_Bench-Card.pdf; RUSSELL J. SKIBA & NATASHA T. WILLIAMS, THE EQUITY PROJECT AT IND. UNIV., ARE BLACK KIDS WORSE? MYTHS AND FACTS ABOUT RACIAL DIFFERENCES IN BEHAVIOR (2014), http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-

Differential-Behavior_031214.pdf; Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 56 Am. Crim. L. Rev. 649, 652-55 (2017) [hereinafter *Race, Paternalism, and the Right to Counsel*]; L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 Iowa L. Rev. 293, 297 (2012) [hereinafter *Self Defense*] (finding that people are more likely to see weapons in the hands of unarmed Black men than white men, which is more likely to lead to systematic and predictable errors in judgments of criminality); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876, 877 (2004) [hereinafter *Seeing Black*] (finding that Black faces influenced a person's ability to spontaneously detect degraded images of crime-relevant objects more than white faces); Dustin Albert & Laurence Steinberg, *Age Differences in Strategic Planning as Indexed by the Tower of London*, 82 Child Dev. 1501 (2011) (finding similar levels of maturation across groups in a study controlling for ethnicity and socio-economic status, and additionally finding that although strategic planning improved steadily as youth mature, an advanced ability to strategically plan did not develop until ages 22-25); Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 Developmental Psychol. 193 (2010) (finding a preference in adolescents for risk taking and for short-term reward over long-term gain, with no significant differences between ethnicities or socio-economic status); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28 (2009) (controlling for both ethnicity and socio-economic status, and finding that youth of similar ages in the study exhibited similar levels of weak future orientation across ethnicity and socio-economic status); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Developmental Psychol. 1764 (2008) (measuring both sensation-seeking and impulsivity amongst a sample of 935 participants, controlling for ethnicity and socio-economic status, and finding that youth across all ethnic and socio-economic groups exhibited similar patterns in sensation-seeking and impulsivity); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychol. 1531 (2007) (measuring resistance to peer pressure, controlling for ethnicity and socio-economic status, and finding that between 10 and 14, little growth in the ability to resist peer pressure occurs, that between 14 and 18 resistance to peer pressure increases linearly, and that between 18 and 30 little growth occurs, in all groups); Lloyd D. Johnson et al., Monitoring the Future: National Survey Results on Drug Use 1975-2010, Volume I: Secondary School Students (2011) (suggesting that Black youth self-report using alcohol and different types of drugs less than other groups and by the 12th grade, white youth report using illicit drugs or alcohol more than any other group); Centers for Disease Control & Prevention, Youth Risk Behavior Surveillance (2014), http://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf (according to self-report measures, white youth are engaged in illegal behavior at similar or higher rates compared to youth of color).

[12] See sources cited, *supra* note 11.

[13] See Joshua Rovner, The Sentencing Project, Racial Disparities in Youth Commitments and Arrests 6 (2016).

[14] See sources cited, *supra* note 8.

[15] Model Code of Judicial Conduct r. 2.2, 2.3(A) (Am. Bar Ass'n 2011).

[16] See Model Code of Judicial Conduct r. 2.3 (Am. Bar Ass'n 2011).

[17] Jerry Kang, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1133 (2012).

[18] Annie E. Casey Found., Race Equity and Inclusion Action Guide: 7 Steps to Advance and Embed Race Equity and Inclusion Within Your Organization (2014), http://www.aecf.org/m/resourcedoc/AECF_EmbracingEquity7Steps-2014.pdf.

[19] Constitutional amendments, legislation, and Supreme Court decisions have addressed instances of structural or institutional bias in marriage, deed restrictions, voting boundaries, voting registration, school desegregation, college admission and other areas. Statutes may include racial or cultural prejudices that are not overt. The court staff may lack diversity. The courthouse grounds may infer a bias by the inclusion or positioning of flags, monuments, plaques, or photographs that suggest a bias or prejudice. The courthouse location, court services location, or jail and prison locations may cause an impediment to access to justice and services. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) ("practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory . . . practices.").

[20] See Am. Civil Liberties Union, Racial Disparities in Sentencing: Hearing on Reports of Racism in the Justice System of the United States 5 (2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

[21] See MP Associates & Ctr. for Assessment & Policy Dev., Racial Equity Tools Glossary [hereinafter Racial Equity Tools], http://www.racialequitytools.org/images/uploads/RET_Glossary913L.pdf (last visited Jan. 3, 2018).

[22] See, e.g., Cmty Relations Services, U.S. Dep't of Justice, Community Relations Services Toolkit for Policing, Understanding Bias: A Resource Guide, https://www.justice.gov/crs/file/836431/download (last visited Dec. 14, 2017). *Explicit Bias*, Perception Inst., https://perception.org/research/explicit-bias/ (last visited Dec. 14, 2017).

[23] See Racial Equity Tools, *supra* note 21.

[24] Even where an explicit bias does not appear to be harmful on its face, for example preference for a person who is from the same university alma matter as one's self, where such bias unfairly favors one group over another to their detriment, it can be harmful. See, e.g, *Griggs*, 401 U.S. 424. *See generally* Model Code of Judicial Conduct r. 2.3 (Am. Bar Ass'n 2011).

[25] See, e.g., Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 Ct. Rev. 190 (2013) [hereinafter *First, Do No Harm*], http://www.ncsc-jurystudies.org/~/media/microsites/files/cjs/what%20we%20do/cr49-4elek.ashx; Mark Soler, *Reducing Racial and Ethnic Disparities in the Juvenile Justice System*, in Nat'l Ctr. for State Courts, Trends in State Courts: Juvenile Justice and Elder Issues 27 (2014), http://www.ncsc.org/~/media/Microsites/Files/Future%20Trends%202014/Reducing%20Racial%20and%20Ethnic%20Disparities_Soler.ashx; Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. Personality & Soc. Psychol. 17 (2009); Kristin A. Lane et al., *Understanding and Using the Implicit Association Test: IV: What We Know (So Far) About the Method*, in Implicit Measures of Attitudes: Procedures & Controversies (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

[26] Kirwan Inst. for the Study of Race & Ethnicity, Understanding Implicit Bias, http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/ (last visited Jan. 3, 2018).

[27] *Id.*

[28] See *First, Do No Harm*, *supra* note 25; *Race, Paternalism, and the Right to Counsel*; *Self Defense*; *Seeing Black*, *supra* note 11.

[29] See *Race, Paternalism, and the Right to Counsel*, *supra* note 11, at 653. See *generally* James Forman, Jr., Locking Up Our Own: Crime and Punishment in Black America (2017); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1197 (2009); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 Minn. L. Rev. 2035, 2039 (2011); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539, 1540 (2004); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 Calif. L. Rev. 1063, 1072 (2006) (discussing studies, including those in which test subjects were Black, rejected racism, and still displayed implicit bias).

[30] See Analysis of the Research, *supra* note 8. *See also* Child Welfare Info. Gateway, Racial Disproportionality and Disparity in Child Welfare (2016) [hereinafter Racial Disproportionality and Disparity], https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf; Office for Civil Rights, U.S. Dep't of Educ., Civil Rights Data Collection, Data Snapshot: School Discipline (2014) [hereinafter Data Snapshot: School Discipline], https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf; Donna St. George, *Federal Data Show Racial Gaps in School Arrests*, Wash. Post, Mar. 6, 2012, https://www.washingtonpost.com/national/federal-data-show-racial-gaps-in-school-arrests/2012/03/01/gIQApbjvtR_story.

html?utm_term=.fe5c0b5f42ab; David J. Losen & Russell Skiba, Suspended Education: Urban Middle Schools in Crisis (2010), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Suspended_Education.pdf.

[31] The Sentencing Project, Disproportionate Minority Contact in the Juvenile Justice System (2014) [hereinafter Disproportionate Minority Contact], http://www.sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf; Ashley Nellis, The Sentencing Project, Policies & Practices that Unfairly Shift Youth of Color into the Juvenile Justice System, https://www.juvjustice.org/sites/default/files/ckfinder/files/resource_473.pdf (last visited Dec. 19, 2017). See generally Statistics, Strategies for Youth Connecting Cops & Kids, https://strategiesforyouth.org/resources/facts/ (last visited Dec. 19, 2017).

[32] Data Snapshot: School Discipline, *supra* note 30.

[33] Am. Civil Liberties Union, School-To-Prison Pipeline, https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline (last visited Dec. 19, 2017); Libby Nelson & Dara Lind, The School to Prison Pipeline Explained (2015), http://www.justicepolicy.org/news/8775.

[34] See Adolescent Development Bench Card, *supra* note 11.

[35] See Black Disparities; Native Disparities; Latino Disparities, *supra* note 2, Children's Bureau, *supra* note 3; Analysis Of The Research, *supra* note 8. See also Jolanta Juskiewicz, Building Blocks for Youth, Youth Crime/Adult Time: Is Justice Served? (2000), http://www.njjn.org/uploads/digital-library/resource_127.pdf.

[36] Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 Cornell L. Rev. 383, 422 (2013).

[37] Sophie Gatowski et al., Nat'l Council of Juvenile & Family Court Judges, Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases (2016).

[38] *Disparity and Disproportionality*, Am. Public Human Services Ass'n, http://aphsa.org/content/APHSA/en/pathways/Positioning-Public-Child-Welfare-Guidance-PPCWG/Disparity-and-Disproportionality.html (last visited Nov. 8, 2017) (no longer on website) (on file with NJDC).

[39] Disproportionate Minority Contact, *supra* note 31, at 8.

[40] *Id.*

[41] David Arnold, Will Dobbie & Crystal S Yang, *Racial Bias in Bail Decisions*, 30 (Nat'l Bureau of Econ. Research, Working Paper No. 23421, 2017).

[42] See Anna Aizer & Joseph J. Doyle, Jr., The Nat'l Bureau of Econ. Research, Juvenile Incarceration, Human Capital and Future Crime: Evidence From Randomly-Assigned Judges 3 (2013), http://www.mit.edu/~jjdoyle/aizer_doyle_judges_06242013.pdf. See also Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 Jus. Q. 462, 473 (2006) (A first-time arrest during high school doubles the likelihood that a youth will drop out and a court appearance quadruples that likelihood.); Randi Hjalmarsson, *Criminal Justice Involvement and High School Completion*, 63 J. Urban Econ. 613, 613 (2008) (Arrested youth are 11 percent less likely to graduate from high school and incarcerated youth are 26 percent less likely to graduate.).

[43] Richard Mendel, The Annie E. Casey Found., No Place for Kids: The Case for Reducing Juvenile Incarceration 24 (2011), http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf.

[44] Jeffrey J. Shook, *Racial Disproportionality in Juvenile Justice: The Interaction of Race and Geography in Pretrial Detention for Violent and Serious Offenses*,

[45] See *Self Defense*, *supra* note at 11.

[46] Black, Latino, Asian American & Pacific Islander, Native & Alaskan Native youth are significantly more likely to be transferred to adult court and sentenced to incarceration than white youth who commit comparable crimes. See Black Disparities; Native Disparities; Latino Disparities, *supra* note 2; Disproportionate Minority Contact, *supra* note 31.

[47] Ctr. for Children's Law & Policy, Graduated Responses Toolkit: New Resources and Insights to Help Youth Succeed on Probation 29 (2016), http://www.cclp.org/wp-content/uploads/2016/06/Graduated-Responses-Toolkit.pdf.

[48] See Reforming Juvenile Justice, *supra* note 2, at 192. See also Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283 (2003).

[49] *Implicit Association Tests*, Project Implicit, https://implicit.harvard.edu/implicit/takeatest.html (last visited Nov. 7, 2017).

[50] See, e.g., *What Can I Do About Bias?*, MTV's Look Different Campaign, http://www.lookdifferent.org/what-can-I-do (last visited Dec. 20, 2017).

[51] See generally Ed Yong, *Justice Is Served, But More So After Lunch. How Food-Breaks Sway the Decisions of Judges*, Discover Mag., Apr. 11, 2011, http://blogs.discovermagazine.com/notrocketscience/2011/04/11/justice-is-served-but-more-so-after-lunch-how-food-breaks-sway-the-decisions-of-judges/#.Wk0A7dKnEnR; John Tierney, *Do You Suffer From Decision Fatigue*, N.Y. Times Mag., Aug. 17, 2011, http://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html?pagewanted=all&_r=0; J.D. Meier, *10 Ways to Defeat Decision Fatigue*, Sources of Insight, http://sourcesofinsight.com/10-ways-to-defeat-decision-fatigue/ (last vested Jan. 3, 2018).

[52] See Judicial Div., Am. Bar Ass'n, Judges: 6 Strategies to Combat Implicit Bias on the Bench (2016), https://www.americanbar.org/publications/youraba/2016/september-2016/strategies-on-implicit-bias-and-de-biasing-for-judges-and-lawyer.html (Judge Bernice B. Donald of the 6th Circuit Court of Appeals stated, "Each of us in doing our jobs are viewing the functions of that job through the lens of our experiences, and all of us are impacted by biases, stereotypes and other cognitive functions that enable us to take shortcuts in what we do."). See also Patricia Devine et al., *Long Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. Experimental Soc. Psychol. 1267, 1270 (2012).

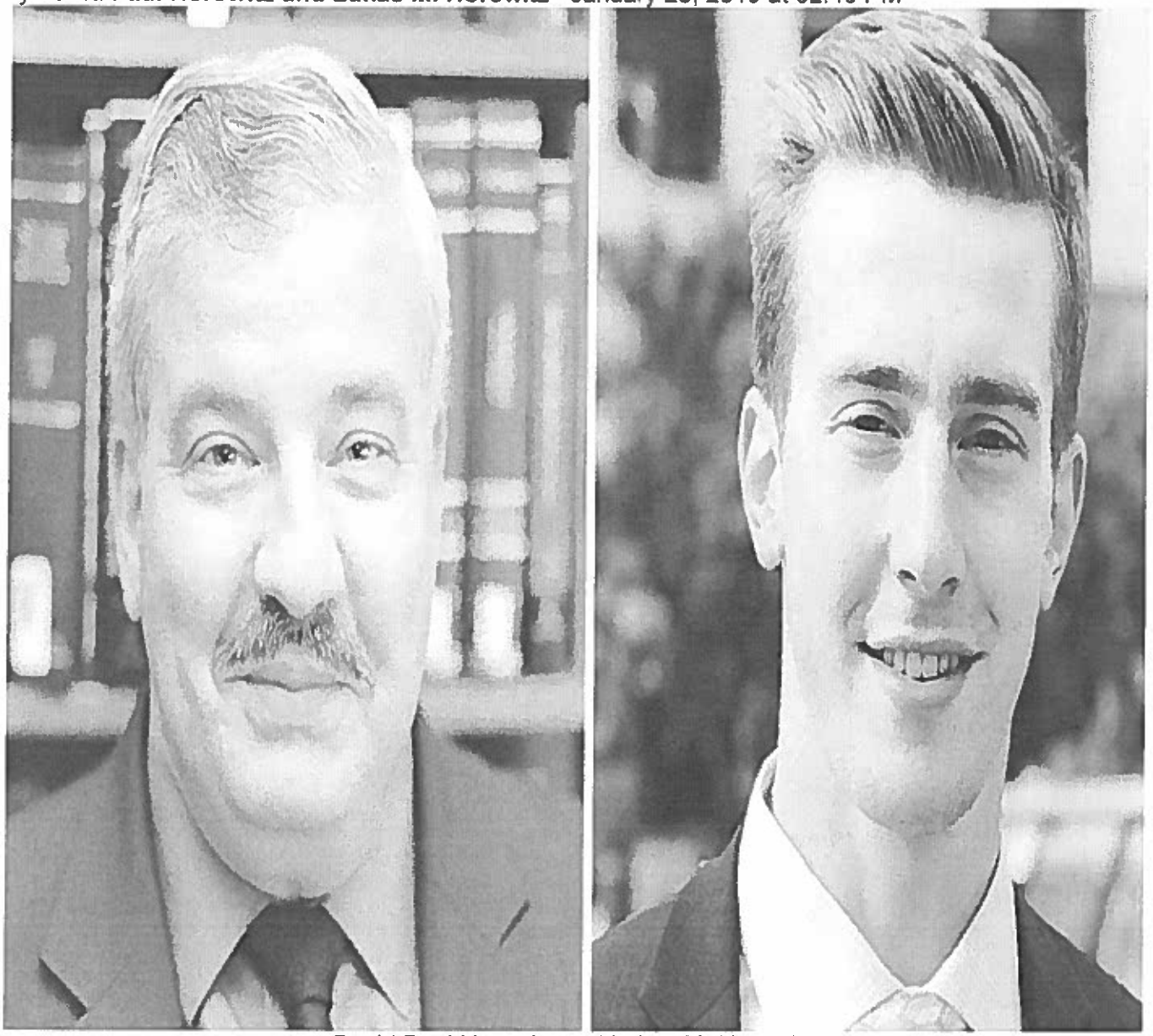
[53] Jon Kabat-Zinn, *Defining Mindfulness* (2017), https://www.mindful.org/jon-kabat-zinn-defining-mindfulness/

This card was developed under grant number SJI-17-T-023 from the State Justice Institute. The points of view expressed are those of the author and do not necessarily represent the official position or policies of the State Justice Institute.

Jurors and Implicit Bias

In their Burden of Proof column David Paul Horowitz and Lukas M. Horowitz write: The judicial system recognizes and addresses attorney bias in jury selection, bias of eyewitnesses when identifying people of other races in criminal trials, and the impact of implicit bias on attorneys and judges. However, one stakeholder in our judicial system does not receive guidance in implicit bias: jurors. Whether they should, or not, is this month's topic.

By **David Paul Horowitz and Lukas M. Horowitz** January 25, 2019 at 02:40 PM



David Paul Horowitz and Lukas M. Horowitz

Bias, of all kinds, is all over the news today, and as our broader society struggles to address bias, the judicial system has too. Steps have been taken to address, and attempt to eliminate, bias at different stages of litigation, by different participants, in both civil and criminal litigation.

The practice of some prosecutors to exclude jurors based on race led the U.S. Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), to bar race-based peremptory jury challenges. The late Judge Sheila Abdus-Salaam noted in the New York Court of Appeals' decision in *People v. Bridgeforth*, 28 N.Y.3d 567, 571 (2016), "[w]e recognize the existence of discrimination on the basis of one's skin color, and acknowledge that under this State's Constitution and Civil Rights Law, color is a classification upon which a *Batson* challenge may be lodged." *Batson*'s holding has been expanded to bar exclusion based on "the basis of race, gender or any other status that implicates equal protection concerns." Id.

Batson was decided 33 years ago, yet on Dec. 4, 2018, the New York Times carried an article titled "Yes, Jury Selection Is as Racist as You Think. Now We Have Proof." We have a long way to go, baby.

Just over a year ago the New York State Court of Appeals, in *People v. Boone*, 30 N.Y.3d 521 (2017), concluded there was "near consensus among cognitive and social psychologists that people have significantly greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race," increasing the risk of wrongful convictions. The solution? "[W]hen identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification."

The existence of implicit bias and its potential impact on both attorneys and judges was deemed so important that New York state made instruction on implicit bias one of only two mandatory topics in continuing education training (the other being ethics).

So, the judicial system recognizes and addresses attorney bias in jury selection, bias of eyewitnesses when identifying people of other races in criminal trials, and the impact of implicit bias on attorneys and judges. However, one stakeholder in our judicial system

does not receive guidance in implicit bias: jurors. Whether they should, or not, is this month's topic.

What Is Implicit Bias?

The concept of implicit bias has emerged as a topic of current mainstream discussion, leading to training throughout both public and private sectors targeting this bias and formulating methods to recognize and avoid the effects of this bias. Every day, our brains process tremendous amounts of information, and much of of this processing is done subconsciously. This system of processing is automatic. When we see a green light, we automatically know that green means go. Within this automatic processing system lies our implicit bias. Implicit bias consists of the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Operating outside of our conscious awareness, implicit biases are pervasive, challenging even the most well-intentioned and egalitarian-minded individuals, resulting in actions and outcomes that do not necessarily align with explicit intentions. Situations that invoke our subconscious processing system include those that involve ambiguous or incomplete information, the presence of time constraints, and circumstances which may compromise cognitive control such as fatigue. Situations in which implicit bias can influence actions and decisions are now all too well known.

We would like to believe we are immune from the effect of implicit bias. Various tests exist to demonstrate whether, and to what extent, a person is susceptible to the impact of implicit bias. The best known is an **online evaluation** from Harvard's Project Implicit, that takes approximately 10 minutes to complete. We each took the test. More on Project Implicit later.

Current Protections Against Juror Bias

In New York, the qualifications to serve as a juror are set forth in Judiciary Law §510, "Qualifications":

In order to qualify as a juror a person must:

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

2. Be not less than eighteen years of age.

3. Not have been convicted of a felony.

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

CPLR §4110, "Challenges for cause," provides two grounds for disqualifying jurors: "Challenges to the favor" and "Disqualification of juror for relationship." CPL 270.20(1), "Trial jury: challenge for cause of an individual juror," provides, in part:

1. A challenge for cause is an objection to a prospective juror and may be made only on the ground that:

(a) He does not have the qualifications required by the judiciary law; or

(b) He has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial …

PJI 1:9 instructs jurors to consider bias, just not their own: "There is no magical formula by which you evaluate testimony … The same tests that you use in your everyday dealings are the tests which you apply in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any …" The same criteria appear in PJI 1:21 and 1:41, and PJI 1:27, "Exclude Sympathy," delivers just that instruction.

Guidance for jurors regarding their own beliefs vis-à-vis reaching a verdict is limited to a general instruction in PJI 1:36:

A lawsuit is a civilized method of determining differences between people. It is basic to the administration of any system of justice that the decision on both the law and the facts be made fairly and honestly. You as the jurors and I as the court have a heavy responsibility—to assure that a just result is reached in deciding the differences between the plaintiff(s) and the defendant(s) in this case.

The most critical task of an attorney during jury selection is to identify and exclude those potential jurors who have a bias potentially harmful to the client's interests. Yet this is no simple task, and any attorney who has picked a jury knows that the least illuminating question that can be asked of a potential juror is along the lines of, "sir/ma'am, can you be a fair and impartial juror?" The most biased person in the world, asked this question in front of a panel of prospective jurors, is likely to affirm their impartiality. Subtle questioning can often elicit answers suggesting bias, and follow-up questioning outside the presence of the panel can sometimes lead to the juror talking themselves off the jury. However, this is, at best, an imperfect system for ferreting out juror bias.

A Proposed Model Charge

The U.S. District Court for the Western District of Washington created "a bench-bar-academic committee to explore the issue [of implicit bias] in the context of the jury system and to develop and offer tools to address it."

One tool created by the Committee is a **video** shown to prospective jurors discussing unconscious bias. The second tool are model charges for use in criminal actions. The court website explains that "[t]he video and jury instructions on this page were created by a committee of judges and attorneys and will be presented to jurors in every case with the intent of highlighting and combating the problems presented by unconscious bias."

The charges formulated by the Committee incorporate unconscious bias language into preliminary, witness credibility, and closing instructions, as well as an instruction to be given prior to jury selection if voir dire will include questions about bias, including unconscious bias.

The charge before openings, "DUTY OF JURY," instructs jurors, in part:

You must decide the case solely on the evidence and law before you and must not be influenced by any personal likes or dislikes, opinions, prejudice, sympathy, or bias, including unconscious bias. Unconscious bias are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

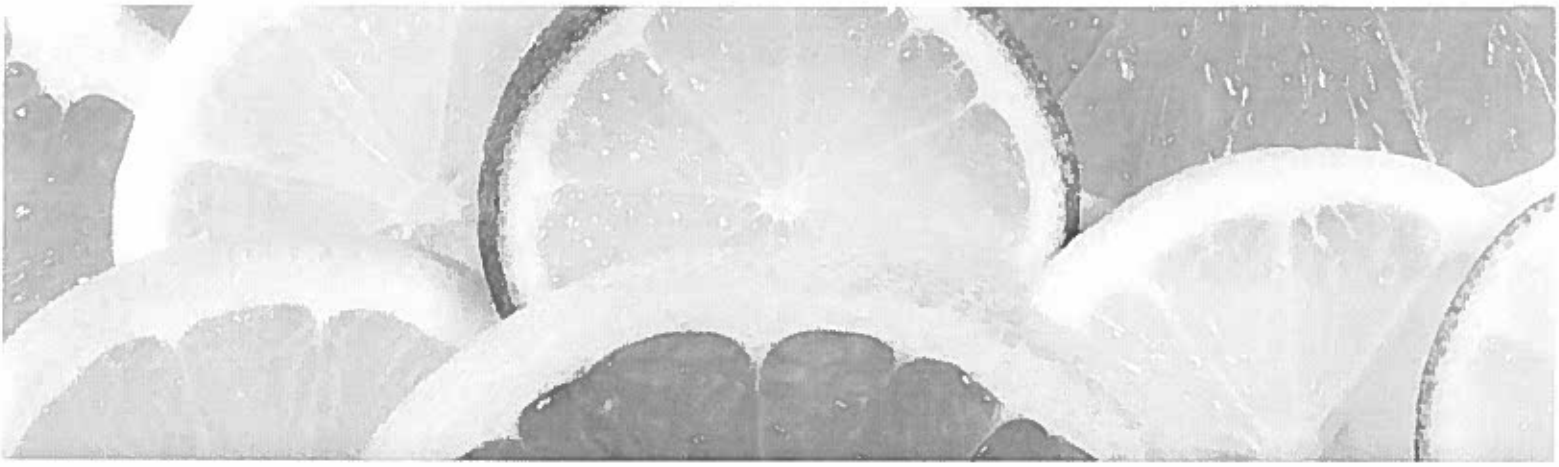
The charge for evaluating witness credibility admonishes jurors: "You must avoid bias, conscious or unconscious, based on the witness's race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender in your determination of credibility." The closing instruction repeats the language in the charge given before openings.

Conclusion

The problem is real, a tool to help ameliorate the problem is available, and as one person involved in the Washington study explained, "[w]hen people ask if it works, I can say without question that it works better than saying nothing." Cheryl Staats, *Understanding Implicit Bias: What Educators Should Know*, American Educator, Vol. 39, pp 29-33, at 29-30, (2016).

None of us wants to admit we possess implicit bias, or that implicit bias may influence our decision making. But they exist, and based upon our experience with Project Implicit, if called to serve as jurors, at least one of us could benefit from a charge on implicit bias.

David Paul Horowitz *is a member of McNamara & Horowitz in New York City, Lecturer at Law at Columbia Law School, and serves as a legal malpractice expert, private arbitrator, mediator, and discovery referee. He can be reached at david@newyorkpractice.org.* **Lukas M. Horowitz** *is a member of the Albany Law School Class of 2019.*



NEXTIONS

Yellow Paper Series

Written in Black & White

Exploring Confirmation Bias in Racialized Perceptions of Writing Skills

Lead Researcher

Dr. Arin N. Reeves

2014-0404

RESEARCH QUESTION: *Given our finding in a previous study that supervising lawyers are more likely than not to perceive African American lawyers as having subpar writing skills in comparison to their Caucasian counterparts, we asked if confirmation bias unconsciously causes supervising lawyers to more negatively evaluate legal writing by an African American lawyer.*

CONFIRMATION BIAS:

A mental shortcut – a bias – engaged by the brain that makes one actively seek information, interpretation and memory to only observe and absorb that which affirms established beliefs while missing data that contradicts established beliefs.

We first discovered empirical evidence that supervising lawyers perceived African Americans lawyers to be subpar in their writing skills in comparison to their Caucasian counterparts when we researched unconscious biases in the legal profession over ten years ago. Since our surveys and focus groups at the time were studying unconscious biases generally, we decided to study this specific bias of writing skills in greater detail via the cognitive construct of **confirmation bias.**

This research summary provides a general overview of the methodology, results and key takeaways from the study. Please note that we studied this question only from the unconscious or implicit bias perspective. While the possibility of explicit bias exists, our research has consistently shown that implicit bias is far more prevalent in our workplaces today than explicit bias, thereby guiding us to utilize our resources to study implicit instead of explicit biases.

Methodology

Nextions, along with the assistance of 5 partners from 5 different law firms, drafted a research memo from a hypothetical third year litigation associate that focused on the issue of trade secrets in internet start-ups. We followed a simple Question Presented, Brief Answer, Facts, Discussion and Conclusion format for the memo, and we deliberately inserted 22 different errors, 7 of which were minor spelling/grammar errors, 6 of which were substantive technical writing errors, 5 of which were errors in fact, and 4 of which were errors in the analysis of the facts in the Discussion and Conclusion sections.

This memo was then distributed to 60 different partners (who had previously agreed to participate in a "writing analysis study" from 22 different law firms of whom 23 were women, 37 were men, 21 were racial/ethnic minorities, and 39 were Caucasian. While all of the partners received the same memo, half the partners received a memo that stated the associate was African American while the other half received a memo that stated the associate was Caucasian:

While all of the partners received the same memo, half the partners received a memo that stated the associate was African American while the other half received a memo that stated the associate was Caucasian.

Name: *Thomas Meyer*	***Name:*** *Thomas Meyer*
Seniority: *3rd Year Associate*	***Seniority:*** *3rd Year Associate*
Alma Mater: *NYU Law School*	***Alma Mater:*** *NYU Law School*
Race/Ethnicity: *African American*	***Race/Ethnicity:*** *Caucasian*

The 60 partners in the study received the memo electronically (an attached pdf) along with the research materials used in the preparation of the memo. The cover email thanked each of them for participating in a study on "writing competencies of young attorneys," and asked them to edit the memo for all factual, technical and substantive errors. The partners were also asked to rate the overall quality of the memo from a 1 to 5, with "1" indicating the memo was extremely poorly written and "5" extremely well written.

The partners were originally given 4 weeks to complete the editing and rating, but we had to extend deadline to 7 weeks in order to obtain more responses. 53 partners completed the editing and rating of the memo. Of the 53 completed responses, 24 had received the memo by the "African American" Thomas Meyer, and 29 had received the memo by the "Caucasian" Thomas.

General Findings

The exact same memo, averaged a 3.2/5.0 rating under our hypothetical "African American" Thomas Meyer and a 4.1/5.0 rating under hypothetical "Caucasian" Thomas Meyer.

The exact same memo, averaged a 3.2/5.0 rating under our hypothetical "African American" Thomas Meyer and a 4.1/5.0 rating under hypothetical "Caucasian" Thomas Meyer. The qualitative comments on memos, consistently, were also more positive for the "Caucasian" Thomas Meyer than our "African American" Thomas Meyer:

"Caucasian" Thomas Meyer	**"African American" Thomas Meyer**
"generally good writer but needs to work on..."	*"needs lots of work"*
	"can't believe he went to NYU"
"has potential"	
"good analytical skills"	*"average at best"*

In regards to the specific errors in the memo:

- An average of 2.9/7.0 spelling grammar errors were found in "Caucasian" Thomas Meyer's memo in comparison to 5.8/7.0 spelling/grammar errors found in "African American" Thomas Meyer's memo.
- An average of 4.1/6.0 technical writing errors were found in "Caucasian" Thomas Meyer's memo in comparison to 4.9/6.0 technical writing errors found in "African American" Thomas Meyer's memo.
- An average of 3.2/5.0 errors in facts were found in "Caucasian" Thomas Meyer's memo in comparison to 3.9/5.0 errors in facts were found in "African American" Thomas Meyer's memo.

The 4 errors in analysis were difficult to parse out quantitatively because of the variances in narrative provided by the partners as to why they were analyzing the writing to contain analytical errors. Overall though, "Caucasian" Thomas Meyer's memo was evaluated to be better in regards to the analysis of facts and had substantively fewer critical comments.

General Findings Cont.

We did not ask for edits and/or comments on formatting. However, we did receive such edits and/or comments in 41 out of the 53 responses, and all of them regarded changes that the partners would have liked to see on the formatting in the memo. Of the 41 edits and/or comments on formatting, 11 were for "Caucasian" Thomas Meyer's memo in comparison to 29 for "African American" Thomas Meyer's memo.

There was no significant correlation between a partner's race/ethnicity and the differentiated patterns of errors found between the two memos. There was also no significant correlation between a partner's gender and the differentiated patterns of errors found between the two memos. We did find that female partners generally found more errors and wrote longer narratives than the male partners.

Analysis & Discussion

We undertook this study with the hypothesis that unconscious confirmation bias in a supervising lawyer's assessment of legal writing would result in a more negative rating if that writing was submitted by an African American lawyer in comparison to the same submission by a Caucasian lawyer. In order to create a study where we could control for enough variables to truly see the impact of confirmation bias, we did not study the potential variances that can be caused due to the intersection of race/ethnicity, gender, generational differences and other such salient identities. Thus, our conclusion is limited to the impact of confirmation bias in the evaluation of African American men in comparison to Caucasian men. We do not know (although we plan to study the issue in the very near future!) how this impact will splinter or strengthen when gender and/or other identities are introduced.

Confirmation bias manifests itself most often in the "data gathering" phase of our evaluation – the time during which we seek out errors, and this manifestation is almost always unconscious.

The data findings affirmed our hypothesis, but they also illustrated that the confirmation bias on the part of the evaluators occurred in the data collection phase of their evaluation processes – the identification of the errors – and not the final analysis phase. When expecting to find fewer errors, we find fewer errors. When expecting to find more errors, we find more errors. That is unconscious confirmation bias. Our evaluators unconsciously found more of the errors in the "African American" Thomas Meyer's memo, but the final rating process was a conscious and unbiased analysis based on the number of errors found. When partners say that they are evaluating assignments without bias, they are probably right in believing that there is no bias in the assessment of the errors found; however, if there is bias in the finding of the errors, even a fair final analysis cannot, and will not, result in a fair result.

Key Takeaways

There are commonly held racially-based perceptions about writing ability that unconsciously impact our ability to objectively evaluate a lawyer's writing... These commonly held perceptions translate into confirmation bias in ways that impact what we see as we evaluate legal writing. We see more errors when we expect to see errors, and we see fewer errors when we do not expect to see errors.

There are commonly held racially-based perceptions about writing ability that unconsciously impact our ability to objectively evaluate a lawyer's writing. Most of the perceptions uncovered in research thus far indicate that commonly held perceptions are biased against African Americans and in favor of Caucasians.

These commonly held perceptions translate into confirmation bias in ways that impact what we see as we evaluate legal writing. We see more errors when we expect to see errors, and we see fewer errors when we do not expect to see errors.

Recommendations for Next Actions

Infusing the point at which unconscious thought has greatest impact with objective mechanisms that force the conscious brain to add input, decreases unconscious bias greatly. We have worked with many employers to revise their formal and informal evaluation processes to be more infused with objective interrupters that compel unconscious biases to be filtered through conscious analysis, and we have seen many success stories. **So, make the subjective more objective in order to make the unconscious more conscious.**

EXAMPLE: In one law firm where we found that minority summer associates were consistently being evaluated more negatively than their majority counterparts, we created an interruption mechanism to infuse the subjective with objective. We worked with the firm to create an Assignment Committee, comprised of 3 partners through whom certain assignments were distributed to the summer associates and through whom the summer associates submitted work back to the partners who needed the work done. When the work was evaluated, the partners evaluating the work did not know which associate had completed the work. The assignments for this process were chosen judiciously, and there was a lot of work done to ensure buy-in from all partners. At the end of the summer, every associate had at least 2 assignments that had been graded blindly. The firm then examined how the blind evaluations compared with the rest of the associate's evaluations and found that the blind evaluations were generally more positive for minorities and women and less positive for majority men.

Ideas for Inclusion

- Distribute and discuss this study with senior lawyers in your organization to gather their reactions and perspectives. Ask them how they would recommend making the subjective more objective in order to reduce confirmation bias in their evaluation processes.

- If racial/ethnic minorities are deemed to be subpar in writing skills, send out samples of a minority lawyer's writing and a sample of a majority lawyer's writing without any identifying information attached. Ask a few senior lawyers to evaluate both samples. Explore how the samples may be evaluated differently when the lawyer's background is not available.

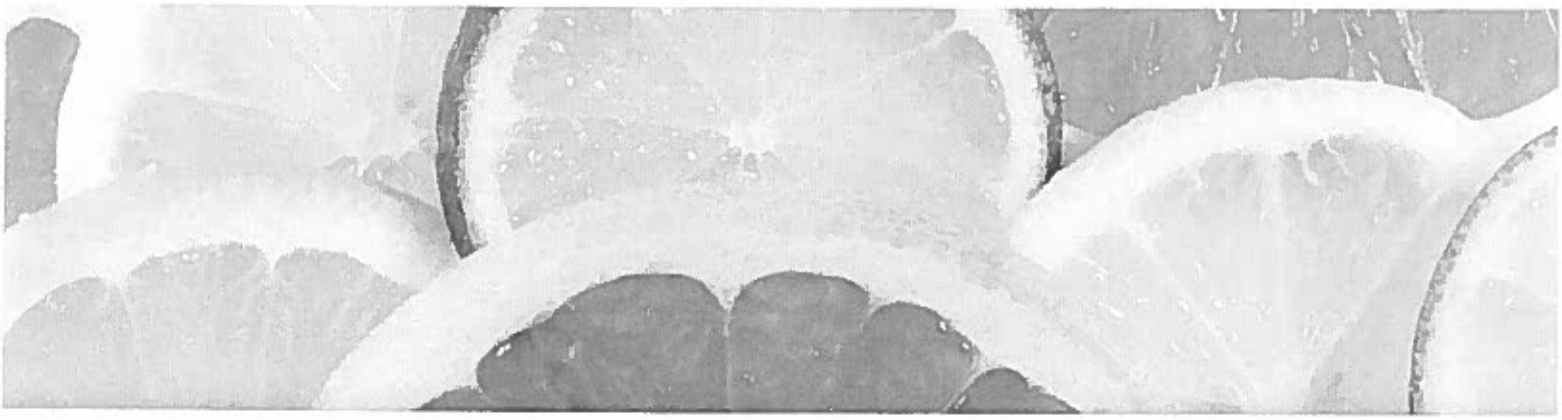
- Implement training on unconscious bias for everyone who is in an evaluative position. Our unconscious bias trainings have proven effective in reducing bias through raising awareness and insights into how unconscious biases operate and can be interrupted.

- If you offer writing assistance in the form of coaches, workshops and such, offer the assistance to everyone, not just racial/ethnic minorities in order to prevent the reification of the bias.

Distribute and discuss this study with senior lawyers in your organization to gather their reactions and perspectives.

Lead Researcher:

Dr. Arin N. Reeves | 312.922.0226



NEXTIONS

THINK SMARTER. LEAD BETTER.

500 N. Michigan Ave., Suite 600
Chicago, Illinois 60611
P 312 922.0226

NCSC
National Center for State Courts

Race & Ethnic Fairness in the Courts

Implicit Bias

A Primer for Courts

Jerry Kang

Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts

August 2009

NCSC
National Center for State Courts

ABOUT THE PRIMER

This Primer was produced as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts. The Campaign seeks to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness across the nation's state courts. The Campaign is funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. Points of view or opinions expressed in the Primer are those of the author and do not represent the official position of the funding agencies. To learn more about the Campaign, visit www.ncsconline.org/ref.

ABOUT THE AUTHOR & REVIEWERS

Jerry Kang is Professor of Law at UCLA School of Law. He has written and lectured extensively on the role of implicit bias in the law. For more information on Professor Kang, please visit jerrykang.net. The Primer benefited from the review and comments of several individuals working with the National Campaign, including Dr. Pamela Casey, Dr. Fred Cheesman, Hon. Ken M. Kawaichi, Hon. Robert Lowenbach, Dr. Shawn Marsh, Hon. Patricia M. Martin, Ms. Kimberly Papillon, Hon. Louis Trosch, and Hon. Roger K. Warren.

Table of Contents

Implicit Bias: A Primer

Schemas and Implicit Cognitions (or "mental shortcuts")

Stop for a moment and consider what bombards your senses every day. Think about everything you see, both still and moving, with all their color, detail, and depth. Think about what you hear in the background, perhaps a song on the radio, as you decode lyrics and musical notes. Think about touch, smell, and even taste. And while all that's happening, you might be walking or driving down the street, avoiding pedestrians and cars, chewing gum, digesting your breakfast, flipping through email on your smartphone. How does your brain do all this simultaneously?

It does so by processing through schemas, which are templates of knowledge that help us organize specific examples into broader categories. When we see, for example, something with a flat seat, a back, and some legs, we recognize it as a "chair." Regardless of whether it is plush or wooden, with wheels or bolted down, we know what to do with an object that fits into the category "chair." Without spending a lot of mental energy, we simply sit. Of course, if for some reason we have to study the chair carefully--because we like the style or think it might collapse--we can and will do so. But typically, we just sit down.

We have schemas not only for objects, but also processes, such as how to order food at a restaurant. Without much explanation, we know what it means when a smiling person hands us laminated paper with detailed descriptions of food and prices. Even when we land in a foreign airport, we know how to follow the crazy mess of arrows and baggage icons toward ground transportation.

These schemas are helpful because they allow us to operate without expending valuable mental resources. In fact, unless something goes wrong, these thoughts take place automatically without our awareness or conscious direction. In this way, most cognitions are implicit.

Implicit Social Cognitions (or "thoughts about people you didn't know you had")

What is interesting is that schemas apply not only to objects (e.g., "chairs") or behaviors (e.g., "ordering food") but also to human beings (e.g., "the elderly"). We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail--such as the elderly--we will not raise our guard. If we think that another category is foreign--such as Asians--we will be surprised by their fluent English. These cognitions also include attitudes, which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term "implicit bias"

includes both implicit stereotypes and implicit attitudes.

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? Or have we already internalized the lessons of Martin Luther King, Jr. and navigate life in a perfectly "colorblind" (or gender-blind, ethnicity-blind, class-blind, etc.) way?

Asking about Bias (or "it's murky in here")

One way to find out about implicit bias is simply to ask people. However, in a post-civil rights environment, it has become much less useful to ask explicit questions on sensitive topics. We run into a "willing and able" problem.

First, people may not be willing to tell pollsters and researchers what they really feel. They may be chilled by an air of political correctness.

Second, and more important, people may not know what is inside their heads. Indeed, a wealth of cognitive psychology has demonstrated that we are lousy at introspection. For example, slight environmental changes alter our judgments and behavior without our realizing. If the room smells of Lysol, people eat more neatly. People holding a warm cup of coffee (versus a cold cup) ascribe warmer (versus cooler) personality traits to a stranger described in a vignette. The experiments go on and on. And recall that by definition, implicit biases are those that we carry without awareness or conscious direction. So how do we know whether we are being biased or fair-and-square?

Implicit measurement devices (or "don't tell me how much you weigh, just get on the scale")

In response, social and cognitive psychologists with neuroscientists have tried to develop instruments that measure stereotypes and attitudes, without having to rely on potentially untrustworthy self-reports. Some instruments have been linguistic, asking folks to write out sentences to describe a certain scene from a newspaper article. It turns out that if someone engages in stereotypical behavior, we just describe what happened. If it is counter-typical, we feel a need to explain what happened. (Von Hippel 1997; Sekaquaptewa 2003).

Others are physiological, measuring how much we sweat, how our blood pressure changes, or even which regions of our brain light up on an fMRI (functional magnetic resonance imaging) scan. (Phelps 2000).

Still other techniques borrow from marketers. For instance, conjoint analysis asks people to give an overall evaluation to slightly different product bundles (e.g., how do you compare a 17" screen laptop with 2GB memory and 3 USB ports, versus a 15" laptop with 3 GB of memory and 2 USB ports). By offering multiple rounds of choices, one can get a measure of how important each feature is to a person even if she had no clue to the question "How much would you pay for an extra USB port?" Recently, social cognitionists have adapted this methodology by creating "bundles" that include demographic attributes. For instance, how

would you rank a job with the title Assistant Manager that paid $160,000 in Miami working for Ms. Smith, as compared to another job with the title Vice President that paid $150,000 in Chicago for Mr. Jones? (Caruso 2009).

Scientists have been endlessly creative, but so far, the most widely accepted instruments have used reaction times--some variant of which has been used for over a century to study psychological phenomena. These instruments draw on the basic insight that any two concepts that are closely associated in our minds should be easier to sort together. If you hear the word "moon," and I then ask you to think of a laundry detergent, then "Tide" might come more quickly to mind. If the word "RED" is painted in the color red, we will be faster in stating its color than the case when the word "GREEN" is painted in red.

Although there are various reaction time measures, the most thoroughly tested one is the Implicit Association Test (IAT). It is a sort of video game you play, typically on a computer, where you are asked to sort categories of pictures and words. For example, in the Black-White race attitude test, you sort pictures of European American faces and African American faces, Good words and Bad words in front of a computer. It turns out that most of us respond more quickly when the European American face and Good words are assigned to the same key (and African American face and Bad words are assigned to the other key), as compared to when the European American face and Bad words are assigned to the same key (and African American face and Good words are assigned to the other key). This average time differential is the measure of implicit bias. [If the description is hard to follow, try an IAT yourself at Project Implicit.]

Pervasive implicit bias (or "it ain't no accident")

It may seem silly to measure bias by playing a sorting game (i.e. the IAT). But, a decade of research using the IAT reveals pervasive reaction time differences in every country tested, in the direction consistent with the general social hierarchies: German over Turk (in Germany), Japanese over Korean (for Japanese), White over Black, men over women (on the stereotype of "career" versus "family"), light-skinned over dark skin, youth over elderly, straight over gay, etc. These time differentials, which are taken to be a measure of implicit bias, are systematic and pervasive. They are statistically significant and not due to random chance variations in measurements.

These pervasive results do not mean that everyone has the exact same bias scores. Instead, there is wide variability among individuals. Further, the social category you belong to can influence what sorts of biases you are likely to have. For example, although most Whites (and Asians, Latinos, and American Indians) show an implicit attitude in favor of Whites over Blacks, African Americans show no such preference on average. (This means, of course, that about half of African Americans do prefer Whites, but the other half prefer Blacks.)

Interestingly, implicit biases are dissociated from explicit biases. In other words, they are related to but differ sometimes substantially from explicit biases--those stereotypes and attitudes that we expressly self-report on surveys. The best understanding is that implicit and explicit biases are related but different mental constructs. Neither kind should be viewed as the solely "accurate" or "authentic" measure of bias. Both measures tell us something important.

Real-world consequences (or "why should we care?")

All these scientific measures are intellectually interesting, but lawyers care most about real-world consequences. Do these measures of implicit bias predict an individual's behaviors or decisions? Do milliseconds really matter>? (Chugh 2004). If, for example, well-intentioned people committed to being "fair and square" are not influenced by these implicit biases, then who cares about silly video game results?

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. Prof. John Jost (NYU, psychology) and colleagues have provided a recent literature review (in press) of ten studies that managers should not ignore. Among the findings from various laboratories are:

- implicit bias predicts the rate of callback interviews (Rooth 2007, based on implicit stereotype in Sweden that Arabs are lazy);
- implicit bias predicts awkward body language (McConnell & Leibold 2001), which could influence whether folks feel that they are being treated fairly or courteously;
- implicit bias predicts how we read the friendliness of facial expressions (Hugenberg & Bodenhausen 2003);
- implicit bias predicts more negative evaluations of ambiguous actions by an African American (Rudman & Lee 2002), which could influence decisionmaking in hard cases;
- implicit bias predicts more negative evaluations of agentic (i.e. confident, aggressive, ambitious) women in certain hiring conditions (Rudman & Glick 2001);
- implicit bias predicts the amount of shooter bias--how much easier it is to shoot African Americans compared to Whites in a videogame simulation (Glaser & Knowles 2008);
- implicit bias predicts voting behavior in Italy (Arcari 2008);
- implicit bias predicts binge-drinking (Ostafin & Palfai 2006), suicide ideation (Nock & Banaji 2007), and sexual attraction to children (Gray 2005).

With any new scientific field, there remain questions and criticisms--sometimes strident. (Arkes & Tetlock 2004; Mitchell & Tetlock 2006). And on-the-merits skepticism should be encouraged as the hallmark of good, rigorous science. But most scientists studying implicit bias find the accumulating evidence persuasive. For instance, a recent meta-analysis of 122 research reports, involving a total of14,900 subjects, revealed that in the sensitive domains of stereotyping and prejudice, implicit bias IAT scores better predict behavior than explicit self-reports. (Greenwald et al. 2009).

And again, even though much of the recent research focus is on the IAT, other instruments and experimental methods have corroborated the existence of implicit biases with real world consequences. For example, a few studies have demonstrated that criminal defendants with more Afro-centric facial features receive in certain contexts more severe criminal punishment (Banks et al. 2006; Blair 2004).

Malleability (or "is there any good news?")

The findings of real-world consequence are disturbing for all of us who sincerely believe that we do not let biases prevalent in our culture infect our individual decisionmaking. Even a little bit. Fortunately, there is evidence

that implicit biases are malleable and can be changed.

- An individual's motivation to be fair does matter. But we must first believe that there's a potential problem before we try to fix it.
- The environment seems to matter. Social contact across social groups seems to have a positive effect not only on explicit attitudes but also implicit ones.
- Third, environmental exposure to countertypical exemplars who function as "debiasing agents" seems to decrease our bias.
    - In one study, a mental imagery exercise of imagining a professional business woman (versus a Caribbean vacation) decreased implicit stereotypes of women. (Blair et al. 2001).
    - Exposure to "positive" exemplars, such as Tiger Woods and Martin Luther King in a history questionnaire, decreased implicit bias against Blacks. (Dasgupta & Greenwald 2001).
    - Contact with female professors and deans decreased implicit bias against women for college-aged women. (Dasgupta & Asgari 2004).
- Fourth, various procedural changes can disrupt the link between implicit bias and discriminatory behavior.
    - In a simple example, orchestras started using a blind screen in auditioning new musicians; afterwards women had much greater success. (Goldin & Rouse 2000).
    - In another example, by committing beforehand to merit criteria (is book smarts or street smarts more important?), there was less gender discrimination in hiring a police chief. (Uhlmann & Cohen 2005).
    - In order to check against bias in any particular situation, we must often recognize that race, gender, sexual orientation, and other social categories may be influencing decisionmaking. This recognition is the opposite of various forms of "blindness" (e.g., color-blindness).

In outlining these findings of malleability, we do not mean to be Pollyanish. For example, mere social contact is not a panacea since psychologists have emphasized that certain conditions are important to decreasing prejudice (e.g., interaction on equal terms; repeated, non-trivial cooperation). Also, fleeting exposure to countertypical exemplars may be drowned out by repeated exposure to more typical stereotypes from the media (Kang 2005).

Even if we are skeptical, the bottom line is that there's no justification for throwing our hands up in resignation. Certainly the science doesn't require us to. Although the task is challenging, we can make real improvements in our goal toward justice and fairness.

The big picture (or "what it means to be a faithful steward of the judicial system")

It's important to keep an eye on the big picture. The focus on implicit bias does not address the existence and impact of explicit bias--the stereotypes and attitudes that folks recognize and embrace. Also, the past has an inertia that has not dissipated. Even if all explicit and implicit biases were wiped away through some magical wand, life today would still bear the burdens of an unjust yesterday. That said, as careful stewards of the justice system, we

should still strive to take all forms of bias seriously, including implicit bias.

After all, Americans view the court system as the single institution that is most unbiased, impartial, fair, and just. Yet, a typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done--and be seen to be done.

Glossary

Note: Many of these definitions draw from Jerry Kang & Kristin Lane, A Future History of Law and Implicit Social Cognition (unpublished manuscript 2009)

Attitude

An attitude is "an association between a given object and a given evaluative category." R.H. Fazio, et al., Attitude accessibility, attitude-behavior consistency, and the strength of the object-evaluation association, 18 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 339, 341 (1982). Evaluative categories are either positive or negative, and as such, attitudes reflect what we like and dislike, favor and disfavor, approach and avoid. See also stereotype.

Behavioral realism

A school of thought within legal scholarship that calls for more accurate and realistic models of human decision-making and behavior to be incorporated into law and policy. It involves a three step process:

First, identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior.

Second, compare that new model with the latent theories of human behavior and decision-making embedded within the law. These latent theories typically reflect "common sense" based on naïve psychological theories.

Third, when the new model and the latent theories are discrepant, ask lawmakers and legal institutions to account for this disparity. An accounting requires either altering the law to comport with more accurate models of thinking and behavior or providing a transparent explanation of "the prudential, economic, political, or religious reasons for retaining a less accurate and outdated view." Kristin Lane, Jerry Kang, & Mahzarin Banaji, Implicit Social Cognition and the Law, 3 ANNU. REV. LAW SOC. SCI. 19.1-19.25 (2007)

Dissociation

Dissociation is the gap between explicit and implicit biases. Typically, implicit biases are larger, as measured in standardized units, than explicit biases. Often, our explicit biases may be close to zero even though our implicit biases are larger.

There seems to be some moderate-strength relation between explicit and implicit biases. See Wilhelm Hofmann, A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures, 31 PERSONALITY & SOC. PSYCH. BULL. 1369 (2005) (reporting mean population correlation r=0.24 after analyzing 126 correlations). Most scientists reject the idea that implicit biases are the only "true" or "authentic" measure; both explicit and implicit biases contribute to a full understanding of bias.

Explicit

Explicit means that we are aware that we have a particular thought or feeling. The term sometimes also connotes that we have an accurate understanding of the source of that thought or feeling. Finally, the term often connotes conscious endorsement of the thought or feeling. For example, if one has an explicitly positive attitude toward chocolate, then one has a positive attitude, knows that one has a positive attitude, and consciously endorses and celebrates that preference. See also implicit.

Implicit

Implicit means that we are either unaware of or mistaken about the source of the thought or feeling. R. Zajonc, Feeling and thinking: Preferences need no inferences, 35 AMERICAN PSYCHOLOGIST 151 (1980). If we are unaware of a thought or feeling, then we cannot report it when asked. See also explicit.

Implicit Association Test

The IAT requires participants to classify rapidly individual stimuli into one of four distinct categories using only two responses (for example, in a the traditional computerized IAT, participants might respond using only the "E" key on the left side of the keyboard, or "I" on the right side). For instance, in an age attitude IAT, there are two social categories, YOUNG and OLD, and two attitudinal categories, GOOD and BAD. YOUNG and OLD might be represented by black-and-white photographs of the faces of young and old people. GOOD and BAD could be represented by words that are easily identified as being linked to positive or negative affect, such as "joy" or "agony". A person with a negative implicit attitude toward OLD would be expected to go more quickly when OLD and BAD share one key, and YOUNG and GOOD the other, than when the pairings of good and bad are switched.

The IAT was invented by Anthony Greenwald and colleagues in the mid 1990s. Project Implicit, which allows individuals to take these tests online, is maintained by Anthony Greenwald (Washington), Mahzarin Banaji (Harvard), and Brian Nosek (Virginia).

Implicit Attitudes

"Implicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects." Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit attitudes and may not endorse them upon self-reflection. See also attitude; implicit.

Implicit Biases

A bias is a departure from some point that has been marked as "neutral." Biases in implicit stereotypes and implicit attitudes are called "implicit biases."

Implicit Stereotypes

"Implicit stereotypes are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category" Anthony Greenwald & Mahzarin 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 also stereotype; implicit.

Implicit Social Cognitions

Social cognitions are stereotypes and attitudes about social categories (e.g., Whites, youths, women). Implicit social cognitions are implicit stereotypes and implicit attitudes about social categories.

Stereotype

A stereotype is an association between a given object and a specific attribute. An example is "Norwegians are tall." Stereotypes may support an overall attitude. For instance, if one likes tall people and Norwegians are tall, it is likely that this attribute will contribute toward a positive orientation toward Norwegians. See also attitude.

Validities

To decide whether some new instrument and findings are valid, scientists often look for various validities, such as statistical conclusion validity, internal validity, construct validity, and predictive validity.

- Statistical conclusion validity asks whether the correlation is found between independent and dependent variables have been correctly computed.
- Internal validity examines whether in addition to correlation, there has been a demonstration of causation. In particular, could there be potential confounds that produced the correlation?
- Construct validity examines whether the concrete observables (the scores registered by some instrument) actually represent the abstract mental construct that we are interested in. As applied to the IAT, one could ask whether the test actually measures the strength of mental associations held by an individual between the social category and an attitude or stereotype
- Predictive validity examines whether some test predicts behavior, for example, in the form of evaluation, judgment, physical movement or response. If predictive validity is demonstrated in realistic settings, there is greater reason to take the measures seriously.

Bibliography

Allen R. McConnell & Jill M. Leibold, Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes, 37 J. Experimental Soc. Psychol. 435 (2001)

Anthony G. Greenwald, et al., Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity, 97 J. Personality & Soc. Psychol. 17 (2009)

Brian D. Ostafin, & Tibor P. Palfai, Compelled to Consume: The Implicit Association Test and Automatic Alcohol Motivation, 20 Psych. of Addictive Behav. 322 (2006)

Claudia Goldin & Cecilia Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, 90 Am. Econ. Rev. 715 (2000)

Dan-Olof Rooth, Implicit Discrimination in Hiring: Real World Evidence (Institute for the Study of Labor, Discussion Paper No. 2764, April 2007)

Denise Sekaquaptewa, et al., Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination, 39 J. Experimental Soc. Psychol.75 (2003).

Dolly Chugh, Societal and Managerial Implications of Implicit Social Cognition: Why Milliseconds Matter, 17 Soc. Just. Res. 203 (2004)

Elizabeth A. Phelps, et. al., Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation, 12 J. Cog. Neuroscience 729 (2000).

Eric Luis Uhlmann & Geoffrey L. Cohen, Constructed Criteria: Redefining Merit to Justify Discrimination, 16 Psychol. Sci. 474 (2005)

Eugene M. Caruso, Dobromir A. Rahnev, & Mahzarin Banaji, Using Conjoint Analysis to Detect Discrimination: Revealing Covert Preferences from Overt Choices, 27 Soc. Cognition 128 (2009)

Gregory Mitchell & Philip E. Tetlock, Antidiscrimination Law and the Perils of Mindreading, 67 Ohio St. L.J. 1023 (2006)

Hal R. Arkes & Philip E. Tetlock, Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?," 15 Psychol. Inquiry 257 (2004)

Irene V. Blair et al, The Influence of Afrocentric Facial Features in Criminal Sentencing, 15 Psychol. Sci. 674 (2004)

Irene V. Blair, Jennifer E. Ma, & Alison P. Lenton, Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery, 81 J. Person. & Soc. Psych. 828 (2001)

Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1491 (2005)

Kurt Hugenberg & Galen V. Bodenhausen, Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat. 14 Psychol. Sci. 640 (2003)

Laurie A. Rudman & Matthew R. Lee, Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music, 5 Group Processes & Intergroup Rel. 133 (2002)

Laurie A. Rudman & Peter Glick, Prescriptive Gender Stereotypes and Backlash Toward Agentic Women, 57 J. Soc. Issues 743 (2001)

Luciano Arcuri et al., Predicting the Vote: Implicit Attitudes as Predictors of the Future Behavior of Decided and Undecided Voters, 29 Political Psychology369

Matthew K. Knock & Mahzarin R. Banaji, Prediction of Suicide Ideation and Attempts Among Adolescents Using a Brief Performance-Based Test, 75 J. Clinical & Consulting Psychology 707 (2007).

Nicola S. Gray, et al., An Implicit Test of the Associations Between Children and Sex in Pedophiles, 114 J. Abnormal Psych. 304 (2005)

Nilanjana Dasgupta & Anthony G. Greenwald, On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and the Disliked Individuals, 81 J. Person. & Soc. Psych.800 (2001)

Nilanjana Dasgupta & Shaki Asgari, Seeing is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping, 40 J. Experimental Soc. Psychol. 642 (2004)

R. Richard Banks, Jennifer L. Eberhardt, Lee Ross, Discrimination and Implicit Racial Bias in a Racially Unequal Society. 94 Calif. Law Rev. 1169 (2006)

William Von Hippel et al., The Linguistic Intergroup Bias As an Implicit Indicator of Prejudice, 33 J. Experimental Soc. Psychol. 490 (1997)

DIVERSITY BENCHMARKING REPORT 2016

NEW YORK CITY BAR

NEW YORK CITY BAR
DIVERSITY

2016 DIVERSITY BENCHMARKING REPORT

EXECUTIVE SUMMARY

Signatory Firms See Gains for Women, Minorities, and LGBT Attorneys and Implement Innovative Inclusion Practices, Yet Barriers Remain

For more than a decade, the City Bar benchmarking research has illustrated enhanced diversity efforts in firms as well as overall incremental gains for women and minority attorneys. However, it has also recorded elevated attrition rates of both women and minorities, and a significant subset of law firms still without any minority and women attorneys in firm or department leadership roles.

With regard to overall representation and hiring, the 2016 benchmarking data remains relatively consistent with the results reported in 2015. We further examined the status of women and minority attorneys in the 71 firms that participated in both the 2015 and 2016 benchmarking surveys and performed statistical comparisons on representation, leadership, and hiring. The data did reflect changes in leadership metrics in 2016, including a significant increase of women and minority representation on management committees, as well as notable increases in LGBT attorney self-reporting. Despite these advances, racial/ethnic diversity at the partner level, erosion in the associate pipeline, and voluntary attrition remain challenges.

Highlights of the research include:

- **Women and minority attorneys made gains in leadership bodies,** with the percentage of women serving on management committees increasing to 23.6% from 20.3% in 2015 and the percentage of minorities serving on management committees increasing to 9.4% from 7.1% in 2015. The percentage of law firms with three or more women attorneys on the management committee increased from 24% in 2014 to 41% in 2016, and the percentage of law firms with three or more minority attorneys on the management committee more than doubled from 7% in 2014 to 18% in 2016.
- Still, nearly half of signatory firms have no racial/ethnic minorities on their management committees and more than one-third have no minority practice group heads.
- In 2016, white men represented 77% of all equity partners at signatory firms. Minority and women partners continue to be concentrated at the income partner level, rather than at the equity level. Moreover, the turnover rate for income partners in 2016 was 6.6%, almost double the 3.4% turnover rate of equity partners.
- Overall representation of minority attorneys increased slightly to 20.6% in 2016 from 18.8% in 2015.

- **Erosion in the associate pipeline directly affects future leadership.** 45% of associates are women compared to 19% of partners and 28% of associates are racial/ethnic minorities compared to 9% of partners. By contrast, 43% of associates are white men compared to 76% of partners. Female attorneys represent 46% of junior level associates, but decline to 44% of mid-level women associates, and 42% of senior level women associates. Representation at the junior level increased, but minority representation has leveled off or declined for mid- and senior level associates: in 2016, 36% of first-year associates were minorities—dropping to 26% of mid-level associates, and 22% of senior level associates. By the eighth year, only 20.5% of associates were minorities.
- **Voluntary attrition** is down overall in law firms, but continues to disproportionately impact minority and women attorneys. 15.6% of minorities and 14.3% of women left signatory firms in 2016—150% and 135% above the 10.6% rate for white men respectively. Even at the equity partner level, differences in voluntary attrition persist – with rates of 9.8% for women and 9.3% for minorities compared to 3.7% for white men.
- **LGBT attorney representation** has more than doubled since the City Bar began collecting data in 2004, from 1.6% to 4.1%, and representation of self-identified LGBT partners has doubled from 1.4% in 2004 to 2.8% in 2016.
- Four percent of all attorneys used **flexible work arrangements** in 2016 – 9% of women attorneys and 1% of men attorneys. Flexible work arrangements are used most frequently by Special Counsel attorneys, and 13% thereof are racial/ethnic minorities.
- Signatory firms' leadership continue to reflect increasing commitment to diversity and inclusion efforts, with 44% of firms reporting that a management committee member serves as chair of the diversity committee, an increase of seventeen percentage points from 27% in 2015.
- Signatory firms are **implementing "better practices,"** with a majority of firms providing attorney development opportunities with an enhanced focus on client relationships, and building more inclusive firm cultures.

Methodology & Updates

In the 2015 update to the benchmarking survey and report, the City Bar incorporated several significant changes including participation in the survey as a prerequisite to being listed as a signatory, a breakdown of racial and ethnic data, and qualitative data including "better practices" and interviews with stakeholders at various firms. This year's report includes data from the 88 participating law firms—a significant increase from prior years—as well as more than 40 hours of qualitative interviews with law firm associates, partners, managing partners, clients, bar leaders, and diversity experts.

Our mission is two-fold: first, to enhance and streamline our data collection efforts to define precisely the challenges that the firms are facing; and second, to foster greater industry-wide collaboration on model initiatives that yield meaningful results in the retention and promotion of women and minority attorneys. To this end, we have included detailed information on the "better practices" that can be adapted to align with each firm's unique challenges and goals. We also sought to learn from the experiences of associates within these firms: in 2017, the City Bar launched its first Associate Leadership Institute, and included findings from participants in this year's report.

It is apparent from the qualitative research and featured initiatives that in order to effect change, law firms must make long-term, individualized investment —beyond standard professional development options—in the careers of minority and women associates whom they seek to retain. Embedding these practices in the firm culture can reframe such opportunities as an investment in the firm's future leadership, rather than necessary remediation, and provide partners with an array of options to support the firm's inclusion efforts.

We will continue to refine three key areas of the survey that require more thorough data: voluntary attrition, representation of attorneys with disabilities, and pipeline data. This report includes the data collected in this year's survey, but we will conduct more detailed analyses of each area through relevant City Bar Committees and Task Forces with the goal of offering enhanced data and recommendations.

Photos from Associate Leadership Institute, J. McClinton *(see p. 23)*

We are most grateful to our signatory firms for embarking on this bold journey with us, and believe this research is critical to guiding and informing the many stakeholders that seek to create a more inclusive profession. We hope that our research—along with the individualized, confidential reports created for each participating firm—will continue to offer tools to bolster each firm's efforts while also encouraging greater accountability, knowledge-sharing, and collaboration across the profession.

PART I:
QUANTITATIVE SUMMARY

NOTABLE GAINS IN LEADERSHIP ROLES FOR WOMEN & MINORITY ATTORNEYS

The 2016 benchmarking data reflects increases in representation at the leadership level for women and minority partners, suggesting that sophisticated retention and promotion efforts have had a positive impact. However, the data highlights the effects of persistent attrition on the pipeline to leadership, as well as the underrepresentation of women and minorities at the equity partnership level. **Despite gains in leadership bodies at individual firms, minority men and women still make up less than 10% of all partners in signatory firms, and only 7% of equity partners are racial/ethnic minorities.** Of the reported top 10% of highest-compensated partners at signatory firms, white and minority women make up only 11%, minority men make up 6%, and white men make up the remaining 83%.

WOMEN ATTORNEYS

Within signatory firms, women attorneys make up 36% of all attorneys reported, despite representing a majority of law school students and 49% of summer associates in 2016. The City Bar benchmarking data has reflected incremental gains for women in leadership at signatory law firms since 2007.

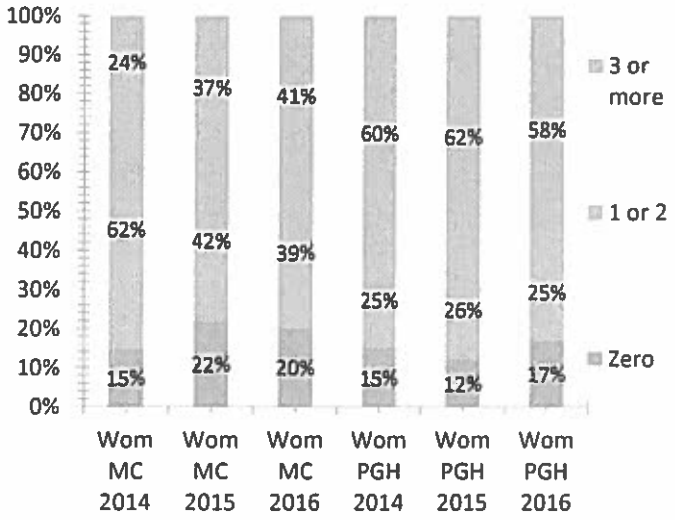
The percentage of women serving on firms' management committees was 23.6% in 2016, increasing from 13.5% in 2007 when data on senior leaders at signatory firms was first captured, and 3.3 percentage points higher than 2015. The percentage of law firms with three or more women serving on management committees increased substantially to 41% in 2016 from 24% in 2014. The percentage of women practice group heads is comparable in 2016 (19.3%) to 2015 and has increased from 15.3% in 2007; and the percentage of firms with three or more women practice group heads remains around 60% (58% in 2016). *(See Charts A and B)*

The benchmarking research has demonstrated growth in the proportion of women partners of approximately 0.3% each year, reaching 19.7% in 2015 as compared with 16.6% a decade before. The 18.6% of women partners at signatory firms in December 2016, down from the three years prior, may reflect participation of new firms in the survey and does not necessarily indicate stalled progress for women partners. In 2016, women made up 24% of income partners and 18% of equity partners, compared to 70% and 77%, respectively, white men.

CHART A: REPRESENTATION OF WOMEN ATTORNEYS IN LEADERSHIP ROLES

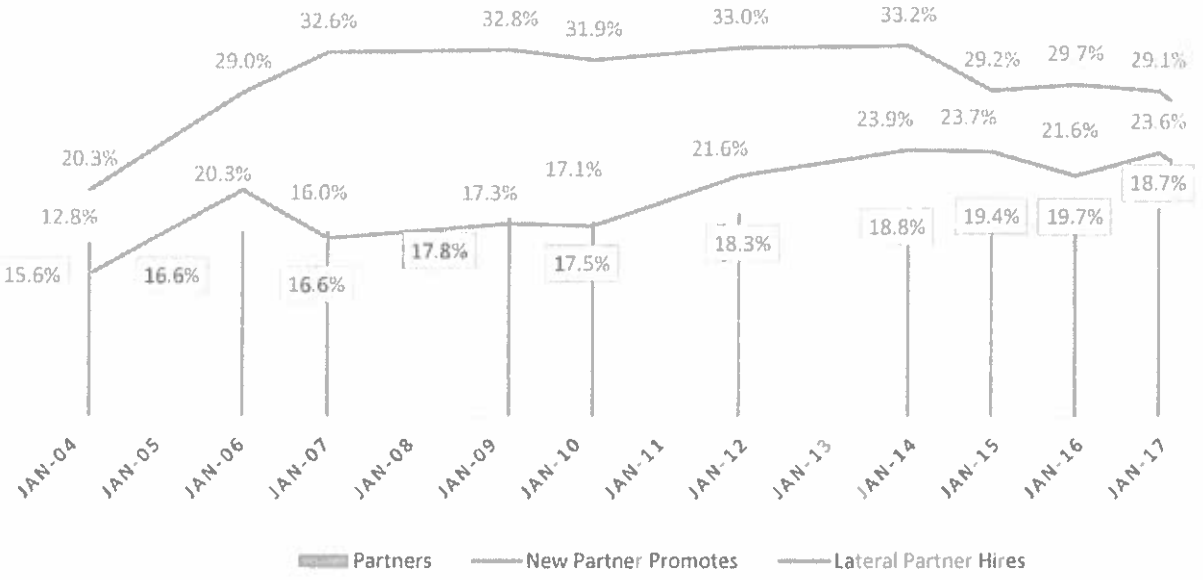
LEVEL	March 2004	Jan 2006	Jan 2007	March 2009	March 2010	Dec 2011	Dec 2013	Dec 2014	Dec 2015	Dec 2016
Partner	15.6	16.6	16.6	17.8	17.5	18.3	18.8	19.4	19.7	18.6
Management Comm.	NA	NA	13.5	17.8	17.1	17.7	16.9	18.3	20.3	23.6
Practice Group Heads	NA	NA	15.3	14.0	15.4	17.3	16.5	16.9	18.7	19.3

CHART B: REPRESENTATION OF WOMEN ATTORNEYS ON FIRM MANAGEMENT COMMITTEES ("WOM MC") AND PRACTICE GROUP HEADS ("WOM PGH")



In 2016, one in five firms had no women on its management committee, and one in six had no women practice group leaders, a slight increase from 2015. While the overall trend line for women in leadership roles shows improvement, the 2016 benchmarking data reflects that the percentage of female new partner promotions was essentially unchanged at 29.1% and has not reached the higher rates of prior years (2007 through 2013.) The representation of women lateral partner hires was 23.6% this year—similar to 2014 and 2015. These stalled data points could negatively impact the long-term representation of women leaders.

CHART C: WOMEN ATTORNEYS



Racial/Ethnic Diversity Among Women Partners Remains a Challenge

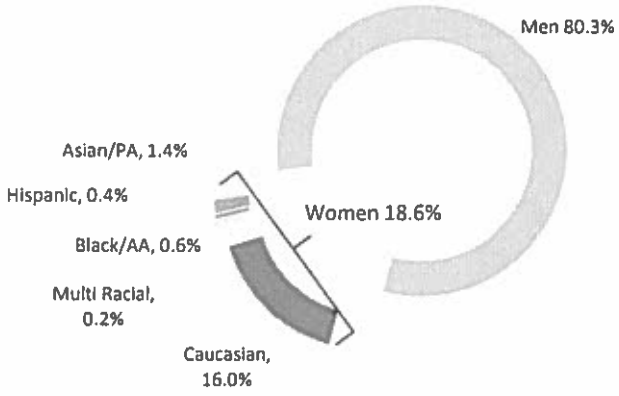
The 2015 Benchmarking Report revealed a notable lack of racial/ethnic diversity among women in leadership. In 2016, **among all partners, male and female, Caucasian women make up 16.0%, Asian/Pacific Islander women make up 1.4%, and Black and Hispanic women partners represent 0.6% and 0.4%, respectively.** *(See accompanying Chart D)* Of all women partners reported, 86.0% are Caucasian, 7.5% are Asian/Pacific Islanders, 3.0% are Black/African American, and 2.3% are Hispanic.

Black/African American, Hispanic, and Asian/Pacific Islander women make up only 2.3% of all equity partners. Furthermore, of all attorneys reported in the 2016 voluntary attrition data, turnover of Black/African American, Hispanic and Asian American equity partners was double that of minority income partners.

Leadership bodies, which include practice group heads, management committee members, and New York office or firm-wide managing partners, remain staggeringly homogenous. Of the women in leadership roles, 87.8% are Caucasian, with Asian/Pacific Islander women representing 5.7%, and with Black/African American women and Hispanic women making up 2.8% and 2.7%, respectively.

Given this data, law firm initiatives for promoting women to the leadership ranks should be inclusive of, and provide necessary support for, women of color.

CHART D: ALL PARTNERS BY GENDER, RACE/ ETHNICITY



MINORITY ATTORNEYS

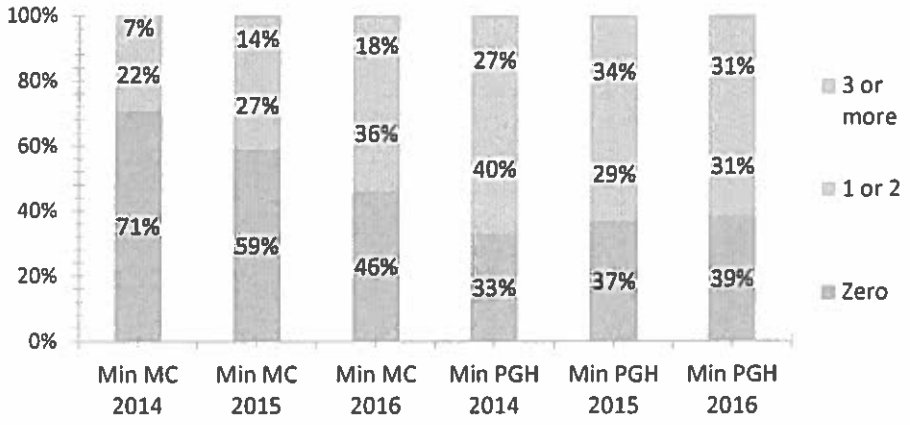
Minority attorney representation in firm leadership showed modest increases—the percentage of minority attorneys on management committees increased to 9.4% in 2016 from 7.1% in 2015—but the percentage of minority practice group heads remains essentially unchanged at 6.9% in 2016 from 7.0% in 2015. Minority Managing Partners/Firm Chairs made up 10.1% in 2016 compared to 10.4% in 2015.

CHART E: REPRESENTATION OF MINORITY ATTORNEYS IN LEADERSHIP ROLES

LEVEL	Jan 2007	March 2009	March 2010	Dec 2011	Dec 2013	Dec 2014	Dec 2015	Dec 2016
Partner	5.4	6.6	6.3	6.6	8.4	8.2	8.4	8.4
Management Comm.	4.7	6.3	6.9	5.7	5.2	6.4	7.1	9.4
Practice Group Heads	5.1	4.5	5.7	5.9	5.8	6.1	7.0	6.9

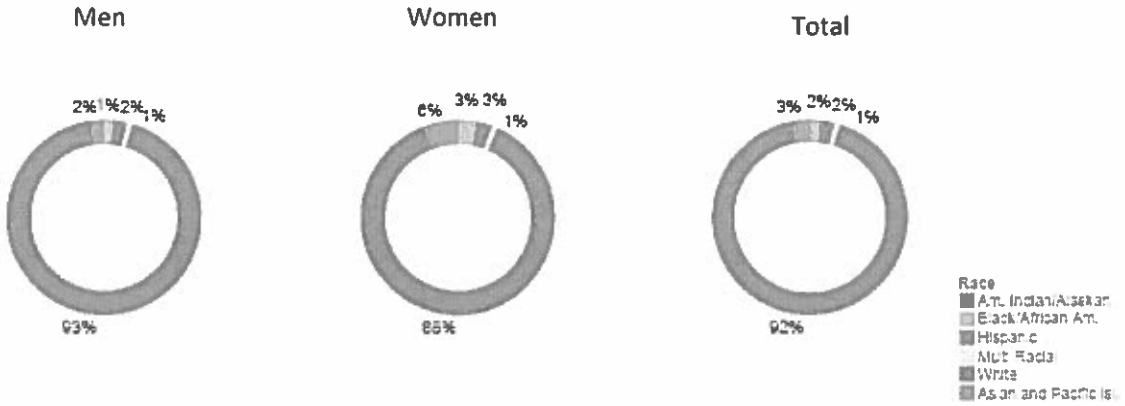
The percentage of firms with three or more minority attorneys on the management committee was 18% in 2016, and the percentage of firms with three or more minority practice group heads was 31% in 2016. **Yet, nearly half of signatory firms have no racial/ethnic minorities on their management committees and more than one-third have no minority practice group heads.**

CHART F: REPRESENTATION OF MINORITY ATTORNEYS ON FIRM MANAGEMENT COMMITTEES ("MIN MC") AND PRACTICE GROUP HEADS ("MIN PGH")



Of all leadership positions (management committee members, practice group heads, and Firm Chair) Asian/Pacific Islander attorneys make up 3%, Hispanic attorneys make up 2%, and Black/African American attorneys make up 2%. *(See Chart G)*

CHART G: LEADERSHIP ROLES BY GENDER, RACE/ETHNICITY

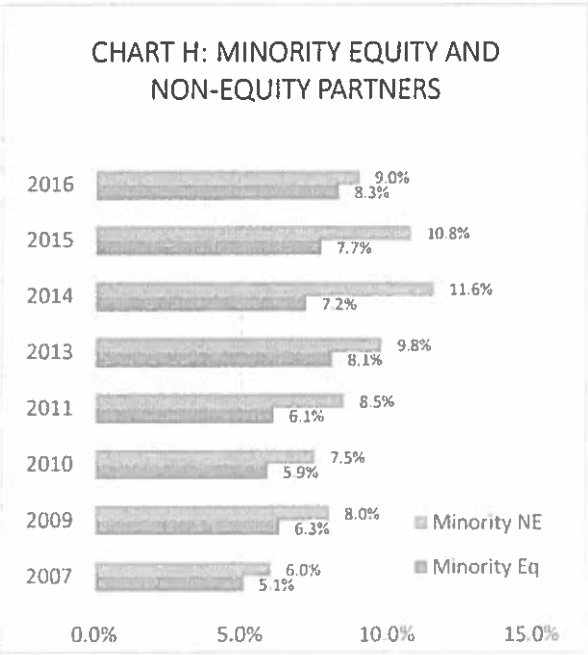


WOMEN & MINORITY ATTORNEYS CONTINUE TO BE DISPROPORTIONATELY REPRESENTED IN INCOME PARTNERSHIPS

Since the City Bar began collecting benchmarking data, it has reflected the disproportionate representation of minority and women partners at the income, rather than equity partner level. As illustrated in Chart H, minority attorneys accounted for 9.0% of income partners and 8.3% of equity partners across firms at the end of 2016. While approximately 16.9% of all partners are income partners, the relative proportion of income partners is approximately 18.0% of all minority partners compared to 21.9% of all women partners and 15.7% of all white men partners.

The turnover rate for income partners across gender and race was double that of equity partners in the 2016 results—6.6% compared to 3.4%.

CHART H: MINORITY EQUITY AND NON-EQUITY PARTNERS



SLIGHT GAINS FOR OVERALL MINORITY REPRESENTATION, DECREASES IN ASCENSION TO LEADERSHIP

Overall representation of minority attorneys improved slightly in 2016 compared to 2015: the percentage of all associates who are minorities increased to 27.6% in 2016 from 25.9% in 2015, minority special counsel increased to 13.5% in 2016 from 12.9% in 2015, and the percentage of minority partners remained unchanged at 8.4% in 2016. *(See Chart J)*

Of all reported attorneys, Asian/Pacific Islanders make up 10.7%, Black/African American attorneys make up 3.5%, and Hispanic attorneys make up 4.1%. *(See Chart I)*

Of the 27.6% of minority associates, Asian/Pacific American attorneys make up 14.4%, Black/African American attorneys and Hispanic attorneys make up 5% each, and multi-racial attorneys make up 3.2%. Of the 13.5% minority Special Counsel, Asian/Pacific Islander attorneys make up 6.9%, Black/African American attorneys make up 2.2%, Hispanic attorneys make up 3.3%, and multi-racial attorneys make up 1%. **Of reported minority partners, Asian/Pacific attorneys make up 4.1%, Black/African American attorneys make up 1.5%, Hispanic attorneys make up 2.2%, and multi-racial attorneys make up 0.5%.**

CHART I:
OVERALLREPRESENTATION BY RACE/ ETHNICITY

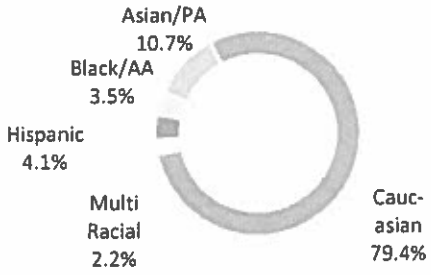
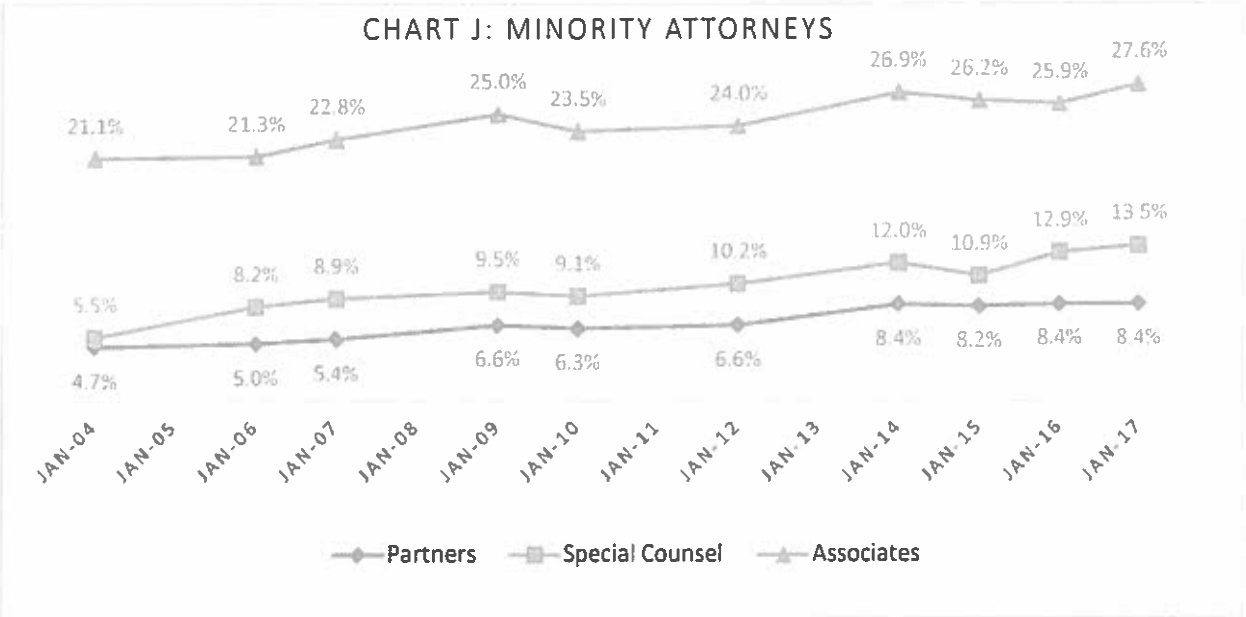


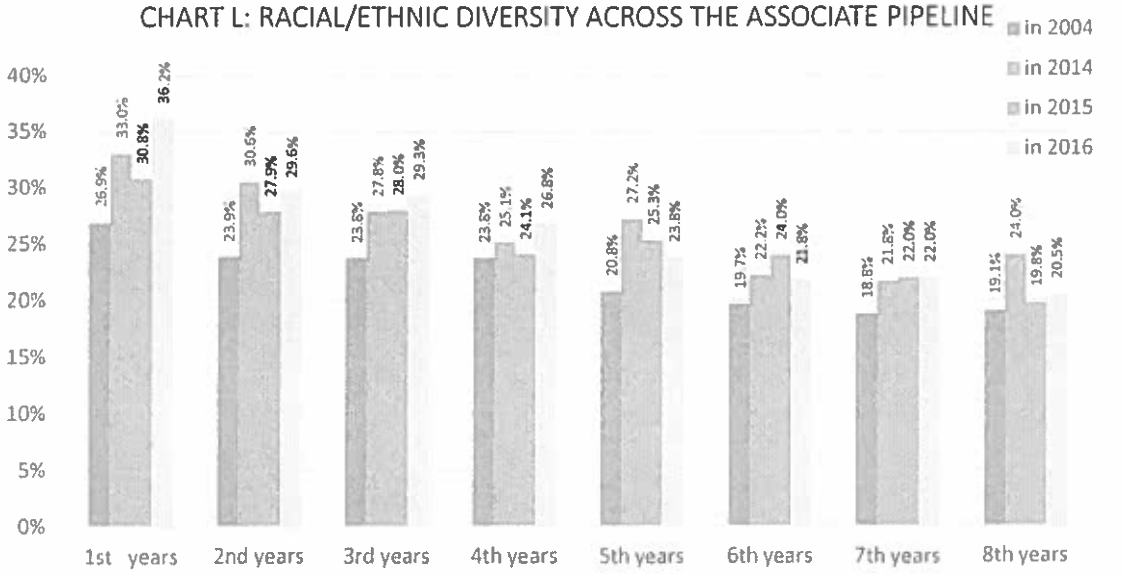
CHART J: MINORITY ATTORNEYS



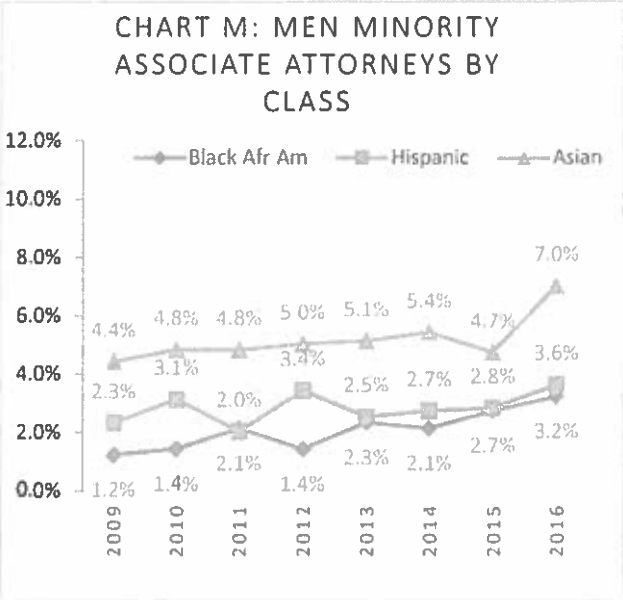
EROSION IN ASSOCIATE PIPELINE CONTINUES TO STALL PROGRESS

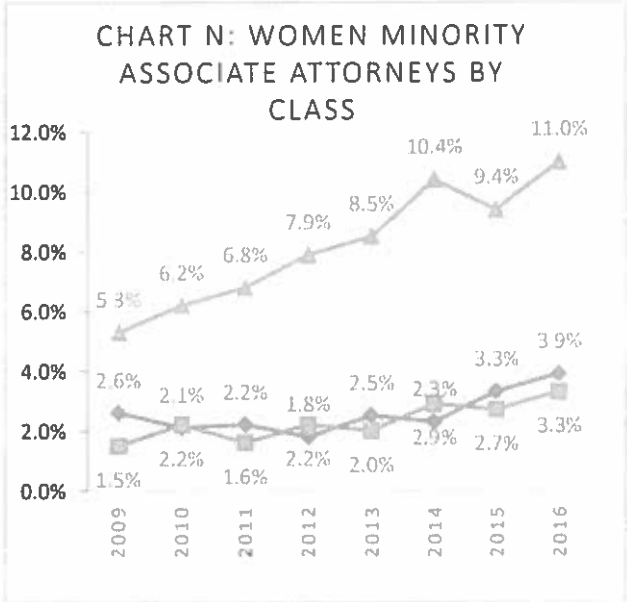
Increased gender diversity in the associate pipeline has been leveling off. Representation of women associates was just over 47% in 2016, whereas the first-year class was 50% female in 2004. The gender diversity of mid-level associates then declines to 44% and 42% of senior-level associates.

Efforts to recruit minority attorneys continue to be strong—in 2016, 36.2% of first-year associates were minorities—however, this diversity is eroded as minority associates continue to turn over at higher rates than their white male colleagues. By eighth year, only 20.5% of associates are minorities. The accompanying Chart L illustrates this differential over time. Racial and ethnic diversity among classes of junior associates was slightly higher in 2016 compared to 2015.



As illustrated in Charts M and N, the group of minority associates that has experienced the greatest increase in representation in recent years is Asian/Pacific Islander women, with modest increases for Black and Hispanic men and women associates from 2015 to 2016.



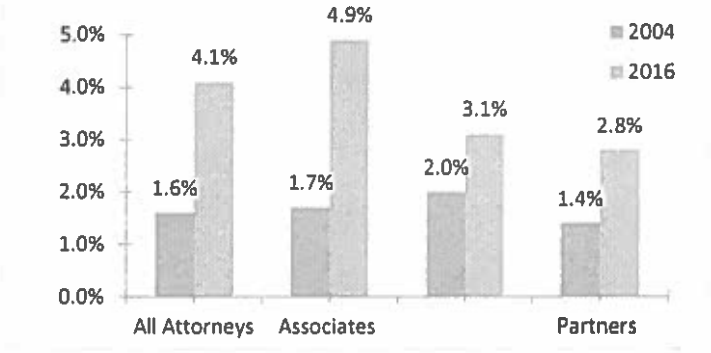


REPRESENTATION OF LGBT ATTORNEYS HAS MORE THAN DOUBLED

Over the last decade, representation of self-identified LGBT attorneys at signatory firms has more than doubled overall and has risen at key levels within firms. **Overall, self-identified LGBT attorneys make up 4.1% of all attorneys in signatory firms, an increase from 1.6% in 2004; which compares favorably to the corresponding national figure of 2.5%.**[1] LGBT associates increased to 4.9% in 2016 from 1.7% in 2004; LGBT special counsel increased slightly to 3.1% in 2016 from 2.0% in 2004; and LGBT partners increased to 2.8% in 2016 from 1.4% in 2004—each category at least one percentage point above national averages.

The increased representation of LGBT attorneys could be attributed to initiatives and resources at law firms that are provided for LGBT attorneys, including robust LGBT networks and programs to educate and train straight "allies."

CHART O: LGBT ATTORNEYS BY LEVEL



ATTORNEYS WITH DISABILITIES

While the benchmarking survey requests information on attorneys with disabilities, very little data is collected on this category of diverse attorneys. We do not know whether there are systemic issues that limit the number of people with disabilities attending law school or whether lawyers with disabilities are reluctant to self-identify. The City Bar's Disability Law Committee has begun fielding surveys to get a more detailed perspective on the representation of and needs of attorneys with disabilities in the profession, and will continue to enhance our research efforts in the years to come.

In the 2016 data, attorneys with disabilities represented 0.5% of the 2016 incoming class, 0.3% of all reported attorneys: 0.3% of associates, 0.5% of special counsel, and 0.3% of all partners, consistent with national averages.[2] Additionally, attorneys with disabilities represented 0.4% of practice group heads and management committee members.

---

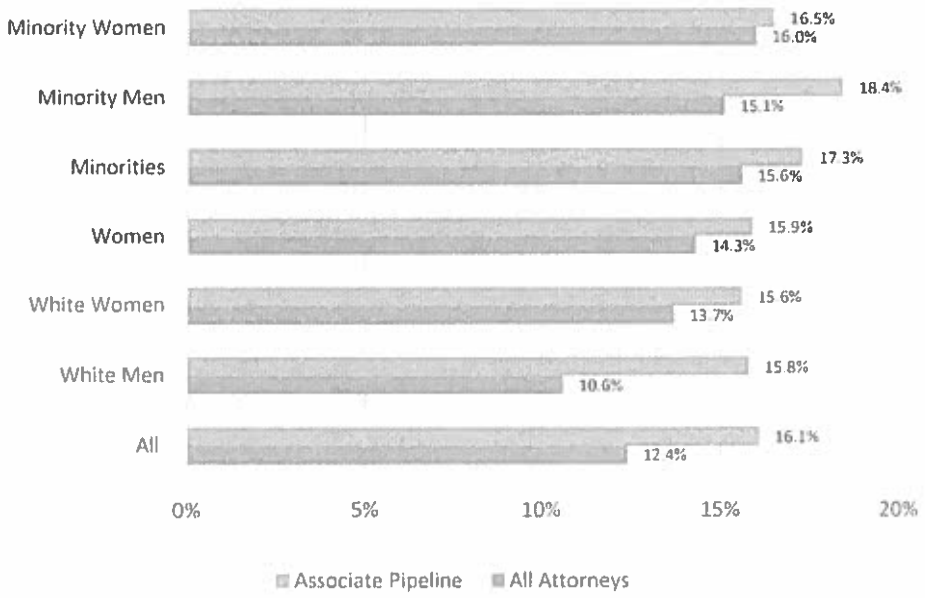
[1] *Openly LGBT Lawyers — 2016,* National Association of Law Placement (NALP), January 2017 http://www.nalp.org/diversity2

[2] *Lawyers with Disabilities — 2016,* National Association of Law Placement (NALP), January 2017 http://www.nalp.org/diversity2

VOLUNTARY ATTRITION RATES CONTINUE TO BE DISPROPORTIONATELY HIGH FOR WOMEN & MINORITY ATTORNEYS

The voluntary attrition rates for women and minority attorneys continue to exceed those of white men. **Among all attorneys who left signatory firms in 2016, 14.3% were women and 15.6% were minorities, compared to 10.6% of white men—or 135% and 150%, respectively, of the voluntary attrition rate for white men.**[3] At the associate level—the future pipeline of talent to firm leadership—attrition rates for white men and women associates are almost at parity (15.8% and 15.6%) while attrition rates for minority men and women are higher (18.4% and 16.5%.) Minority women have the highest overall voluntary attrition rate—16.0% compared to 12.4% for signatory firm attorneys overall.

CHART P: VOLUNTARY ATTRITION RATES



Of all reported attorneys, 15.5% of Black/African American attorneys, 14.9% of Hispanic attorneys and 14.9% of Asian/Pacific Islander attorneys left firms voluntarily, compared to 11.6% of Caucasian attorneys; attrition rates of minority attorneys were 28% to 34% higher than for white men. *(See Chart Q, p. 15)* Furthermore, voluntary attrition rates were 10.6% for white men compared to 13.7% for white women. Differences in voluntary attrition persist among equity partners: the rate for white men was 3.7%, compared to 9.8% for women and 9.3% for minorities. The aforementioned differences in overall voluntary turnover by race and gender also reflect the historical effect of the concentration of women

[3] *Attrition rates are based on analysis of a subset of firms who participated in both the 2015 and 2016 surveys and provided turnover data.*

and minorities at lower levels compared to white men, since attrition rates are highest at the associate level.

Only 43% of associates are white men compared to 76% of partners; 45% of associates are women compared to 19% of partners and 28% of associates are racial/ethnic minorities compared to 9% of partners.

CHART Q: VOLUNTARY ATTRITION BY GENDER, RACE/ETHNICITY

To gain a more complete understanding of the numbers and the reasons attorneys leave law firms, the City Bar is undertaking an extensive Voluntary Attrition Survey, which we hope will provide better context and more precise data than the benchmarking survey, and will release the findings of this research separately.

PIPELINE INITIATIVES COMMON AT HIGH SCHOOL AND LAW SCHOOL LEVEL, BUT NEED FOR MORE SUPPORT IN COLLEGE

The survey update included a section to assess whether signatory firms have or support pipeline programs for students in high school, college, and law school. Of the 88 firms that responded to these questions, 81% have or support programs for high school students, 60% have programs for undergraduate students, and 85% support programs for law students. Of the 86 firms that responded to this section of the survey, 70 have hired former students from the pipeline programs they have supported; 13% of these hires have been for non-attorney positions and 87% have been for attorney positions, and 12 firms reported more than a dozen attorney hires from pipeline programs.

The pipeline initiatives for high school students most frequently mentioned by surveyed firms include the **City Bar's Thurgood Marshall Summer Law Internship Program, Legal Outreach, NJ LEEP, Just the Beginning Foundation, Prep for Prep, Cristo Rey Network,** and partnerships with regional high schools. More than two dozen signatory firms participate in the Justice Resource Center's Mentor-Law Firm School Partnership Program to expose public school children first-hand to the practice and study of law through moot court and mock trial coaching.

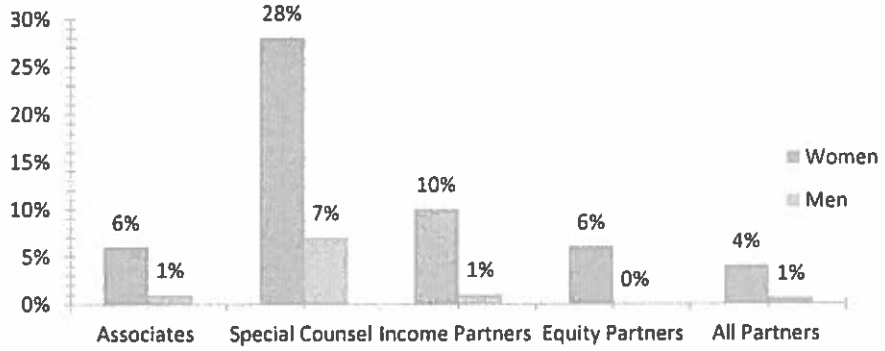
For undergraduate students, a majority of law firms support **Sponsors for Educational Opportunity (SEO), the Ronald H. Brown Law School Prep Program for College Students,** and firm-specific pre-law scholars programs.

At the law student level, most firms support the **City Bar 1L Diversity Fellowship Program, Law Preview Scholarship, the Leadership Council on Legal Diversity (LCLD) 1L Scholars Program and Success in Law School Mentoring Program, and Sponsors for Educational Opportunity (SEO).** Additionally, 29 signatory firms have created their own Diversity Fellowship Programs for first and second-year law students. Many signatory firms support Practicing Attorneys for Law Students, Inc. (PALS) by providing attorney mentors to regional law students and hosting development panels at their firms.

FLEXIBLE WORK PRACTICES USED MOST FREQUENTLY BY SPECIAL COUNSEL ATTORNEYS

Overall, 4% percent of attorneys used flexible work schedules in 2016, with women attorneys being the primary users of flexible work schedules—9% of women compared to 1% of men. The survey highlights the importance of the special counsel role as an alternative to the partnership track for attorneys seeking greater career path flexibility. Since the City Bar began tracking diversity benchmarking data, the special counsel role has been the primary way attorneys at signatory firms make use of flexible work practices. In 2016, 28% of women special counsel attorneys and 7% of men special counsel attorneys adopted a reduced schedule. In addition, 6% of women equity partners and 10% of women income partners worked on reduced schedules. Of all reported attorneys working on a formal part-time flexible arrangement, 13% were racial/ethnic minorities.

CHART R: USE OF REDUCED SCHEDULES BY LEVEL

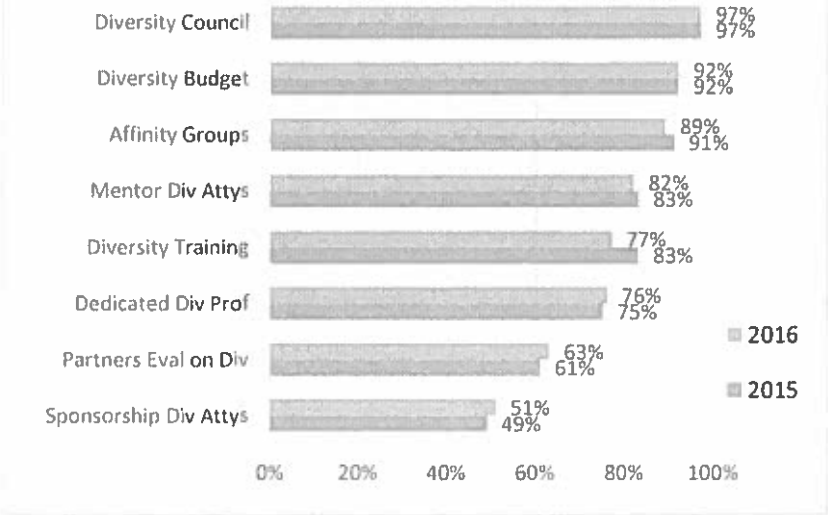


PART II:
DIVERSITY SUPPORT, QUALITATIVE FINDINGS & BETTER PRACTICES

INCREASED SUPPORT FOR DIVERSITY

Signatory firms continue to allocate resources and personnel toward their diversity efforts: 90% of signatory firms indicate the presence of a diversity council, diversity budget, and affinity groups. More than 75% of responding firms require diversity training, mentor diverse attorneys, and have a dedicated diversity professional. *(See Chart S)* The 2016 data reflected increased support for designated diversity staff, sponsorship efforts for diverse attorneys, and evaluation of partners on their diversity efforts.

CHART S: ELEMENTS OF DIVERSITY SUPPORT



Commitment from firm leadership to diversity and inclusion efforts continues to grow, with 44% of firms reporting that a management committee member serves as chair of the diversity committee—an increase from 27% in 2015.

Additionally, diversity budget figures have been robust, with 97% of firms reporting that diversity budgets remained steady or have increased from 2015 to 2016, and nearly 30% of firms anticipating an increase in their diversity budgets for the 2017 calendar year. The 2016 survey requested an approximation of budget allocation to specific elements: of the 62 firms that provided this data, the most significant budget allocations were staff and internal diversity programs/training, with 30 firms reporting that they allocate some percentage of their diversity budget directly to attorney development.

Diversity training was offered in more than 77% of signatory firms. Most (60%) of these training programs are mandatory; however, while some firms require full firm participation, others limit mandatory participation solely to partners, associates, or new hires. We may see some change in this practice with New York's mandatory "diversity, inclusion and the elimination of bias" CLE requirement going into effect in 2018.

Affinity groups continue to be a foundational element for prioritizing diversity, and signatory firms reported an average of 5 affinity groups per firm in 2016.

Survey respondents were also asked to rate the importance of diversity elements and practices in helping their firms reach their diversity goals. Dedicated staff, diversity budgets, and diversity councils

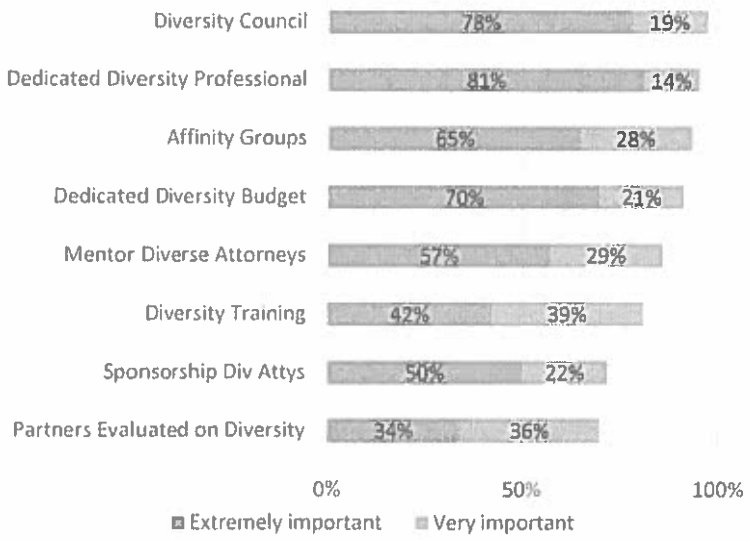
and affinity groups ranked as the top "extremely important" elements in driving change; more than 75% of signatory firms reported that having a diversity council and a dedicated diversity professional were of extreme importance. (*See Chart T*) Affinity groups, mentorship, and sponsorship of diverse attorneys were also rated as extremely important by more than half of responding law firms.

The importance of evaluating partners on diversity metrics has increased from 33% in 2013 to 63% in the 2016 survey results, and 52% of firms reported that compensation is tied to performance on diversity goals.

> "PARTNERS WILL GET INVOLVED [WITH DIVERSITY] WHEN THEIR COMPENSATION IS TIED TO RESULTS. If law firms followed the model of some of their clients, who are aligning compensation and bonuses to achieving diversity goals, it would undoubtedly demonstrate that this effort is valued by the whole firm and motivate those who are already at the top."

Firms also continued to stress the importance of a designated diversity professional with influence over key decisions regarding promotions and compensation. Of all reporting firms in 2016, 76% reported dedicated diversity staff; 46% reported a staff of 1-2 professionals, 19% reported a staff of 3-4, and 9% reported a staff of 5 or more. To fully execute diversity initiatives, convene stakeholders, and complete survey data, the City Bar recommends that all midsize and larger signatory firms have at least one dedicated diversity professional. As we continue to work with all of our signatory firms, we will work closely with the 26% that reported less than one full-time diversity professional.

CHART T: IMPORTANCE OF DIVERSITY SUPPORTS IN DRIVING PROGRESS



BETTER PRACTICES

In order to achieve true inclusion, numerical representation of women and minority attorneys must increase, particularly in the upper echelons of law firms. When looking at 88 law firms as an aggregate, the numbers move incrementally and may present a discouraging message of stagnation. However, when we focused on individual signatory law firm initiatives, we found more promising results which indicated increased retention and advancement of minority and women attorneys. We then identified categories of initiatives, which were included in the 2015 Report as a bulleted list of "better practices." These recommendations fell into three categories: **attorney development, client access and relationships, and training/firm culture.**

To expand on these practices, the 2016 survey asked respondents to indicate which practice(s) were currently implemented and to provide detailed descriptions and supporting data. To help law firms that are working to implement or strengthen specific initiatives, we have provided blueprints for several successful strategies and examples from specific law firm programs that can be used as models.

In addition to the qualitative questions on the survey, the Office for Diversity and Inclusion and members of the Benchmarking Task Force conducted qualitative interviews with associates, partners, managing partners, clients, bar leaders, and diversity experts. We have incorporated this data to support the need for and impact of these initiatives in this section as well.

As law firms use their quantitative data to identify specific challenges within their firms, we hope that the increased transparency of these "better practices" will serve as a guide for firms to implement creative, effective solutions.

> "YOU HAVE TO BE INTENTIONAL – WE DECIDED THAT THE MOST IMPACTFUL ROUTE WOULD BE TO MAKE THINGS A LITTLE MORE OBJECTIVE AND A LITTLE LESS SUBJECTIVE. This requires buy-in from leadership, and means that you have to start to intervene on assignment processes, feedback and evaluation processes, and flexible work arrangements. It may be painful at first because you are making direct changes to the organization, and we are as a profession resistant to change, but our other methods were not enough."

ATTORNEY DEVELOPMENT

For many associates in law firms, some of the criteria upon which they are evaluated are nuanced, and not always specifically taught or prioritized. While they understand that building strategic relationships and the ability to bring in business will translate to their ultimate success in the firm, not all law firms have initiatives to evaluate the skill level and/or specifically train on these fundamental leadership competencies. In the 2016 survey, **67% of participating law firms indicated that they maintain a list of developmental milestones that is made available to associates, and which identifies the objective criteria expected to prepare for the next level of promotion.** These guides can give associates greater agency over their career progression and drive more direct, meaningful feedback discussions.

Attorney development strategies help associates in law firms fully understand what is required to succeed, ensure fair allocation of work assignments, and systemize advocacy of minority and women associates in critical decisions regarding their careers. Of all participating law firms:

- **72%** of signatory firms provide targeted business development and leadership training on communication styles, emotional quotient (EQ), leadership presence, and strategic career planning *(See Associate Leadership Institute, p. 23);*
- **74%** engage practice group leaders in monitoring work allocation protocols and quality of assignments (e.g., billable hours, visibility);
- **70%** provide opportunities to expand practice area expertise;
- **48%** of firms are creating sponsorship programs, which pair partners and associates, and where the partner is responsible for the associate's development *(See Sponsorship Programs, p. 24);*
- **49%** of firms develop multi-year action plans for diverse associates; and
- **56%** provide associates with executive coaches.

> "ASSOCIATES NEED TO MAKE AN INVESTMENT IN THEIR OWN SUCCESS. Client pressure has shifted the model so there is more to do and less time, which leaves less discretionary time for associate development, while the need for it is constant if not increasing. Associates need to seek out and cultivate high-quality relationships that will lead to premium work experiences. "

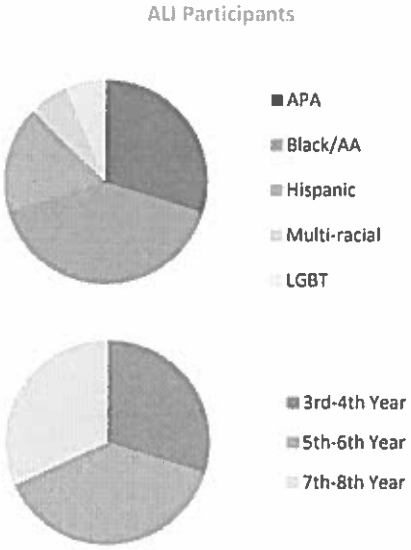
In addition to these specific initiatives, our qualitative research reveals a number of efforts to enhance the profiles of diverse associates externally, which complement the firms' internal professional development curriculum. These include fellowship programs and executive leadership programs like the **Leadership Council for Legal Diversity (LCLD) and Council of Urban Professionals (CUP), OutNext, board service opportunities, speaking/publishing opportunities, and bar association activity.**

For these programs to positively impact minority and women associates in firms, they must be created with specific consideration given to the challenges that diverse attorneys face—firm trainings often assume a set of shared background experiences, a one-size fits all approach that can be counterproductive.

CITY BAR ASSOCIATE LEADERSHIP INSTITUTE

The Office launched its first Associate Leadership Institute ("ALI"), a five-part intensive skills and leadership development program for mid-level and senior associates at signatory firms, to respond to the 2015 benchmarking data, which reflected elevated attrition rates and lack of representation of minority and women attorneys in law firms' top ranks. The curriculum included keynote speakers and intensive training modules on topics including executive presence, brand building, sponsorship, business development, and career planning.

The inaugural class included 50 participants from 30 law firms, evenly split between male and female participants, 3rd-5th year and 6th-8th year associates, and was more than 60% Black/Hispanic attorneys.



The Institute was created in partnership with the Council of Urban Professionals, Bliss Lawyers, the Center for Talent Innovation, and Practicing Attorneys for Law Students, Inc. The Planning Committee was comprised of associates, partners, and representatives from partner organizations. Faculty included representatives from diversity-focused initiatives like the Center for Talent Innovation and the Council of Urban Professionals, as well as in-house leadership from financial institutions, including Morgan Stanley and Prudential Financial. The faculty also included executive coaches, who helped participants develop specific action plans to demonstrate their value to their firms and clients.

In the post-program feedback, participants were asked to reflect on their experience during the program and rank their current skill and comfort level with each of the topics upon completion of the Institute (on a scale of 1 - 5, 5 being the highest ranking and 1 being the lowest), and provided the following:

- Executive presence and communication: 4-5 (60% of respondents self-ranked 5)
- Develop and manage personal brand: 3-5 (60% of respondents self-ranked 4)
- Solicit and use feedback: 3-5 (60% of respondents self-ranked 4)
- Understand mentor and sponsor relationships: 4-5 (60% of respondents self-ranked 5)
- Leverage network to achieve career goals: 4-5
- Development of career plan: 4-5 (80% of respondents self-ranked 4)

Additional feedback included:

- 80% of survey respondents have taken steps to leverage network and strategic relationships
- 60% have sought out mentors; 40% have sought out sponsors
- 100% have begun to create a business development plan
- 80% have begun to develop a career plan
- 100% have taken steps toward strengthening visibility within and outside of firm (80% reported they have done so frequently)

More information about the Institute, including the curriculum, faculty, participant directory, and a blueprint to create your own institute are available on the program website: http://www.nycbar.org/ALI

SPONSORSHIP PROGRAMS

Going beyond traditional mentoring programs, sponsorship initiatives pair women and minority associates with senior leaders in the firm who can have a measurable impact on the career progression of their protégés. Sponsors help protégés to develop necessary skills, and more importantly, have a voice at decision-making tables and are willing to advocate for them on pay/raises, high-profile assignments, and promotions. Sponsors can point out shortcomings and skill gaps and advise on acquiring critical experience, building key networks, and projecting executive presence. The protégé/sponsor pair develop an achievable timeline and action plan for career progression, and the firm tracks the progress of the associate through the course of the program.

Cadwalader Sponsorship Program

Cadwalader was one of the first law firms to formally prepare women and diverse senior associates and special counsel for future leadership roles at the firm with its Sponsorship Program. The firm's Taskforce for the Advancement of Women launched this initiative as a pilot program for high-performing women associates and special counsel October 2013. The goal of the pilot program was to ensure that talented women attorneys with six or more years' experience would have the opportunity to gain the skills necessary to move up the ranks and have long-term success at the firm. In 2015, the Sponsorship Program was expanded to racially diverse attorneys and LGBT attorneys in the firm's domestic offices.

The firm provides each protégé with one or more influential partners to act as sponsors for at least one year, providing guidance, assignments, marketing and leadership opportunities, and more exposure throughout the firm. Sponsors are selected based on their significant leadership and influence within and outside the Firm to ensure that the program has a positive impact on the protégés' careers. The firm's Managing Partner, Patrick Quinn, is one of the program's sponsors and is fully invested in the firm's diversity initiatives, acting as Chair of its global diversity committee.

In addition to being paired with sponsors, a detailed and vigorous curriculum is created each year for the protégés. Program participants receive individual coaching and attend sessions on business development, communication skills, and firm operations. Since the Program's launch, nine protégés have been promoted to partner and nine have been promoted to special counsel. 60% of newly-promoted partners in 2016 were women. In the firm's most recent partner promotions class, 40% were members of the Sponsorship Program, and 50% were women, minorities, and/or LGBT attorneys from throughout the firm.

Additional Firm Models

Debevoise's Sponsorship Program pairs women and minority associates who have been identified as prospective partner candidates with members of the Management Committee or Department Chairs to ensure that top-ranked associates have access to opportunities and develop the profile that will maximize his or her partnership opportunity. The sponsor/protégé pair develops an action plan that is revisited informally when there are needs to be addressed, develops clear steps to achieve developmental goals, and provides regular feedback.

Other models include the Day Pitney Protégé Program, Proskauer Rose Women's Sponsorship Program (WSP), Skadden Career Sponsorship Program Pilot, and the Hunton & Williams Sponsorship Program.

Additional Resources:
Hewlett, Sylvia Ann. Forget a Mentor, Find a Sponsor

CLIENT ACCESS & RELATIONSHIPS

Initiatives that create opportunities for associates to engage with clients and increase their ability to build their book of business have demonstrated success in retaining and promoting minority and women associates. Of all surveyed firms:

- **66%** of firms have focused on assessing client team composition and product on the firm's most significant matters;
- **86%** have developed initiatives to strengthen relationships with clients; and
- **30%** have engaged in efforts to enhance gender diversity on corporate boards, initiatives that have strengthened the leadership skills of women at the partner level.

> "WHAT MAKES A PARTNER SUCCESSFUL? HIS/HER ABILITY TO BRING IN BUSINESS. White partners who need only focus exclusively on their business will ultimately be more successful than minority partners who have to take on all of the internal and external diversity efforts for the firm, mentor the minority associates coming up behind them, *and* focus on their business."

> "Take a good idea and leverage it by getting more companies to do it together. This can take an idea with local impact and expand it to have a broader impact. Make it more strategic, cohesive.
>
> ONE COMPANY CAN'T DO THAT BUT 30 CAN."

In the last year, many corporate law departments have enhanced efforts to guide law firms towards successful inclusion strategies. *(See Better Practices, p. 26)* Additionally, the City Bar polled in-house partners on their most impactful initiatives, both internally and those to drive results in their outside counsel, and found the following practices to be considered most effective:

- Conversations to communicate goals, address blind spots, share better practices;
- Accountability methods based on diversity metrics on invoices, RFPs and pitches (headcount, hiring, promotion and attrition data);
- Tracking of demographics for teams staffing your matters (including: hours, fees billed, partner credit allocation process);
- Initiatives to strengthen personal relationships and develop talent at law firms (opportunities for organic networking and mentoring between clients and firms);
- Setting goals for management team profiles; and
- Providing financial and non-financial incentives for meeting goals.

METLIFE TALENT STEWARDSHIP INITIATIVE

The MetLife Talent Stewardship Initiative, launched in 2016 after a two-year development phase under the leadership of former General Counsel Ricardo Anzaldua, was created to expand on the company's multi-pronged internal inclusion initiatives, but designed specifically to address and impact the underrepresentation of minority and women attorneys advancing in the leadership pipeline. The initiative enhanced the company's feedback methods to identify high-potential talent while mitigating possible biases, then paired those protégés with one of the direct reports to the GC and CCO, all of whom were required to participate in the initiative. The protégé/sponsor pair then identified achievable goals for the protégé's career advancement, meeting regularly to develop competencies and provide feedback, and then reporting to Senior Leadership on the progress made.

After evaluating the initiative's internal success, MetLife sought to partner with its outside counsel to encourage them to develop similar models which would positively impact the metrics required in their RFPs. In the Spring of 2017 MetLife hosted a *Creating a Diverse Leadership Pipeline Workshop – Ideas and Initiatives That Work* summit for more than 70 law firms at their New York headquarters. At this session, the Center for Talent Innovation presented the concept and framework, followed by panel presentations and roundtable discussions which outlined initiatives to retain and promote diverse talent.

Following the summit, MetLife issued a timeline for law firms to present the company, by June 2018, with a formal talent development plan that demonstrates how they will promote and retain diverse lawyers. Firms will have the opportunity to refine and revise as needed through December 2018, when business would then be allocated to the firms that had fulfilled this imperative.

The collaborative effort to work with the firms by sharing the company's successful model and working together to achieve greater accountability — rather than simply imposing penalties or providing financial incentives — differentiates this initiative from the mandates imposed on outside counsel by Microsoft, HP, and other corporations.

LEAD MENTORING PROGRAM

The Lawyers for Empowerment and the Advancement of Diversity (LEAD) Mentoring Program, launched in 2015, was created in partnership with financial services institutions and law firms to match minority law firm associates in their second-fourth years of practice with in-house counsel mentors. The mentor pairs are created to help associates develop personal relationships that could ultimately develop into business relationships, to add value to their firms and clients. Mentors include diverse and non-diverse individuals from the financial institutions. The pairs meet monthly, and the participating institutions host formal scheduled events for all mentors and mentees on a rotating basis. LEAD also established sub-practice groups to enable participating law firms and financial institutions to discuss substantive legal issues to provide additional avenues for associates to demonstrate their legal expertise to in-house counsel at participating financial institutions.

Partnering law firms include signatory firms Cadwalader Wickersham & Taft LLP, Cleary Gottlieb Steen & Hamilton LLP, Clifford Chance US LLP, Milbank Tweed Hadley & McCloy LLP, Reed Smith LLP, Sidley Austin LLP, WilmerHale, and Shearman & Sterling LLP. The firms partner with financial institutions and corporations including Credit Suisse, Bank of New York Mellon, Morgan Stanley, Thomson Reuters, AllianceBernstein L.P., Barclays PLC, and Bank of America Merrill Lynch.

BIAS TRAINING AND FIRM CULTURE

Implicit bias remains a significant challenge to law firm diversity and inclusion efforts.

Initiatives to address implicit bias are created to foster an environment where all cultures and viewpoints are valued, and timely, prescriptive feedback is encouraged. However, training once a year is not enough—when viewed as a "check the box" initiative, it can fail to address structural barriers to inclusion and, when done incorrectly, can trigger biases and/or foster unhealthy workplace environments.

The most inclusive, informed law firms provide a multi-faceted, customized implicit bias and/or cultural competency curriculum that is administered regularly to all members of the firm.

- **73%** of signatory firms provide training for partners to understand and interrupt implicit bias and develop objective evaluation and feedback methods; and
- **84%** are monitoring exit interviews of departing associates.

Furthermore, firms can create organizational strategies to engineer the biases out of hiring and promotional decisions, as well as assignment and evaluation processes. Resources like the Harvard Implicit Association Test (IAT), the Intercultural Development Inventory (IDI), and The Center for WorkLife Law Bias Interrupters can be used as a foundational element to educate and inform individuals within law firms of biases and the impact they have on morale, productivity and advancement opportunities.

Leadership engagement is critical to creating a cultural change. In the qualitative sections of the survey, several firms emphasized the positive impact that leadership engagement has had on their diversity initiatives. When leadership is engaged in diversity efforts, it communicates the importance of the issue to the firm overall, and can inspire and motivate other non-minority members of the firm who may otherwise not get involved. From the perspective of leadership, the dialogue can change from one of a "problem" to an opportunity to see growth in a set period of time, particularly as firm leadership involvement expedites the approval process to implement necessary elements and/or policy changes.

> "BECAUSE I WAS THE ONLY BLACK ATTORNEY IN MY OFFICE, IT WAS VERY LONELY THERE. I didn't feel like I belonged there. I wanted to connect with like-minded people. I created a network to demonstrate the importance of having people who believe in you to support you, surround you. I felt a responsibility to show how we can create an environment that makes people feel like friends, so they are willing to help one another."

> "OUR EXECUTIVE COMMITTEE GOES THROUGH A LIST OF ASSOCIATES AND DISCUSSES WHAT THEY NEED, NAME BY NAME. This way everyone is aware of what each associate needs to succeed, and everyone knows who is supporting whom. Our Managing Partner checks in on the EC/Associate team. These are the people making the decisions about who will become partner, so it is important to take a holistic approach, rather than just focusing on the metrics."

CONCLUSION

There is much to be celebrated in this year's report: the increased representation of minority and women attorneys in leadership roles will ensure that a wider array of perspectives is being heard in rooms where critical decisions are being made. The demonstrated innovation and execution of targeted, impactful initiatives is inspiring. And client demand has intensified, emboldened by the 71 Fortune 500 companies that have signed onto ABA Resolution 113 Model Diversity Survey.

However, there is a long road ahead, and we must not lose momentum. We must engage stakeholders at all levels within law firms, client organizations and broadly throughout the profession in this mission in order to achieve results. As a bar association, we benefit from partnering with law firms, clients, our membership, bar associations, and organizations. This positions us uniquely to see the profession from a broad perspective. We offer the following guidance to consider in your individual and institutional efforts to foster a more inclusive profession:

KNOW YOUR CHALLENGES

Diversity programs are most successful when they are targeted at a very specific goal. However, many law firms struggle to address the truly complex challenges their diversity efforts face, and thus cast a wide net on solving diversity issues generally. We encourage law firms to leverage their data to focus their efforts on one or two issue(s) and set measurable goals to achieve in the year ahead.

HAVE A STRATEGIC PLAN

Once you have identified the problem, conduct a thorough analysis to ensure a customized solution that will have a direct impact on the challenges identified. This includes an assessment of culture, processes, financial and personnel needs and resources, as well as objective measures of success.

NON-MINORITY ENGAGEMENT

The data shows that straight, white men continue to occupy the vast majority of partner, equity partner, and other leadership bodies in law firms. Unless we engage non-minority members of the firm in inclusion efforts, these percentages will never change—there is simply not a critical mass of women and minority attorneys at the most senior levels of leadership to effect change. We acknowledge that there are many reasons why people do not engage in diversity initiatives. However, several law firms have created guides, toolkits, and ally initiatives to train, support, and guide majority members of the firm towards inclusion. For specific examples of what white male allies can do, see the Weil Upstander Initiative Action Guide.

CITY BAR ACTION PLANS

Following their individual data reports, the City Bar meets with each signatory firm to develop an action plan and consider the following:

- Review individualized data and identify pain points
- Consider the top 2-3 challenges to focus on in the year ahead
- Assess whether internal and external spending correlates directly to the 2-3 identified challenges and ideal outcomes
- Set goals and timelines
- Strategize how you will measure outcomes

To schedule a meeting, please visit: https://nycbardiversity.typeform.com/to/Dgzki4

Photos from Associate Leadership Institute, J. McClinton (see p. 23)

COLLABORATION

Talk to other law firms, share better practices and, when able, engage in collaborative efforts to communicate that inclusion is a priority. In 2016, 44 law firms (including 24 signatories) piloted the Mansfield Rule, which measures whether law firms have affirmatively considered women lawyers and attorneys of color—at least 30% of the candidate pool —for promotions, senior level hiring, and significant leadership roles in the firm, including equity partner promotions, lateral partner and mid/senior level associate searches, practice group leadership, Executive Committee and Board service, Partner Promotions, Nominating, and Compensation Committees, and Chairperson/Managing Partner positions. Initiatives like this, where firms and corporations can provide a collective voice for a broader impact, will undoubtedly create change.

In the year that followed the 2015 Report release, our Office met with more than 40 signatory firms to discuss the findings and formulate action plans. We are committed to using research and resources provided by the Office and City Bar Committees to strengthen partnerships with our signatories, which we believe will engender measurable change.

We look forward to continuing our work with all of you in the years ahead, and are optimistic that with more collaboration and courage, we will build a more inclusive profession.

ACKNOWLEDGEMENTS

The 2016 Benchmarking Report was created under the leadership of New York City Bar President John S. Kiernan; Executive Director Bret I. Parker; and Director of Diversity and Inclusion Gabrielle Lyse Brown. Amy Richman of WFD Consulting led the research effort. The survey update effort was supported by Kathy Chin and Hon. Rosalyn Richter, Co-Chairs of the Committee to Enhance Diversity in the Profession, and led by Joseph Drayton of Cooley LLP, Chair of the Committee's Benchmarking Task Force.

Profound thanks to Deloitte Transactions and Business Analytics LLP and Deloitte Financial Advisory Services LLP for the individual firm reports, especially Kamran Masood, Elene Karanicolas, Allison May, Vivian Yeh, and Cynthia O'Brien for fielding the survey and designing the individual firm reports and graphics for the public report.

And special thanks to research fellows Elena Lobo and Raabia Qasim; as well as Monica Parks, Maria Cilenti, Martha Harris, Mary Margulis-Ohnuma and Dr. Arin Reeves for editorial support and guidance.

We are most grateful for the law firms that provided detailed information on the better practices, as well as the many individuals who provided their time, experiences, and expertise in the qualitative interviews.

And last but certainly not least, we give our deepest thanks to the signatory law firms who participated in the survey and for your partnership to enhance our research efforts each year.

All photos are from our 2017 Associate Leadership Institute, by J. McClinton of Dos Ojos Media.

NEW YORK CITY BAR
DIVERSITY

Questions about the report and reprint permission can be directed to:

Gabrielle Lyse Brown, Director of Diversity & Inclusion

Office for Diversity and Inclusion | New York City Bar | 42 West 44th Street, New York, NY 10036

(212) 382-6713 | gbrown@nycbar.org | www.nycbar.org/diversity

For press inquiries, please contact Eric Friedman (212) 382-6754 | efriedman@nycbar.org.

BIAS INTERRUPTERS *small steps big change*

Why Our Company Should Use Bias Interrupters

Diversity makes business sense

- Diverse workgroups perform better and are more committed, innovative and loyal.[1]
- Gender diverse workgroups have better collective intelligence, which improves performance by the group and its members, leading to better financial performance.[2]
- Racially diverse work groups consider a broader range of alternatives, make better decisions and are better at solving problems.[3]

Allowing bias to flourish affects many groups

- Allowing unconscious bias to flourish affects many different groups: modest or introverted men, LGBT+, individuals with disabilities, class migrants (professionals from blue-collar backgrounds), women, and people of color.[4]
- We now know that workplaces that view themselves as being highly meritocratic often are, in fact, *more* biased than other organizations[5] and that the usual responses—one-shot diversity trainings, mentoring and networking programs—typically don't work.[6]

Bias interrupters work

Bias interrupters are evidence-based tweaks to hiring and other business systems that can produce sharp, measurable gains. Bias interrupters work:

- A fortune 250 fintech company sharply increased diversity by: 1) keeping metrics on the pool of candidates contacted, interviewed, and hired, 2) sharing those metrics with the CEO, the hiring manager and the relevant executive committee member and 3) linking achievement of diversity goals to executive bonuses. After just 18 months, 48% of newly hired executives at the VP & above level were diverse, including 77% of newly hired SVPs.
- Airbnb increased the percentage of women on its data science team from 15% to 30% in 2015 by taking several small steps, including: 1) taking names off resumes when judging objective tests given to candidates and 2) ensuring that women were half or more of the interview panel and audience for presentations by female candidates.[7]

---

[1] e.g., Dahlin et al., 2005; Ely & Thomas, 2001; Jehn et al., 1999
[2] Richard et al., 2004, Wooley et al, 2011; Lewis, 2016
[3] Phillips et al., 2006, Antonio et al., 2004; Richard et.al., 2003
[4] See Identifying & Interrupting Bias in Performance Evaluations worksheet, available at www.biasinterrupters.org
[5] Castilla, 2015
[6] Kalev, Dobbin & Kelly, 2006
[7] Grewal & Newman, 2015

BIAS INTERRUPTERS *small steps big change*

Identifying & Interrupting Bias in Hiring

The four patterns below describe *tendencies not absolutes.* Here's what to watch out for:

Prove-It-Again! ("PIA") Groups stereotyped as less competent often have to prove themselves over and over. "PIA groups" include women, people of color, individuals with disabilities, older employees, LGBT+, and class migrants (professionals from blue-collar backgrounds.)

1. **Higher standards.** When evaluating identical resumes "Jamal" needed eight additional years of experience to be judged as qualified as "Greg," and "Jennifer" was offered $4,000 less in salary than "John."
2. **"He'll go far;" "She's not ready"** Majority men tend to be judged on their potential, whereas PIA groups tend to be judged on what they have already accomplished.
3. **Casuistry: education vs. experience.** When a man had more experience, people tended to choose to hire the man because he had more experience. But when the man had more education, people again chose the man because he had more education. Both education and experience counted less when women had them.
4. **Elite school bias.** Over-reliance on elite educational credentials hurts class migrants and candidates of color. Almost half of Harvard students are from families in the top 4% of household incomes. Top students from lower ranked schools are often as successful as students from elite schools
5. **PIA groups get horns; others a halo.** Horns=one weakness generalized into an overall negative rating. Halo=one strength generalized into a global positive rating.
6. **"We applied the rule—until we didn't."** Objective requirements often are applied rigorously to PIA groups—but leniently (or waived entirely) for majority men.
7. **Do only the superstars survive?** Superstars may escape PIA problems that affect others.

Tightrope A narrower range of workplace behavior often is accepted from women and people of color ("TR groups"). Class migrants and modest or introverted men can face Tightrope problems, too.

1. **Leader or worker bee?** TR groups face pressure to be "worker bees" who work hard and are undemanding...but if they comply, they lack "leadership potential."
2. **Modest, helpful, nice; dutiful daughter, office mom?** Prescriptive stereotypes create pressures on women to be mild-mannered team players—so "ambitious" is not a compliment for women and niceness may be optional for men but required of women.
3. **Direct and assertive—or angry and abrasive?** Behavior seen as admirably direct, competitive, and assertive in majority men may be seen as inappropriate in TR groups —"tactless," "selfish," "difficult" Anger that's accepted in majority men may be seen as inappropriate in TR groups.
4. **"She's a prima donna"; "He knows his own worth."** The kind of self-promotion that works for majority men may be seen as off-putting in TR groups. Modest men may encounter bias that reflects assumptions about how "real men" should behave. Also, strong modesty norms can make class migrants, Asian-Americans, and women uncomfortable with self-promotion.

5. **Racial stereotypes.** Asian-Americans are stereotyped as passive and lacking in social skills; African-Americans as angry or too aggressive: Latinos as hotheaded or emotional.

The **Parental Wall** can affect both fathers and mothers—as well as employees without children.

1. **"He has a family to support."** Fathers face expectations that they will not—or should not—take time off for caregiving, or that they should get jobs because they are breadwinners.
2. **Gaps in her resume.** People take time off for many reasons. Be consistent. If you don't penalize for military service, don't do so for taking time off for children either.
3. **"Her priorities lie elsewhere" (or should!).** Mothers are stereotyped as less competent and committed and are 79% less likely to be hired than identical candidates without children.
4. **"I worry about her children."** Mothers who work long hours tend to be disliked and held to higher performance standards. Taxing jobs may be withheld on the assumption that mothers will not—or should not—want them.

Tug of War Sometimes bias creates conflict within underrepresented groups.

1. **Tokenism.** If people feel there's only one slot per group for a prized position, group members may be pitted against each other to get it.
2. **Strategic distancing and the loyalty tax.** People from underrepresented groups may feel they need to distance themselves from others of their group, or align with the majority against their own group, in order to get ahead.
3. **Passthroughs. PIA:** People from underrepresented groups may hold members of their own groups to higher standards because "That's what it takes to succeed here." **Tightrope:** Women may fault each other for being too masculine—or too feminine. People of color may fault each other for being "too white"—or not "white" enough. **Parental wall:** Parents may fault each other for handling parenthood wrong—taking too much time off or too little.

Eight Powerful Bias Interrupters

1. Decide in advance what factors are important for the job.
2. Give each candidate a separate rating for each factor, then average the ratings to identify the highest ranked candidates.
3. Don't just hire friends of friends unless your networks, your org, or both, are diverse. Consider candidates from multi-tier schools, not just elite institutions.
4. Make sure to give everyone—or no one—the benefit of the doubt.
5. If you waive objective requirements, do so consistently and require an explanation.
6. Don't insist on likeability, modesty, or deference from some but not others.
7. Don't make assumptions about what mothers—or fathers—want or are able to do, and don't count "gaps in a resume" against someone without a good reason for doing so.
8. If you comment on "culture fit," "executive presence," or other vague concepts, start with a clear definition and keep track to ensure such concepts are applied consistently.

84 NTDLR 1195
84 Notre Dame L. Rev. 1195

C

Notre Dame Law Review
March, 2009

Articles

*1195 DOES UNCONSCIOUS RACIAL BIAS AFFECT TRIAL JUDGES?

Jeffrey J. Rachlinski [FNa1]

Sheri Lynn Johnson [FNd1]

Andrew J. Wistrich [FNd2]

Chris Guthrie [FNd3]

Race matters in the criminal justice system. Black defendants appear to fare worse than similarly situated white defendants. Why? Implicit bias is one possibility. Researchers, using a well-known measure called the Implicit Association Test, have found that most white Americans harbor implicit bias toward black Americans. Do judges, who are professionally committed to egalitarian norms, hold these same implicit biases? And if so, do these biases account for racially disparate outcomes in the criminal justice system? We explored these two research questions in a multi-part study involving a large sample of trial judges drawn from around the country. Our results--which are both discouraging and encouraging--raise profound issues for courts and society. We find that judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases.

*1196 Introduction

Justice is not blind.

Researchers have found that black defendants fare worse in court than do their white counterparts. In a study of bail-setting in Connecticut, for example, Ian Ayres and Joel Waldfogel found that judges set bail at amounts that were twenty-five percent higher for black defendants than for similarly situated white defendants. [FN1] In an analysis of judicial decisionmaking under the Sentencing Reform Act of 1984, David Mustard found that federal judges imposed sentences on black Americans that were twelve percent longer than those imposed on comparable white defendants. [FN2] Finally, research on capital punishment shows that "killers of White victims are more likely to be sentenced to death than are killers of Black victims" and that "Black defendants are more likely than White defendants" to receive the death penalty. [FN3]

Understanding why racial disparities like these and others persist in the criminal justice system is vital. Only if we understand why black defendants fare less well than similarly situated white defendants can we determine how to address this deeply troubling problem.

Two potential sources of disparate treatment in court are explicit bias and implicit bias. [FN4] By explicit bias, we mean the kinds of bias that people knowingly--sometimes openly--embrace. Explicit bias exists and undoubtedly accounts for many of the racial disparities in the criminal justice system, but it is unlikely to be the sole culprit. Researchers have found a marked decline in explicit bias over time, even as disparities in outcomes persist. [FN5]

Implicit bias--by which we mean stereotypical associations so subtle that people who hold them might not even be aware of them--also appears to be an important source of racial disparities in the criminal *1197 justice system. [FN6] Researchers have found that most people, even those who embrace nondiscrimination norms, hold implicit biases that might lead them to treat black Americans in discriminatory ways. [FN7] If implicit bias is as common among judges as it is among the rest of the population, it might even account for more of the racially disparate outcomes in the criminal justice system than explicit bias.

In this Article, we report the results of the first study of implicit racial bias among judges. We set out to explore whether judges hold implicit biases to the same extent the general population and to determine whether those biases correlate with their decisionmaking in court. Our results are both alarming and heartening:

(1) Judges hold implicit racial biases.

(2) These biases can influence their judgment.

(3) Judges can, at least in some instances, compensate for their implicit biases.

Our Article proceeds as follows. We begin, in Part I, by introducing the research on implicit bias and its impact on behavior. In Part II, we briefly describe the methods of our study. We provide a much more detailed account in the Appendix. In Part III, we report our results and interpret them. Finally, in Part IV, we explore the implications of our results for the criminal justice system, identifying several possible measures for combating implicit racial bias.

I. Implicit Bias

Psychologists have proposed that implicit biases might be responsible for many of the continuing racial disparities in society. [FN8] To assess the extent to which implicit biases account for racial disparities, researchers must first ascertain whether people hold implicit biases and then determine the extent to which implicit biases influence their actions.

*1198 A. Demonstrating Implicit Bias

In their efforts to assess whether people harbor implicit biases, psychologists have used a variety of methods. [FN9] Standing front and center among these methods, however, is the Implicit Association Test (IAT). [FN10] Developed by a research group led largely by Tony Greenwald, Mahzarin Banaji, and Brian Nosek, the IAT is the product of decades of research on the study of bias and stereotypes [FN11] and has attracted enormous scholarly and popular attention. [FN12] More than four and a half million people have taken the IAT. [FN13] The test takes different forms, but most commonly, it consists of a computer-based sorting task in which study participants pair words and faces. A typical administration of the "Race IAT" proceeds as follows [FN14]:

First, researchers present participants with a computer screen that has the words "White or Good" in the upper left-hand corner of the screen and "Black or Bad" in the upper right. The researchers then inform the participants that one of four types of stimuli will appear in the center of the screen: white people's faces, black people's faces, good (positive)

words, or bad (negative) words. The researchers then explain that the participants should press a designated key on the left side of the computer when a white face or a good word appears and press a designated key on the right side of the computer when a black face or a bad word appears. Researchers refer to the white/good and black/bad pairings as "stereotype congruent," *1199 because they are consistent with negative stereotypes associated with black Americans. [FN15] The participants complete several trials of this first task.

Then, the computer is programmed to switch the spatial location of "good" and "bad" so that the words "White or Bad" appear in the upper left-hand corner and "Black or Good" appear in the upper right. The researchers explain to the participants that they are now supposed to press a designated key on the left side of the keyboard when a white face or a bad word appears and press a designated key on the right side of the keyboard when a black face or a good word appears. Researchers refer to these white/bad and black/good pairings as "stereotype-incongruent," because they are inconsistent with the negative stereotypes associated with black Americans. The participants then complete several trials of this second task. [FN16]

Researchers have consistently found that white Americans express a strong "white preference" on the IAT. [FN17] They make this determination by comparing the amount of time it takes respondents to complete the two tasks identified above--that is, their "response latency." [FN18] Most white Americans complete the first task (in which they sort white and good from black and bad) more quickly than the second (in which they sort black and good from white and bad). [FN19] In other words, most white Americans produce higher response latencies when faced with the stereotype-incongruent pairing (white/bad or black/good) than when faced with the stereotype-congruent pairing (white/good or black/ bad).

Researchers have observed a different pattern of implicit biases among black Americans. Black Americans do not exhibit the same white preference that whites express, but neither do they show a mirror-image black preference. [FN20] Rather, black Americans express a much greater variation, with many expressing moderate to strong black preferences that are rarely found in white Americans. [FN21] But *1200 some also express white preferences--sometimes even strong ones. [FN22] On average, black Americans express a slight white preference, but the average masks wide variation in response. [FN23] Latinos also express a small white preference. Asian Americans show a white preference that is comparable to but somewhat weaker than that found in white Americans. [FN24]

The implications of the research using the IAT are a matter of some debate, [FN25] but the cognitive mechanisms underlying the research are clear enough. The white preference arises from well-established mnemonic links. Whites more closely associate white faces with positive words and black faces with negative words than the opposite. Thus, when they complete the white/good versus black/bad trials, they need only make a judgment about whether the stimulus that appears in the middle of the screen is positive or negative. The incongruent association, in contrast, requires that they first judge whether the stimulus is a word or a face and then decide on which side it belongs. Stereotype-incongruent associations interfere with the sorting task in much the same way that the use of green ink can make the word "blue" hard to read. [FN26]

The white preference on the IAT is well-documented among white Americans. [FN27] Researchers have conducted and published hundreds of academic studies, and several million people have participated in IAT research. [FN28] They have determined that the implicit biases documented through IAT research are not the product of the order in which people undertake the tasks, their handedness, or any *1201 other artifact of the experimental method. [FN29] The prevailing wisdom is that IAT scores reveal implicit or unconscious bias. [FN30]

B. Implicit Bias and Behavior

Even if implicit bias is as widespread as the IAT studies suggest, it does not necessarily lead to, or explain, racially disparate treatment. Only if researchers can show that implicit bias influences decisionmakers can we infer that implicit bias is a cause of racial disparities.

Implicit bias, at least as measured by the IAT, appears to correlate with behavior in some settings. In a recent review, Greenwald and his colleagues identified 122 research reports assessing the relationship between IAT scores and observable behaviors; [FN31] of these, thirty-two involved "White-Black interracial behavior." [FN32] Across these twenty-four studies, the researchers found a modest correlation of 0.24 between the implicit bias measures and the observed behaviors tested in the studies. [FN33] This means that implicit bias accounted for roughly six percent of the variation in actual behavior. [FN34]

Six percent might not sound like much, but a six percent disparity could have an enormous impact on outcomes in the criminal justice system. In a typical year, judges preside over approximately twenty-one million criminal cases in state courts [FN35] and seventy thousand*1202 in federal courts, [FN36] many of which involve black defendants. Throughout the processing of these cases, judges make many judgments concerning bail, pretrial motions, evidentiary issues, witness credibility, and so forth. Each of these judgments could be influenced by implicit biases, so the cumulative effect on bottom-line statistics like incarceration rates and sentence length is much larger than one might imagine. [FN37] Furthermore, six percent is only an average. Some judges likely hold extremely strong implicit biases. And some defendants are apt to trigger an unconscious bias to a much greater extent than others. [FN38] Even this seemingly small effect might harm tens or even hundreds of thousands of black defendants every year.

Researchers have found, however, that people may have the ability to compensate for the effects of implicit bias. [FN39] If they are internally driven or otherwise motivated to suppress their own biases, people can make judgments free from biases, [FN40] even implicit ones. [FN41] In one recent study, [FN42] for example, a team of researchers administered the IAT to a group of physicians and asked them to diagnose and treat a hypothetical patient--identified to some of the physicians as a white man and to others as a black man--based on a description *1203 of symptoms. [FN43] The researchers found a correlation between IAT scores and treatment; the physicians with higher IAT scores were more likely to offer appropriate treatment to white patients than to black patients diagnosed with the same condition. [FN44] But among the sixty-seven physicians who reported some awareness of the purpose of the study, those with higher IAT scores were more likely to recommend the treatment to black patients. [FN45] In other words, the doctors who were aware of the purpose of the study compensated for their implicit biases when the situation made them sensitive to the risk of behaving--or being observed to behave--in a biased way. "This suggests," argue the authors, "that implicit bias can be recognized and modulated to counteract its effect on treatment decisions." [FN46]

Jack Glaser and Eric Knowles found similar results in a study using the so-called "Shooter Task." [FN47] In research of this type, subjects participate in a simulation akin to a video game in which they watch a person on screen pull either a gun or an innocent object, like a wallet, out of his pocket. [FN48] If he pulls a gun, the participants are instructed *1204 to "shoot" by pushing a button on a joystick; if he pulls a benign object, they are instructed to refrain from shooting. [FN49] Researchers have found that most white adults exhibit a "shooter bias" in that they are more likely to shoot a black target--regardless of what object the on-screen target pulls out of his pocket [FN50]--and that this effect correlates with a white preference on the IAT. [FN51] Glaser and Knowles found in their study, however, that those rare individuals with a white preference on the IAT and who are highly motivated to control prejudice were able to avoid the shooter bias. [FN52] In short, "those high in an implicit negative attitude toward prejudice show less influence of implicit stereotypes on automatic discrimination." [FN53]

In sum, the research on implicit bias suggests that people exhibit implicit biases, that there is some evidence that im-

plicit bias can influence behavior, and that people can overcome or compensate for implicit biases if properly motivated and if the racial context is made sufficiently salient. Whether and how this research applies to judges and the criminal justice system is an open question and one to which we turn in the next Part.

II. The Study Design

We are aware of only two IAT studies exploring a behavior of direct interest to the criminal justice system. In one study, researchers found that college student subjects harboring a strong implicit bias in favor of whites imposed longer criminal sentences on a Latino defendants than on a white defendants. [FN54] In another study in Germany, researchers correlated implicit attitudes towards native Germans and Turkish immigrants among German college students with judgments of guilt of a Turkish defendant. [FN55] The researchers found a high correlation between negative association with Turkish immigrants and judgments of guilt when the materials made "threatening" aspects of the *1205 Turkish defendant salient. [FN56] Though suggestive, these studies, standing alone, do not tell us much about implicit bias in the criminal justice system. Most importantly, they tell us nothing about a central actor in the system: the judge. Do judges hold implicit racial biases? If so, do those biases affect their judgments in court? We sought to answer these two questions in our study. [FN57]

A. Judges

We recruited judges to participate in our study at judicial education conferences, as we have in our prior work. [FN58] The 133 judges who participated in our study came from three different jurisdictions. [FN59] The judges asked us not to identify their jurisdictions, [FN60] but we can describe the basic characteristics of each of the three. We recruited seventy judges from a large urban center in the eastern United *1206 States. [FN61] These seventy judges, who are appointed to the bench for renewable terms, constitute roughly three-quarters of the judges who sit in this jurisdiction. We recruited forty-five judges from a large urban center in the western United States. [FN62] These forty-five judges, who are appointed to the bench but then stand for election, make up roughly half of the judges in their jurisdiction. We recruited our final group of judges at an optional session at a regional conference. These eighteen judges, who sit in various towns and cities throughout the state in which the conference was held, are appointed to the bench but are then required to stand for election. [FN63]

We did not ask the judges to identify themselves by name, but we did ask them to identify their race, gender, exact title, political affiliation, and years of experience on the bench. [FN64] Table 1 summarizes the demographic information that the judges provided. As Table 1 indicates, our sample of judges, particularly those from the eastern jurisdiction, is fairly diverse, at least in terms of gender and race.

Table 1: Demographic Information of the Judges (Percentage Within Group and Number)

Demographic Parameter	Eastern Jurisdiction (70)	Western Jurisdiction (45)	Optional Conference (18)	Overall (133)
White	52.9 (37)	80.0 (36)	66.7 (12)	63.9 (85)
Black	42.9 (30)	4.4 (2)	5.6 (1)	24.8 (33)

Race	Latino	4.3 (3)	11.1 (5)	16.7 (3)	8.3 (11)
	Asian	0.0 (0)	4.4 (2)	11.1 (2)	3.0 (4)
Gender	Male	55.7 (39)	66.7 (30)	50.0 (9)	58.7 (78)
	Female	44.3 (31)	33.3 (15)	50.0 (9)	41.4 (55)
Political	Democrat	86.6 (58)	64.4 (29)	64.7 (11)	76.0 (98)
Affiliation	Republican	13.4 (9)	35.6 (16)	35.3 (7)	24.0 (31)
Average Years of Experience		9.8	10.8	9.3	10.1

*1207 B. Methods and Materials

To explore the two questions animating this Article--that is, whether judges hold implicit racial biases, and if so, whether those biases produce biased judicial decisions--we designed a multipart study requiring the participating judges to complete computer tasks [FN65] and then to respond to a paper questionnaire.

We proceeded as follows. We placed in front of each judge a laptop computer and a questionnaire. The computer screen and the front page of the questionnaire introduced the study and asked the judges to await instruction before beginning. [FN66] Once the judges were *1208 fully assembled, we announced "Today, we shall ask you to participate actively in your own education." [FN67]

We asked the judges to complete the computer tasks and to respond to the questionnaire according to the instructions provided. We assured the judges that their responses were anonymous and that we had no way of identifying them individually, but we also made clear that participation was entirely voluntary and that any judge who wanted to exclude her results from the study could do so. (Only one judge chose to do so.) We informed the judges that we would compile their cumulative results and share them with the group at the end of the session.

With these important preliminaries out of the way, we then asked the judges to begin the study. The study included a race IAT; [FN68] two hypothetical vignettes in which the race of the defendant was not explicitly identified but was subliminally primed; and another hypothetical vignette in which the race of the defendant was made explicit. [FN69] The final page of the questionnaire asked judges to provide the basic demographic information identified above. [FN70]

III. The Study Results

We present the results in two parts. First, we report the judges' IAT scores, which demonstrate that judges, like the rest of us, harbor implicit racial biases. Second, we report the results of our judicial decisionmaking studies, which show that implicit biases can influence judicial decisionmaking but can also be overcome, at least in our experimental setting.

[FN71]

*1209 A. The Implicit Association Test

To measure implicit associations involving race, we gave the judges a computer-based-race IAT comparable to the race IAT given to millions of study participants around the world. [FN72] We asked the judges to perform two trials of the IAT, as described above. The first required them to pair white faces with positive words and black faces with negative words. In other words, the first trial required them to select stereotype-congruent pairings. The second required them to pair white faces with negative words and black faces with positive words. In other words, the second trial required them to select stereotype-incongruent pairings. [FN73]

To determine each judge's implicit bias score, we performed two calculations. First, we subtracted each judge's average response latency in the stereotype-congruent round from the stereotype-incongruent round to calculate the IAT measure. This measure reflects the most commonly used scoring method for large samples of data collected on the Internet, and hence allows us to compare judges to ordinary adults. [FN74] Second, we constructed a standardized measure consisting of the average difference in response latencies for each judge divided by the standard deviation of that judge's response latencies in the target rounds. This measure is less commonly reported, but more stable, and produces higher correlations with other behaviors. [FN75]

*1210 We found a strong white preference among the white judges, as shown in Table 2. Among the eighty-five white judges, seventy-four (or 87.1%) showed a white preference on the IAT. Overall, the white judges performed the stereotype-congruent trial (white/good and black/bad) 216 milliseconds faster than the stereotype-incongruent trial (black/good and white/bad). The black judges, by contrast, demonstrated no clear preference overall. Although fourteen of forty-three (or 44.2%) showed a white preference, the black judges performed the stereotype-congruent trial (white/good and black/bad) a mere twenty-six milliseconds faster than the stereotype-incongruent trial (black/good and white/bad). Comparing the mean IAT scores of the white judges with those of the black judges revealed that the white judges expressed a significantly larger white preference. [FN76]

Table 2: Results of Race IAT by Race of Judge

Race of Judge (sample size)	Mean IAT Score in milliseconds (and standard deviation)*		Percent of Judges with lower average latencies on the white/good versus black/bad round
	Judges	Internet Sample	
White (85)	216 (201)	158 (224)	87.1
Black (43)	26 (208)	39 (244)	44.2

*Note: Positive numbers indicate lower latencies on the white/good versus black/bad round

Because we used a commonly administered version of the IAT, we are able to compare the results of our study to the

results of other studies involving ordinary adults. We found that the black judges produced IAT scores comparable to those observed in the sample of black subjects obtained on the Internet. [FN77] The white judges, on the other *1211 hand, demonstrated a statistically significantly stronger white preference than that observed among a sample of white subjects obtained on the Internet. [FN78] For two reasons, however, this does not necessarily mean that the white judges harbor more intense white preferences than the general population. First, we did not vary the order in which we presented the materials, and this order effect could have led to artificially higher IAT scores. [FN79] Second, the judges performed both trials much more slowly than the other adults with whom we are making this comparison, and this, too, could have led to artificially higher IAT scores. [FN80] We also suspect that the judges were older, on average, than the Internet sample. To the extent that implicit racial bias is less pronounced among younger people, we would expect the judges to exhibit more implicit bias than the Internet sample.

B. IAT and Judicial Behavior

To assess the impact of implicit bias on judicial decisionmaking, we gave the judges three hypothetical cases: the first involving a juvenile shoplifter, the second involving a juvenile robber, and the third involving a battery. We speculated that the judges might respond differently depending upon whether we made the race of the defendant salient, so in the first two cases, we did not identify the race of the defendant explicitly, but we did so implicitly through a subliminal priming technique described below. In the third case, we made race explicit, informing some of the judges that the defendant was "Caucasian" and others that he was "African American." [FN81] By comparing the *1212 judges' individual IAT scores with their judgments in these hypothetical cases, we are able to assess whether implicit bias correlates with racially disparate outcomes in court.

1. Race Primed

We asked the judges to decide two hypothetical cases, one involving a juvenile shoplifter and one involving a juvenile armed robber. Before giving the judges the scenarios, though, we asked them to perform a subliminal priming task, following a protocol developed by Sandra Graham and Brian Lowery. [FN82] The task appeared to be a simple, computer-based, spatial recognition task. [FN83] To complete the task, the judges were required to focus their attention on the center of the computer screen in front of them. Words appeared in one of the four corners for 153 milliseconds before being masked by a string of random letters. [FN84] At that speed, words are extremely difficult to process *1213 consciously. [FN85] Each judge saw sixty words. Half of the judges saw words associated with black Americans, [FN86] and half saw words with no common theme. [FN87] After the sixtieth trial, the task stopped. [FN88] The computer screen then instructed the judges to turn to the written materials. [FN89]

*1214 a. The Shoplifter Case

We first presented the judges with a scenario called the "Shoplifter Case." The judges learned that William, a thirteen year old with no prior criminal record, had been arrested for shoplifting several toys from a large, upscale toy store. [FN90] The judges read that there is some conflicting evidence on the degree to which William resisted arrest, but there is no dispute over the fact that he had shoplifted. [FN91]

Following the scenario, we asked the judges three questions about William. First, we asked them what disposition they thought most appropriate. We listed seven options below the question, ranging from a dismissal of the case to a transfer to adult court. [FN92] Second, we asked judges to predict on a seven-point scale (from "Not at all Likely" to "Very Likely") whether William would commit a similar crime in the future. And finally, we asked them to predict on an identical seven-point scale the likelihood that William would commit a more serious crime in the future. In short, we

asked them one question about sentencing and two questions about recidivism.

Table 3: Average Results on Juvenile Shoplifter (All Three Questions on a Seven-Point Scale: Higher Numbers Indicate Harsher Judgments*)

Prime (and n)	Q1: Disposition	Q2: Recidivism-Same Crime	Q3: Recidivism-More Serious Crime
Black (63)	2.34	2.58	2.23
Neutral (70)	2.40	2.36	1.94

*Note: The seven-point scale for questions two and three have been transposed from the original for this Table, so that higher numbers consistently meant harsher judgment.

The judges' determinations were not influenced by race. As shown in Table 3, judges primed with the black-associated words did not produce significantly different judgments than the judges primed with the neutral words. [FN93] Our primary interest, however, was in determining whether the judges' implicit biases correlated with their judgments. We found that the judges' scores on the race IAT had a marginally significant influence on how the prime influenced their judgment. [FN94] Judges who exhibited a white preference on the IAT gave *1215 harsher sentences to defendants if they had been primed with black-associated words rather than neutral words, while judges who exhibited a black preference on the IAT gave less harsh sentences to defendants if they had been primed with black-associated words rather than neutral words. We did not find any significant relationship between the judges' IAT scores and either of the recidivism measures, although the data showed a similar trend. [FN95]

b. The Robbery Case

The second scenario, called the "Robbery Case," described Michael, who was arrested for armed robbery at a gas station convenience store two days shy of his seventeenth birthday. [FN96] Michael, who had previously been arrested for a fight in the school lunchroom, threatened the clerk at the convenience store with a gun and made off with $267 in cash. He admitted the crime, claiming that his friends had dared him to do it. After they had read this scenario, we asked the judges the same three questions we asked them about William in the shoplifter case.

Table 4: Average Results on Juvenile Armed Robber (All Three Questions on a Seven-Point Scale: Higher Numbers Indicate Harsher Judgments*)

Prime (and n)	Q1: Disposition	Q2: Recidivism-Same Crime	Q3: Recidivism-More Serious Crime
Black (63)	4.92	3.54	3.17
Neutral (70)	4.97	3.61	3.48

*Note: The seven-point scale for questions two and three have been transposed from the original for this Table, so that higher numbers consistently meant harsher judgment.

Again the judges' determinations were not influenced by race. As shown in Table 4, the judges primed with black-associated words did not produce significantly different ratings than the judges primed *1216 with the neutral words. [FN97] As noted, however, our primary interest was in the relationship between implicit bias and these judgments. As with the shoplifting case, the judges' scores on the race IAT had a marginally significant influence on how the prime influenced their judgment in the robbery case. [FN98] Judges who exhibited a white preference on the IAT gave harsher sentences to defendants if they had been primed with black-associated words rather than neutral words, while judges who exhibited a black preference on the IAT gave less harsh sentences to defendants if they had been primed with black-associated words rather than neutral words. We did not find any significant relationship between the judges' IAT scores and either of the recidivism measures, although the data showed a similar trend. [FN99]

To summarize, we found no overall difference between those judges primed with black-associated words and those primed with race-neutral words. This finding contrasts sharply with research conducted by Graham and Lowery, who found that police and parole officers primed with black-associated words were more likely than those primed with neutral words to make harsh judgments of juvenile offenders. [FN100] The officers who had seen the black-associated words *1217 deemed the juveniles more culpable, more likely to recidivate, and more deserving of a harsh punishment. [FN101]

The overall lack of an effect of the racial prime, however, gives us little reason to conclude that the judges were not affected by their unconscious racial biases. We found in both the shoplifter case and the robbery case that judges who expressed a white preference on the IAT were somewhat more likely to impose harsher penalties when primed with black-associated words than when primed with neutral words, while judges who expressed a black preference on the IAT reacted in an opposite fashion to the priming conditions.

To be sure, we did not find a significant relationship between IAT scores and the judges' judgments of recidivism. That is, white preferences on the IAT did not lead judges primed with words associated with black Americans to predict higher recidivism rates. The judges made fairly race-neutral assessments of the two defendants' character. This result suggests that the correlation we found between IAT score and sentence might not be robust. But, of course, a judges' neutral assessment of character would be a small comfort to a juvenile defendant who received an excessive sentence due to his race.

2. Race Made Explicit

The fact that we did not explicitly provide any information about the race of the defendant (although judges obviously might have made assumptions about their race) is important because judges will commonly be aware of the race of the defendant appearing in front of them. To address this concern, we also gave our judges a hypothetical vignette in which we made race explicit. To enable comparison with another study, we used a vignette developed by Samuel Sommers and Phoebe Ellsworth. [FN102]

We asked the judges to imagine they were presiding over a bench trial in which the prosecution charges André Barkley, a high school basketball player, with battering his teammate, Matthew Clinton. There is no question that Barkley injured Clinton, but Barkley claims, somewhat incredibly, that he was only acting in self-defense. We informed some of the judges that the defendant was an African American male and that the victim was a Caucasian male. We informed the *1218 rest of the judges that the defendant was Caucasian and that the victim was African American. Following the scenario, we asked all of the judges to render a verdict and to rate their confidence in their judgment on a nine-

point scale (from "Very Confident" to "Not at all Confident"). [FN103]

We found that the white judges were equally willing to convict the defendant whether he was identified as Caucasian or as African American. Among the white judges who read about an African American defendant, seventy-three percent (thirty-three out of forty-five) said they would convict, whereas eighty percent (thirty-five out of forty-four) of the white judges who read about a Caucasian defendant said that they would convict. [FN104] This contrasts sharply with the results obtained by Sommers and Ellsworth, who used only white participants. They found that ninety percent of the participants in their study who read about an African American defendant said that they would convict as compared to seventy percent of the participants who read about a Caucasian defendant. [FN105] On the other hand, we found that black judges were significantly more willing to convict the defendant when he was identified as Caucasian rather than as African American. When the defendant was identified as Caucasian, ninety-two percent (twenty-four out of twenty-six) of the black judges voted to convict; when he was identified as African American, however, only fifty percent (nine out of eighteen) voted to convict. The difference between the white judges and the black judges is statistically significant.*1219 [FN106] Analysis of the judges' assessments of their confidence in their verdicts produced similar results. [FN107]

The focus of this study, however, is on the relationship between implicit bias and judgment. As above, we wanted to assess the effect of the interaction between the judges' IAT scores and the race of the defendant on the judges' verdicts. Unlike our results in the first study, however, we did not find even a marginally significant interaction here. [FN108] Judges who exhibited strong white preferences on the IAT did not judge the white and black defendants differently, and neither did judges who expressed black preferences on the IAT. Analysis of the confidence ratings produced the same result. [FN109]

Because the white judges and the black judges reacted differently to the problem, we also conducted an analysis to account for these differences. To do this, we assessed the interaction between the race of the defendant and the IAT score, along with the race of the *1220 judge. [FN110] The three-way interaction between race of judge, race of defendant, and IAT score was significant. [FN111] This result means that the IAT scores of the black judges and the white judges had different effects on the judges' reactions to the race of the defendant, as we explain below in further analyses. Analysis of the confidence ratings produced similar results. [FN112]

To allow us to interpret this interaction, we ran the less complex analysis separately for black and white judges. That is, we assessed the interaction between the IAT score and race of the defendant in two separate analyses. With respect to the white judges, we found no significant results; if anything, the white judges with a greater white preference expressed a greater propensity to convict the Caucasian defendant rather than the African American defendant. [FN113] Among black judges, however, those who expressed a stronger black preference on the IAT were less likely to convict the African American defendant relative to the Caucasian defendant. [FN114] An analysis of confidence ratings produced similar results. [FN115]

The findings among black judges can best be seen by dividing the black judges into two groups: those who expressed a black preference on the IAT and those who expressed a white preference on the IAT. Among those black judges who expressed a black preference, one hundred percent (fourteen out of fourteen) voted to convict the Caucasian defendant, while only forty percent (four out of ten) of these *1221 judges voted to convict the African American defendant. Among those black judges who expressed a white preference, eighty-three percent (ten out of twelve) voted to convict the Caucasian defendant, while sixty-three percent (five out of eight) voted to convict the African American defendant. In effect, the black judges who expressed white preferences made verdict choices similar to those of their white colleagues, while black judges who expressed a black preference treated the African American defendant more leniently.

In sum, then, IAT scores predicted nothing among the white judges. Among the black judges, however, a black preference on the IAT was associated with a willingness to acquit the black defendant.

C. Interpretation of Results

Our research supports three conclusions. First, judges, like the rest of us, carry implicit biases concerning race. Second, these implicit biases can affect judges' judgment, at least in contexts where judges are unaware of a need to monitor their decisions for racial bias. Third, and conversely, when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.

Our first conclusion was perhaps the most predictable, though it is still troubling. Given the large number of Americans who have taken the IAT, and given the frequency with which white Americans display at least a moderate automatic preference for white over black, it would have been surprising if white judges had failed to exhibit the same automatic preference. Similarly, the black judges carry a more diverse array of implicit biases, just like black adults generally: some exhibit a white preference just like the white judges; others exhibit no preference; and some exhibit a black preference. Overall, like adults, most of the judges--white and black--showed a moderate-to-large degree of implicit bias in one direction or the other. If ordinary adults carry a "bigot in the brain," as one recent article put it, [FN116] then our data suggest that an invidious homunculus might reside in the heads of most judges in the United States, with the potential to produce racially biased distortions in the administration of justice.

It is worth noting, however, that the research on so-called "chronic egalitarians" suggests that this result was not inevitable. Some whites with longstanding and intense personal commitments to eradicating bias in themselves--chronic egalitarians--do not exhibit the preference for whites over blacks on the IAT that most white *1222 adults show. [FN117] Despite their professional commitment to the equal application of the law, judges do not appear to have the same habits of mind as the chronic egalitarians. The proportion of white judges in our study who revealed automatic associations of white with good and black with bad was, if anything, slightly higher than the proportion found in the online surveys of white Americans. Thus, a professional commitment to equality, unlike a personal commitment to the same ideal, appears to have limited impact on automatic racial associations, at least among the judges in our study. Alternatively, the overrepresentation of black Americans among the criminal defendants who appear in front of judges might produce invidious associations that overwhelm their professional commitment. In either case, our findings are consistent with the implicit associations found among capital defense attorneys. White capital defense attorneys, another group which might be expected to have strong professional commitments to the norm of racial equality, [FN118] exhibit the same automatic preference for whites as the general population. [FN119]

Taken together, then, the research on judges and capital defense attorneys raises serious concerns about the role that unconscious bias might play in the criminal justice system. Jurors are drawn from randomly selected adults, and a majority of white jurors will harbor implicit white preferences. If police, prosecutors, jurors, judges, and defense attorneys all harbor anti-black preferences, then the system would appear to have limited safeguards to protect black defendants from bias. Based on IAT scores alone, both black judges and black jurors seem to be less biased than either white judges or white jurors, because black Americans show less implicit bias than white Americans. But even considerable numbers of blacks express implicit biases. Perhaps the only entity in the system that might avoid the influence of the bigot in the brain is a diversely composed jury.

That said, the rest of our results call into question the importance of IAT scores alone as a metric to evaluate the potential bias of decisionmakers in the legal system. Our second and third conclusions show that implicit biases can translate into biased decisionmaking under certain circumstances, but that they do not do so consistently.

*1223 Implicit associations influenced judges--both black judges and white judges--when we manipulated the race of the defendant by subliminal methods. Judges with strong white preferences on the IAT made somewhat harsher judgments of the juvenile defendants after being exposed to the black subliminal prime, and judges with strong black preferences on the IAT were somewhat more lenient after exposure to the black subliminal prime. In effect, the subliminal processes triggered unconscious bias, and in just the way that might be expected.

The story for the explicit manipulation of race is more complicated, however. The white judges, unlike the white adults in the Sommers and Ellsworth study, [FN120] treated African American and Caucasian defendants comparably. But the proper interpretation of this finding is unclear. We observed a trend among the white judges in that the higher their white preference, the more favorably they treated the African American defendant in the battery case. Thus, among the white judges, implicit bias did not translate into racial disparities when the race of the defendant was clearly identified in an experimental setting.

We believe that the data demonstrate that the white judges were attempting to compensate for unconscious racial biases in their decisionmaking. These judges were, we believe, highly motivated to avoid making biased judgments, at least in our study. Codes of judicial conduct demand that judges make unbiased decisions, at least in our study. [FN121] Moreover, impartiality is a prominent element in almost every widely accepted definition of the judicial role. [FN122] Judges take these norms seriously. When the materials identified the race of the defendant in a prominent way, the white judges probably engaged in cognitive correction to avoid the appearance of bias.

The white judges in our study behaved much like the subjects in other studies who were highly motivated to avoid bias in performing an assigned task. [FN123] What made our white judges different from the subjects studied by these other researchers is that most of the judges reported that they suspected racial bias was being studied, despite the *1224 fact that the only cue they received was the explicit mention of the defendant's race. [FN124] We think this report was truthful, given that the judges behaved the same way as other white subjects who attempted to avoid the influence of implicit bias.

The black judges responded somewhat differently to the overt labeling of the defendant's race. Like the white judges, the black judges in our study also reported being aware of the subject of the study, yet they showed a correlation between implicit associations and judgment when race was explicitly manipulated. Among these judges, a greater white preference produced a greater propensity to convict the African American defendant. In other words, the black judges clearly reacted differently when they were conscious that race was being manipulated--a difference that correlated with their score on the race IAT.

We do not conclude, however, that black judges are less concerned about avoiding biased decisionmaking than white judges. We have no doubt that the professional norms against bias concern the black judges just as deeply as their white counterparts--if not more so. And we are mindful that research on the effect of race on judges' decisions in actual cases demonstrates no clear effects. [FN125] We believe that both white and black judges were motivated to avoid showing racial bias.

Why then did the black judges produce different results? We can only speculate, but we suspect that both groups of judges were keen to avoid appearing to favor the white defendant (or conversely, wanted to avoid appearing to disfavor the black defendant). Black judges, however, might have been less concerned with appearing to favor the black defendant than the white judges. Those black judges who expressed a white preference, however, behaved more like their white counterparts in this regard, thereby producing a correlation between verdict and IAT score among black judges.

We also cannot ignore the possibility that the judges were reacting to the race of the victim, rather than (or in addi-

tion to) the race of the defendant. In all cases, we identified the victim as the opposite *1225 race as the defendant. Furthermore, black judges might have reacted differently to the fact that the case involved a cross-racial crime.

Given our results, we cannot definitively ascribe continuing racial disparities in the criminal justice system to unconscious bias. We nevertheless can draw some firm conclusions. First, implicit biases are widespread among judges. Second, these biases can influence their judgment. Finally, judges seem to be aware of the potential for bias in themselves and possess the cognitive skills necessary to avoid its influence. When they are motivated to avoid the appearance of bias, and face clear cues that risk a charge of bias, they can compensate for implicit bias.

Whether the judges engage their abilities to avoid bias on a continual basis in their own courtrooms, however, is unclear. Judges are subject to the same significant professional norms to avoid prejudice in their courtrooms that they carried with them into our study. And judges might well point to our study as evidence that they avoid bias in their own courtrooms, where the race of defendants is often reasonably clear, and they never face subliminal cues. But courtrooms can be busy places that do not afford judges the time necessary to engage the corrective cognitive mechanisms that they seem to possess. And even though many decisions are made on papers only, judges might unwittingly react to names or neighborhoods that are associated with certain races. Control of implicit bias requires active, conscious control. [FN126] Judges who, due to time pressure or other distractions, do not actively engage in an effort to control the "bigot in the brain" are apt to behave just as the judges in our study in which we subliminally primed with race-related words. Moreover, our data do not permit us to determine whether a desire to control bias or avoid the appearance of bias motivates judges in their courtrooms the way it seemed to in our study.

Furthermore, judges might be overconfident about their abilities to control their own biases. In recently collected data, we asked a group of judges attending an educational conference to rate their ability to "avoid racial prejudice in decisionmaking" relative to other judges who were attending the same conference. Ninety-seven percent (thirty-five out of thirty-six) of the judges placed themselves in the top half and fifty percent (eighteen out of thirty-six) placed themselves in the top quartile, even though by definition, only fifty percent can be above the median, and only twenty-five percent can be in the *1226 top quartile. [FN127] We worry that this result means that judges are overconfident about their ability to avoid the influence of race and hence fail to engage in corrective processes on all occasions.

To be sure, this is only one study, and it has its limitations. The results might be the product of the particular judges who participated in our study, or the materials we used, or even the fact that hypothetical scenarios were used. Most importantly, we cannot determine whether the mental processes of judges on the bench more closely resemble those of judges subliminally primed with race or those for whom race was explicitly manipulated. Thus, it is not clear how implicit racial bias influences judicial decisionmaking in court, but our study suggests, at a minimum, that there is a sizeable risk of such influence, so we turn in the next Part to reforms the criminal justice system might consider implementing.

IV. Mitigating Implicit Bias in Court

To minimize the risk that unconscious or implicit bias will lead to biased decisions in court, the criminal justice system could take several steps. These include exposing judges to stereotype-incongruent models, providing testing and training, auditing judicial decisions, and altering courtroom practices. Taking these steps would both facilitate the reduction of unconscious biases and encourage judges to use their abilities to compensate for those biases.

A. Exposure to Stereotype-Incongruent Models

Several scholars have suggested that society might try to reduce the presence of unconscious biases by exposing decisionmakers to *1227 stereotype-incongruent models. [FN128] This suggestion, in fact, probably represents the dominant policy proposal among legal scholars who write about unconscious bias. [FN129] We certainly agree, for example, that posting a portrait of President Obama alongside the parade of mostly white male judges in many courtrooms would be an inexpensive, laudable intervention.

Our results, however, also raise questions about the effectiveness of this proposal. The white judges from the eastern jurisdiction in our study showed a strong set of implicit biases, even though the jurisdiction consists of roughly half white judges and half black judges. Indeed, the level of implicit bias in this group of judges was only slightly smaller than that of the western jurisdiction, which included only two black judges (along with thirty-six white, five Latino, and two Asian judges). Exposure to a group of esteemed black colleagues apparently is not enough to counteract the societal influences that lead to implicit biases.

Consciously attempting to change implicit associations might be too difficult for judges. Most judges have little control over their dockets, which tend to include an overrepresentation of black criminal defendants. [FN130] Frequent exposure to black criminal defendants is apt to perpetuate negative associations with black Americans. This exposure perhaps explains why capital defense attorneys harbor negative associations with blacks, [FN131] and might explain why we found slightly greater negative associations among the white judges than the population as a whole (although as we noted above, the latter finding might have other causes).

B. Testing and Training

The criminal justice system might test candidates for judicial office using the IAT or other devices to determine whether they possess implicit biases. We do not suggest that people who display strong *1228 white preferences on the IAT should be barred from serving as judges, nor do we even support using the IAT as a measure of qualification to serve on the bench. [FN132] The direct link between IAT score and decisionmaking is far too tenuous for such a radical recommendation. And our data show that judges can overcome these implicit biases at least to some extent and under some circumstances. Rather, knowing a judge's IAT score might serve two other purposes. First, it might help newly elected or appointed judges understand the extent to which they have implicit biases and alert them to the need to correct for those biases on the job. [FN133] Second, it might enable the system to provide targeted training about bias to new judges. [FN134]

Judicial training should not end with new judges, however. Training for sitting judges is also important. Judicial education is common these days, but one problem with it, at least as it exists at this time, is that it is seldom accompanied by any testing of the individual judge's susceptibility to implicit bias, or any analysis of the judge's own decisions, so the judges are less likely to appreciate and internalize the risks of implicit bias. [FN135] As Timothy Wilson and his colleagues have observed, "people's default response is to assume that their judgments are uncontaminated." [FN136] Surely this is true of judges as well. Moreover, because people are prone to egocentric bias, they readily assume that they are better than average, or the factors that might induce others to make poor or biased decisions would not affect their own decisions. Our research demonstrates that judges are inclined to make the same sorts of favorable assumptions about their own abilities that non-judges do. [FN137] Therefore, while education regarding implicit bias as a general matter might be useful, specific training revealing the vulnerabilities of the judges being trained would be more useful. [FN138]

Another problem with training is that although insight into the direction of a bias frequently can be gained, insight into the magnitude*1229 of that bias cannot. One group of psychologists provided the following example:

> Consider Ms. Green, a partner in a prestigious law firm, who is interviewing candidates for the position of an associate in her firm. When she interviews Mr. Jones, a young African-American attorney, she has an immediate negative impression, finding him to be arrogant and lacking the kind of brilliance she looks for in new associates. Ms. Green decides that her impression of Mr. Jones was accurate and at a meeting of the partners, argues against hiring him. She wonders, however, whether her negative evaluation was influenced by Mr. Jones' race. [FN139]

The psychologists explained:

> Ms. Green may know that her impression of Mr. Jones is unfairly negative and want to avoid this bias, but have no idea of the extent of the bias. Should she change her evaluation from "Should not be hired" to "Barely acceptable" or to "Best applicant I've seen in years"? [FN140]

This scenario illustrates the problem well. How is one to know if correction is warranted, and if so, how much? [FN141] In a circumstance like the one depicted above or like any of the circumstances described in the materials included in our study, there is a risk of insufficient correction, unnecessary correction, or even overcorrection, resulting in a decision that is distorted as a result of the adjustment, but simply in the opposite direction. [FN142] Testing might mitigate this problem by *1230 helping judges appreciate how much compensation or correction is needed.

The results of our study are thus somewhat surprising in that the white judges' corrections in the case in which the defendant's race was explicit seemed to be neither too much nor too little. On average, these judges treated white and black defendants about the same. This result cannot, however, reasonably be taken as meaning that judges correct for the influence of implicit bias perfectly in all cases in which they attempt to do so. We presented only one scenario--other cases might produce overcompensation or undercompensation. And individual judges are apt to vary in terms of their willingness or ability to correct for the influence of unconscious racial bias. Also, the white judges were slightly less harsh on the black defendants. The difference simply failed to rise to the level of statistical significance, as it was small (only six percentage points). Had we collected data on a thousand judges rather than a hundred, we might have begun to observe some overcompensation or undercompensation.

C. Auditing

The criminal justice system could also implement an auditing program to evaluate the decisions of individual judges in order to determine whether they appear to be influenced by implicit bias. For example, judges' discretionary determinations, such as bail-setting, sentencing, or child-custody allocation, could be audited periodically to determine whether they exhibit patterns indicative of implicit bias. Such proposals have been suggested as correctives for umpires in Major League Baseball and referees in the National Basketball Association after both groups displayed evidence of racial bias in their judgments. [FN143]

Auditing could provide a couple of benefits. First, it would obviously increase the available data regarding the extent to which bias affects judicial decisionmaking. Second, it could enhance the accountability of judicial decisionmaking. [FN144] Unfortunately, judges operate in an institutional context that provides little accountability, at least in the sense that they receive little prompt and useful feedback.*1231 [FN145] Existing forms of accountability, such as appellate review or retention elections, primarily focus on a judge's performance in a particular case, not on the systematic study of long-term patterns within a judge's performance that might reveal implicit bias. [FN146]

D. Altering Courtroom Practices

In addition to providing training or implementing auditing programs, the criminal justice system could also alter

practices in the courtroom to minimize the untoward impact of unconscious bias. For example, the system could expand the use of three-judge courts. [FN147] Research reveals that improving the diversity of appellate court panels can affect outcomes. One study found that "adding a female judge to the panel more than doubled the probability that a male judge ruled for the plaintiff in sexual harassment cases . . . and nearly tripled this probability in sex discrimination cases." [FN148] In trial courts, judges typically decide such issues alone, so adopting this mechanism would require major structural changes. Although convening a three-judge trial court was once required by statute when the constitutionality of a state's statute was at issue, [FN149] three-judge trial courts are virtually nonexistent today. [FN150] The inefficiency of having three judges decide cases that one judge might be able to decide nearly as well led to their demise, and this measure might simply be too costly to resurrect.

Another possibility would be to increase the depth of appellate scrutiny, such as by employing de novo review rather than clear error review, in cases in which particular trial court findings of fact might be tainted by implicit bias. For example, there is some evidence that male judges may be less hospitable to sex discrimination claims than they ought to be. [FN151] If that bias does exist, less deferential appellate review by a diverse panel might offer a partial solution.

*1232 Conclusion

Our study contains both bad news and good news about implicit biases among judges. As expected, we found that judges, like the rest of us, possess implicit biases. We also found that these biases have the potential to influence judgments in criminal cases, at least in those circumstances where judges are not guarding against them. On the other hand, we found that the judges managed, for the most part, to avoid the influence of unconscious biases when they were told of the defendant's race.

The presence of implicit racial bias among judges--even if its impact on actual cases is uncertain--should sound a cautionary note for those involved in the criminal justice system. To prevent implicit biases from influencing actual cases, we have identified several reforms that the criminal justice system could implement, ranging from relatively inexpensive measures, like implementing focused judicial training and testing, to relatively expensive measures, like altering courtroom practices. To render justice blind, as it is supposed to be, these reforms are worth considering.

*1233 Appendix A: Materials

Shoplifter Case

You are presiding over a case involving criminal charges against a juvenile, William T. William is a 13-year-old who was arrested for shoplifting in a large, upscale toy store in _____. He has no prior record. You are trying to get a sense of the case and the only facts available to you follow:

> According to a store clerk, on Saturday, April 2, at about two o'clock in the afternoon, the clerk observed William putting videogames under his shirt. The clerk rang for a security guard, but before the guard arrived, the boy started to leave the store. When the clerk grabbed William, the boy dropped the toys and kicked him in an attempt to escape. A uniformed security guard arrived as the clerk let go of William, and when the guard told the boy to stop, he did.

According to the security guard, when he arrived he observed five items on the floor in front of William. The prices of those items together added up to $90. He said that William told him that he was shopping, and showed him $10 he had

brought along with which to make purchases. William claimed that he had used his shirt as a sort of pouch to hold the items he was looking at. William also told the guard he was startled when grabbed by someone from behind, and then tripped, but that he did not kick anyone.

1. In your opinion, without regard to the options actually available in this kind of situation, what would be the most appropriate disposition of this case?

____ 1) Dismiss it with an oral warning

____ 2) Adjourn the case in contemplation of dismissal (assuming William gets in no further trouble)

____ 3) Put William on probation for six months or less

____ 4) Put William on probation for more than six months

____ 5) Commit William to a juvenile detention facility for six months or less

____ 6) Commit William to a juvenile detention facility for more than six months

____ 7) Transfer William to adult court

2. In your opinion, on a scale of one to seven, how likely is it that William will later commit a crime similar to the one with which he is charged?

Very Likely Not at all Likely

1 2 3 4 5 6 7

*1234 3. In your opinion, on a scale of one to seven, how likely is it that William will commit more serious crimes in the future?

Very Likely Not at all Likely

1 2 3 4 5 6 7

Robbery Case

You are presiding over a case involving criminal charges against a juvenile, Michael S., who was arrested for armed robbery of a gas station when he was two days shy of his seventeenth birthday. He has one prior arrest for a fight in the school lunchroom the previous year. You are trying to get a sense of the case and the only facts available to you follow:

> According to the gas station clerk, on Friday, March 17, at about seven in the evening, she heard a male voice say, "Don't look at me, but give me the money." She kept her eyes down, and as she opened the cash register, the man said, "I could shoot you, don't think I won't." She handed him the drawer's contents ($267.60) and saw him run out the door with a gun. After he jumped into the passenger side of a car and it left, she called the police.

According to the responding officer, the clerk could not identify the robber, but a customer said he thought he recognized Michael, and gave the officer Michael's name and address. Michael's mother was home, and at nine forty-five, Michael walked in the door, was given Miranda warnings, and waived his rights. He first stated that he had just been

hanging around with friends, not doing anything special. After the officer asked who the friends were, Michael admitted that he had walked into the gas station with a gun. He told the officer that he said to the clerk, "Give me the money, please. I don't want to hurt you." Michael insisted that the gun was not loaded and that he no longer had it. He said that the money was gone, that he was sorry, and would pay it back. When asked why he did it, Michael said that his friends had dared him, but he would not reveal who those friends were, or to whom the gun belonged.

1. In your opinion, without regard to the options actually available in this kind of situation, what would be the most appropriate disposition of this case?

_____ 1) Dismiss it with an oral warning

_____ 2) Adjourn the case in contemplation of dismissal (assuming Michael gets in no further trouble)

_____ 3) Put Michael on probation for six months or less

_____ 4) Put Michael on probation for more than six months

*1235 _____ 5) Commit Michael to a juvenile detention facility for six months or less

_____ 6) Commit Michael to a juvenile detention facility for more than six months

_____ 7) Transfer Michael to adult court

2. In your opinion, on a scale of one to seven, how likely is it that Michael will later commit a crime similar to the one with which he is charged?

Very Likely Not at all Likely

1 2 3 4 5 6 7

3. In your opinion, on a scale of one to seven, how likely is it that Michael will commit more serious crimes in the future?

Very Likely Not at all Likely

1 2 3 4 5 6 7

Battery Case

Defendant: André Barkley, 6'0", 175 lbs., African American male, 18 years old, student

Alleged Victim: Matthew Clinton, 6'2", 185 lbs., Caucasian male, 16 years old, student

Charge: One Count of Battery with Serious Bodily Injury

Prosecution

The prosecution claims that André Barkley is guilty of battery with serious bodily injury. Barkley was the starting

point guard on the high school basketball team, but the team had been struggling, and the coach decided to bench him in favor of a younger, less experienced player named Matthew Clinton. Before the first game after the lineup change, Barkley approached Clinton in the locker room and began yelling at him. Witnesses explain that the frustrated defendant told Clinton, "You aren't half the player I am, you must be kissing Coach's ass pretty hard to be starting."

When other teammates stepped between the two players, Barkley told them to get out of the way. When two other players then grabbed Barkley and tried to restrain him, the defendant threw them off, pushed Clinton into a row of lockers, and ran out of the room, according to prosecution witnesses. As a result of this fall, two of Clinton's teeth were chipped and he was knocked unconscious. The prosecution claims that Barkley has shown no remorse for his crime, and has even expressed to friends that Clinton "only got what he had coming."

*1236 Defense

The defense claims that Barkley was merely acting in self-defense, and that Clinton's injuries were accidental. According to an assistant coach, Barkley did not get along with many people on the team and had been the subject of obscene remarks and unfair criticism from many of his teammates throughout the season. Barkley claims that he was afraid for his own safety during the altercation in the locker room and "definitely felt ganged up on."

Barkley admits he "might have been aggressive towards Matthew and started the whole thing," but says that he was just frustrated and the argument was "nothing that should have started a big locker room fight or anything." Barkley claims that when several other players grabbed him from behind for no reason, he tried to break free and must have accidentally knocked into Clinton in the attempt to get out of the locker room. He explained that the reason he never apologized to Clinton in the hospital was that he "didn't think he'd want to see me," but Barkley did say he "was truly, truly sorry" that Clinton had been injured.

1. Based on the available evidence, if this were a bench trial, would you convict the defendant?

Yes No

2. How confident are you that your judgment is correct?

Very Confident Not at all Confident

1 2 3 4 5 6 7 8 9

Demographic Questions Provided to Judges What is the title of the judicial position you currently hold? _____

How many years have you served as a Judge (in any position)?

____ years

Please identify your gender:

____ male ____ female

During your judicial career, approximately what percentage of your time has been devoted to the following areas:

____ Criminal cases

____ Civil cases

____ Family law cases

____ Probate or trusts

____ Other

*1237 Which of the two major political parties in the United States most closely matches your own political beliefs?

____ The Republican Party

____ The Democratic Party

Please identify your race (Check all that apply)

____ White (non-Hispanic)

____ Black or African American

____ Hispanic or Latino

____ Asian

____ Native American or Pacific Islander

____ Other

*1238 Appendix B: IAT Procedure

We used seven rounds of trials to produce the IAT score. Rounds one, two, three, five, and six are essentially practice rounds designed to minimize order effects and variation associated with unfamiliarity with the task. The study begins with one round in which the participants only sort black and white faces. In this round the word "White" appeared in the upper left and the word "Black" appeared in the upper right of the screen. In each trial, one of ten faces, five white and five black, appeared in the middle of the screen. [FN152] The faces appeared at random, although an equal number of white and black faces appeared in the sixteen trials. [FN153]

The instructions before each round informed the judges as to what they would be sorting in the upcoming round. For example, in the first round, the instructions indicated that the judge should press the "E" key (labeled with a red dot) if a white face appeared and the "I" key (also labeled with a red dot) if a black face appeared. The materials also state that if the judge pressed the correct key, the next face would appear; if the judge pressed the wrong key, a red "X" would appear. These instructions were similar in all seven rounds of the IAT. [FN154]

The remaining six rounds were similar to the first, although they varied the stimuli and categories. In the second round, instead of the *1239 black and white faces, the computer presented good and bad words. These consisted of seven words with positive associations (Joy, Love, Peace, Wonderful, Pleasure, Friend, Laughter, Happy) and seven words with negative associations (Agony, Terrible, Horrible, Nasty, Evil, War, Awful, Failure). Like the faces, these words were

taken from previous work on the IAT. Throughout the trials in the second round, the word "Good" remained in the upper-left of the computer screen and the word "Bad" remained in the upper-right of the computer screen. The judges were instructed in a similar fashion to round one, to press the "E" key when a good word appeared in the center of the screen and to press the "I" key when a bad word appeared in the center of the screen.

The third round combined the tasks in the first two rounds. The words "White or Good" appeared in the upper-left of the computer screen and the words "Black or Bad" appeared in the upper-right of the computer screen. Thus, the task presented both categories in the same spatial location as they had been in the first two rounds. The instructions indicated to the judge that either a white or black face or a good or bad word would appear in the center of the computer screen. The instructions continued that the judges should press the "E" key if either a white face or a good word appeared and the "I" key if either a black face or a bad word appeared. Although the computer selected randomly from the faces and concept words, the computer presented an equal number of names and faces of both types. We presented the judges with sixteen trials of this task

Round four was identical to round three in every respect except that the computer presented forty trials, rather than sixteen.

Round five prepared the judges for the reverse association. To create the reversal, the spatial locations of the good and bad words were reversed. The word "Bad" was moved to the left and the word "Good" was moved to the right. The fifth round was thus identical to the second round in that the computer presented only the good and bad words, but that the computer presented the words in their new locations. The instructions were also identical to those of round two except that they identified the new locations and corresponding response keys for the words.

The penultimate round paired the good and bad words in their new locations with the black and white labels in their original location. Thus, the words "White or Bad" appeared in the upper left and the words "Black or Good" appeared in the upper right. The instructions resembled those for rounds three and four. They indicated, however, that judges should press the "E" key if a white face or bad word appeared and to press the "I" key if a black face or good word *1240 appeared. Round six, like the other practice rounds, consisted of sixteen trials.

Round seven was identical to round six in every respect except that the computer presented forty trials, rather than sixteen. The computer recorded the reaction times between the presentation of the stimuli and the time of the correct response for all judges in all rounds. The computer also recorded which stimuli it presented and whether an error occurred.

*1241 Appendix C: IAT Scoring

Scoring the IAT requires researchers to make several judgments about the data. It requires deciding which of the seven rounds to use (some studies make use of the practice rounds); how to manage latencies that seem too long or too short; how to assess erroneous responses; how to identify and score participants who respond too slowly, too quickly, or made too many errors; whether to standardize the responses; and whether to use every round in a trial (or drop the first two, which commonly produce excessively long latencies). Greenwald and his colleagues tested essentially all variations on answers to these issues and produced a scoring method that they believe maximizes the correlation between the IAT and observed behavior. [FN155]

We used two different scoring methods. First, for each judge, we calculated the difference between the average latency in the stereotype-congruent rounds in which the judges sorted white/good versus black/bad and the average latency in the stereotype-incongruent rounds in which the judges sorted white/bad versus black/good. This procedure fol-

lows the method that other researchers have used in reporting data from hundreds of thousands of participants collected on the Internet. [FN156] Hence, we can compare this average score with that of large groups of ordinary adults. (We describe this procedure at greater length below.)

In an exhaustive review of IAT methodology, however, Greenwald and his colleagues concluded that the average difference might not be the best measure of implicit associations. [FN157] These researchers found that people who are slower on the task produce larger differences in their IAT scores. [FN158] This tendency confounds the IAT score, as people who are simply less facile with a keyboard will appear to have stronger stereotypic associations. Furthermore, Greenwald and his colleagues also found that the average difference did not correlate as well with people's decisions and behavior as other scoring methods. [FN159] After conducting their review, Greenwald and his colleagues identified a preferred scoring method, which we followed to assess the correlation between IAT effects and judges' decisions. [FN160] The method essentially uses the mean difference for each participant divided by the standard *1242 deviation of that participant's response latencies, although it includes some variations. (We also describe this procedure at greater length below.)

1. Mean-Difference IAT Score Calculation

To calculate the mean-difference IAT score, we largely followed the procedures outlined in Nosek and his colleagues' report of IAT scores from tens of thousands of people collected through the Internet. [FN161] We also wanted to compare our results with the more detailed, contemporary Internet data collected and reported on the "Project Implicit" website, which appears to use the same scoring method. [FN162] Because the data in these studies come from voluntary participants who access the site on the Internet, the authors have adopted a number of techniques for excluding data from participants who may have wandered off during the study or are otherwise not fully engaged with the tasks. [FN163] While such techniques are less appropriate for our participants, who were engaged in person, we followed the Project Implicit scoring methods to facilitate a comparison.

The authors of the Internet study first adjusted raw latency scores that seemed much slower or faster than participants who are fully engaged with the task. The researchers treat any latency larger than 3000 milliseconds (ms) as 3000 ms, and any latency shorter than 300 ms as 300 ms. [FN164] The researchers also eliminated the first two trials in all rounds from consideration, having found that these rounds often displayed an erratic pattern of long latencies-- presumably because participants commonly begin the task, and then pause to get settled in. [FN165] These researchers also excluded participants who failed to perform to certain criteria. They excluded participants who exhibited overall average latencies in the two critical rounds greater than 1800 ms, or who displayed average latencies in either of the two critical rounds (four or seven) greater than 1500 ms. [FN166] They also excluded participants who produced any critical round in which more than twenty-five percent of the latencies were less than 300 ms. [FN167] Finally, they excluded participants who made more than ten errors in any critical*1243 round. [FN168] These researchers report that these criteria resulted in the exclusion of fifteen percent of their subjects. [FN169] After these adjustments and exclusions, these researchers calculated the mean difference between the critical stereotype-congruent round (either round four or seven) and the stereotype-incongruent rounds (either round four or seven). [FN170]

We followed these procedures to calculate the mean IAT score for the judges in our study. We capped latencies greater than 3000 ms as 3000 ms, and raised latencies lower than 300 ms to 300 ms. [FN171] We also discarded the first two rounds from the analysis. We excluded the results of the race IAT from six judges (or 4.5%) who produced either mean latencies greater than 1800 ms in one of the two critical rounds of the race IAT or a mean across both rounds greater than 1500 ms. [FN172] Similarly, we excluded the results of the gender IAT from ten judges (or 7.5%) who violated one or both of these criteria. [FN173] Nosek and his colleagues reported that they eliminated two percent of their parti-

cipants for being too slow, [FN174] whereas we eliminated more. At the same *1244 time, none of the judges in our studies produced more than a twenty-five percent error rate in either of the critical rounds in either IAT. By contrast, Nosek and his colleagues eliminated roughly thirteen percent of their participants for having high error rates. [FN175] The judges were thus slower and more accurate than Nosek and his colleagues' subjects, and overall, the application of their criteria eliminated fewer judges than their results would have predicted.

Unlike Nosek and his colleagues, [FN176] we did not randomize the order in which we presented the IAT. That is, roughly half of the participants in the Internet sample receive the stereotype-congruent round first, while half receive the stereotype-incongruent round first. The seven-round IAT is designed to reduce order effects substantially, but nevertheless, they remain. Greenwald and his colleagues report that the IAT scores can correlate weakly with the order in which the materials are presented. [FN177] Randomizing the order would have produced a cleaner measure of the IAT effect across all judges, but would have reduced the correlation between the IAT score and behavior. [FN178] Hence, all of our judges received the materials in the same order. On the race IAT, judges receive the stereotype-congruent pairing first (white/good and black/bad) and on the gender IAT, judges receive the stereotype-incongruent pairing first (male/humanities and female/science). Our procedure would have tended to increase the IAT score on the race IAT, as compared to the sample by Nosek and his colleagues, and decrease the IAT score on the gender IAT.

By using these procedures, we scored judges in exactly the same method as Nosek and his colleagues in the data that they harvested *1245 from the Internet. Because laboratory data are obviously different in some respects, we only treated the data this way for purposes of comparison with the Internet samples, and not for assessing the correlation between the IAT scores and the decisions that judges made. For the correlations, we calculated a standardized score.

2. Standardized IAT Score Calculation

To calculate the standardized IAT score, we followed the procedures recommended by Greenwald and his colleagues. [FN179] These researchers designed their methods precisely to improve the reliability and predictive power of their measures. [FN180] We use the methods that produced the highest correlations between implicit measures and behavioral measures. They differ from the scoring method used to calculate the mean differences. As noted above, we used the Greenwald methodology to collect the IAT scores. [FN181] Following those scoring procedures, we removed single trials with latencies greater than 10,000 ms (that is, ten seconds) from the analysis. We otherwise left low and high values in the analysis without adjustment. We made no correction for errors, because our IAT collection methods required the judges to provide the correct response before proceeding and hence the latency includes the delay that would result from an incorrect answer. Error rates were also low, as noted above. Following Greenwald and his colleagues' scoring method, we used all of the trials, rather than dropping the first two in the round.

We departed from the method Greenwald and his colleagues endorse, however, in one respect. Those researchers suggested using the two paired practice rounds (rounds three and six) in the analysis. [FN182] They reported that using this data produced slightly higher correlations between the IAT scores and explicit choices. [FN183] We found, however, that latencies in the practice rounds were highly erratic. A high percentage of the trials eliminated for being greater than 10,000 ms were in the trial rounds. [FN184] Even with these observations removed, the average standard deviation in the two practice rounds on the race *1246 IAT was over one second (1064 ms), as compared to 596 ms in the trial rounds. This suggested to us that we ought not to use the practice rounds in the analysis. The practice rounds of the gender IAT were more stable. The standard deviation from the practice rounds (724 ms) was much closer to that of the trial rounds (560 ms). Even though the practice rounds in the gender IAT seemed more stable, for consistency, we dropped these as well. Our measure of the IAT effect for purposes of correlating the IAT scores with judges' decisions was therefore the average difference between the stereotype-congruent round and the stereotype-incongruent round divided by the standard

deviation of latencies in both rounds combined. Following Greenwald and his colleagues, we call the measure d'.

Because the latencies that we observed seemed slower than those which have been observed in the Internet study, we assessed the correlation between our two IAT measures and the mean latency. The correlation coefficients between the mean differences and the overall latency were 0.305 on the race IAT and 0.361 on the gender IAT. These correlations are high enough to indicate that our judges have higher IAT scores than other populations simply because they were somewhat slower. [FN185] The standardized IAT measure using only the trial rounds, however, produced correlations of only 0.046 and 0.002 with the overall mean latencies for the race and sex IATs, respectively. Hence, the d' measure provided a much more reliable measure of the IAT effect than the mean difference.

[FNa1]. Professor of Law, Cornell Law School.

[FNd1]. Professor of Law, Cornell Law School.

[FNd2]. Magistrate Judge, United States District Court, Central District of California.

[FNd3]. Professor of Law, Vanderbilt Law School. The authors are grateful for the comments and assistance of Ian Ayres, Steve Burbank, Jack Glaser, Tracey George, Tony Greenwald, Matthew Patrick Henry, Reid Hastie, Christine Jolls, Dan Kahan, Jerry Kang, Cass Sunstein, and the participants in workshops at the University of Arizona Law School, Bar Ilan University Law School, Brooklyn Law School, the University of Chicago Law School, Chicago-Kent Law School, Cornell Law School, George Washington University Law School, Harvard Law School, Hebrew University Law School, the University of Illinois School of Law, Notre Dame Law School, Ohio State University Law School, St. Louis University Law School, Syracuse University Law School, Tel-Aviv University Law School, Temple Law School, Villanova Law School, the University of Zurich, the Annual Meeting of the American Law and Economics Association, and the Annual Conference on Empirical Legal Studies.

[FN1]. Ian Ayres & Joel Waldfogel, A Market Test for Race Discrimination in Bail Setting, 46 Stan. L. Rev. 987, 992 (1994). To calculate this disparity, Ayres and Waldfogel controlled for eleven other variables, but they conceded that they might still be missing one or more omitted variables that might explain the differential. Id. By comparing differences in both bond rates and bail rates, however, they were able to provide even more compelling evidence that the bail rate differences they observed were race-based. Id. at 993.

[FN2]. David B. Mustard, Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts, 44 J.L. & Econ. 285, 300 (2001).

[FN3]. R. Richard Banks et al., Discrimination and Implicit Bias in a Racially Unequal Society, 94 Cal. L. Rev. 1169, 1175 (2006).

[FN4]. See Christine Jolls & Cass R. Sunstein, The Law of Implicit Bias, 94 Cal. L. Rev. 969, 969-70 (2006) (providing examples of both explicit and implicit bias).

[FN5]. See Paul M. Sniderman & Thomas Piazza, Black Pride and Black Prejudice 6-8 (2002).

[FN6]. Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Cal. L. Rev. 945, 951, 961 (2006) ("[E]vidence that implicit attitudes produce discriminatory behavior is already substantial and will continue to accumulate." (footnote omitted)); Kirstin A. Lane et al., Implicit Social Cognition and Law, 3 Ann. Rev. L. & Soc. Sci. 427, 433 (2007) (calling implicit social cognitions "robust" and "pervasive").

[FN7]. See Jerry Kang & Mahzarin R. Banaji, Fair Measures: A Behavioral Realist Revision of "Affirmative Action," 94 Cal. L. Rev. 1063, 1065 (2006) (arguing that implicit bias shows that affirmative action programs are necessary to address "discrimination in the here and now" (emphasis omitted)).

[FN8]. Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489, 1512 (2005).

[FN9]. In addition to the Implicit Association Test, which we discuss in detail, researchers have used subliminal priming techniques, see, e.g., Sandra Graham & Brian S. Lowery, Priming Unconscious Racial Stereotypes About Adolescent Offenders, 28 L. & Hum. Behav. 483, 487-88 (2004); reaction-time studies, see, e.g., Greenwald & Krieger, supra note 6, at 950-53 (labeling studies of implicit bias as studies of biases in reaction times); and novel brain-imaging techniques, see, e.g., Elizabeth A. Phelps et al., Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation, 12 J. Cognitive Neurosci. 729, 729-30 (2000).

[FN10]. Alexander R. Green et al., Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients, 22 J. Gen. Internal Med. 1231, 1231-32 (2007).

[FN11]. See Greenwald & Krieger, supra note 6, at 952.

[FN12]. See, e.g., Michael Orey, White Men Can't Help It, Bus. Wk., May 15, 2006, at 54 (discussing the role of expert witness testimony on "unconscious bias theory" in gender and race employment discrimination cases); Diane Cole, Don't Race to Judgment, U.S. News & World Rep., Dec. 26, 2005/Jan. 2, 2006, at 90.

[FN13]. See Project Implicit, General Information, http:// www.projectimplicit.net/generalinfo.php (last visited Mar. 9, 2009) ("Visitors have completed more than 4.5 million demonstration tests since 1998, currently averaging over 15,000 tests completed each week.").

[FN14]. Greenwald & Krieger, supra note 6, at 952-53 (describing the basic IAT technique).

[FN15]. See Online Psychology Laboratory, Implicit Association Test (Race), http://opl.apa.org/Experiments/About/AboutIATRace.aspx (last visited Mar. 9, 2009).

[FN16]. See id.

[FN17]. See Brian A. Nosek et al., Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site, 6 Group Dynamics 101, 105 (2002) (reporting data indicating that white adults taking the IAT strongly favored the white/good versus the black/bad pairing on the IAT).

[FN18]. Id. at 104.

[FN19]. Id. at 105.

[FN20]. Id.

[FN21]. Id. Throughout, we adopt the convention that a "strong" bias means a tendency to favor one pairing over another on the IAT by over three-quarters of a standard deviation, a "small" bias means an effect of less than one-quarter of a standard deviation, and a "moderate" effect means an effect that is in between one-quarter and three-quarters of a standard deviation.

[FN22]. Id.

[FN23]. Id.

[FN24]. Id. at 110.

[FN25]. See Hal R. Arkes & Philip E. Tetlock, Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?," 15 Psychol. Inquiry 257, 257-58 (2004) (arguing that the IAT does not measure bias or prejudice); Mahzarin R. Banaji et al., No Place for Nostalgia in Science: A Response to Arkes and Tetlock, 15 Psychol. Inquiry 279, 279 (2004) (responding to the arguments of Arkes and Tetlock).

[FN26]. See J. Ridley Stroop, Studies of Interference in Serial Verbal Reactions, 18 J. Experimental Psychol. 643, 659-60 (1935) (presenting evidence that words colored differently from their semantic meaning are difficult to read).

[FN27]. See Project Implicit, supra note 13.

[FN28]. Id.

[FN29]. See Anthony G. Greenwald et al., Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm, 85 J. Personality & Soc. Psychol. 197, 209-11 (2003) (discussing mechanisms for reducing order effects); see also Anthony G. Greenwald & Brian A. Nosek, Health of the Implicit Association Test at Age 3, 48 Zeitschrift für Experimentelle Psychologie 85, 87 (2001) ("Subject handedness was found to have essentially zero relation to magnitude of the race IAT effect.").

[FN30]. See, e.g., Samuel R. Bagenstos, Implicit Bias, "Science," and Antidiscrimination Law, 1 Harv. L. & Pol'y Rev. 477, 477 (2007); Greenwald et al., supra note 29, at 199-200.

[FN31]. Anthony G. Greenwald et al., Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity, J. Personality & Soc. Psychol. (forthcoming 2009).

[FN32]. Note that some of the papers Greenwald and his co-authors include in their analysis report multiple studies using independent samples of subjects. Id. (manuscript at 10, 21).

[FN33]. Id. (manuscript at 21).

[FN34]. To be precise, the square of the correlation coefficient of 0.24 is 0.0576, which we round up to 6%.

[FN35]. See Nat'l Ctr. for State Courts, Examining the Work of State Courts, 2006, at 45-46 (Robert C. LaFountain et al. eds., 2006), http:// www.ncsconline.org/D_Research/csp/2006_files/EWSC-2007WholeDocument.pdf (providing data for criminal cases entering state courts in 2005).

[FN36]. Admin. Off. of the U.S. Courts, Federal Judicial Caseload Statistics: March 31, 2007, at 58 tbl.D (2007), http://www.uscourts.gov/caseload2007/tables/D00CMar07.pdf (observing U.S. district courts to have 71,652 and 69,697 cases pending in the twelve-month periods ending March 31, 2006 and 2007, respectively).

[FN37]. Kang & Banaji, supra note 7, at 1073.

[FN38]. See Jennifer Eberhardt et al., Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes, 17 Psychol. Sci. 383, 384 (2006) ("Defendants whose appearance was perceived as more stereotypically Black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically Black.").

[FN39]. See Jack Glaser & Eric D. Knowles, Implicit Motivation to Control Prejudice, 44 J. Experimental Soc. Psychol. 164, 164-65, 170-71 (2008).

[FN40]. See Bridget C. Dunton & Russell H. Fazio, An Individual Difference Measure of Motivation to Control Prejudiced Reactions, 23 Personality & Soc. Psychol. Bull. 316, 324-26 (1997); E. Ashby Plant & Patricia G. Devine, Internal and External Motivation to Respond Without Prejudice, 75 J. Personality & Soc. Psychol. 811, 824-28 (1998).

[FN41]. See John A. Bargh, The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effects, in Dual-Process Theories in Social Psychology 361, 375-78 (Shelly Chaiken & Yaacov Trope eds., 1999); Patricia G. Devine et al., The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice, 82 J. Personality & Soc. Psychol. 835, 845-47 (2002); John F. Dovidio et al., On the Nature of Prejudice: Automatic and Controlled Processes, 33 J. Experimental Soc. Psychol. 510, 535-36 (1997); Russell H. Fazio et al., Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?, 69 J. Personality & Soc. Psychol. 1013, 1025-26 (1995).

[FN42]. Green et al., supra note 10.

[FN43]. Id. at 1232-33.

[FN44]. Id. at 1235. The researchers also found that white doctors who express white preferences on the IAT were more likely to diagnose black patients than white patients as having coronary artery disease, based upon the same symptoms. Id. at 1234-35. Indeed, the doctors offered the appropriate treatment--thrombolysis--to an equal number of black patients as white patients! Id. As the authors rightly point out, this does not mean there was no disparity; among patients who were diagnosed as suffering from coronary artery disease, black patients were less likely to be offered the appropriate treatment. Id. It is at least curious, however, that doctors with implicit white preferences would be more likely to diagnose coronary artery disease for black patients than white patients, but less likely to treat it. The diagnosis disparity runs in the opposite direction of the treatment-for-diagnosis disparity, and ultimately, the two effects actually cancel each other out. Id. at 1236-37. Of course, if doctors behaved the same way in the real world, black and white patients who presented the same symptoms would be treated in the same way. Thus, though the IAT predicted discriminatory acts, implicit bias does not seem to result in discrimination overall. Id. at 1234-37. This aspect of the study has been the source of some debate. See John Tierney, In Bias Test, Shades of Gray, N.Y. Times, Nov. 18, 2008, at D1. One other recent study also shows no correlation between measures of implicit bias and medical decisions among physicians. See Janice A. Sabin et al., Physician Implicit Attitudes and Stereotypes About Race and Quality of Medical Care, 46 Med. Care 678, 682 (2008) ("We did not find a relationship between difference in treatment recommendations by patient race and implicit measures.").

[FN45]. Green et al., supra note 10, at 1235.

[FN46]. Id. at 1237.

[FN47]. Glaser & Knowles, supra note 39, at 167-71.

[FN48]. Joshua Correll et al., The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals, 83 J. Personality & Soc. Psychol. 1314, 1315-17 (2002).

[FN49]. Id. at 1315-16.

[FN50]. Id. at 1320.

[FN51]. Id. at 1320-21; Glaser & Knowles, supra note 39, at 168-69.

[FN52]. Glaser & Knowles, supra note 39, at 169-70.

[FN53]. Id. at 171.

[FN54]. Robert W. Livingston, When Motivation Isn't Enough: Evidence of Unintentional Deliberative Discrimination Under Conditions of Response Ambiguity 9-10 (2002) (unpublished manuscript, on file with the Notre Dame Law Re- view).

[FN55]. See Arnd Florack et al., Der Einfluss Wahrgenommener Bedrohung auf die Nutzung Automatischer Assoziationen bei der Personenbeurteilung [The Impact of Perceived Threat on the Use of Automatic Associations in Person Judgments], 32 Zeitschrift für Sozialpsychologie 249 (2001).

[FN56]. Id. at 255 tbl.1.

[FN57]. We recognize that we have emphasized disparities concerning black Americans, rather than other races. We have done so for three reasons. First, even though Latinos, Native Americans, and Asian Americans are also targets of racism, both explicit and implicit, in the United States some of the most striking disparities involve black Americans in the legal system. Second, the research on the IAT has emphasized biases concerning black Americans as well. Third, our sample of judges includes a large group of black American judges, but few Latinos, few Asian Americans, and no Native Americans. We thus cannot draw any conclusions about the reactions of judges of these ethnicities. We therefore focus our attention here on biases involving black Americans.

[FN58]. See Chris Guthrie et al., Blinking on the Bench: How Judges Decide Cases, 93 Cornell L. Rev. 1, 13 (2007) [hereinafter Guthrie et al., How Judges Decide]; Chris Guthrie et al., Inside the Judicial Mind, 86 Cornell L. Rev. 777, 814-15 (2001) [hereinafter Guthrie et al., Judicial Mind]; Jeffrey J. Rachlinski et al., Inside the Bankruptcy Judge's Mind, 86 B.U. L. Rev. 1227, 1256-59 (2006); Andrew J. Wistrich et al., Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding, 153 U. Pa. L. Rev. 1251, 1323-24 (2005).

[FN59]. At two of the conferences, we collected data from judges attending a plenary session. At the third, we collected data from judges attending an optional session.

[FN60]. Their concerns might be justified. Some of our previous work has been reported in the New York Times and the American Bar Association Journal, among other places. See, e.g., Patricia Cohen, Judicial Reasoning Is All Too Human, N.Y. Times, June 30, 2001, at B7; Debra Cassens Weiss, Judges Flunk Story Problem Test, Showing Intuitive Decision-Making, A.B.A. J., Feb. 19, 2008, https://abajournal.com/news/judges_flunk_story_problem_test_showing_ intuitive_decision_making/. The latter report leads with the unfortunate headline "Judges Flunk Story Problem Test," which casts the judges in a more negative light than the data warrant. Interest in the present Article is sufficiently high that, des-

pite our own efforts to limit its use before it was finalized, it was cited by Judge Jack Weinstein in a published opinion, United States v. Taveras, 424 F. Supp. 2d 446, 462 (E.D.N.Y. 2006), and discussed at length in a recent volume of the Annual Review of Law and Social Science, Lane et al., supra note 6, at 441-45.

[FN61]. Eighty judges attended the session at which we collected data, but we excluded ten from our study. We excluded one judge at his or her request. We excluded nine other judges because they failed to provide us with demographic information. We believe that these failures were largely accidental. To complete the demographic page, the judges had to return to the written materials after completing the final IAT, and these nine judges failed to do so. We did not realize that this process would cause problems at our presentation in the eastern jurisdiction, and hence we did not obtain this data. In the subsequent presentations, we made sure that the judges completed the last page as we collected the surveys.

[FN62]. Forty-eight judges attended the session at which we collected the data, but we excluded three from our study. One judge neglected to provide demographic information, and we lost the data for two other judges due to a computer malfunction.

[FN63]. Over ninety percent of the judges in the eastern jurisdiction attended this conference (although, as noted, we did not obtain data from all of them). Attendance was lower among the western judges; the sample includes roughly half of the judges in their jurisdiction. These judges' willingness to participate in our study was thus unlikely to have been affected by their interest (or lack thereof) in the content of the material. In fact, the judges were not aware of the subject matter of the talk before the session began. This was not our first presentation to the eastern judges. Three years earlier, we had presented a completely different set of materials to the same educational conference. Some of the results from that earlier session have been published, also without identifying the jurisdiction. Wistrich et al., supra note 58, at 1279-81. Many of the judges were therefore familiar with our methods, although the present study differs from our earlier work. Our prior work dealt largely with judicial reliance on heuristics in making judgments, whereas this research is entirely devoted to the influence of race and gender on judgment. This was our first presentation to the western judges. The regional judges differed from the eastern and western judges in that they opted not only to attend the judicial education conference at which we spoke but also to attend our optional session.

[FN64]. We include these questions below in Appendix A.

[FN65]. The computer tasks were all conducted on laptop computers rented for the purpose of running the experiment. They were all relatively contemporary machines of similar makes. At the eastern and western sessions, all were Hewlett-Packard NX9010; at the regional conference, they were IBM ThinkPads. All had fifteen-inch screens. The software to run the tasks was designed with a program called Inquisit 2.0, created specifically for measuring implicit associations by a company called Millisecond Software. See Inquisit, http:// www.millisecond.com (last visited Mar. 7, 2009).

[FN66]. The instructions on the survey were as follows:

Many of the points to be discussed at this session are best experienced directly. We therefore ask that before the session starts, you participate in a series of exercises on the laptop computer and evaluate a series of hypothetical cases in the pages that follow. (Participation in all aspects of this exercise is voluntary, of course.) Please do not discuss these materials while you are participating. We shall collect these surveys before the discussion and present the results during the session.

The first part of the exercise consists of a computer task. Please do not begin the task or turn this page until asked to do so.

The instructions on the computer screen were:

JURISDICTION: Judicial Education Conference, DATE

We shall begin by making announcements as to the nature of this exercise.
Please DO NOT BEGIN until after the announcements.
After the announcements, please press the space bar to begin.

[FN67]. Judge Wistrich conducted the introduction at the eastern and western conferences; Professor Rachlinski did it at the regional conference.

[FN68]. We also conducted an IAT related to gender after the race IAT, but do not report those results here.

[FN69]. We also included a scenario in which we manipulated the gender of a target legal actor as the third scenario. We do not report these results here.

[FN70]. The order of the materials was thus as follows: the priming task; the written scenario of the shoplifter; the written scenario of the armed robber; the gender scenario (not reported here); the battery case; the race IAT; the gender IAT (not reported here); and the demographics page.

[FN71]. We analyzed the three groups of judges separately, but there were no significant differences between the judges, except as noted below, so we have kept them together throughout the analysis. Similarly, we found no differences between the judges on the basis of the gender, political affiliation, or experience. Because previous research on the IAT suggests that Latinos score somewhat closer to black Americans on the IAT we used, we combined the few Latino judges with the black judges for these analyses. Nosek et al., supra note 17, at 110 tbl.2. Similarly, we combined the Asian American judges with the white judges.

[FN72]. The exact instructions at the outset of the IAT were as follows:

The remaining computer tasks involve making CATEGORY JUDGMENTS.

Once the tasks begin, a word or words describing the CATEGORIES will appear in the upper left and upper right corners of the computer screen.

A TARGET word or picture will also be displayed in the center of the screen, which you must assign to one of the two categories

Please respond AS RAPIDLY AS POSSIBLE, but don't respond so fast that you make many errors. (Occasional errors are okay.)

An "X" will appear when you make an error. Whenever the "X" appears, correct the mistake by pressing the other key.

[FN73]. For a more detailed account of our IAT procedure, see Appendix B.

[FN74]. See, e.g., Nosek et al., supra note 17, at 104-05 (reporting average differences in response latencies among large samples of subjects obtained through the Internet).

[FN75]. See Greenwald et al., supra note 29, at 209-10 (describing standardized measures). The full account of our scoring methods is included as Appendix C.

[FN76]. The specific statistical result was: $t(82) = 4.94$, $p < .0001$. Throughout this Article, we reserve the use of the words "significant" and "significantly" for statistical significance.

[FN77]. The specific statistical result was: $t(42) = 0.18$, $p = .86$. In conducting this test, we took the effect size among the Internet sample of 0.16 standard deviations to be the "population" effect size among black participants on the Internet, and tested whether our observed difference, with our observed standard deviation, would be likely to be reliably higher

or lower than the effect in the Internet data. The priming condition did not appear to affect the judges' IAT scores. Also, the judges themselves varied somewhat in their IAT scores. White judges in the eastern jurisdiction expressed an average standardized preference of 0.33, compared to 0.48 and 0.55 in the western jurisdiction and the regional conferences, respectively. These differences were marginally significant. Because the black judges in our study were concentrated largely in the eastern jurisdiction, similar tests for variations among these judges would not be reliable.

[FN78]. The specific statistical result was: $t(84) = 2.26$, $p = .026$. We compared our results to those of the Internet sample reported in Nosek et al., supra note 17, at 105. In making this comparison, we took the effect size among the Internet sample of 0.83 standard deviations to be the "population" effect size among white participants on the Internet, and tested whether our observed difference, with our observed standard deviation, would likely be reliably higher or lower than the effect in the Internet data.

[FN79]. We selected data collection and scoring procedures so as to minimize the effects of order of presentation. Greenwald and his fellow authors reported that the effect of order of presentation is less than one percent, using the methods we followed. See Greenwald et al., supra note 29, at 210 tbl.2.

[FN80]. See id. at 200 ("IAT effects will be artificially larger for any subjects who respond slowly.").

[FN81]. Throughout this Article we follow the convention of using the terms "black" and "white" to denote race, as the terms more closely reflect the faces in the IAT, the instructions in the IAT (which refer to black and white), and might more closely reflect how the black judges would describe themselves (although there would be variation on this). When referring to the criminal defendants, however, we use African American and Caucasian, following the references mentioned in the hypothetical cases.

[FN82]. Graham & Lowery, supra note 9, at 487-88.

[FN83]. At the beginning of the task, three asterisks appeared in the center of the screen. A sixteen-character letter string then appeared in one of the four quadrants of the screen. The judges were instructed to press a specific key on the left-hand side of the computer (the "E" key, which was marked with a red dot) when the letter string appeared in one of the quadrants on the left and to press a specific key on the right-hand side of the computer (the "I" key, which was also marked with a red dot) when a word appeared in one of the two quadrants on the right. Reminders as to which key to press also remained on the computer screen throughout the first task (that is, "press the 'E' key for left" and "press the 'I' key for right"). When the judges identified the quadrant correctly, the word "correct" would appear in the center in letters. When the judges made an error, the word "error" would appear instead. In either case, the three asterisks would then replace the words "correct" or "error" and the task would repeat. The exact instructions the judges saw are below.

Once you begin the first computer task, the screen will go blank, then three asterisks (* * *) will appear in the center. Focus your attention on these. A string of letters will then appear in the upper-right, lower-right, upper-left, or lower-left portion of the computer screen.

If the string appears on the left-hand side (either up or down), press the "E" key.

If the string appears on the right-hand side (either up or down), press the "I" key.

If you correctly identify the position, the screen will flash the word "correct"; if you identify the wrong position, the screen will flash the word "error."

The task will then repeat a number of times. Other words may appear with the letter string. Ignore these and try to identify the position of the letters as quickly as possible.

When you are ready, press the space bar to begin the task.

[FN84]. Each trial thus proceeded as follows: the three asterisks would appear in the center of the screen; 1200 milli-

seconds later (1.2 seconds) one of the prime words (selected at random) would appear in one of the four quadrants (at random as determined by the computer); 153 milliseconds after that, the letter-string would appear over the prime; this would remain until the judge pressed either the "E" or "I" key; then either the "correct" or "error" in the center (depending upon the judge's response) and would remain for roughly one second; then the three asterisks would replace the word "correct" or "error"; and the process would repeat. Due to an error in the computer programming, the judges in the eastern conference were only exposed to the subliminal prime for sixty-four milliseconds, rather than 153 milli- seconds.

[FN85]. Graham and Lowery reported that none of the officers in their study was able to identify the nature of the words being shown to them. Graham & Lowery, supra note 9, at 491. We did not ask our judges their assessment of what the words were.

[FN86]. The words came directly from the Graham and Lowery study: graffiti, Harlem, homeboy, jerricurl, minority, mulatto, negro, rap, segregation, basketball, black, Cosby, gospel, hood, Jamaica, roots, afro, Oprah, Islam, Haiti, pimp, dreadlocks, plantation, slum, Tyson, welfare, athlete, ghetto, calypso, reggae, rhythm, soul. Id. at 489 n.5.

[FN87]. These words also came directly from Graham and Lowery: baby, enjoyment, heaven, kindness, summer, sunset, truth, playful, accident, coffin, devil, funeral, horror, mosquito, stress, toothache, warmth, trust, sunrise, rainbow, pleasure, paradise, laughter, birthday, virus, paralysis, loneliness, jealousy, hell, execution, death, agony. Graham and Lowery used neutral words that matched the words associated with black Americans for positive or negative associations. Id.

[FN88]. Our study differed from that of Graham and Lowery in several ways, any of which might have affected the results. First, Graham and Lowery used eighty trials, rather than the sixty we used. Id. at 489-90. Second, because we ran a large group of judges at the same time, we did not use audible beeps to indicate correct responses. Id. Third, our hypothetical defendants differed. We did not have access to the original materials Graham and Lowery used, and so wrote our own. See fact pattern infra Appendix A. Fourth, we asked fewer questions concerning the hypothetical defendants. Although we do not see how any of these differences would necessarily affect the results, priming tasks can be sensitive to details.

[FN89]. The following appeared on the screen:

Thank you for completing the first computer task.

Now please turn to the written materials.

Please leave this computer on with the screen up.

After you have completed four pages of written materials, please press the space bar to continue with the final computer tasks.

In case a judge accidentally or mistakenly hit the space bar, we added another intervening page before the second computer task, which appeared once the space bar was pressed. It read as follows:

If you have completed the four case summaries, please press the space bar to begin the final computer task.

[FN90]. The location of the crime would reveal the jurisdiction and hence we delete it. The location was an upscale shopping district.

[FN91]. The exact materials for this scenario and all others are included infra Appendix A.

[FN92]. The options were as follows:

(1) Dismiss it with an oral warning

(2) Adjourn the case in contemplation of dismissal (assuming William gets in no further trouble)

(3) Put William on probation for six months or less
(4) Put William on probation for more than six months
(5) Commit William to a juvenile detention facility for six months or less
(6) Commit William to a juvenile detention facility for more than six months
(7) Transfer William to adult court.

[FN93]. The results were as follows: Question 1, z = 0.51, p = .61; Question 2, z = 0.73, p= .46; Question 3, z =1.09, p = .28.

[FN94]. To accomplish this analysis, we conducted an ordered logit regression of the judges' disposition against the priming condition, the judges' IAT scores, and an interaction of the two. The interaction term reflects the effect of the IAT score on how the prime affected the judge. This term was marginally significant in the model, z = 1.84, p = .07.

[FN95]. For the first recidivism question, z = 1.41, p = .16. On the second recidivism question, z = 1.49, p = .14. On these questions, the black judges and the white judges seemed to respond in similar ways. We ran the full model (predictors of prime, race of judge, IAT, and all interactions between these variables) on all three variables as well. Adding the race-of-judge terms and interactions did not produce any significant effects.

[FN96]. The use of an armed robbery breaks somewhat with Graham and Lowery, who had used two simple property crimes. See Graham & Lowery, supra note 9, at 490.

[FN97]. The results were as follows: Question 1, z = 0.17, p = .87; Question 2, z = 0.09, p=.93; and Question 3, z = 1.62, p = .11.

[FN98]. Our findings were: z = 1.85, p = .06.

[FN99]. For the first recidivism question, z = 0.62, p = .53; on the second recidivism question, z = 0.54, p = .59. As above, on these questions, the black judges and the white judges seemed to respond in similar ways. We ran the full model (predictors of prime, race of judge, IAT, and all interactions between these variables) on all three variables as well. Adding the race-of-judge terms and interactions did not produce any significant effects.

[FN100]. See Graham & Lowery, supra note 9, at 493-94, 496.

[FN101]. Id. Only police officers predicted that the defendant was more likely to recidivate; parole officers did not show any differences on this question. Id.

[FN102]. Samuel R. Sommers & Phoebe C. Ellsworth, White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom, 7 Psychol. Pub. Pol'y & L. 201, 216-17 (2001). We thank the authors for graciously sending us the materials and giving us permission to use them.

[FN103]. We used the same question to elicit verdicts and confidence ratings as the one Sommers and Ellsworth used: "Based on the available evidence, if this were a bench trial, would you convict the defendant?" Below this were the words "Yes" and "No." Finally, we asked the judges, "How confident are you that your judgment is correct?" Below this question, the materials presented a nine-point scale, with "1" labeled "Not at all Confident" and "9" labeled "Very Confident." Id. at 217; see also infra Appendix A (providing the materials used in our study).

[FN104]. This difference was not statistically significant. Fishers exact test, p = .62.

[FN105]. The difference between our results and those obtained by Sommers and Ellsworth is significant: 2(1) = 6.74, p < .01 (using the expected conviction rates of seventy percent for Caucasian defendants and ninety percent for African American defendants, as reported by Sommers & Ellsworth, Sommers & Ellsworth, supra note 102, at 217).

[FN106]. The analysis consisted of a logistic regression of the verdict against the race of the defendant, the race of the judge, and the interaction of these two parameters. The interaction was significant, z = 2.12, p = .03, which was the result of the differential treatment of the two defendants by the black judges. The race of the defendant was also significant, z = 2.81, p = .005, indicating that overall, the judges were less likely to convict the African American defendant than the Caucasian defendant.

[FN107]. We combined the nine-point confidence measure with the binary outcome to create an eighteen-point scale. In our coding, a "1" corresponded to a judge who was very confident that the defendant should be acquitted, whereas an "18" corresponded to a judge who was very confident that the defendant should be convicted. The average confidence that the judges expressed in the defendant's guilt were as follows: white judges judging Caucasian defendants-- 13.64; white judges judging African American defendants--12.2; black judges judging Caucasian defendants--16.08; black judges judging African American defendants--9.89. Statistical analysis of these results (by ANOVA) produced results consistent with the analysis of the verdicts alone. That is, the judges were significantly more convinced of the Caucasian defendant's guilt than of the African American's guilt (F(1, 129) = 15.04, p < .001). This disparity was much more pronounced among black judges (F(1, 129) = 5.84, p < .025).

[FN108]. To accomplish this analysis, we conducted a logistic regression of the judges' verdict against the priming condition, the judges' IAT scores, and an interaction of the two. The interaction term reflects the effect of the IAT score on how the race of the defendant affected the judges' verdict. This term was not significant in the model, z = 1.04, p = .30.

[FN109]. We also replicated this analysis with the eighteen-point confidence ratings. See infra note 112. Specifically, we regressed the judges' confidence in the defendant's guilt against the defendant's race, the judges' IAT score, and the interaction between the race and IAT score. As with the verdict itself, this analysis showed that the race of the defendant was significant, t-ratio = 3.49, p < .001, but the interaction between race of defendant and IAT score was not, t-ratio = 1.51, p = .13.

[FN110]. In this analysis, the race of the defendant and the interaction between race of judge and race of the defendant were significant, just as they were in the simpler models. (Race of defendant, z = 1.99, p = .05; interaction between race of the judge and race of the defendant, z = 2.35, p = .02. The interaction of the defendant's race and IAT score was not significant, z = 1.00, p = .23.)

[FN111]. The result was as follows: z = 2.18, p = .03.

[FN112]. Regressing the eighteen-point confidence rating against the race of the judge, the race of the defendant, the judges' IAT scores, and all interactions between these variables revealed significant effects for race of the defendant, t-ratio = 2.95, p = .005; a significant interaction of race of the defendant with race of the judge, t-ratio = 2.68, p = .01; and the three-way interaction of race of judge, race of defendant, and IAT score, t-ratio = 2.68, p = .02. The interaction of race of defendant and IAT scores was still not significant in this model, t-ratio = 1.27, p = .20.

[FN113]. The results are as follows: z = 1.15, p = .25.

[FN114]. The results are as follows: z = 1.87, p = .06. Given the high conviction rate of the black judges for the Caucasian defendant, this trend actually meant that they were more likely to convict the African American defendants to the ex-

tent that they exhibited greater white preferences on the IAT.

[FN115]. The white judges displayed a greater propensity to convict the Caucasian defendant relative to the African American defendant as the IAT score increased, but the trend did not approach significance, t-ratio = 1.00, p = .40. The black judges showed the opposite trend, which was significant: t-ratio = 2.25, p = .03.

[FN116]. Siri Carpenter, Buried Prejudice: The Bigot in Your Brain, Sci. Am. Mind, May 2008, at 32, 32.

[FN117]. See Gordon B. Moskowitz & Amanda R. Salomon, Preconsciously Controlling Stereotyping: Implicitly Activated Egalitarian Goals Prevent the Activation of Stereotypes, 18 Soc. Cognition 151, 155 (2000).

[FN118]. See Theodore Eisenberg & Sheri Lynn Johnson, Implicit Racial Attitudes of Death Penalty Lawyers, 53 DePaul L. Rev. 1539, 1540 (2004) ("One would hope that those who represent capital defendants (or at least African-American capital defendants) would themselves be free of racialized thinking....").

[FN119]. Id. at 1546-48.

[FN120]. See Sommers & Ellsworth, supra note 102, at 217.

[FN121]. See Model Code of Judicial Conduct, at Canon 2 (2008) ("A judge shall perform the duties of judicial office impartially, competently, and diligently.").

[FN122]. See, e.g., Am. Bar Ass'n, Black Letter Guidelines for the Evaluation of Judicial Performance, at Guideline 5-2.3 (2005), available at http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf (prescribing "[a]bsence of favor or disfavor toward anyone, including but not limited to favor or disfavor based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status").

[FN123]. See Glaser & Knowles, supra note 39, at 171.

[FN124]. During our presentation, one of us asked for a show of hands to indicate how many thought we were studying race. While not the most ideal way to make this inquiry, and while we did not keep a precise count, most of the judges raised their hands.

[FN125]. See, e.g., Kathryn Abrams, Black Judges and Ascriptive Group Identification, in Norms and the Law 208, 215 (John N. Drobak ed., 2006) ("The most noteworthy feature of these studies is that they find no consistent, and only a few salient, differences in decisionmaking that correlate with the race of the judge.").

[FN126]. See Carpenter, supra note 116, at 37-38.

[FN127]. These data were collected by us at a conference of New York City administrative law judges in the summer of 2008. As one of the questions, we asked the following:

Relative to the other judges attending this conference, how would you rate yourself on the following:

Avoiding racial bias in making decisions

____ In the highest quartile (meaning that you are more skilled at this than 75% of the judges attending this confer- ence)

____ In the second highest quartile (meaning that you are more skilled at this than 50% of the judges in this room, but less skilled than 25% of the judges attending this conference)

____ In the second lowest quartile (meaning that you are more skilled at this than 25% of the judges in this room,

but less skilled than 50% of the judges attending this conference)
____ In the lowest quartile (meaning that you are less skilled at this than 75% of the judges attending this confer- ence).

[FN128]. Jolls & Sunstein, supra note 4, at 988-90; Kang & Banaji, supra note 7, at 1105-08.

[FN129]. See, e.g., Kang & Banaji, supra note 7, at 1112 ("In Grutter v. Bollinger, the Court emphasized that student diversity was valuable because it could help 'break down racial stereotypes.'" (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003))); see also Kang, supra note 8, at 1579-83 (arguing that public broadcasting should be regulated so as to promote positive images of minorities).

[FN130]. Bureau of Justice Statistics, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2004, at 1 (2004), available at http:// www.ojp.usdoj.gov/bjs/pub/pdf/fdluc04.pdf (stating that an estimated forty percent of defendants were black).

[FN131]. See Eisenberg & Johnson, supra note 118, at 1553-56.

[FN132]. Others have made tentative suggestions that the IAT be used as a screening device for certain professions. See, e.g., Ian Ayres, Pervasive Prejudice? 424 (2001) ("Implicit attitude testing might also itself be used as a criterion for hiring both governmental and nongovernmental actors.").

[FN133]. Green et al., supra note 10, at 1237 ("These findings support the IAT's value as an educational tool.").

[FN134]. See id. (recommending "securely and privately administered IATs to increase physicians' awareness of unconscious bias").

[FN135]. See Carpenter, supra note 116, at 32.

[FN136]. Timothy D. Wilson et al., Mental Contamination and the Debiasing Problem, in Heuristics and Biases 185, 190 (Thomas Gilovich et al. eds., 2002).

[FN137]. See Guthrie et al., Judicial Mind, supra note 58, at 814-15.

[FN138]. See Green et al., supra note 10, at 1237.

[FN139]. Wilson et al., supra note 136, at 185.

[FN140]. Id. at 187.

[FN141]. See id. at 191 ("Three kinds of errors have been found: insufficient correction (debiasing in the direction of accuracy that does not go far enough), unnecessary correction (debiasing when there was no bias to start with), and overcorrection (too much debiasing, such that judgments end up biased in the opposite direction).").

[FN142]. See id. (suggesting that people's "corrected judgments might be worse than their uncorrected ones"); see also Antony Page, Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.U. L. Rev. 155, 239-40 (2005) ("One major problem for any correction strategy is determining the magnitude of the correction required. Unfortunately, people are not very good at this determination. Some research suggests that among those who are very motivated to avoid discrimination, overcorrection is a common problem.... A second problem is that a correction strategy appears to require significant cognitive resources...." (citations omitted)); id. at 241-42 ("'[T]o consciously and willfully

regulate one's own... evaluations [and] decisions... requires considerable effort and is relatively slow. Moreover, it appears to require a limited resource that is quickly used up, so conscious self-regulatory acts can only occur sparingly and for a short time.'" (omissions in original) (quoting John A. Bargh & Tanya L. Chartrand, The Unbearable Automaticity of Being, 54 Am. Psychol. 462, 476 (1999))).

[FN143]. See Christopher A. Parsons et al., Strike Three: Umpires' Demand for Discrimination 24-25 (Nat'l Bureau of Econ. Research, Working Paper Series, Paper No. 13665, 2007), available at http://ssrn.com/abstract=1077091; Joseph Price & Justin Wolfers, Racial Discrimination Among NBA Referees 30 (Nat'l Bureau of Econ. Research, Working Paper Series, Paper No. 13206, 2007), available at http://ssrn.com/abstract=997562.

[FN144]. Accountability improves performance in other contexts, so it likely would do so for judges as well. See Jennifer S. Lerner & Philip E. Tetlock, Accounting for the Effects of Accountability, 125 Psychol. Bull. 255, 270-71 (1999).

[FN145]. See Guthrie et al., How Judges Decide, supra note 58, at 32.

[FN146]. See, e.g., Jean E. Dubofsky, Judicial Performance Review: A Balance Between Judicial Independence and Public Accountability, 34 Fordham Urb. L.J. 315, 320-22 (2007) (explaining that the judicial performance review system in Colorado focuses only on a judge's performance in a particular case).

[FN147]. See Michel E. Solimine, Congress, Ex Parte Young, and the Fate of the Three-Judge District Court, 70 U. Pitt. L. Rev. 101, 128-134 (2008).

[FN148]. Jennifer L. Peresie, Note, Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts, 114 Yale L.J. 1759, 1778 (2005).

[FN149]. Note, Judicial Limitation of Three-Judge Court Jurisdiction, 85 Yale L.J. 564, 564 (1976).

[FN150]. Arthur D. Hellman, Legal Problems of Dividing a State Between Federal Judicial Circuits, 122 U. Pa. L. Rev. 1188, 1225 (1974).

[FN151]. See Peresie, supra note 148, at 1778.

[FN152]. The faces were taken from the Project Implicit website. See Brian A. Nosek et al., Project Implicit, Stimulus Materials (2006), http:// www.projectimplicit.net/stimuli.php. They include only the center of the face, with ears, hair, and anything below the chin cropped out. None of the faces has facial hair, eyeglasses, or distinguishing features. Id. (providing faces that can be downloaded under the "race faces" stimulus set).

[FN153]. In this respect we varied from the procedures recommended by Greenwald and his colleagues, see Greenwald et al., supra note 29, at 198, by reducing the practice rounds from the twenty they suggested to sixteen. We did this in the interest of saving time. We did retain the forty trials in the critical rounds. We had more time available in the western jurisdiction, and increased the length of rounds three and six to twenty trials.

[FN154]. The exact instructions were as follows:

> In the first round, the two CATEGORIES that you are to distinguish are:
> BLACK vs. WHITE faces.
> Press the "E" key if the TARGET is a WHITE face.
> Press the "I" key if the TARGET is a BLACK face.
> Remember that an "X" will appear when you make an error. Whenever the "X" appears, correct the mistake by

pressing the other key.

Please respond AS RAPIDLY AS POSSIBLE, but don't respond so fast that you make many errors. (Occasional errors are okay.)

Press the space bar when you are ready to begin.

[FN155]. Greenwald et al., supra note 29, at 212-15.

[FN156]. Nosek et al., supra note 17, at 103-04.

[FN157]. Greenwald et al., supra note 29, at 212-15.

[FN158]. Id. at 201-02.

[FN159]. Id. at 203.

[FN160]. Id. at 214 tbl.4.

[FN161]. Nosek et al., supra note 17, at 103-04.

[FN162]. Project Implicit, Background Information (2002), https:// implicit.harvard.edu/implicit/demo/background/index.jsp (last visited on Mar. 9, 2009).

[FN163]. See Nosek et al., supra note 17, at 104.

[FN164]. Id.

[FN165]. Id.

[FN166]. Id.

[FN167]. Id.

[FN168]. Id.

[FN169]. Id.

[FN170]. Id.

[FN171]. None of the judges provided latencies that were less than 300 ms in either of the two critical rounds measuring the race IAT; two of the judges provided responses that were faster than 300 ms in the gender IAT (one round each). Many more of the judges produced latencies that exceeded 3000 ms. On the race IAT, fifty-eight judges (or 50.4%) produced at least one latency greater than 3000 ms in the stereotype-congruent round (round four). Specifically, in the stereotype-congruent round: thirty-three judges produced one long latency; twenty produced two; three produced three; and two produced four. In the stereotype-incongruent round on the race IAT (round seven), sixty-eight judges (or 59.1%) produced at least one latency greater than 3000 ms. Specifically, in the stereotype-incongruent round: thirty-three judges produced one long latency; twelve produced two; ten produced three; four produced four; two produced five; four produced six; and three produced seven. On the gender IAT, fifty-seven judges (or 49.6%) produced at least one latency greater than 3000 ms in the stereotype-congruent round (round seven). Specifically, in the stereotype-congruent round: thirty-six judges produced one long latency; seven produced two; nine produced three; three produced four; one produced

five; and one produced eight. In the stereotype-incongruent round on the gender IAT (round four), fifty-six judges (or 48.7%) produced at least one latency greater than 3000 ms. Specifically, in the stereotype-incongruent round: twenty-seven judges produced one long latency; fifteen produced two; six produced three; three produced four; two produced five; one produced six; and one produced seven. Note that because some of these long latencies fell into the first two rounds, they are not included in the analysis.

[FN172]. One of the judges violated both criteria. We calculated both means after excluding the first two rounds.

[FN173]. Four judges violated both criteria.

[FN174]. Nosek et al., supra note 17, at 104.

[FN175]. Id.

[FN176]. Id.

[FN177]. Greenwald et al., supra note 29, at 210 tbl.2, report the effect of order with a correlation coefficient, rather than a mean or percent difference. They report that the correlation varies with the IAT, noting that the gender IAT that we used here produces a higher correlation between order and IAT score than do other IATs. They report correlations as high as 0.29 (depending upon the scoring method), which would mean that order can account for up to ten percent of the IAT score. Id. By contrast, the race IAT that we used produces small correlations with order, ranging from 0.002 to 0.054; thus, order accounts for, at most, one-quarter of one percent of the IAT score. The order effects seem to vary with context, and hence we cannot be certain of the extent of the influence of order on our materials.

[FN178]. Had we randomized the order, each judge's IAT score would have varied with the order to some extent. This would have introduced some variation to the IAT score that would inherently reduce the correlation we observed across all judges. Our measure of the IAT score across all judges would have been more reliable had we randomized, but the IAT score for the individual judges would have been less consistent, thereby interfering with the correlation.

[FN179]. Greenwald et al., supra note 29, at 199-200.

[FN180]. Id.

[FN181]. In the eastern and western samples we reduced the number of trials in the practice rounds (rounds 1, 2, 3, 5, and 6) from twenty to sixteen, so as to save time.

[FN182]. Greenwald et al., supra note 29, at 213.

[FN183]. Id. at 214-15.

[FN184]. In the race IAT, twenty-nine out of the thirty-three instances in which judges produced latency scores of greater than 10,000 ms on a trial (or 87.9%) occurred during the practice rounds. In the gender IAT, the two instances in which judges exhibited trials that exceeded 10,000 ms occurred in the target round.

[FN185]. Note that these correlations used all judges, with no exclusions for speed, did not bound the data between 300 and 3000 ms, and did not exclude the first two rounds, as we did for calculating the mean differences.
84 Notre Dame L. Rev. 1195

END OF DOCUMENT