

# ARTICLE

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## Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators

**Abstract.** Cognitive science has revealed that past experiences and prior assumptions, even those of which we are not conscious, greatly influence how humans perceive the world. Emerging research has demonstrated that attorneys and judges, like everyone else, are the products of their gender, ethnicity, race, and socioeconomic status. As a consequence, legal decision-making is susceptible to the subtle influences of implicit bias. Effective and ethical client advocacy requires an attorney to understand how her own implicit biases will affect her interactions with clients. An attorney should also acknowledge that implicit biases may affect a judge's interpretation of her client's story and legal arguments. This Article explains how insights from cognitive science should inform an attorney's representation of clients in civil litigation.

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## I. INTRODUCTION

Most lawyers mistakenly view reason and logic as both the primary motivator of their behavior and the primary tool to change the thinking and behavior of others. However, emerging cognitive science research has revealed that our seemingly neutral, logical, and reasoned judgments are actually influenced by unconscious frameworks of thinking about the world that are triggered by our autonomic nervous system.<sup>1</sup> It is now generally understood that the impact of past experiences and prior assumptions, even those of which we are not conscious, can have great power in directing all humans' present perceptions, judgments, feelings, and behaviors.<sup>2</sup> Underlying our thinking is a complex system of unconscious judgments of people, places, and situations, of which we are unaware.<sup>3</sup>

Humans create blueprints based on prior experiences to evaluate new situations, people, and themselves.<sup>4</sup> We rely on mental shortcuts, which psychologists often refer to as "heuristics" or "schemas," to make complex decisions.<sup>5</sup> As with other schemas, stereotypes can facilitate the rapid categorization of people and allow us to "save cognitive resources."<sup>6</sup> However, reliance on these cognitive shortcuts can also lead to erroneous and biased judgments.<sup>7</sup> While "explicit" biases are attitudes and

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1. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1217 (2004).

2. ZIVA KUNDA, MAKING SENSE OF PEOPLE, SOCIAL COGNITION 211 (1999).

3. See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 121 (1994) ("One reason we have used the term *contamination* is to draw an analogy to contamination in the physical realm . . . . One difference between physical and mental contamination, however, concerns their ease of detection. It is much more difficult to detect mental contamination, particularly at the individual level.").

4. See, e.g., Richard K. Sherwin, *The Narrative Construction of Legal Reality*, VT. L. REV. 681, 700 (1994) (explaining the "mental blueprints" humans use for quick assessments of new experiences, based on prior experiences).

5. See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974) ("[P]eople rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations.").

6. See Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 700 (1994) ("These [schemas] allow us to economize on mental energy: we need not interpret things afresh when there are preexisting categories that cover the experience or condition in question."); see also C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93, 96 (2000) ("In attempting to make sense of other people, we regularly construct and use categorical representations to simplify and streamline the person perception process.").

7. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging by Heuristic Cognitive*

stereotypes that are consciously accessible through introspection, “implicit” biases are not consciously accessible.<sup>8</sup> These biases are more likely to emerge during stressful situations or when someone must make a decision under time constraints.<sup>9</sup> Regardless of conscious and explicit desires for unbiased decision-making, implicit biases “can produce behavior that diverges from a person’s avowed or endorsed beliefs or principles.”<sup>10</sup> Furthermore, studies have shown that when a person believes himself to be objective, he is more susceptible to biases.<sup>11</sup>

In light of this research, “[w]hat, if anything, should we do about implicit bias in the courtroom? In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls?”<sup>12</sup> As lawyers, our ethical obligations to our clients and the justice system require us to be very concerned about implicit bias in our courtrooms. These issues have not only captured the attention of academics and scientists, but also the American Bar Association, the National Center for State Courts, and the Institute for the Advancement of the American Legal System have recognized that implicit biases present a serious problem for the administration of justice in the legal system, and they have thus implemented initiatives to address the issue.<sup>13</sup> Our adversarial system

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*Illusions in Judicial Decision Making*, 86 JUDICATURE 44, 44 (2002); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974); see also Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012) (explaining that our decisions are influenced by “a long litany of biases”). See generally Jean R. Sternlight & Jennifer Robbenolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437 (2008) (applying psychological insights to the practice of law).

8. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012).

9. See, e.g., Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1229 (2004) (contending that to overcome implicit bias, a person must not “already be too cognitively busy or occupied” when receiving new information because “the more cognitively busy individuals are,” the more those individuals must rely on schemas and stereotypes to guide judgments).

10. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006).

11. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1173 (2012) (citing Eric Luis Uhlmann & Geoffrey L. Cohen, “*I Think It, Therefore It’s True*”: *Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210-11 (2007)) (reviewing a study where participants that were primed to see themselves as objective actually showed more bias in their evaluations of a potential employee).

12. *Id.* at 1126 (emphasis omitted).

13. See PAMELA M. CASEY, NAT’L CENTER FOR ST. CTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION 1 (2012), available at <http://www.ncsc.org/-/>

strives to be fair, predictable, and uniform.<sup>14</sup> The rule of law would be compromised if case outcomes varied because of a judge's social status or because a litigant is from a minority group.<sup>15</sup>

Attorneys<sup>16</sup> and judges<sup>17</sup> are not immune from these influences, although most would consider themselves to be objective and fair-minded.<sup>18</sup> A federal district court judge explained how his self-confidence in colorblindness was shaken after he received the results of the Implicit Association Test (IAT) that measures implicit racial bias:

I was eager to take the test. I knew I would “pass” with flying colors. I didn't.

. . . After much research, I ultimately realized that the problem of implicit bias is a little recognized and even less addressed flaw in our legal system . . . . I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. Implicit biases cause subtle actions, . . . [b]ut they are also powerful and pervasive enough to affect decisions about whom we employ, whom we leave on juries, and whom we believe. Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.<sup>19</sup>

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media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB\_report\_033012.ashx (evaluating the programs implemented by three states to reduce the effect of implicit bias); NATALIE KNOWLTON & MALIA REDDICK, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., LEVELING THE PLAYING FIELD: GENDER, ETHNICITY, AND JUDICIAL PERFORMANCE EVALUATION 32 (2012), available at [http://iaals.du.edu/images/wygwam/documents/publications/IAALS\\_Level\\_the\\_Playing\\_Field\\_FINAL.pdf](http://iaals.du.edu/images/wygwam/documents/publications/IAALS_Level_the_Playing_Field_FINAL.pdf) (providing empirically based strategies for reducing implicit bias in the judicial system); *Task Force on Implicit Bias*, A.B.A., <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html> (last visited Apr. 1, 2014) (educating lawyers and judges about the “pervasive implications and effects of implicit bias”); *Gender and Racial Fairness Resource Guide*, NAT'L CENTER FOR ST. CTS., <http://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/Resource-Guide.aspx> (last visited Apr. 1, 2014) (describing state efforts to eliminate bias in the courtroom through the creation of task forces).

14. Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 349 (2012).

15. *Id.*

16. One study showed that even death penalty defense lawyers—who are perceived as committed to racial justice and equality—harbor the same implicit biases held by the majority of Americans. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1553 (2004).

17. Hon. Mark W. Bennett, Essay, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 706 (2013) (asserting that judges “most assuredly” have implicit biases).

18. *See id.* (“Of course, [m]ost judges view themselves as objective and especially talented at fair decision[-]making.” (quoting Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1172 (2012))).

19. Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV.

Recent legal scholarship—applying cognitive science research to address the impact of implicit bias on decision-making<sup>20</sup>—has focused on how judges can mitigate the effects of their own implicit biases.<sup>21</sup> These solutions call for decisionmakers to understand that they are predisposed to making irrational, biased decisions.<sup>22</sup> Less attention, however, has been given to the role of attorneys in recognizing their own predispositions to implicit bias and how cognitive science research should inform their advocacy.<sup>23</sup> The goal of this Article is to make a modest contribution to the implicit bias legal scholarship by identifying some pitfalls of implicit biases in client representation and outlining several strategies for effective advocacy in light of cognitive science research.

An attorney must first understand how implicit biases affect her own thinking and thus, her relationship with her client. In the following section, this Article presents a brief overview of some of the relevant cognitive science research to frame the discussion of how attorneys' decisions are influenced by implicit biases. It explains why attorneys must be vigilant about relying on their assumptions, and proposes some practical solutions for mitigating the effects of implicit biases in the representation of clients. Section III discusses how knowledge of implicit biases and their effect on judicial decision-making should inform an attorney's case strategies. In other words, how can attorneys present their cases in ways that will help judges avoid deferring to their implicit biases? Although attorneys may appeal to a judge's biases and predilections when it is favorable to their client's positions, this Article is concerned with the pejorative effects of implicit biases in the courtroom, and takes the position

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L. & POL'Y REV. 149, 150 (2010).

20. The effects of implicit biases on jury decisions have also been studied. *See generally* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012) (exploring the effect of implicit bias on the jury process and discussing the advantages and disadvantages of various proposals to remedy the effect of implicit bias).

21. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1169 (2012) (offering strategies to mitigate the effects of implicit bias); Nicole Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2164325](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164325) (arguing that judicial empathy is a prerequisite for moving judges "away from their own biased vantage point").

22. *Cf.* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1172 (2012) (urging judges and jurors to doubt their own objectivity in order to reduce the effects of their implicit biases).

23. *See* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1272 (2002) ("[T]he main purpose of this Article . . . is to inform advocacy practice with current science [regarding stereotypes and prejudice] and to encourage other legal scholars to attend to the many implications of current scientific research.").

that legal judgments tainted by implicit biases have detrimental effects on the administration of justice. “Because unconscious bias has the potential to undermine the fairness of legal proceedings, efforts to minimize the effects of unconscious bias within the participants to such proceedings is a desirable goal toward furthering fundamental fairness.”<sup>24</sup>

## II. IMPLICIT BIASES AND THEIR INFLUENCE ON ATTORNEYS’ DECISION-MAKING

### A. *Brief Overview of Cognitive Science Research*

Although lawyers may consider reason and logic as the driving force behind their behavior, judgments are often based on implicit biases, which act “as a lens through which we view the world. . . . [They] automatically filter[] how we take in and act on information.”<sup>25</sup> Scientists who study human reasoning agree that it occurs via a “dual process” cognitive system.<sup>26</sup> “System I is rapid, intuitive, and error-prone; System II is more deliberative, calculative, slower, and is often more likely to be error-free.”<sup>27</sup> System I mental processes affect social judgments such as whom we favor,<sup>28</sup> but they operate without conscious awareness or intentional control.<sup>29</sup> Implicit biases are automatic, unconscious mental processes based on implicit attitudes or implicit stereotypes that are formed by one’s life experiences and lurk beneath the surface of the conscious.<sup>30</sup> System I processes elucidate our implicit biases.<sup>31</sup> Implicit biases are rooted in the basic way in which humans understand the complex flood of information

24. Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1582 (2013).

25. Shawn C. Marsh, *The Lens of Implicit Bias*, JUV. & FAM. JUST. TODAY, Summer 2009, at 16, 17, available at [http://www.ncjfcj.org/sites/default/files/The%20Lens%20of%20Implicit%20Bias\\_0.pdf](http://www.ncjfcj.org/sites/default/files/The%20Lens%20of%20Implicit%20Bias_0.pdf).

26. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 974 (2006).

27. *Id.*

28. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 467–68 (2010).

29. *Id.*; see also Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006) (explaining that implicit cognition represents the unconscious, or unintentional control over “social perception, impression formation, and judgment” motivating people’s actions).

30. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006).

31. See Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 975 (2006) (“[T]he problem of implicit bias is best understood in light of existing analyses of System I processes.”).

from the world.<sup>32</sup> Cognitive structures, called schemas,<sup>33</sup> are “mental blueprints” that allow an individual to understand new people, circumstances, objects, and their relationships to each other, by using an existing framework of stored knowledge based on prior experiences.<sup>34</sup>

Schemas are cognitive shortcuts allowing us to comprehend “new situations and ideas without having to interpret and construct a diagram of inferences and relationships for the first time.”<sup>35</sup> When we see or think of a concept, the schema is activated unconsciously.<sup>36</sup> The schema brings to mind other information that we associate with the original concept.<sup>37</sup> Put another way, these mental blueprints sort “our experiences and acquired knowledge” and organize them into categories that function like containers.<sup>38</sup> “[S]chemas influence every feature of human cognition, affecting not only what information receives attention, but also how that information is categorized, what inferences are drawn from it, and what is or is not remembered.”<sup>39</sup> We automatically infer character from behavior, “experience affective reactions to a variety of objects,” and behave in

32. See *id.* (stating that implicit bias is “largely automatic” and that because it occurs so rapidly, often there is no time for consideration or correction).

33. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498 (2005) (defining a schema as a “cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes” (quoting SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 98 (2d ed. 1991))).

34. Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 700 (1994).

35. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 265 (2009).

36. See ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 303 (1999) (“[A] wide range of our thoughts, feelings, and behaviors can be triggered automatically by particular conflagrations of cues, without any intention or awareness on our part.”).

37. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1119 (2008) (providing an example of a schema that “fancy restaurants in suburbs are likely to be a site of discrimination against black customers,” which would be “informed by specific knowledge of the long history of anti[-]black discrimination in restaurants” (footnote omitted)); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 700 (1994) (“Consider, for example, the schema that applies to the following situation: *John went to a party. The next morning he woke up with a headache.* Now it is common knowledge that people drink too much at parties and wake up the next day feeling hungover. The situation described leaves out the explanation. But we have no trouble supplying it. There is a schema in our head that quickly comes to mind to provide that explanation.”).

38. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 265 (2009).

39. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1131 (2004).



accordance with traits prompted by recent experiences.<sup>40</sup> For example, if an individual is introduced as a professor, a “professor schema” may be activated and we might associate this person with wisdom, authority, or past experiences with a professor. In this way, we can understand how stereotypes are formed—they are developed from our experiences and the associations our minds make between concepts, such as social groups, and certain attributes.<sup>41</sup>

People create different event schemas, or scripts, which help them to understand how a process, or event, occurs.<sup>42</sup> Because individual experiences create schemas, the way each person perceives a particular situation may be different.<sup>43</sup> When an individual’s cognitive mind unconsciously selects a script to interpret a situation, that individual’s judgments “will be based on the assumptions derived from” the social knowledge embedded in the script, rather than on the unique characteristics of the particular situation.<sup>44</sup> Scripts not only function as cognitive shortcuts that provide meaning to a set of events, but they also reinforce traditional cultural and societal values.<sup>45</sup> For example, in a study

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40. ZIVA KUNDA, MAKING SENSE OF PEOPLE, SOCIAL COGNITION 303 (1999).

41. See, e.g., Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 741 (1995) (“Stereotypes consist of well-learned sets of associations among groups and traits established in children’s memories at an early age, before they have the cognitive skills to decide rationally upon the personal acceptability of the stereotypes.” (footnote omitted)).

42. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1139 (2004) (“Scripts are in some ways like recipes—helping us interpret both the things we see and the things we do not see. If we observe a person paying a bill and leaving a restaurant, a restaurant script triggers knowledge of earlier events that have happened: The customer has ordered, been served, and eaten food.”).

43. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1118–19 (2008) (explaining how white and black observers perceived differently a scenario in which an African-American family is seated near the back of the restaurant and for ten minutes, the parents attempt to get the waiter’s attention to ask for menus and order food). Professor Robinson predicts that white participants would likely state they did not consider that the placement of the family’s table might have a racial correlation, while black observers might fill in the informational gaps with the assistance of a schema, such as, “fancy restaurants in suburbs are likely to be a site of discrimination against black customers.” *Id.*

44. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 299 (2009); see also Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1006 (2006) (“In discrimination cases, as elsewhere, judges are constantly using ‘intuitive’ or ‘common sense’ psychological theories in the construction and justification of legal doctrines and in their application to specific legal disputes.”).

45. See, e.g., Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1132 (2004) (“[O]ne of the key findings of social cognition literature is that the absence of clear concepts and categories increases the

conducted by the Heldrich Center for Workplace Development at Rutgers University, “[h]alf of the African-American respondents said that ‘African-Americans are treated unfairly in the workplace,’ while just 10% of white respondents agreed with that statement. Thirteen percent of nonblack people of color shared this perception.”<sup>46</sup> There is also evidence from polls, while mixed, suggesting that men and women perceive discrimination differently.<sup>47</sup> For example, in a recent Pew Research survey, 75% of Millennial women said that more changes are necessary to attain gender parity in the workplace; only 57% of Millennial men agreed.<sup>48</sup>

Although relying on schemas, such as stereotypes, is cognitively efficient, “the price we pay for such efficiency is bias in our perceptions and judgments.”<sup>49</sup> It is extremely difficult for the individual to deviate from what the script has taught her about the world because the outcome suggested by the script will seem to be a natural result of precedent events.<sup>50</sup> Stereotypes are resistant to change because perceptions become impervious to new information.<sup>51</sup> People give more consideration to information that is consonant with a stereotype and give less credence to information that is stereotype-inconsistent; they not only seek out information that is consistent with the stereotype, but also better

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cognitive energies required to process information and thus deters individuals from learning new ideas or processing new information.”).

46. Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1107 (2008) (quoting K.A. DIXON, DUKE STOREN & CARL E. VAN HORN, JOHN J. HELDRICH CTR. FOR WORKPLACE DEV., RUTGERS UNIV., *A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB* 8 (2002), available at [http://www.heldrich.rutgers.edu/sites/default/files/content/A\\_Workplace\\_Divided.pdf](http://www.heldrich.rutgers.edu/sites/default/files/content/A_Workplace_Divided.pdf)).

47. See, e.g., *id.* at 1113 (highlighting data that suggests men and women perceive discrimination, particularly sexual harassment, differently).

48. *On Pay Gap, Millennial Women Near Parity—For Now*, PEW RES. SOC. & DEMOGRAPHIC TRENDS (Dec. 11, 2013), <http://www.pewsocialtrends.org/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now/>.

49. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 11 (1994) (citing RICHARD E. NISBETT & LEE ROSS, *HUMAN INFERENCES: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 113–38 (1980)).

50. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 265 (2009); see also Gerald Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 15 (1984) (“Man inadvertently reveals certain judgmental tendencies in coping with the world. Whenever he responds, Man depends on what first comes to mind, on what is available. He judges frequency, probability, and causality on the basis of the most easily generated information.” (footnotes omitted)).

51. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 11 (1994) (citing RICHARD E. NISBETT & LEE ROSS, *HUMAN INFERENCES: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 113–38 (1980)).

remember stereotype-consistent information.<sup>52</sup> “[W]e see what we expect to see. Like well-accepted theories that guide our interpretation of data, schemas incline us to interpret data consistent with our biases.”<sup>53</sup>

In the 1990s, Mahzarin Banaji, Anthony Greenwald, and their colleagues developed the Implicit Associations Test (IAT) and have since been using the test to conduct social cognition research on implicit racial bias.<sup>54</sup> The IAT pairs an attitude object (such as a racial group) with an evaluative dimension (good or bad) and tests how response accuracy and speed indicate implicit and automatic attitudes and stereotypes.<sup>55</sup> For example, in one task, participants are told to quickly pair together pictures of African-American faces with positive words from the evaluative dimension.<sup>56</sup> The strength of the attitude or stereotype is determined by the speed at which the participant pairs the words.<sup>57</sup> The results from hundreds of thousands of IATs taken on the IAT project’s website expose systematic implicit racial biases.<sup>58</sup>

There is a trove of evidence suggesting that implicit biases, measured by the IAT, can affect interaction with others<sup>59</sup> and can predict discriminatory behavior in the real world.<sup>60</sup> For example, an experiment

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52. See Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, U. CIN. L. REV. 97, 143 (2010) (“Just as one tends to seek out information that confirms one’s expectations, one also tends to better remember expectation-consistent information.” (footnote omitted)).

53. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1515 (2005) (footnote omitted) (citing EDWARD E. SAMPSON, *DEALING WITH DIFFERENCES: AN INTRODUCTION TO THE SOCIAL PSYCHOLOGY OF PREJUDICE* 121–22 (1999)).

54. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995); Anthony G. Greenwald, Debbie E. McGhee, & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998).

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

56. *Id.*

57. *Id.*

58. Clear evidence of the pervasiveness of implicit bias comes from Project Implicit, a research website operated by research scientists, technicians, and laboratories at Harvard University, Washington University, and the University of Virginia. *About Us*, PROJECT IMPLICIT, <http://www.projectimplicit.net/index.html> (last visited Mar. 25, 2014).

59. JERRY KANG, NAT’L CENTER FOR ST. CTS., *IMPLICIT BIAS: A PRIMER FOR COURTS* 4 (2009), available at [http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit\\_3\\_kang.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf); see also Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 954 (2006) (“[M]any studies that have used an IAT attitude measure have also included a measure of one or more social behaviors that are theoretically expected to be related to attitude or stereotype measures.”).

60. See JERRY KANG, NAT’L CENTER FOR ST. CTS., *IMPLICIT BIAS: A PRIMER FOR COURTS* 4

featuring doctors making patient assessments provides an example of discriminatory behavior predicted by implicit bias measures.<sup>61</sup> “Physicians with stronger implicit anti-black attitudes and stereotypes” were not as likely to prescribe a medical procedure for African-Americans compared to white Americans with the same medical profiles.<sup>62</sup> In addition, implicit measures are relatively better predictors of “spontaneous behaviors such as eye contact, seating distance, and other such actions that communicate social warmth or discomfort.”<sup>63</sup> When interacting with a member of a stigmatized group, a person with a more resilient adverse attitude toward that particular group tends to display more negative behaviors, such as blinking, and fewer positive behaviors, like smiling.<sup>64</sup> Significantly, implicit biases cause a person to interpret identical actions by people of various racial and ethnic groups differently, depending on one’s own group membership.<sup>65</sup> For example, people with higher implicit bias towards

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(2009), available at [http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit\\_3\\_kang.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf) (“There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world—in ways that can have real effects on real lives.”); Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 436 (2007) (noting that implicit bias predicts discriminatory behaviors in individuals); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 759 (2001) (revealing that implicit bias predicts more negative evaluations of agentic (i.e., confident, aggressive, ambitious) women in certain hiring conditions); see also Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence* 5 (Inst. for the Study of Labor, Discussion Paper No. 2764, 2007), available at <http://ftp.iza.org/dp2764.pdf> (reporting that implicit bias predicts the rate of callback interviews based on an implicit stereotype in Sweden that Arabs are lazy).

61. Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 430 (2007).

62. *Id.*

63. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 955 (2006); see also Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 640 (2003) (explaining that implicit bias predicts how individuals read the friendliness of facial expressions).

64. Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 436 (2007); see JERRY KANG, NAT’L CENTER FOR ST. CTS., IMPLICIT BIAS: A PRIMER FOR COURTS 4 (2009), available at [http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit\\_3\\_kang.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf) (“[I]mplicit bias predicts awkward body language[,] which could influence whether folks feel that they are being treated fairly or courteously.” (citations omitted)).

65. See Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 436 (2007) (showing that “[p]eople with higher implicit bias judged ambiguous actions by a black or Turkish target more negatively” than ambiguous actions by a white target (citations omitted)); see also Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 134 (2002) (reviewing research that shows implicit bias predicts more negative evaluations of ambiguous actions by an African-American).

certain groups judged ambiguous actions and facial expressions by members of that group more negatively.<sup>66</sup> These manifestations of implicit bias, even among people who strive to be impartial, can significantly impact an attorney's ability to effectively represent clients.<sup>67</sup>

#### B. *Reducing the Effects of Implicit Bias in Client Representation*

Cognitive science teaches us that our own experience is the unconscious starting point for decision-making and provides a lens through which we understand others.<sup>68</sup> Although reliance on ingrained schemas is difficult to overcome, implicit biases caused by categories and schemas may be mitigated, or even eliminated,<sup>69</sup> by first recognizing that race, gender, sexual orientation, and other social categories may be influencing decision-making; in doing so we rely “less mindlessly on a given schema and scrutinize[] more thoroughly the available data.”<sup>70</sup> Research shows that “[t]he path from implicit bias to negative behavior does not appear immutable.”<sup>71</sup> Awareness of implicit biases and motivation to act in a non-prejudiced manner are critical to mitigating the effects of implicit bias on behavior.<sup>72</sup>

“Current models of prejudice and stereotype reduction argue that prejudice-free responses require perceivers to be aware of their biases; to be motivated to change their responses because of personal values, feelings of guilt, compunction, or self-insight; and to possess cognitive resources necessary to develop and practice correction strategies.”<sup>73</sup> Experiments

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66. Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 436 (2007).

67. See Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 411 (2002) (“Those biases will have a substantial effect on our work if we do not confront them.”).

68. Shawn C. Marsh, *The Lens of Implicit Bias*, JUV. & FAM. JUST. TODAY, Summer 2009, at 16, 17, available at [http://www.ncjfcj.org/sites/default/files/The%20Lens%20of%20Implicit%20Bias\\_0.pdf](http://www.ncjfcj.org/sites/default/files/The%20Lens%20of%20Implicit%20Bias_0.pdf); see also Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 408 (2002) (“[A]s a professional you need to explore and confront your own cultural influences and the extent of your unconscious (or conscious) biases, including your own racism, sexism, and homophobia.”).

69. See Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1229 (2004) (suggesting that biases and reliance on schemas may be eliminated).

70. *Id.*

71. Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 437 (2007).

72. *Id.*; see also Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 143–44 (2010) (agreeing that it is possible to control “the effects of automatic stereotypes”).

73. Nilanjana Dasgupta & Anthony Greenwald, *On the Malleability of Automatic Attitudes:*

conducted by Irene Blair and Mahzarin Banaji revealed that, while stereotype activation is an automatic process, people can control or eliminate the effect of stereotypes on their judgments if they have the intention to do so and their cognitive resources are not over-constrained.<sup>74</sup> Reliance on implicit biases is thus mitigated through creative analysis,<sup>75</sup> which includes the “creation of new categories, openness to new information, and awareness of more than one perspective.”<sup>76</sup>

A growing body of research provides evidence that perspective-taking, or imagining oneself in the shoes of someone from a different social or ethnic group, is a cognitive strategy that can reduce stereotyping.<sup>77</sup> To successfully perform this “particular feat of mental gymnastics,” a person must actively consider another person’s mental state and then try to experience or infer the other person’s perceptions.<sup>78</sup> Recent experiments using various interventions to make participants engage in more perspective-taking have demonstrated that actively contemplating others’ psychological experiences weakens the “automatic expression of racial biases.”<sup>79</sup> For example, in one experiment, before viewing a five-minute video of a black man being treated worse than an identically situated white man, participants were asked to imagine “what they might be thinking, feeling, and experiencing if they were Glen [the black man], looking at the

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*Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 82 J. PERSONALITY & SOC. PSYCHOL. 800, 800 (2001) (citations omitted).

74. Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1159 (1996).

75. See Shawn C. Marsh, *The Lens of Implicit Bias*, JUV. & FAM. JUST. TODAY, Summer 2009, at 16, 19, available at [http://www.ncjfcj.org/sites/default/files/The%20Lens%20of%20Implicit%20Bias\\_0.pdf](http://www.ncjfcj.org/sites/default/files/The%20Lens%20of%20Implicit%20Bias_0.pdf) (“Mindfulness is a concept drawn from the cognitive behavioral therapies that encourage being in the moment, understanding your thought processes, developing awareness, and challenging thinking errors.”).

76. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1235 (2004) (quoting ELLEN LANGER, *MINDFULNESS* 61–79 (1989)) (internal quotation marks omitted).

77. See, e.g., Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78 J. PERSONALITY & SOC. PSYCHOL. 708, 722 (2000) (concluding that perspective-taking can diminish an individual’s application of stereotypes).

78. See Nicholas Epley & Eugene M. Caruso, *Perspective Taking: Misstepping into Others’ Shoes*, in *HANDBOOK OF IMAGINATION AND MENTAL SIMULATION* 295, 297 (Keith D. Markman et al. eds., 2009) (“[T]here is no more immediate barrier to accurate perspective[-]taking than failing to use it in the first place.”).

79. Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027, 1027 (2011); see also Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1233 (2011) (detailing psychological research that suggests ways to reduce the effects of cognitive biases).

world through his eyes and walking in his shoes as he goes through the various activities depicted in the documentary.”<sup>80</sup> The control group was told to “remain objective and emotionally detached.”<sup>81</sup> In other variations, requiring participants to write an essay imagining a day in the life of a young black male triggered perspective-taking.<sup>82</sup> These perspective-taking activities substantially decreased implicit bias as measured by the IAT and behavioral changes.<sup>83</sup> For example, the researchers found that those in the perspective-taking condition chose to sit closer to a black interviewer,<sup>84</sup> and black experimenters rated their interaction with white participants put in the perspective-taking condition more positively.<sup>85</sup>

As discussed below, understanding how judgments are susceptible to the influence of implicit bias and being motivated to control the effects of biases are critical to effective and ethical client representation.

### C. *Advocacy and Decision-making: Understanding the Impact of Implicit Bias*

An attorney has ethical obligations as “a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”<sup>86</sup> As one who is obligated to “seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession,”<sup>87</sup> an attorney should be concerned about the influence of implicit biases on her

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80. Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027, 1030 (2011); see also Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78 J. PERSONALITY & SOC. PSYCHOL. 708, 721 (2000) (reporting that perspective-taking decreases “the accessibility and application of stereotypes”).

81. Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027, 1030 (2011).

82. *Id.* at 1031.

83. *Id.* at 1035; see also Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1276 (2002) (showing that people may not be able to do much about the automatic activation of stereotypes, but they can behave “in substantially nonprejudiced ways” if properly motivated); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 963–65 (2006) (“Implicit biases are malleable.”); Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 438 (2007) (“Conscious exertion to be unbiased may—at least temporarily—reduce implicit bias.”).

84. Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027, 1035 (2011).

85. *Id.* at 1037.

86. MODEL RULES OF PROF'L CONDUCT pmb1. (1) (2011).

87. *Id.* at pmb1 (6).

own judgment and in legal decision-making.<sup>88</sup> As the ABA's Task Force on Implicit Bias has stated, "[U]nderstanding implicit bias and ways to debias one's approach to law-related issues and decisions is critical to a fair and representative perception and reality of access to justice and equity."<sup>89</sup> The Model Rules of Professional Conduct prohibit attorneys from exhibiting bias or prejudice "based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, . . . when such actions are prejudicial to the administration of justice."<sup>90</sup> Thus, understanding one's own implicit biases is also critical for ethical and effective client representation.<sup>91</sup> To do so requires the attorney to explore and acknowledge her own implicit biases resulting from cultural and societal influences, which may manifest as unconscious racism, sexism, ageism, or homophobia.<sup>92</sup>

These implicit biases can influence an attorney's interactions with a client from the first meeting and interview.<sup>93</sup> As experienced attorneys

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88. See *What Is Implicit or Unconscious Bias*, A.B.A., <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/what-is-implicit-bias.html> (last visited Apr. 1, 2014) (highlighting the problems created by implicit biases, particularly in the legal profession); cf. Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 CLINICAL L. REV. 329, 330 (2006) (expressing concern that lawyers do not hear their clients' stories, thus hindering effective representation); Linda F. Smith, *Always Judged—Case Study of an Interview Using Conversation Analysis*, 16 CLINICAL L. REV. 423, 441 (2009) ("Ethnographic studies that have considered attorney-client conversations focus on the relationship that the attorney and client develop and the degree to which the attorney comes to understand the client's perspective. These studies have been largely critical of the attorneys, noting their substantial failure to understand or honor the clients' views.").

89. *What Is Implicit or Unconscious Bias*, A.B.A., <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/what-is-implicit-bias.html> (last visited Apr. 1, 2014).

90. MODEL RULES OF PROF'L CONDUCT, R. 8.4 cmt. 3 (2011); see also Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1578 (2013) (reiterating that ethical rules preclude lawyers from discriminatory manifestations).

91. See Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 407–08 (2002) (advocating that attorneys examine and confront their own implicit biases).

92. See Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 769 (2004) (noting the potential for implicit bias to negatively affect the attorney-client relationship, and urging lawyers to acknowledge those biases in order to work toward overcoming them); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 415–16 (2002) (calling for lawyers to "confront their own cultural identity, including the biases and prejudices that accompany that identity").

93. See Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 769 (2004) ("You may feel that you could never possibly understand your client because the two of you differ so much in terms of gender, race, class, culture, religion, sexual orientation, or citizenship status or other factors."); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 408 (2002) (describing how implicit biases can be detrimental to effective representation of



understand, establishing rapport and gaining trust are critical to effective client representation.<sup>94</sup> A lawyer must gain the client's trust and confidence to understand the client's goals and objectives.<sup>95</sup> Psychological research demonstrates that people usually remember and reveal more information when they feel at ease, and they may be more willing to accept professional advice when they trust their advisor.<sup>96</sup> Certain behaviors, such as leaning forward when speaking to a person, not crossing one's arms, smiling, and nodding have been shown to help establish rapport.<sup>97</sup> However, implicit biases can impede an attorney's ability to establish rapport because an attorney who harbors implicit biases about a particular group may exhibit negative behaviors, such as unevenness in eye contact, leaning back, or looking down while taking notes.<sup>98</sup> When interviewing a client who is a member of a stigmatized group, an attorney unaware of her implicit biases and their effects could unconsciously send signals of distrust or disinterest to the client with her tone of voice, demeanor, eye contact, facial expressions, and body language.<sup>99</sup>

Attorneys can establish rapport during client interviews by allowing clients to describe their situation in their own words without interruptions, engaging in "active listening," and showing empathy by acknowledging the

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clients); cf. Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 442 (2007) (analyzing court opinions that recognize "implicit bias may affect the perceptions of participants in the legal system").

94. Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 442 (2008); see also Linda F. Smith, *Was It Good for You Too? Conversation Analysis of Two Interviews*, 96 KY. L.J. 579, 643-47 (2008) (encouraging attorneys to allow the client "substantial opportunity to talk" in order to establish rapport). See generally Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755 (2004) (providing practitioners with tips and guidelines for establishing a good lawyer-client relationship).

95. See, e.g., Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 499 (2008) ("Trust is central to the attorney-client relationship.").

96. *Id.* at 503.

97. *Id.*; see also Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogue and Commentary*, 10 CLINICAL L. REV. 755, 762 (2004) (explaining how to convey "empathy, sympathy, approval and support," and stressing their efficacy in good lawyer-client communication).

98. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 955 (2006) (asserting that implicit biases can predict "spontaneous behaviors" like eye contact and seating distance); Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 436 (2007) ("Nonverbal behaviors such as facial expressions, eye contact, and body posture have been shown to leak implicit attitudes.").

99. Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 436 (2007).

client's feelings.<sup>100</sup> Because a client's background and facts may be completely different from any situation an attorney has experienced personally, it is important for the attorney to listen attentively to absorb and appreciate the client's specific circumstances, feelings, and goals.<sup>101</sup> As the research described in the previous section suggests, perspective-taking can mitigate the effects of implicit bias.<sup>102</sup> Effective lawyers already understand the importance of perspective-taking when representing clients.<sup>103</sup> Professor Menkel-Meadow emphasizes that "lawyers need to learn to experience 'the other' from the values that the *other* holds, *not those of the lawyer*—this is the challenge of most lawyer–client relations and lawyer–opposing side relations."<sup>104</sup> Professor Grose has likewise stated, "Being a lawyer is about representing people: asking questions that elicit stories that we can hear and understand and retell. To be able to ask those questions and hear and retell those stories, we must learn to understand human motivation that is different from our own."<sup>105</sup> To understand the experiences, behaviors, and feelings of others as they experience them requires lawyers to put aside their own biases, prejudices, and points of view.<sup>106</sup>

Attorneys have a duty to "act with reasonable diligence."<sup>107</sup> This means that a lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."<sup>108</sup> In order to represent a client's interest diligently, an attorney must first understand the client's goals and motives.<sup>109</sup> Implicit biases

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100. Linda F. Smith, *Always Judged—Case Study of an Interview Using Conversation Analysis*, 16 CLINICAL L. REV. 423, 441 (2010); Linda F. Smith, *Was It Good for You Too? Conversation Analysis of Two Interviews*, 96 KY. L.J. 579, 579–80 (2008).

101. Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 763 (2004).

102. See, e.g., Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027, 1030 (2011) (recounting an experiment in which perspective-taking reduced the effect of implicit bias).

103. See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 620 (1994) ("[T]he good lawyer needs to understand, from a human point of view, what the other wants to happen in the world . . .").

104. *Id.* (emphasis added).

105. Carolyn Grose, *A Field Trip to Benetton . . . and Beyond: Some Thoughts on "Outsider Narrative" in a Law School Clinic*, 4 CLINICAL L. REV. 109, 126 (1997).

106. See, e.g., Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 436, 543 (2008) ("[A]ttorneys need to be aware of the use of such heuristics in their own thinking.").

107. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2011).

108. *Id.* at R. 1.3 cmt. 1.

109. See Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists*:

may interfere with an attorney's ability to comprehend and represent a client's story.<sup>110</sup> Attorneys may be implicitly biased by the appearance of their clients, their race, religion, or age, which could lead to incorrect presumptions and judgments.<sup>111</sup> For example, an attorney may assume that an untidy woman is an unfit parent, or that a disabled person should be identified as a victim.<sup>112</sup> Assumptions and implicit biases may prevent an attorney from learning all information potentially advantageous to understanding her client's goals and experiences.<sup>113</sup> These biases will operate to categorize clients and their cases based on experiences with other clients or assumptions about them.<sup>114</sup> When interviewing a client, an attorney may be inclined to ask narrowly tailored questions that confirm, rather than challenge, those assumptions.<sup>115</sup> Recognizing the tendency for implicit biases to affect one's judgments about people can help an attorney make efforts to ask questions that will take him beyond these stereotypes.<sup>116</sup>

Ignoring the influence of implicit bias will lead an attorney to risk misunderstanding her clients.<sup>117</sup> This misunderstanding may cause frustration ("My client just isn't making any sense!"),<sup>118</sup> and perhaps more significantly, failure to achieve the client's objectives.<sup>119</sup> Our assumptions and implicit biases about who people are, their behavior, and their needs, among other characteristics, can impair our ability to understand the actual

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*Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 436, 497 (2008) ("They may feel a wide variety of emotions relating to their situation—including anger, guilt, embarrassment, or fear—and may be interested in pursuing a wide variety of goals.").

110. See, e.g., Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 408 (2002) ("[A]s a professional you need to explore and confront your own cultural influences and the extent of your unconscious (or conscious) biases . . .").

111. Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 459 (2008).

112. See, e.g., Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 252 (2001) (pointing out potential issues that may arise as a result of stereotypes in a lawyer–client relationship where the client is disabled).

113. Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 459–60 (2008).

114. See *id.* at 530 ("[D]ecisionmaking is often influenced by such previous investments.").

115. *Id.* at 455–56.

116. See *id.* at 456 ("[I]t is also possible that lawyers could use their experiences to construct and pursue alternative hypotheses that broaden the inquiry.").

117. Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 412 (2002).

118. *Id.* (internal quotation marks omitted).

119. *Id.*

person before us.<sup>120</sup> Professor Grose has asserted that attorneys must “engage in critical reflection” to recognize the assumptions through which we filter all information, such as how we define and classify individuals who seek out our legal advice.<sup>121</sup> Reflecting upon the influence of implicit biases will lead an attorney to question why connecting with or understanding the client is difficult.<sup>122</sup> Understanding the role of implicit biases in coloring perceptions can help an attorney appreciate a client’s story that appears to make little sense or a client’s decision to pursue what appears to be an ill-conceived strategy, which “might be perfectly reasonable with another’s lens and another’s bundle of preferences and values.”<sup>123</sup> Additionally, recognizing the distorting effects of implicit biases on another person’s stories and experiences can help an attorney be less judgmental about her clients’ values and decisions.<sup>124</sup>

Lawyering also requires the exercise of judgment regarding a client’s available choices.<sup>125</sup> According to Model Rule 2.1, “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social[,] and political factors that may be relevant to the client’s situation.”<sup>126</sup> An attorney’s implicit biases and other schemas will affect how she understands her client and may determine the advice she provides to the client.<sup>127</sup> For example, schemas may cause the attorney to make incorrect

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120. Carolyn Grose, *A Persistent Critique: Constructing Clients’ Stories*, 12 CLINICAL L. REV. 329, 358–59 (2006).

121. *Id.* at 359.

122. *Id.*

123. Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 412 (2002) (footnote omitted).

124. *Id.*

125. See Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 531 (2008) (explaining that an attorney must “do her best to describe client options in an evenhanded manner”).

126. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2011).

127. See Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1578 (2013) (positing that unconscious bias can affect interaction with clients); Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 452 (2008) (“[P]reconceptions can be important to interpreting data and therefore can strongly influence all other tasks that depend on this most basic inferential undertaking.” (quoting RICHARD E. NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 67 (1980) (internal quotation marks omitted))); cf. Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 430 (2007) (reporting that physicians with stronger anti-black implicit attitudes were not as likely to prescribe certain medications to black patients than similarly situated white patients).

assumptions about the clients' goals.<sup>128</sup> Although an attorney's primary objective in resolving a dispute may be to maximize his monetary recovery, his client may be more concerned with repairing a relationship, obtaining an apology, or dealing with the emotions, such as guilt, embarrassment, or fear, triggered by the situation.<sup>129</sup> Understanding how these initial schemas can influence perception may allow the attorney to realize that the client is concerned primarily with non-monetary issues, and that the client's dispute might be better resolved through courses of action other than litigation.<sup>130</sup> As Rule 2.1 indicates, an attorney should consider relevant moral, economic, and social considerations when advising a client.<sup>131</sup> Determining whether these considerations are relevant may require an attorney to move beyond her schemas.<sup>132</sup>

An attorney must not only comprehend her client's story, but must then "stand in the shoes" of the client when she communicates the client's experiences, goals, and aspirations to a legal audience.<sup>133</sup> As storytellers, lawyers weigh factors such as the law, the audience, and the client's goals to craft the story.<sup>134</sup> They must distill facts and decide which ones are

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128. See Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 341, 361 (2007) (discussing a study which determined that plaintiffs' litigation objectives "rarely correlated with what legal actors perceived as their prime litigation aims"); Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 436, 453 (2008) (commenting that lawyers' schemas may make them focus more on monetary recovery as a measure of success in litigation, rather than the client's particular needs or goals).

129. Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 436, 497 (2008); see also Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 260 (2000) (claiming that the lawyer-client relationship will "be enhanced by the lawyer's recognition and resolution of strong emotional reactions—positive or negative—towards a client" and, conversely, "a lawyer's inability to come to terms with such emotions" affect the representation).

130. Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 436, 453 (2008).

131. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2011); see also Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 436, 453 (2008) (urging lawyers to consider "non-legal issues" as part of "the ethical practice of law").

132. Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 436, 453 (2008).

133. See *id.* at 491 ("[T]he relevant psychology suggests that the empathetic lawyer can . . . learn more from and provide more information to his client, as well as build better rapport and trust.").

134. Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ASS'N LEGAL WRITING DIRECTORS 37, 44 (2010).

significant.<sup>135</sup> In writing the story for the court, the lawyer chooses each word and how to tell the story.<sup>136</sup> By “pick[ing] and choos[ing] from available facts to present a picture of what happened,”<sup>137</sup> a story told by a lawyer reflects what matters to her.<sup>138</sup> Each element of the story is the product of conscious and unconscious choices made by the storyteller.<sup>139</sup> Thus, an attorney’s own experiences, biases, and values can affect her ability to convey the client’s story.<sup>140</sup> Because a lawyer exercises her discretion when creating and conveying a compelling story, it is critical that she understands the influence of her own values or judgment.

Implicit biases play a role in the attorney’s interactions with a client, her ability to understand and appreciate the client’s situation and objectives, and her ability to accurately represent her client’s story to a legal audience.<sup>141</sup> An attorney also must understand the impact of implicit biases on the listener of a client’s story (the judge for purposes of this Article).<sup>142</sup> This discussion will follow a brief overview of judicial decision-making research.

### III. INFLUENCE OF IMPLICIT BIAS ON JUDICIAL DECISION-MAKING

#### A. *Brief Overview of Judicial Decision-making Research*

“[J]udges’ early lives, their experiences both on and off the bench, and their professional careers instill in them certain ideas, beliefs and attitudes about issues and people . . . .”<sup>143</sup> Although most judges believe they are objective and able to avoid the influence of biases,<sup>144</sup> recent studies have demonstrated that even the most qualified judges may rely on intuitive

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135. *Id.* at 44–45.

136. *Id.* at 44.

137. *Id.* (quoting Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2421 (1988)).

138. *Id.*

139. *Id.* at 41.

140. *Id.* at 44.

141. *See id.* (discussing how an attorney’s weighing of the substance of a case—including factual elements, legal factors, and a client’s goals—can affect how the attorney tells the client’s story and how the audience interprets the same story).

142. *See id.* at 44–46 (“Lawyers should use [context] clues to help guide their ongoing pursuit of the client’s narrative and to work with the client to construct a story that will engage the decisionmaker’s curiosity and compassion without triggering his disbelief or dismissal.”).

143. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 19–20 (1994).

144. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009) (reporting that 97% of judges in an educational program rated themselves in the top half of the judges attending the program “in their ability to avoid racial prejudice in decision[-]making”).

thought processes, resulting in judgment that is flawed with systemic errors.<sup>145</sup> Judges, like everyone, are the result of their race,<sup>146</sup> ethnic background, nationality, socioeconomic situation,<sup>147</sup> gender,<sup>148</sup> sexual orientation, religion, and ideology.<sup>149</sup> “Ideally, judges reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors.”<sup>150</sup> However, this ideal does not coincide with the findings of behavioral scientists, whose research has shown that the human mind is a complex mechanism; regardless of conscious or avowed biases and prejudices, most people, no matter how well-educated or personally committed to impartiality, harbor some implicit biases.<sup>151</sup> As Judge Posner explains, using intuition is inevitable and “compelled by the institutional structure of adjudication.”<sup>152</sup> Judges make hundreds, if not thousands, of judicial decisions in the course of a year, and they have not the time, before or after casting votes, to engage in “elaborate analytical

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145. See Nicole Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, AKRON L. REV. 29–33 (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2164325](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164325) (discussing studies of judicial decision-making and the influence of implicit biases).

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

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

148. Neil A. Lewis, *Debate on Whether Female Judges Decide Cases Differently*, N.Y. TIMES, June 3, 2009, at A16 (analyzing Justice Ginsburg’s arguments in a Supreme Court case involving the appropriateness of the strip search of a thirteen-year-old girl by school authorities). Justice Ginsburg’s experience as a female may have influenced her interpretation of the issues and brought a new perspective that would not have been expressed in her absence. *Id.*; see also Nicole Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, AKRON L. REV. 5–6 (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2164325](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164325) (reviewing the factors influencing judges intuitive thought processes and decisions).

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

150. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 4 (1994) (footnote omitted).

151. See *id.* at 5 (commenting that a judge’s blind faith in her impartiality may create “a false sense of confidence” in her decisions, which may cause her to “fail to take into account the unavoidable influences we all experience as human beings”).

152. RICHARD POSNER, HOW JUDGES THINK 110 (2008).

procedures.”<sup>153</sup> The conditions under which judges must make decisions inevitably lead to reliance on intuitive thinking that can lead to “illusions of judgment.”<sup>154</sup> Given the severe time constraints at every stage of the decision-making process, “the judge’s reasoning process is primarily intuitive.”<sup>155</sup> Judgments based upon intuition, personal background, or previous experiences can be unreliable grounds for judicial decision-making<sup>156</sup> because of the likelihood that implicit biases will influence the decision.<sup>157</sup>

As explained in the previous section, an attorney’s primary role is to effectively present a client’s story, so that it is heard and accepted by the decisionmaker.<sup>158</sup> When crafting a client’s story, an attorney must realize that it will be understood through the stories already existing in the mind of the judge.<sup>159</sup> These “background” or “stock” stories based on one’s past experiences are stereotypes about what it means to be an employee, a parent, etc.<sup>160</sup> “When a listener can identify a stock story sufficiently similar to his own, he makes a ‘likeness judgment.’”<sup>161</sup> To process information rapidly and efficiently, the listener compares the facts of the

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153. *Id.*

154. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 783 (2001) (“[J]udges make decisions under uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts that sometimes cause illusions of judgment.”).

155. RICHARD POSNER, *HOW JUDGES THINK* 110 (2008).

156. See Linda L. Berger, *A Revised View of the Judicial Hunch*, 18 LEGAL COMM. & RHETORIC: J. ASS’N LEGAL WRITING DIRECTORS 1, 18 (2013) (“[J]udicial intuition [is] unreliable because judges are unlikely to obtain accurate and reliable feedback on most of the judgments they make.” (internal quotations omitted)).

157. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (“Although the judges displayed less vulnerability to [illusions of judgment] than other experts and laypersons . . . under certain circumstances judges rely on heuristics that can lead to systematically erroneous judgments.”).

158. See, e.g., Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ASS’N LEGAL WRITING DIRECTORS 37, 46 (2010) (opining that attorneys persuade by storytelling); see also Margaret Moore Jackson, *Confronting “Unwelcomeness” from the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 CARDOZO J.L. & GENDER 61, 77 (2007) (“Stories and storytelling are central components of law and law practice.”).

159. See, e.g., Margaret Moore Jackson, *Confronting “Unwelcomeness” from the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 CARDOZO J.L. & GENDER 61, 78 (2007) (declaring that before telling client stories, an attorney must be aware of “the stories already in the minds of the intended audience”).

160. *Id.*

161. Diana Lopez Jones, *Stock Stories, Cultural Norms, and the Shape of Justice for Native Americans Involved in Interparental Child Custody Disputes in State Court Proceedings*, 5 PHOENIX L. REV. 457, 464 (2012) (footnote omitted).



story with a stock story that he already knows, generally accepting the stock story without analyzing it independently.<sup>162</sup> The result of this information processing in legal decision-making is that the story most familiar to the judge is usually the one that prevails.<sup>163</sup> Due to the need to clear increasingly expanding dockets,<sup>164</sup> judges may substitute their own stock stories for a litigant's unfamiliar story, rather than carefully process and analyze the new information.<sup>165</sup> For example, Professor Neitz recently argued that "[b]ecause judges are more economically privileged than the average individual litigant appearing before them, they may be unaware of the gaps between their own experiences and realities and those of poor people."<sup>166</sup> She explained that this class privilege may lead judges to assume that all people have comparable experiences.<sup>167</sup> "Treating all parties as though they were socioeconomically identical rises beyond privilege to the level of bias, precisely because judges have a duty to consider the unique facts of every case."<sup>168</sup> The experiences of indigent litigants may be foreign to judges, thus making judges susceptible to socioeconomic bias in their decision-making processes.<sup>169</sup>

According to traditional lawyering wisdom, to win a case a lawyer must proffer the client's story so that it "resonates with the understanding and

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162. *Id.*

163. *Id.*

164. See, e.g., Hon. Mark W. Bennett, Essay, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 703 (2013) (lamenting that federal judges have tremendous case-loads); see also Diana Lopez Jones, *Stock Stories, Cultural Norms, and the Shape of Justice for Native Americans Involved in Interpersonal Child Custody Disputes in State Court Proceedings*, 5 PHOENIX L. REV. 457, 467–68 (2012) (criticizing the "unrelenting pressure" of judicial economy).

165. Diana Lopez Jones, *Stock Stories, Cultural Norms, and the Shape of Justice for Native Americans Involved in Interparental Child Custody Disputes in State Court Proceedings*, 5 PHOENIX L. REV. 457, 467–68 (2012); see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989) (describing the creation of "stories" to strengthen the cohesiveness of the group); Christopher Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 866 (1992) ("The story telling dilemma in law arises when authoritative discourse and knowledge impede the transfer of the storyteller's meaning and images. Hence the receiver's interpretive understanding of the story is often at odds with the message intended by the teller."); Gerald Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984) ("To solve a problem through persuasion of another, we . . . must understand and manipulate the stock stories the other person uses in order to tell a plausible and compelling story—one that moves that person to grant the remedy we want.").

166. Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 141 (2013).

167. *Id.*

168. *Id.*

169. *Id.* at 148.

expectations that the finder of fact has about a person in the client's situation."<sup>170</sup> However, this approach:

[L]imits possible stories a lawyer can tell on behalf of a disempowered client whose experiences, perspectives, and images are absent from the dominant legal narratives. . . .

. . . .

. . . . In order to win cases, . . . lawyers must fit their clients' stories into law's established terms by squeezing client identities, histories, and problems into universalized narratives. The reliance on precedent by both judges and lawyers blocks the recognition and understanding of stories told that do not fit with past authoritative accounts.<sup>171</sup>

Discussing the implications of these issues in detail is beyond the scope of this Article, but this narrative theory reveals the danger of implicit biases, which may hinder a judge's ability to understand and properly evaluate a litigant's story.<sup>172</sup> Attorneys should understand that although a case theory based on the client's story may sound plausible to the attorney and client, a judge may be unable to understand or credit the story because it seems unrealistic or improbable from his particular vantage point.<sup>173</sup> Vetting a case theory with colleagues, particularly those of different backgrounds, can thus be a valuable tool.

Armed with this understanding of judicial decision-making, how can an attorney argue her clients' cases in ways that will prevent judges from deferring to their implicit biases? As discussed above, motivation to avoid the influence of biases has been shown to mitigate the effects of these biases.<sup>174</sup> If a judge is unaware of how implicit biases operate or has no motivation to avoid these influences, is there anything an advocate can do

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170. Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 250 (2001).

171. Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 872–73 (1992) (footnotes omitted).

172. Many critical scholars have argued “that the law’s constraints make it impossible for stories that diverge from the dominant narrative to be heard and recognized.” Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 277 (2001).

173. See, e.g., Diana Lopez Jones, *Stock Stories, Cultural Norms, and the Shape of Justice for Native Americans Involved in Interparental Child Custody Disputes in State Court Proceedings*, 5 PHOENIX L. REV. 457, 467–68 (2012) (discussing problems with stock stories in the context of child custody disputes involving Native American litigants). Jones points out, for example, that “[t]ribal member litigants, particularly those raised in or around the reservation community, understand that their stock stories are wholly unfamiliar to judges in the dominant culture.” *Id.* at 467.

174. See, e.g., Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027, 1030 (2011) (finding that perspective-taking reduces the effects of implicit bias).

to prevent a judge's implicit biases from affecting his decision-making? Is she resigned to accept the influence of these biases and hope for an outcome not unjustly affected by them? Unfortunately, "[d]espite the threats to impartiality created by implicit bias on the part of judges, attorneys, and jurors, protections against it and its effects are few."<sup>175</sup> Although no studies have yet been conducted to directly answer this question, the following discussion identifies several procedural postures which are particularly susceptible to the influence of a judge's implicit biases and examines how awareness of these implicit bias pitfalls can inform an attorney's strategies.

B. *From Dispositive Motions to the Appeal: The Influence of Implicit Bias*

Analyzing the standards under which federal district court judges decide motions to dismiss and motions for summary judgment reveals the pitfalls of implicit bias in judicial decision-making.<sup>176</sup> In deciding whether to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6),<sup>177</sup> a district judge must decide whether the pleadings contain "enough facts to state a claim to relief that is plausible on its face."<sup>178</sup> Thus, a claim is facially "plausible" only when a "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."<sup>179</sup> In any civil case in federal court, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."<sup>180</sup> Instead, the plaintiff must

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175. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 838 (2012).

176. See Hon. Mark W. Bennett, Essay, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 706-07 (2013) (arguing that implicit biases may contribute to the high number of employment discrimination cases that are disposed of via summary judgment).

177. FED. R. CIV. P. 12(b)(6).

178. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief . . ." FED. R. CIV. P. 8(a)(2). In *Conley v. Gibson*, the Supreme Court interpreted this language as preventing the dismissal of a complaint under Rule 12(b)(6), "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In *Twombly*, the majority instead announced that pleadings must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Two years later in *Ashcroft v. Iqbal*, the Court emphasized that the plausibility standard of *Twombly* governs the pleading standard "in all civil actions and proceedings in the United States district courts." *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (quoting FED. R. CIV. P. 1) (internal quotation marks omitted).

179. *Iqbal*, 556 U.S. at 678.

180. *Id.*

support legal conclusions with “well-pleaded factual allegations,” which must be taken as true, if scrutinized, to see whether “they plausibly give rise to an entitlement to relief.”<sup>181</sup> Whether such facts give rise to a plausible claim for relief is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>182</sup> Judge Nancy Gertner explained the difficulty in applying this test: “What is plausible to me, what my common sense indicates, coming from where I come from, may not be what is plausible to other judges, what comports with their common sense.”<sup>183</sup> Stated another way, the differences among judges may lead one judge to dismiss a complaint, while another might determine that an indistinguishable claim survives, only because of the way “each judge applies his or her ‘judicial experience and common sense.’”<sup>184</sup> This standard:

[A]ppeals too much to judicial subjectivity, which inevitably depends (at least in part) on an individual judge’s background, values, preferences, education, and attitudes . . . . One does not have to be paranoid to be concerned that these highly individualistic considerations are at work and impacting a district judge’s thinking on a motion to dismiss . . . .<sup>185</sup>

Requiring judges to use their judicial experience and common sense may be a license to invoke implicit biases, particularly in employment discrimination cases.<sup>186</sup> As Professor Kang and his co-authors explained, “When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to

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181. *Id.* at 679.

182. *Id.*

183. Nancy Gertner, *A Judge Hangs Up Her Robes*, 38 LITIG. 60, 61 (2012); see Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 335 (2013). (“Does it mean that . . . we are supposed to be comforted by assuming that judicial experience is homogeneous among members of the federal bench, or that common sense is generously and equally distributed among them and will be applied in a uniform manner?”).

184. Suzette M. Malveaux, *The Jury (Or More Accurately The Judge) Is Still out for Civil Rights and Employment Cases Post-Iqbal*, 57 N.Y.L. SCH. L. REV. 719, 724 (2013).

185. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 336 (2013).

186. See Hon. Mark W. Bennett, Essay, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 706–07 (2013) (arguing that implicit biases may contribute to the high number of employment discrimination cases that are disposed of via summary judgment); Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 238 (2012) (examining the subjective standards promulgated by *Iqbal* and the resulting potential for implicit judicial bias).

rely more heavily on our schemas.”<sup>187</sup> Thus, deciding whether a claim is “plausible” based only on “minimal facts that can be alleged before discovery” may not be sufficient “to ground that judgment in much more than the judge’s schemas.”<sup>188</sup> A recent study of civil rights actions involving allegations of employment and housing discrimination supports this reason for concern.<sup>189</sup> In this study, Professor Brescia found that employment and housing discrimination cases are being dismissed at a higher rate since *Ashcroft v. Iqbal*<sup>190</sup> announced that the plausibility criterion governs pleading standards in all civil actions in the United States district courts.<sup>191</sup> These findings “may suggest . . . that the subjective elements of the plausibility standard, . . . may be creeping into judicial decision-making.”<sup>192</sup>

Similar arguments have been asserted against the increased granting of summary judgment motions.<sup>193</sup> Considerable scholarship has criticized the summary judgment standard for potentially permitting a judge to decide the motion based on his personal, subjective views of the evidence.<sup>194</sup> Rule 56 of the Federal Rules of Civil Procedure provides that

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187. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160 (2012) (footnote omitted). Kang and his co-authors use an example of a Latina plaintiff: “[I]n order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff.” *Id.*

188. *Id.* at 1162.

189. *See id.* at 1162–63 (echoing various studies that demonstrate increased dismissal rates for post-*Iqbal* federal employment discrimination cases). Kang and his co-authors recognize that it may not be possible to test whether explicit or implicit biases influence how judges decide motions to dismiss actual cases. *Id.* at 1162. However, they also point to preliminary data about dismissal rates pre and post-*Iqbal* to support their hypothesis that *Iqbal*’s plausibility standard poses a risk of increasing the impact of implicit biases at the Rule 12(b)(6) stage for race-discrimination claims in particular. *Id.* at 1162–63. *See generally* Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235 (2012) (describing a study of judicial decisions in discrimination actions).

190. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

191. Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 286 (2012).

192. *Id.*

193. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1163–64 (2012) (claiming that implicit biases at the summary judgment phase may not be as pervasive because “more individuating information” will be available to the judge through discovery, but cautioning that the judge must still make a judgment call that could be subject to implicit biases).

194. *See* Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. Rev. 759, 760 (2009) (“[T]he terms ‘reasonable jury,’ ‘reasonable juror,’ ‘rational juror,’ ‘rational factfinder,’ and others are used interchangeably in decisions regarding dispositive motions, even though the terms are capable of significantly different meanings. This lack of definition makes it more likely that judges decide dispositive motions based on their own views of the evidence, as opposed to what a reasonable jury could find.” (footnote omitted)); *see also* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 143–48 (2007) (propounding that summary judgment is an

summary judgment can only be granted if there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>195</sup> At summary judgment, judges determine whether a reasonable jury could find for the defendant.<sup>196</sup> In doing so, the judge ultimately sits as a juror, deciding if she can rule for the plaintiff.<sup>197</sup> In other words, “judges decide the motions based on their own individual views of the evidence,” and not necessarily on how a reasonable jury would decide.<sup>198</sup> Professor Schneider articulated the problems with the application of the reasonable juror standard: “But what if the judge does not realize the differences between those views—his or her perspective and those of a ‘reasonable juror’? What if a judge does not have the humility, self-awareness, or insight to recognize the limitations of his or her own perspective?”<sup>199</sup> Deciding a motion for summary judgment, therefore, creates the risk that implicit biases will seep into the judge’s determination of “reasonableness.”<sup>200</sup>

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unconstitutional practice because the judge “decides whether the case should be dismissed before a jury hears the case”).

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

196. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (laying out summary judgment requirements).

197. Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 719 (2007).

198. Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 761 (2009).

199. Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 766–67 (2007). Authors Dan M. Kahan, David A. Hoffman, and Donald Braman make an argument similar to Professor Schneider’s, but they also suggest that judges “engage in a sort of mental double check” before making a summary judgment ruling:

Before concluding . . . that no reasonable juror could find such facts, the judge should try to imagine *who* those potential jurors might be. If, as will usually be true, she cannot identify them, or can conjure only the random faces of imaginary statistical outliers, she should proceed to decide the case summarily. But if instead she *can* form a concrete picture of the dissenting jurors, and they are people who bear recognizable identity-defining characteristics—demographic, cultural, political, or otherwise—she should stop and think hard. Due humility obliges her to consider whether privileging her own view of the facts risks conveying a denigrating and exclusionary message to members of such subcommunities. If it does, she should choose a different path.

Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837, 898–99 (2009).

200. Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 764 (2012). In an opinion denying summary judgment in an age discrimination case, Judge Getner wrote “[D]iscrimination is a complex phenomenon . . . . It is about concepts like bias and motivation, precisely the kinds of concepts least suited for resolution by a judge.” *Diaz v. Jiten Hotel Mgmt., Inc.*, 762 F. Supp. 2d 319, 322 (D. Mass. 2011) (footnote omitted). Judge Getner further explained that she was “troubled by recent

The “abuse and overuse” of summary judgment in employment-discrimination cases, as well as the potential for implicit biases to affect decision-making, has been well-documented.<sup>201</sup> For instance, results of a recent study suggest that a judge’s analysis of an employment-discrimination case varies based on her race and experiences.<sup>202</sup> The study revealed that white judges are much more likely to dispense with employment-discrimination cases during the summary judgment stage than are minority judges, and white judges discard cases that involve minority plaintiffs “at a much higher rate than cases involving white plaintiffs.”<sup>203</sup> Although there are many ways to explain this trend,<sup>204</sup> judges’ implicit biases are at least partly to blame.<sup>205</sup> Judge Donald and her former law clerk recently wrote, “While judges strive to apply the law fairly and impartially, they are human and therefore must view things through their own cognitive lenses—judges, like all humans, are not free from biases. . . . [I]mplicit biases nevertheless ‘strongly influence how courts decide particular cases especially in the discrimination context.’”<sup>206</sup> Judge Bennett predicts that those judges who would deny any implicit bias might in fact be more likely to be influenced by their inevitable biases.<sup>207</sup>

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statistics that suggest that 70% of summary judgment motions in civil rights cases and 73% of summary judgment motions in employment discrimination cases are granted.” *Id.* at 322 n.3.

201. See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–10 (2007) (reporting that summary judgment motions are granted in 73% of employment discrimination cases, almost always in favor of the defendant); Kerri Lynn Stone, *Shortcuts in Employment Discrimination*, 56 ST. LOUIS U. L.J. 111, 112 (2011) (“Research confirms everyday observations of how much more difficult it is for employment discrimination plaintiffs than for other plaintiffs to survive pre-trial motions to dismiss their cases and to win at trial or on appeal” (footnote omitted)).

202. Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 346 (2012).

203. *Id.*

204. See, e.g., *id.* (recognizing the weakness in their methodology and that their data “cannot identify what specific information influences” a judge’s summary judgment decision).

205. See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1006 (2006) (“In discrimination law, there already is, and there has long been, an ‘intuitive psychologist behind the bench.’” (quoting Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835, 835 (2004))).

206. Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 760–61 (2012) (quoting Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 562 (2001)).

207. Hon. Mark W. Bennett, Essay, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685,

Research has confirmed, “when a person believes himself to be objective, such belief licenses him to act on his biases.”<sup>208</sup> Judges’ implicit biases against employment discrimination plaintiffs may also be attributed to “a shift in society’s understanding of discrimination” in that perhaps many believe workplace discrimination “is no longer the problem that it was when Title VII was enacted.”<sup>209</sup> As Judge Bennett framed the question, “So, is it any wonder that, with all these factors coming into play, judges have increased antipathy to employment discrimination cases, either on an overt, conscious level or, more likely, in an implicit, unconscious way?”<sup>210</sup>

An appellate court’s decision is also subject to the influences of implicit bias.<sup>211</sup> Judge Posner has described the process of reviewing cases on appeal, explaining that appellate judges read parties’ briefs, talk with their law clerks, listen to oral arguments, and immediately after, briefly discuss the case with their colleagues, taking a tentative vote that “usually turns out to be final.”<sup>212</sup> Even though a judicial opinion can serve as a check on implicit bias by requiring the judge to explain how she arrived at her decision, it is an “imperfect check;” the vote deciding the legal issue is cast before the opinion is written and most judges do not see their vote as a

706 (2013).

208. *Id.* at 707 (quoting Eric Luis Uhlmann & Geoffrey L. Cohen, “*I Think It, Therefore It’s True*”: Effects of Self-Perceived Objectivity on Hiring Discrimination, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 208 (2007)) (internal quotation marks omitted).

209. Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 761 (2012). Professor Trina Jones offers an additional explanation for plaintiffs’ lack of success in employment discrimination cases:

Because [employment discrimination] claims are premised on the continuing presence of racism, they are now counter to society’s normative beliefs. Thus, it is not surprising that they are met with suspicion and skepticism. If judges believe that discrimination is rare and aberrant, then they will perceive no need to probe deeply an employer’s justifications, even when those justifications are specious and proved false. Rather, a burden will be placed on plaintiffs to come forth with additional proof to counter the colorblind, post[-]racial presumption.

Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 433–34 (2010).

210. Hon. Mark W. Bennett, Essay, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 707 (2013) (citing Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–10 (2007)).

211. See Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128, 129 (2000) (describing the appellate playing field as “uneven” because defendants succeed “significantly more often” on appeal than do plaintiffs). The authors attribute this statistic to the attitudes of appellate judges, who “exhibit a bias in favor of defendants” in order to counter a “perceived pro-plaintiff bias” in the trial court. *Id.*

212. RICHARD POSNER, *HOW JUDGES THINK* 110 (2008).



hypothesis that must be proven through further research.<sup>213</sup> Rather, the research is to find evidence to support the hypothesis.<sup>214</sup> The fact that appellate decisions are not unanimous suggests that judges evaluate the same facts and legal principles using distinct filters shaped by personal experience.<sup>215</sup>

### C. *Mitigating the Impact of Implicit Biases in Judicial Decision-making*

The most important lesson from this Article's discussion of implicit biases and their influence on judicial decision-making is that attorneys should not presume that judges are capable of evaluating information differently than the rest of humanity—they are not immune from the influence of implicit biases.<sup>216</sup> In light of the cognitive science research and an understanding of judicial decision-making standards that are susceptible to the influence of implicit bias, the following section makes some modest proposals for reducing the influence of these biases.

Although the psychological research regarding deactivation of stereotypes and implicit biases has not been empirically tested in a legal setting, some studies in other contexts have demonstrated several ways in which the activation of stereotypes may be temporarily inhibited.<sup>217</sup> For example, because multiple schemas may apply to one person, making people focus on only one of those categories “inhibits the activation of stereotypes associated with another category.”<sup>218</sup> To illustrate, “an Asian

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213. *Id.*

214. *Id.* Searching for support for a pre-determined conclusion is evidence of confirmation bias, which is a tendency for a person to search for information that “confirms, rather than contradicts one’s initial judgment . . . .” *Id.* at 111; see also Hadar Aviram, *Legally Blind: Hyperadversarialism, Brady Violations, and the Prosecutorial Organizational Culture*, 87 ST. JOHN’S L. REV. 1, 32 (2013) (defining confirmation bias by explaining that because people are attached to their perceptions, they “seek information that confirms” those perspectives and “resist persuasion to the contrary”).

215. RALPH ADAM FINE, *THE HOW-TO-WIN APPEAL MANUAL: WINNING APPELLATE ADVOCACY IN A NUTSHELL 2* (3d ed. 2012).

216. See Hon. Mark W. Bennett, Essay, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 706 (2013) (insisting that judges are subject to implicit biases). See generally Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195 (2009) (conducting a study to measure judges’ implicit racial biases and finding, that like most people, judges “carry implicit biases concerning race”).

217. See, e.g., Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 331–32 (2012) (providing ways in which stereotypes may be temporarily inhibited).

218. *Id.* at 331 (quoting Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1246 (2002)) (internal quotation marks omitted). *But see*

female mechanic,” would be associated with different schemas for Asian, female, and mechanic.<sup>219</sup> By emphasizing the mechanic schema, for instance, the stereotypes regarding Asians and females may be deactivated.<sup>220</sup> There is also evidence that role schemas may supersede racial or gender schemas because people use their “role” schemas first.<sup>221</sup> Thus, when a person encounters an African-American police officer, for example, the “police officer” schema will ostensibly govern the interaction.<sup>222</sup> In telling a client’s story, effective attorneys understand that they should “humanize their clients.”<sup>223</sup> Professor Blasi explains that doing so “means conveying the multidimensional complexity of human beings who may otherwise be understood by reference to one label or group.”<sup>224</sup> In other words, to preclude a judge from activating racial or gender stereotypes, an attorney should highlight the individual and complex characteristics of the client.<sup>225</sup> Psychological research also shows that avoiding the influences of stereotypes in decision-making requires a decisionmaker to put forth more effort and time to gathering individuating information about the litigant, rather than relying on her triggered stereotypes.<sup>226</sup> Hence, to weaken the impact of gender stereotypes, providing personalized information about a particular woman may

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Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1253 (2002) (reviewing studies that have demonstrated a “rebound effect,” in which the active suppression of stereotypes leads to increased stereotyping in the future).

219. Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 331 (2012).

220. *Id.*

221. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1503 n. 63 (2005) (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 143 (2d ed. 1991)).

222. *Id.*; Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 331 (2012).

223. Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1279 (2002).

224. *Id.*

225. *Id.*; see also Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 286 (2012) (recommending that decisionmakers avoid relying on stereotypes by using a “bottom-up model” for constructing decisions, rather than beginning with stereotypical predispositions).

226. Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 286 (2012); see also Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1253 (2002) (remarking that one can control the automatic activation of stereotypes by “devoting time and cognitive resources to focusing on individuating information”); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160 (2012) (forewarning that during the motion to dismiss phase, judges “lack sufficient individuating information,” which leaves them with no other option “but to rely more heavily” on their schemas).

suppress pervasive gender stereotypes.<sup>227</sup> When the imparted information is “concrete, unambiguous, and explicitly relevant to the judgment at hand,” a judge’s reliance on stereotypes dwindles and more credence is given to the substantive facts about the individual.<sup>228</sup> Applying the lessons from these studies, an attorney should recognize the significance of conveying to the court a client’s complete story, emphasizing specific and individuating facts.<sup>229</sup>

It may also be possible to control stereotypes by priming persons with ideals of fairness and equality.<sup>230</sup> Results of several studies indicate that people can cultivate cognitive habits that subdue stereotyping.<sup>231</sup> For example, people primed using scrambled sentences that included words like “helpful” and “friendly”—words associated with cooperation—were more predisposed to “cooperate in potentially competitive games.”<sup>232</sup> The results of the study evince that priming people with “fairness or egalitarian goals” might prompt subconscious cognitions that could potentially abate the consequences of automatic stereotype activation.<sup>233</sup> In light of these findings, to suppress the activation of stereotypes, an attorney should present a client’s story in a way that “appeal[s] to the judge’s spirit of justice.”<sup>234</sup> Judge Fine’s observations also support this advice. Regardless of their personal philosophies and backgrounds,

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227. See Margaret Moore Jackson, *Confronting “Unwelcomeness” from the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 CARDOZO J.L. & GENDER 61, 82 (2007) (“Psychological theory holds that individual information concerning a particular woman is believed to have an impact on disassembling descriptive stereotypes.” (footnote omitted)).

228. See *id.* (quoting Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL’Y & L. 665, 686 (1999)) (internal quotation marks omitted) (“[P]arties can thwart the stereotypes inherent in thinking . . . by presenting specific facts while telling the story from her point of view.”).

229. *Id.*

230. See Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1253 (2002) (detailing a way in which to work against developing stereotypes); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160–62 (2012) (addressing tactics for avoiding reliance on schemas by providing information to the decisionmaker proactively).

231. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1254 (2012).

232. *Id.* In contrast, subjects that were primed with words correlated with achievement—such as “win,” or “compete”—were more persistent in their attempts to solve the puzzles, “suggesting that the priming had altered their motivational level.” *Id.* (footnote omitted).

233. *Id.*

234. Laurie A. Lewis, *Winning the Game of Appellate Musical Shoes: When the Appeals Band Plays, Jump from the Client’s to the Judge’s Shoes to Write the Statement of Facts Ballad*, 46 WAKE FOREST L. REV. 983, 983 (2011). In the appellate context, Professor Lewis posits that appealing to the judge’s sense of justice will result in a favorable ruling for the client on appeal: “If the client suffered an injustice in the court below, the judge will seek to ‘do justice’ for the client.” *Id.*

appellate judges desire to do what they consider to be “right.”<sup>235</sup> Although what is “right” is difficult to define without context, Judge Fine asserts that in reading an appellate brief, a judge must be “*made to see* that your client *deserves* to win.”<sup>236</sup> A judge may be so persuaded through effective storytelling.<sup>237</sup> For example, Professor Chestek recommends portraying a client as the protagonist of a story and the opposing party as an antagonist who is harmful to the client’s interests.<sup>238</sup> A client’s story should be presented in a compelling and captivating way so as to make the court agree with the client’s position.<sup>239</sup> Professor Lewis explains, “Once immersed in a human drama, the judge looks for the interplay between the captivating story and justice. For the appellate judge is keenly sensitive to the possibility that your client was the unwitting victim of an injustice.”<sup>240</sup> Thus, in priming the judge to focus on goals of justice and fairness, an attorney may help suppress the judge’s implicit biases.

Although the above suggestions are merely theoretical as they apply to advocacy, recognition of implicit biases and motivation to control their influences has been shown to be successful in reducing the effects of these biases on decision-making.<sup>241</sup> When judges are aware of the necessity of monitoring their own reactions to check for the influence of implicit biases, coupled with a motivation to defeat those biases, they seem able to overcome them.<sup>242</sup> Thus, increasing awareness of the problems with

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235. RALPH ADAM FINE, *THE HOW TO WIN APPEAL MANUAL: WINNING APPELLATE ARGUMENTS IN A NUTSHELL* 14 (3d ed. 2012).

236. *Id.*; see also Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING J. LEGAL WRITING INST. 127, 144 (2008) (alleging that if the judge sympathizes with a client’s story, she will be more prone to decide in the client’s favor).

237. See Harry Pregerson & Suzianne D. Painter-Thorne, *The Seven Virtues of Appellate Brief Writing: An Update from the Bench*, 38 SW. L. REV. 221, 226 (2008) (intimating that appellate brief writers should consider borrowing storytelling techniques from writers in other fields, like journalism, and use these techniques “to craft compelling stories that make the reader want to continue reading”).

238. Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 127, 144 (2008); see also Brian L. Porto, *Improving Your Appellate Briefs: The Best Advice from Bench, Bar, and Academy*, VT. B.J., Winter 2011, at 36, 38 (identifying complaints from appellate judges about lawyers’ briefs that lack effective storytelling).

239. See, e.g., Brian L. Porto, *Improving Your Appellate Briefs: The Best Advice from Bench, Bar, and Academy*, VT. B.J., Winter 2011, at 36, 38 (advocating narratives to convey the “essence of the case”).

240. Laurie A. Lewis, *Winning the Game of Appellate Musical Shoes: When the Appeals Band Plays, Jump from the Client’s to the Judge’s Shoes to Write the Statement of Facts Ballad*, 46 WAKE FOREST L. REV. 983, 996 (2011).

241. See generally Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (conducting a study on implicit biases harbored by judges and concluding that those biases can be suppressed with the proper motivation).

242. *Id.* at 1221.

implicit bias may be the best solution for reducing the impact of these biases in judicial decisions.<sup>243</sup> From a practical perspective, attorneys can focus the judge's attention on the legal standards under which a motion or brief should be reviewed.<sup>244</sup> For example, in arguing against the granting of summary judgment, Judge Donald and J. Eric Pardue suggest that "[r]eminding judges to liberally interpret the reasonableness of potential inferences provides a buffer, however slight, against the tendency to substitute their judgment for the jury's."<sup>245</sup> Because the plausibility standard from *Iqbal* has been applied inconsistently by the lower courts,<sup>246</sup> a plaintiff opposing a defendant's motion to dismiss may have the opportunity propose a standard for plausibility that allows a judge to recognize the dangers of implicit bias in making such a determination. A standard, such as one adopted by the Eastern District of Texas<sup>247</sup>, could help judges consider plausibility more liberally, to prevent a judge from grounding his decision in his schemas.<sup>248</sup> As the magistrate concluded:

[T]he critical inquiry is whether a plaintiff's claim is "conceivable" (*not enough* for Rule 12) or "plausible" (*sufficient* for Rule 12). . . . The majority in *Swanson* put it this way: "As we understand it, . . . the plaintiff must give enough details about the subject matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things

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243. See *id.* (postulating that a judge's increased self-awareness of her own implicit biases may actually reduce their effects).

244. See Laurie A. Lewis, *Winning the Game of Appellate Musical Shoes: When the Appeals Band Plays, Jump from the Client's to the Judge's Shoes to Write the Statement of Facts Ballad*, 46 WAKE FOREST L. REV. 983, 997 (2011) (pointing out that the standard of review "implicates how you write your client's narrative").

245. Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 764 (2012).

246. See Alex Reinert, *The Impact of Ashcroft v. Iqbal on Pleading*, 43 URB. LAW 559, 577 (2011) (criticizing the *Iqbal* opinion for imprecisely articulating the new pleading standard which has led to its inconsistent application at the trial court level).

247. *Escuadra v. Geovera Specialty Ins. Co.*, 739 F. Supp. 2d 967, 980 (E.D. Tex. 2010). This standard was based on *Tellabs, Inc. v. Makor Issues & Rights*, a United States Supreme Court case decided in 2007 that involved the Private Securities Litigation Reform Act. See generally *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (interpreting the standard for pleadings in a Private Securities Litigation Reform Act case). Professor Reinert clarifies the Supreme Court opinion: "Specifically, the Court in *Tellabs* defined 'plausibility' for the purposes of the PSLRA [Private Securities Litigation Reform Act] as equipoise: that is, if the plaintiff's theory of relief was 'at least compelling' as the alternative explanations, the complaint would survive a motion to dismiss under the PSLRA." Alex Reinert, *The Impact of Ashcroft v. Iqbal on Pleading*, 43 URB. LAW 559, 583 (2011) (quoting *Tellabs*, 551 U.S. at 324).

248. See Alex Reinert, *The Impact of Ashcroft v. Iqbal on Pleading*, 43 URB. LAW 559, 583-84 (2011) (praising the Eastern District of Texas for conducting "an extensive analysis of the plausibility problem").

have happened, not *did* they happen.”<sup>249</sup>

Including information about how implicit bias can affect and taint decision-making in a complaint, motion, jury instructions, or brief can call attention to the problem.<sup>250</sup> Exposure to the implicit bias research may help a judge minimize her implicit bias when deciding motions or appeals.<sup>251</sup> However, an attorney is likely to exercise restraint in doing so—naturally, people do not like being accused of hosting biases, even unconscious ones.<sup>252</sup> Although an attorney should make the judge aware of implicit biases, she may not want the judge to interpret the information as implying that the judge is biased.<sup>253</sup> An effective lawyer challenges the judge to move beyond a common schema without accusing the judge of bias.<sup>254</sup> For instance, when representing a father in a custody bench trial, counsel might open with: “Your Honor, although the ‘tender years’ doctrine of young children always being awarded to the mother has been overturned, it appears to be alive and well in a few cases. In this case, the father is seeking custody based on the following factors.”<sup>255</sup> This particular method of arguing reminds the judge of a specific bias without accusing her of embracing the bias.<sup>256</sup>

#### IV. CONCLUSION

Justice Cardozo explained: “Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex

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249. *Escuadra*, 739 F. Supp. 2d at 980 (quoting *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010)).

250. See Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1275 (2002) (noting awareness of prejudice or stereotypes is most often the first step to reducing the effects); Mark A. Drummond, *Section of Litigation Tackles Implicit Bias: Implicit Bias Can Be Eliminated by Awareness*, A.B.A., LITIG. NEWS, Spring 2011, at 20, 21 available at <http://www.charnalaw.com/documents/aba-litigation-news-implicit-bias.pdf> (“[A]ll of the research seems to indicate that once people are made aware of implicit bias, it disappears.”).

251. See Mark A. Drummond, *Section of Litigation Tackles Implicit Bias: Implicit Bias Can Be Eliminated by Awareness*, A.B.A., LITIG. NEWS, Spring 2011, at 20, 21 available at <http://www.charnalaw.com/documents/aba-litigation-news-implicit-bias.pdf> (touting the research of Jeffrey J. Rachlinski and company, reviewing their findings that awareness of implicit bias can reduce its effects); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (examining judicial bias according to decisions).

252. Mark A. Drummond, *Section of Litigation Tackles Implicit Bias: Implicit Bias Can Be Eliminated by Awareness*, A.B.A., LITIG. NEWS, Spring 2011, at 20, 21, available at <http://www.charnalaw.com/documents/aba-litigation-news-implicit-bias.pdf>.

253. See *id.* (addressing the need for caution when addressing race).

254. *Id.*

255. *Id.* (internal quotation marks omitted).

256. *Id.*

of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge . . . .”<sup>257</sup> The implicit biases of attorneys and judges pervert the processes and results in both civil and criminal litigation, and innately impede equal justice for all.<sup>258</sup> It therefore behooves attorneys to understand the emerging cognitive science research regarding implicit bias and decision-making. Because awareness and the motivation to correct one’s thinking is the “best cure thus far” for implicit bias,<sup>259</sup> state bar associations and law firms should follow the ABA’s lead to educate attorneys about this pervasive problem.<sup>260</sup> With greater awareness among the legal community of how implicit biases operate, it is this author’s hope that researchers will explore and empirically test proposals to address the problems of implicit bias in our legal system, motivating legal decisionmakers to correct their thinking.<sup>261</sup>

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257. William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3, 5 (1988) (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921)).

258. A.B.A. TASK FORCE ON IMPLICIT BIAS, <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html> (last visited Apr. 1, 2014).

259. Mark A. Drummond, *Section of Litigation Tackles Implicit Bias: Implicit Bias Can Be Eliminated by Awareness*, A.B.A., LITIGATION NEWS, Spring 2011, at 20, 20 available at <http://www.charnalaw.com/documents/aba-litigation-news-implicit-bias.pdf>.

260. A.B.A. TASK FORCE ON IMPLICIT BIAS, <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html> (last visited Apr. 1, 2014).

261. See, e.g., Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1581 (2013) (calling for “an expansion of some of the more promising concepts from psychological studies to a broader audience, including not just judges, but every lawyer, client, juror, witness, and court employee, before legal proceedings can begin in any given case”).

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