

Professor Debra Lyn Bassett  
Justice Marshall F. McComb Professor of Law  
Southwestern Law School

# EXAMINING BIAS ACROSS THE LEGAL SYSTEM

# California Bar Diversity Statistics

- Total active membership: 182,186
- White attorneys: 79.3%
- Male attorneys: 60.6%
- Age 55+ attorneys: 48%
- Female attorneys: 39.4%
- Asian/Pacific Islander attorneys: 7.7%
- Latino/a attorneys: 4.2%
- African-American attorneys: 2.7%
- GLBT attorneys: 4.6%

# California Law Firm Demographics

## ◎ San Francisco

- Total partners: 1,326 (25% women, 11% minorities)
- Total associates: 1,435 (51% women, 26% minorities)

## Los Angeles area

Total partners: 2,093 (21% women, 13% minorities)

Total associates: 2,325 (48% women, 31% minorities)

Source: NALP Press Release, 2013 Figures

# MCLE Requirement

- Cal. R. Ct. 2.72 requires, as part of California lawyers' 25-hour MCLE requirement, that one hour be devoted to the topic of “the elimination of bias in the legal profession by reason of, but not limited to, sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation . . . .”

# “Bias”

- ⦿ Noun: Prejudice in favor of or against one thing, person, or group compared with another, usually in a manner considered to be unfair
- ⦿ Verb: To show prejudice for or against someone or something unfairly; e.g., the tests were biased against racial minorities

# Measuring Attitudes

- ⦿ Until 1980s, most psychologists believed attitudes, including prejudices, operated consciously—that individuals were aware of their own biases—and therefore relied on self-reporting in measuring bias and prejudice.

# Explicit and Implicit Indices

- Beginning in the 1980s and expanding tremendously in the 1990s, psychologists documented that attitudes have both “explicit” and “implicit” indices. Explicit attitudes operate consciously; implicit attitudes operate unconsciously.

# How Could This Happen?

- Our brains necessarily organize and interpret information and use various mental shortcuts to process that information. Unfortunately, but perhaps not surprisingly, errors can occur during this process.





# Unconscious Bias

- ⦿ Also called “implicit” or “automatic” bias
- ⦿ Project Implicit: Implicit Association Test
  - <https://implicit.harvard.edu/implicit/>

# Implicit Association Test

African American

or

Good

European American

or

Bad



# IAT and Racism

- The IAT does not measure actions; psychological research has repeatedly reaffirmed that people can override their biases.

# Overcoming Unconscious Bias

- ⦿ Mental imagery of counter-stereotypes;
- ⦿ Exposure to exemplars;
- ⦿ Diversity within the operating environment;
- ⦿ Diversity education;
- ⦿ Unconscious bias education;
- ⦿ Appealing to equality and fairness.

# Psychology and Law

- ⦿ At the time that psychologists were relying on self-reporting in assessing bias and prejudice, the law was similarly relying on overt actions when finding actionable discrimination.
- ⦿ Law historically has tended to be slow in accepting the findings of psychological research, perhaps because psychological studies have not always translated well to real life.

# Recognizing Bias In the Practice of Law

- Examples/scenarios

# Integrating Bias Studies with the Law

- After some initial resistance, the psychological research into unconscious bias has become more widely accepted, resulting in important programs aimed at addressing such bias.



# Existing Programs



# How is the Law Making Use of Psychology's Unconscious Bias Studies?

- ◎ Current programs addressing unconscious bias
  - American Bar Association's Section of Litigation, together with
  - National Conference on State Courts
  - CLE

# Broader Reach in Legal Proceedings



# Broader Reach into Law Practice More Generally



# Unconscious Bias in the Practice of Law

- ◎ Unconscious bias reaches into every participant in legal proceedings—judges, lawyers, clients, witnesses, court personnel, experts. Existing programs should be expanded to include all participants in legal proceedings.
- ◎ Unconscious bias is not limited to litigation, and thus the lessons from the psychological research should be integrated into law practice more generally.

# Eliminating Bias in the Legal Profession

- ◎ Make use of psychological literature in overriding biases to include:
  - Diversity education
  - Education about unconscious bias
  - Appealing to equality and fairness

THE END