ONONDAGA COUNTY BAR ASSOCIATION

Recognizing & Addressing Implicit or Unconscious Bias

Part 1

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Paula C. Johnson, Professor of Law

Paula C. Johnson is professor of law at Syracuse University College of Law and serves as co-president of the Society of American Law Teachers (SALT), a national organization of approximately 800 law professors. She received her B.A. from the University of Maryland, College Park; her J.D. from Temple University School of Law; and her LL.M. from Georgetown University Law Center. At Syracuse, she teaches criminal law, criminal procedure, voting rights, professional responsibility, and a seminar on women in the criminal justice system. She also has taught at the University of Arizona, the University of Baltimore, and Northern Illinois University.

She has written and spoken extensively on matters of race, gender and law in academic arenas, the popular press, and community forums. Her writings include, Inner Lives: Voices of African American Women in Prison (NYU Press 2003); and book chapter, A Legal and Qualitative Study of the Relationships between Incarcerated African American Mothers and Their Children, Institute for Policy Research (Northwestern University 2002). Her law review articles include Ad-In/Ad-Out: Deciding Victory and Defeat in Affirmative Action Legal Contestations, 66 Albany Law review 433 (2003); Danger in the Diaspora: Law, Culture and Violence Against Women of African Descent in the United States and South Africa, 1 Univ. Iowa Journal of Gender, Race and Justice 471 (1998); The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of Vincent Chin, 1 Michigan Journal of Race and Law 347 (1996); At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing, 4 American University Journal of Gender and Law 1 (1995); and Silence Equals Death: The Response to AIDS within Communities of Color, University of Illinois Law Review 1075 (1992).

At Syracuse University, Professor Johnson serves on a range of College of Law and University committees, including the Chancellor's Search Committee. She's served as co-chair of Sistaprof, an organization of Syracuse University Africana women professors, and co-chair of the S.U. Senate's Lesbian, Gay, Bisexual and Transgendered (LGBT) Concerns Committee. Her public service includes membership on the boards of the Hiscock Legal Aid Society, the Center for Community Alternatives, and the Battered Women's Justice Project National Advisory Committee. In 2003, she received the Unsung Heroine Award from the Syracuse University Martin Luther King, Jr. Awards Committee, and the Woman of the Year Award from the Syracuse University African American Male Congress.

Suzette Melendez, Director of Children's Rights and Family Law Clinic

Professor Melendez's teaching and scholarly interests are in the areas of domestic violence and delivery of legal services to women and children. She joined the College of Law in 2002, as an adjunct to teach a course on domestic violence and now directs the Children's Rights and Family Law Clinic.

Professor Melendez earned a bachelor's degree from the SUNY Binghamton. She earned a juris doctor from the University Of Connecticut School Of Law. She has supervised the statewide Domestic Violence Representation Project at Legal Service of New Jersey and served as a staff attorney at Essex Newark Legal Services in the area of family law. She also has worked at the Legal Aid Society of New York City representing clients in the areas of housing and public entitlements.

In addition to her litigation experience, Professor Melendez has engaged in policy work on issues affecting her clientele at various levels including state and county domestic violence working groups local and state bar associations and judicial committees.

Melanie Cuevas-Rodriguez, Esq., Associate Director Career Services, Diversity and Pro Bono Programs

Melanie Cuevas-Rodriguez received her bachelor's degree in Sociology and English/Literature & Rhetoric from SUNY Binghamton, a master's degree in Public Administration from the Maxwell School of Citizenship and Public Affairs, and a J.D. from Syracuse University College of Law. Melanie was a Debevois & Plimpton Equal Justice Works Fellow at the National Center for Law and Economic Justice in New York City where she assisted with the Center's efforts to secure economic justice for the poor through impact litigation and policy advocacy. Before returning to the College of Law, Melanie worked at the Frank H. Hiscock Legal Aid Society in Syracuse where she represented clients in various civil matters including domestic violence and family law.

Ms. Rodriguez is admitted to practice in New York. Her professional affiliations are the Onondaga County Bar Association, New York State Bar Association and the Association for Legal Career Professionals (NALP).

In addition to counseling students, Ms. Rodriguez manages the College of Law's Pro Bono Program as well as plans and organizes diversity programming and initiatives.

M. Eric Galvez, Esq., Associate, Barclay Damon LLP

M. Eric Galvez focuses his practice on various aspects of intellectual property litigation, patents and prosecution. Prior to joining Barclay Damon, he practiced at Sidley Austin in Washington, D.C. He has dealt with a wide range of issues including patent litigation (in federal courts and in the International Trade Commission), inter partes review proceedings, patent prosecution, trade secret misappropriation, off-label promotion, trademark oppositions, and intellectual property due diligence. He has significant experience with a variety of technologies including biologics, chemical drugs, dietary supplements, chemical engineering, nanotechnology, mobile phone technology, coaxial cable technology, food manufacturing technology and medical devices.

Eric received his law degree from Emory University, where he was selected for the Order of Emory Advocates for his proficiency in oral advocacy, represented Emory in INTA moot court competitions, and received numerous awards for commercializing Georgia Institute of Technology inventions.

He holds a Master of Public Health in Health Policy from the University of Medicine and Dentistry of New Jersey's School of Public Health, where he received the 2005 Community Service Award for starting MedAccess-NJ, a program working with medical and public health school faculty, pharmaceutical companies, and clinics to help more than a thousand indigent patients in New Jersey receive needed prescription medications. He received his bachelor's degree from William and Mary, where he was awarded the biology department's top academic prize in organismal biology.

Formerly, Eric was a scientist at Roche Diagnostics and conducted patentability analysis for the Centers of Disease Control Tech Transfer Office, and has been published in peer-reviewed scientific journals. He is currently serving as co-chair of MedTech Association's Government and Public Affairs Committee and is a member of the Barclay Damon Diversity Leadership Team in Syracuse.

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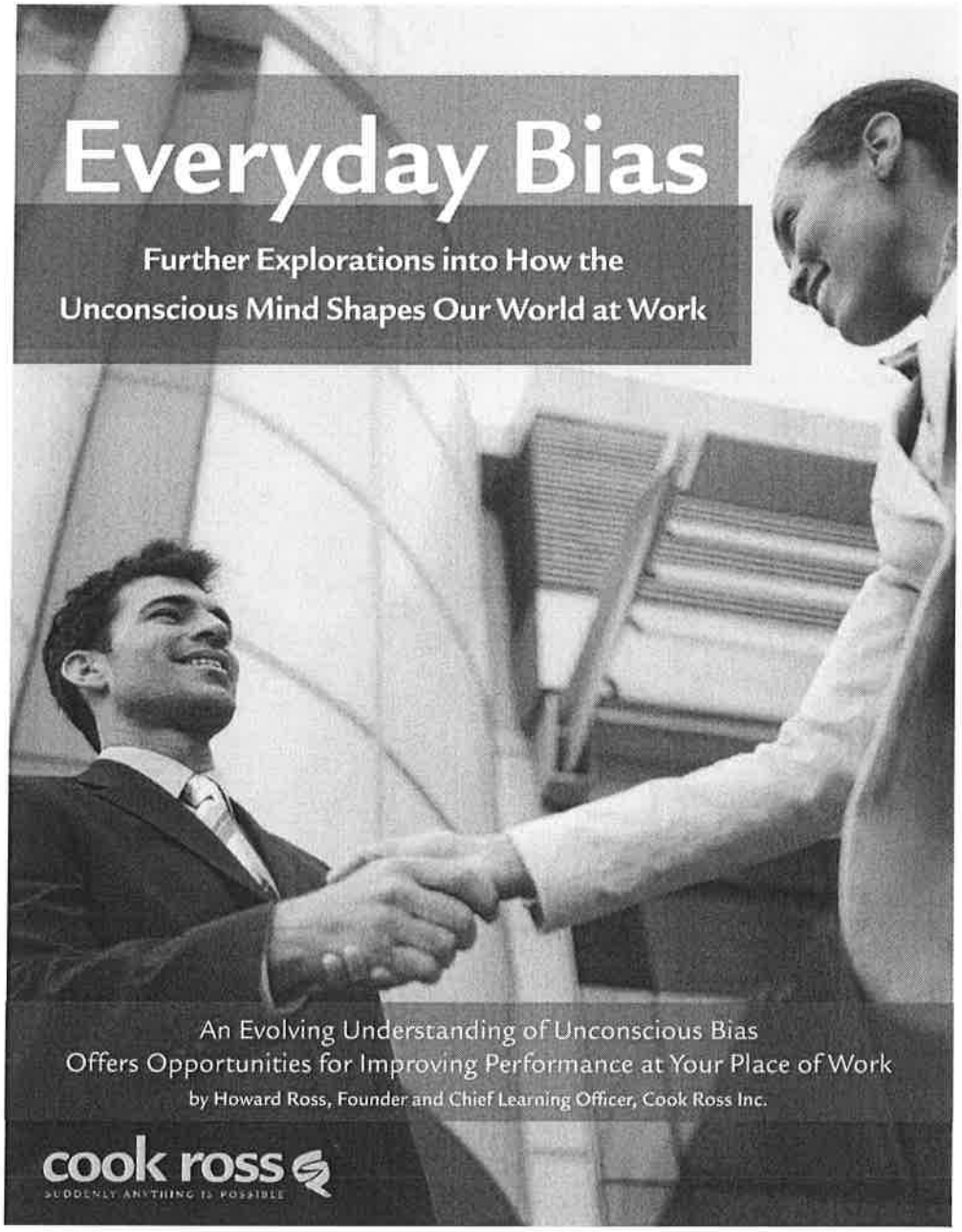
Everyday Bias: Further Explorations into How the Unconscious Mind Shapes Our World at Work (June 2014)

Howard Ross

Cook Ross Inc.

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.



Everyday Bias: Further Explorations into How the Unconscious Mind Shapes Our World at Work

An Evolving Understanding of Unconscious Bias Offers Opportunities for Improving Performance at Your Place of Work

by Howard Ross, Founder and Chief Learning Officer, Cook Ross Inc.

INTRODUCTION

Hurricanes were exclusively assigned female names until the late 1970's. Since then, the World Meteorological Association (WMA) has alternatively given them male and female names. In May of 2014, the Proceedings of the National Academy of Science released the results of an interesting study from the University of Illinois[1]. Researchers analyzed more than sixty years of death tolls from ninety four hurricanes that occurred in the United States between 1950 and 2012. They removed two hurricanes whose death tolls were so dramatically greater than the others that they would skew the data: Hurricane Katrina, which killed approximately 1,500 people in 2005, and Hurricane Audrey, which killed more than 400 in 1957. The researchers then compared the death rates of the hurricanes based on the gender classification of their names.

What they found was fascinating.

It turns out that there is a dramatic difference between the average death rates of the storms named for men (23) and those named for women (45). Was this because the WMA chose female names for the harshest storms? Not unless they had a crystal ball. The names, it turns out, are designated years before the actual hurricanes. The difference, it seems, lies not in the naming of the storms, but in the reaction to the storms' names. "People may be dying as a result of the femininity of a hurricane (name)," said Sharon Shavitt, one of the studies co-authors. "In judging the intensity of a storm, people appear to be applying their beliefs about how men and women behave," Shavitt says. "This makes a female-named hurricane, especially one with a very feminine name such as Belle or Cindy, seem gentler and less violent."

[1] "Female hurricanes are deadlier than male hurricanes" National Academy of Sciences, Jung, Shavitt, Viswanathan, and Hilbe, May 2014 Kiju Jung, Sharon Shavitt, Madhu Viswanathan, and Joseph M. Hilbe

Female hurricanes are deadlier than male hurricanes

PNAS 2014; published ahead of print June 2, 2014, doi:10.1073/pnas.1402786111

Is it possible that people consciously choose to take female-named hurricanes less seriously? Is it likely that during times of emergency preparedness somebody says, or even thinks, "Don't worry about that one...she's just a girl!"? Doubtful. It is much more likely that this is yet one more example of unconscious bias at work.

Unconscious or implicit bias is an issue that affects every person and every organization, no matter how inclusive people think they may be, or how diverse their organization has tried to become.

Everyone possesses unconscious biases, and they impact us in ways that we can hardly imagine.

The encouraging news is that breakthroughs in our understanding of this fascinating topic offer new opportunities for organizations that truly wish to create inclusive workplaces and diverse employee populations.

At Cook Ross, we published our first major thought paper on unconscious bias (http://www.cookross.com/docs/unconsciousbias.pdf) in 2007. That paper concentrated on the definition, reality and prevalence of unconscious bias. Since that time, our understanding of unconscious bias and its implications for organizational performance has expanded greatly. Our discoveries arise not only from research in the neurological and cognitive sciences, but also—and perhaps more importantly—from our experience with thousands of clients. This work has permitted us to gain a deeper understanding of how individual and group behaviors affect organizational performance.

The collective body of knowledge about this topic has also grown exponentially. The topic has been brought to public view in a way that allows us to address problems with broader strokes, addressing the full impact of unconscious bias.

This paper represents an update in our learnings on unconscious bias since we published the original paper. I will discuss some of those new findings and will also lay out ten distinct ways unconscious bias manifests in the workplace, including a case study from a Cook Ross client, a leading global management consulting company that has leveraged unconscious bias awareness to increase the number of women in senior leadership positions. Lastly, the paper presents practical guidelines for reducing the influence of unconscious bias on decision-making in the talent management process.

UNCONSCIOUS BIAS: WHY IS IT IMPORTANT?

The concept of unconscious bias in organizations was initially recognized in the 1960s, against a backdrop of hiring changes that were brought about by federal civil rights legislation and changes in societal social norms. Bias is culturally rooted, and generally directed at value and belief systems different from our own. Bias falls into the realm of the unconscious when it transcends our moment-to-moment perception and awareness. For instance, a person may know "instinctively" when they feel physically threatened without knowing the exact source or location of the threat. Ultimately, the impact of bias may not be different whether it is conscious or unconscious. Both can create inequities in opportunity and treatment, and also very poor decision-making. However, our understanding of how unconscious they are may radically alter our way of dealing with these biases and creating more conscious organizations.

Distinguishing friend from foe is essential to our survival. The ability to do so quickly might mean the difference between life and death. As a result, our minds tend to look for danger first, a clear precautionary function. We are far safer assuming danger and being surprised when it is not there, then in assuming all is safe and finding danger instead. In a survival context, a "false positive" is always safer than a "false negative." As a result, we may unconsciously look for cues that identify something as threatening in a person we encounter, based on what we have experienced before. This may make a lot of sense in terms of keeping us safe, but when a job candidate with qualifications similar to another person is given a low rating because they "don't feel" like a good fit, it becomes problematic.

Organizations that wish to create diverse employee populations and more inclusive workplaces have struggled for decades with

cultural bias and with trying to attain "cultural competency." The essential ingredient in culturally competent organizations is the recognition that re-training the conscious "rational" mind to achieve behavioral change is often largely ineffectual. Leaders in particular need to recognize that we don't always consciously know exactly what in our organizations needs adjustment. Let me cite an example to clarify.

Research has shown that people tend to believe others more when they have similar accents.[2] Let us say a person is not aware that they consistently exhibit a preference for team members who speak with the same kind of accent that they do. (Of course, for most people, accents and dialects only exist when they are present in other people who speak differently from them...an unconscious bias in itself!) Creating systems and structures that reveal those patterns and help explore areas of discomfort are critical. Avoiding difficult conversations about bias will lead to poor talent management decisions and many other inefficiencies. Still, views and preferences among people will continue to legitimately

[2] Shiri Lev-Ari, Boaz Keysar, Why don't we believe non-native speakers? The influence of accent on credibility. Journal of Experimental Social Psychology 46 (2010) 1093-1096.

differ. We may still prefer our own unconscious or conscious views and our own patterns of thinking and behavior. They feel more comfortable to us. The challenge is that "comfortable" feelings are not necessarily synonymous or strategically aligned with organizational goals and priorities. "Comfortable" could prevent you from getting the best talent and organizational results.

Developing an awareness of our own biases is the foundation for making better decisions. Why? If you are in possession of that awareness, you can take advantage of our growing understanding of unconscious bias and its implications for organizational success and failure. The available body of knowledge has exploded during the past six years as discoveries unfold from research in the neurological and cognitive sciences.

New findings are teaching us more about the brain and consciousness than we have ever known. Some of this work is valuable and is based on solid evidence. Some is not as well reasoned. Too often the approaches that people take in applying research findings to organizational behavior are missing the fundamental basis of what the research findings are actually teaching us.

What one can only surmise from the findings of the best research is just how universal unconscious bias is...in everyone.

While unconscious bias still may not be fully understood, many organizational leaders today at least agree that it is real, prevalent, and a barrier to organizational success. To help bring understanding of unconscious bias to a new level, let's examine several issues that have been recently researched and brought to public view. Some of these insights are discussed in my books, *ReInventing Diversity: Transforming Organizational Community to Strengthen People, Purpose, and Performance* (2011), and *Everyday Bias: Identifying and Navigating Unconscious Judgments in Our Daily Lives* (2014).

NOT INHERENTLY BAD OR GOOD: IT'S JUST THERE

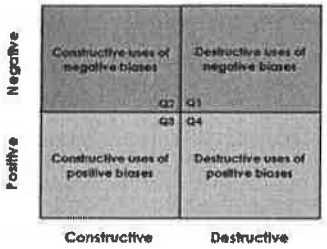
Our everyday use of the word bias has a distinctly negative connotation. The Merriam-Webster dictionary defines bias as an "unreasoned judgment" or "prejudice." In working with diversity issues, we have been told repeatedly that bias is bad. Bias carries a stigma. If you are biased, the prevailing discourse suggests you also must be a bigot or one who practices discrimination. Therefore, we must eliminate bias.

We make a fundamental mistake when reducing bias to something purely "bad." Too often we conflate people's intentions with the impact of their actual behavior or we make attribution errors. If we believe good people are free of bias, then someone who has bias must be bad and must intend to harm. As a result, people have created "anti-bias" training and

practices. Bias, however, is not inherently bad or good. As discussed in our original paper, bias is a fundamental function of the human mind. It is a danger detector that allows us to navigate the world safely. By attempting to eliminate bias, all too often we have actually driven it more into the unconscious.

In order to expand the conversation, it is critical for us to recognize that these biases can be positive or negative and can have constructive or destructive outcomes.

How does bias occur?



We are most familiar, of course, with destructive uses of negative bias (Q1). The classic case of someone not being hired or promoted because they belong to a particular group exemplifies this kind of bias. But there are also constructive uses of negative bias (Q2). For example, when we realize that a particular behavior (e.g. raising one's hand with a knife in it pointed at you) should be avoided or protected against. There may also be constructive uses of positive bias (Q3), as when we recognize that a person with a particular cultural background may be valuable in a certain position in which people from that culture are prevalent. Another example occurs when we decide to hire people with particular "qualifications," which are simply biases that we have all agreed to and written down. And, finally, there are times when there are destructive uses of positive bias, as when we hire one person because they "feel familiar" and in doing so do not hire someone who is more talented. We live in a web of all of these biases.

CONFRONTING BIAS CONSTRUCTIVELY

Understanding this basic truth is not quite enough. We must be vigilant and recognize biases as they arise. We must not allow the unconscious nature of bias to work as an excuse for the impact of it to continue. For example, we may believe that not having conscious intent is enough to negate the negative impact of something we say or do. We get into an offensive/defensive posture because we don't have the capacity to look at the issue from anything other than the right/wrong perspective. Past attempts at diversity training have often reflected this moralizing approach. We have tried to show people how wrong they are, thinking that in and of itself would force them to change. The problem is that guilt may seem effective as a motivator, but in reality, it is not. Guilt leads to self-recrimination, which is destructive rather than constructive. More often than not, guilt creates contraction, resistance, forced compliance, and sometimes, backlash.

It has been fascinating to see unconscious bias proliferate as a topic throughout the diversity industry within the past several years. Basically, good and reasoned research done with the purest of intentions gets plugged into the traditional "good person/bad person" paradigm of diversity work. "You may not be biased," the trainer often says, "but you are unconsciously biased!!"

We believe passionately in the connections between neuroscience research, diversity, and organizational performance. For instance, we know that unconscious bias is present, but how, honestly, can we reasonably castigate someone for reacting in a way that they don't even realize is happening in the first place? This is not to suggest that people are not responsible for the impact of their behavior. All of us are responsible for our behavior. Our challenge is to determine whether or not our way of creating opportunities for insight and behavior change is appropriate and effective. After all, what the research clearly shows is that "they" are not the ones who demonstrate bias. "We" are the ones who demonstrate bias. All of us, every day. The key is not to drive people toward guilt, but to move us all toward responsibility. The daunting task of leaders is to create mechanisms to help people

develop an understanding of how these subtle and often invisible dynamics might be benefiting them or affecting them in ways that they haven't realized and haven't always intended.

The reality is that good people develop bias. Bad people develop bias. All people develop bias. The question is: how we can see bias in others if we're not even willing to look at it in ourselves? While there is no question that certain groups are more negatively impacted by bias on a grand societal scale, the limiting patterns of unconscious behavior are not restricted to any one group. All of us have these attitudes and exhibit these behaviors. Effective managers and business leaders must focus on their own assumptions and biases if they expect to have the legitimacy and experience to guide others in acknowledging and confronting their bias.

And here lies the fault lines of neuroscience, personal behavior, organizational behavior, organizational performance and societal health (economic and otherwise). The work needs to be conducted on an organizational level, in a manner that allows individuals and groups to solve problems and create value. But we do this with the understanding that the connections stretch from our organizational learning out to society and the world.

NEW RESEARCH FINDINGS

As Brett Pelham, a social psychologist at the American Psychological Association has said:

> *"Virtually all bias is unconscious bias. We have learned to trust women to be nurturing and men to be powerful, for example, in much the same way that Pavlov's puppies trusted ringing bells to predict the arrival of meat powder. If we had to think consciously about keeping our balance, digesting, breathing and perceiving the moon as a celestial sphere rather than a floating coin, we would all fall over, throw up, suffocate, and fail to appreciate the moon's majestic beauty. Being biased is how we get through life without everything being brand new every time we experience it."*

The new reality that science is teaching us is that virtually everything we do is driven by unconscious thoughts, reactions, feelings, and beliefs. In a way, we are far more robotic in our thinking and actions than we have ever realized. In addition, our automatic thoughts happen much faster than our more careful ones. New research findings are teaching us how unconscious bias forms and operates in the brain. The prefrontal neocortex (PFC) is the part of the brain that most distinguishes humans from all other animals. It gives people the capacity for metacognition, or the capacity to think about our thinking. This makes humans more able to contemplate thoughts and behavior than any other animal. Yet, the "computing power" of the PFC is relatively tiny compared to the far more robust autonomic parts of the brain. In order to conserve our mental resources and the internal chemicals (e.g., glucose) that feed the brain, we naturally rely on our "automatic" functions and reactions. It is not efficient for the brain to stop and really think about each stimulus and response. In fact, it is downright dangerous. Imagine, for example, if we had to stop and think about hitting the brake when somebody stops short in front of us while we are driving. How many of us would react quickly enough to avoid hitting the car?

Since the time of Plato, we have generally believed our rational minds need to "control" our emotional or subconscious minds in order for us to function at the highest level. The reverse appears more likely to be true.

Think about it. If somebody asks "1+1=?" you react pretty quickly. If they ask "223 x 175" you move much more slowly. You need more brainpower. You need to compute, not recite from memory. Assumptions about people fitting into stereotypes operate the same way. It is much quicker and easier

to form the unconscious first impression, "She is/looks/does ____, so therefore she must be like ____" than it is to say, "Let me stop and see what I can learn about her."

We are beginning to better understand how this organic mechanism works. The memory connections that we make seem to occur in the hippocampus, a part of the limbic system of the brain next to, and closely associated with, the amygdala. The way it works is actually very logical at some level. Let's say I am walking down the street and a man with a red shirt attacks me. In the hippocampus, "red shirt" becomes connected to pain. Three months later, I meet somebody wearing a red shirt and I begin to feel "uncomfortable" with that person. I may not have any conscious memory that my attacker was wearing a red shirt or that my discomfort has anything to do with the attack at all. It just occurs at the moment as fear of potential danger.

Similarly, imagine that you have grown up watching the whole slew of early sitcoms on television that depicted fathers as the "bread winners" and mothers as the homemakers. You might remember at least a few of them: Ozzie and Harriet; Leave it to Beaver; Father Knows Best; etc. Really, the list is practically endless. In your brain, specifically in your hippocampus, women and domestic chores may have become linked. Then years later, a woman comes into a meeting and, without thinking, you say, "Would you mind getting some coffee?" Or, even more insidiously, if you are a woman, you automatically get the coffee without even being asked to do so! Yes, we even internalize unconscious biases about people like ourselves.

As I stated earlier, we are learning more and more about this subject and how it functions. Let's now look at examples of research published since the 2007 paper that help illustrate these concepts.

THE HIRING PROCESS

Getting a job is of paramount importance for millions of people around the world, and generally receiving an offer requires going through an interview or even many interviews. We know that our beliefs about people—most of them existing beyond our awareness—lead to automatic thinking and behaviors that inevitably appear when interviewing and hiring. Let's have a look at a few touch points where our unconscious bias surfaces in the hiring process.

"PRIMING EFFECTS"

We are discovering that the information and messages we use to inform our decisions are much more subtle and non-rational than we ever realized. Lawrence Williams, a marketing professor at the University of Colorado and John Bargh, a psychologist at the Automaticity in Cognition, Motivation, and Emotion Lab at Yale University, conducted a series of fascinating experiments[3] about a phenomenon they refer to as "the priming effect." They studied test subjects who were asked to conduct job interviews. Everything about the people they interviewed was structured to be as similar as possible except for the fact that some of the interviewers were given warm drinks while they were conducting the interviews and some cold drinks. Based on nothing more than that, the interviewers who were holding the warm drinks scored their interviewees higher than those holding the cold ones. They attributed a "warmer personality" to these people. We are not certain why such attributions were made.

[3] Citations for Williams and Bargh's work can be found at the Yale University Automaticity in Cognition Lab Page: http://www.yale.edu/acmelab/publications.html

Perhaps our common societal messaging about people having a "cold heart" or a "warm smile" has created a neurolinguistic encoding within our brains. We also know that a cold hand may be interpreted unconsciously as signaling that a person is less friendly, less healthy, less robust, or less confident. Either way, the result is a non-rational way of conducting interviews and scoring job candidates.

Mikki Hebl and Laura Mannix, two Rice University researchers, found a similar dynamic exists when an interviewer was asked to walk out and meet his or her interview subject in a waiting area[4]. If the interviewee was sitting next to somebody who was perceived to be obese, they rated him or her lower in their interview scores. Talk about guilt by association!

Both of these studies, and many others like them, naturally bother people who believe in fairness and equity in job decisions. After all, how fair is it to be more likely to select somebody simply because they are sitting next to a particular person in the lobby, or because you happen to have a warmer drink in your hand? It seems ridiculous, doesn't it?

However, the more pressing issue to business people may be:

How can we run an effective, productive and profitable organization when we make talent management decisions based on such ludicrous and invisible conditions?

EYES, COFFEE, HONESTY, AND THE TEN COMMANDMENTS

Unconscious bias makes its mark known in many areas involving employees that go well beyond hiring. In another recent study, researchers Melissa Bateson, Daniel Nettle, and Gilbert Roberts at the University of Newcastle-upon-Tyne in Great Britain put signs on the walls of break rooms in companies that asked people to pay for their coffee, tea, and snacks on the "honor system."[5] Some of the notes had flowers on them, others photographs of eyes.

COFFEE CLUB

Prices:

Coffee (with or without milk): 50p
Tea (with or without milk): 30p
Milk only (in your own coffee or tea): 10p
Full cup of milk: 30p

Please put your money in the blue tin.

It turned out that people were more honest when the note on the wall had pictures of eyes looking at them rather than flowers. Now why should photos of eyes be more likely to rationally propel anyone toward honesty?

The findings from this study are consistent with a studies conducted by Dan Arielly, the Duke University behavioral economist, who found that students were more honest in grading themselves in tests when they had simply been asked to read the Ten Commandments before taking the test[6]. Feeling like we are being watched or being reminded of our "moral compass" seems to have an impact on us, even when it is simply a piece of paper on the wall or a list to read!

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[4] Michelle R. Hebl and Laura M. Mannix
The Weight of Obesity in Evaluating Others: A Mere Proximity Effect
Pers Soc Psychol Bull January 2003 29: 28-38, doi:10.1177/0146167202238369

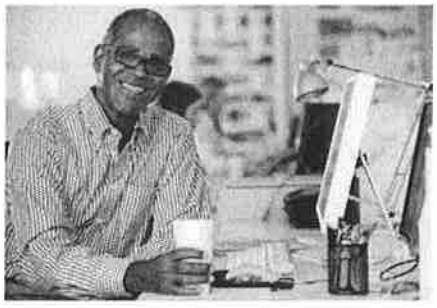
[5] Melissa Bateson, Daniel Nettle, and Gilbert Roberts
Cues of being watched enhance cooperation in a real-world setting
Biol Lett. Sep 22, 2006; 2(3): 412–414. June 27, 2006. doi: 10.1098/rsbl.2006.0509

[6] Dan Ariely, The Honest Truth About Dishonesty: How We Lie to Everyone--Especially Ourselves, Pub by Harper Perennial June 2013.

ISN'T UNCONSCIOUS BIAS REALLY ABOUT STEREOTYPING?

Now that it has been examined how warm drinks, staring eyes, and the Ten Commandments relate to unconscious bias, let's look at the all-too prevalent thought that unconscious bias is all about stereotyping. It's true that much of what we think of as "bias" has a lot to do with stereotyping, be it racial or addressed to other facets of our identities. However, it may be far more complex than that in reality.

Amy Cuddy, a social psychologist at the Harvard Business School, has conducted some of the most interesting research done on stereotyping.[7] Cuddy distinguished two basic kinds of bias. One form is based on how warmly we feel toward people and how inclined we are to like them, to be empathetic toward them, and to see them as somebody to whom we can personally relate. The second is based on what we think of the person's competency.



We can see one example of the importance of these distinctions in the current marketplace. One group that has felt the sting of unconscious bias in the recent employment marketplace is people over age 50. While we may have no "dislike" of people in this age group, researchers at Harvard have found that about 90 percent of Americans associate negative competency traits with the "elderly." What they also found was that these negative ideas were just as prevalent among people who were 60 or older as they were among people 20 or younger. We may "like" somebody very much, and still have strong negative biases about their competency.

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All of this research tells us that our decisions that involve stereotyping are neither intentional nor rational. They make no sense; yet, these decisions run our lives, often in unintended ways.

TEN DISTINCT WAYS THAT BIAS SURFACES

Over the course of the past ten years, we have examined hundreds of research studies on unconscious bias. This does not even include all of the anecdotal examples that we have all seen and experienced first hand while working with clients. All of this research leads to the conclusion that there are at least 10 distinct ways that unconscious bias manifests itself in the workplace and in many other areas of life. They are:

1. **Diagnosis Bias:** The propensity to label people, ideas, or things based on our initial perceived opinion. Dozens of studies demonstrate the way our quick decisions about people affect the way we treat them. Simply think of a time when you saw somebody, made an assumption about him

[7] Cuddy, Amy J.C., Peter Glick, and Anna Beninger. "The Dynamics of Warmth and Competence Judgments, and Their Outcomes In Organizations." Research in Organizational Behavior 31 (2011): 73–98.

or her, and then acted accordingly. How many times have you made assumptions like that about people? The truth is, it has probably happened any time that you've met somebody new. We "scope them out," without having to think about doing it. It is just the way we are "wired."

2. **Pattern Recognition:** The tendency to sort and identify information based on prior experience or habit. This is a fundamental protective mechanism of the mind. If we see something in a person that has been dangerous for us—or that we think has been dangerous for us, or even reminds of us something that has been dangerous for us—we don't wait to determine whether or not it will threaten us this time. Instead, we immediately respond. This is very much like staying away from a hot stove after having been burned by one before.
3. **Value Attribution:** The inclination to imbue a person or thing with certain qualities based on initial perceived value. An example of this was an experiment conducted by the Washington Post, when the noted violinist Joshua Bell was asked to play in a subway station in Washington D.C., looking like the typical itinerant subway troubadour.[8] Almost nobody stopped to listen, even though the night before he had sold out the Kennedy Center for the Performing Arts.
4. **Confirmational Behavior:** The tendency to look for what confirms our beliefs and to ignore what contradicts our beliefs while disregarding facts that contradict our point of view. This is often called the "Pygmalion Effect," or the self-fulfilling prophecy.
5. **Automatic Perception:** The reflexive reaction to a particular person, object or situation based on unconscious associations and expectations. One example of this was a groundbreaking study, conducted at MIT and the University of Chicago, in which identical résumés with "traditionally White" and "traditionally Black" names were sent to companies looking to hire people.[9] A total of 50 percent more of the people with traditionally White names were called back for interviews. Similar results were found in studies conducted in Singapore with traditionally dominant Chinese surnames and in Sweden with traditionally dominant Swedish surnames.

Another similar study was recently conducted by Jo Handelsman, a Professor of Molecular, Cellular & Developmental Biology at the Yale School of Medicine. Handelsman gave science professors a one-page synopsis about a potential hire.[10] When the name "John" was put on the document, the candidate was rated a "4" on a 7-point scale and was offered an average starting salary of $30,328. When the exact same document was distributed with simply the name "Jennifer" replacing "John," the rating was 3.3 and the salary offered was $26,508. A stunning aspect of this study was that there was no difference between male and female professors in their relative gender assessments.[11]

[8] Gene Weingarten, Pearls Before Breakfast – Can one of the nation's greatest musicians cut through the fog of a D.C. rush hour? Washington Post, April 8, 2007. http://www.washingtonpost.com/wp-dyn/content/article/2007/04/04/AR2007040401721.html

[9] Marianne Bertand and Senhild Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal? A Field experiment on Labor Market Discrimination. The American Economic Review, Vol 94, No. 4, (September 2004), pp. 991-1013.

[10] Moss-Racusin, C.A., J.F. Dovidio, V.L. Brescoll, M.J. Graham, and J. Handelsman. 2012. Science faculty's subtle gender biases favor male students. Proceedings of the National Academy of Sciences. 109(41): 16474-16479. Anderson, W. A., U. Banerj

[11] "Bias Persists for Women of Science, a Study Finds," New York Times, September 24, 2012

6. **Selective Attention/Inattentional Blindness:** The propensity to see some things and not others dependent upon what a person is paying attention to at a particular moment. This explains why pregnant women tend to see lots of other pregnant women, or when you are thinking of buying a car you seem to see advertisements for that car every time you turn around. It also explains why two people can look at the same picture and see different things. One of the most well known examples of this is the experiment originally conducted by Daniel Simons, a professor in the Department of Psychology and the Beckman Institute for Advanced Science and Technology at the University of Illinois, and Chris Chabris, Associate Professor of Psychology and Co-Director of the Neuroscience Program, Union College.[12] Simons and Chabris developed a video showing two groups of students passing basketballs back and forth and asked the viewers to count the number of times the team in white completed a pass. During the sequence a person in a gorilla suit walks across the scene, stops and beats its chest, and then walks off, and yet few people ever see the gorilla because we are so busy counting the passes!
7. **Priming Effect:** The inclination to respond to something based on expectations created by a previous experience or association. (The "cold drink/hot drink" experiment outlined earlier is a demonstration of this phenomenon.)
8. **Commitment Confirmation/Loss Aversion:** Our tendency to maintain belief or support in something because we have committed to it, and because we want to avoid possible losses. Most of us have experienced this one. We choose somebody for something, perhaps hire him or her, and then are reluctant to admit we made a bad choice. This is kind of like continuing to throw good money into a poker game, even though we know we have a bad hand!
9. **Stereotype Threat:** The experience of anxiety or concern in a situation where a person has the potential to confirm a negative stereotype about their social group. This has often been referred to as "internalized oppression" and was, perhaps, most famously demonstrated in the well-known experiment conducted by Drs. Mamie and Kenneth Clark with black children who, when offered white or black dolls to play with, preferred to play with white dolls.[13] This important experiment is known to have influenced the U.S. Supreme Court in the 1954 Brown vs. Board of Education school desegregation ruling. In more recent studies, Professor Claude Steele found that simply asking African American students to report their race before taking their SAT tests significantly lowered their scores.[14] Being reminded of being black seemed to internalize a negative performance bias. Similarly, in a 1995 study by psychology professors Margaret Shih, Todd L. Pittinsky and Nalini Ambady, Asian female students were shown to perform significantly higher on math tests when they were reminded of their Asian identity rather than their gender identity.[15]
10. **Anchoring Bias:** The common tendency to rely too heavily or "anchor" on one trait or piece of information when making decisions. Nobel Prize winner Daniel Kahneman and his research partner, Amos Tversky, famously identified this bias.[16] For example, do you automatically assume, without questioning, that people who come from elite schools are better qualified than others? Or that certain personality types are "more professional"?

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[12] http://www.theinvisiblegorilla.com/gorilla_experiment.html

[13] Clark, Kenneth; Mamie Clark (1950). "The Negro child in the American social order". The Journal of Negro Education 19 (3): 341–350

[14] Claude M. Steele and Joshua Aronson, Stereotype Threat and Intellectual Test Performance of African Americans, Journal of Personality and Social Psychology, Vol 69(5), Nov 1995, 797-811. doi: 10.1037/0022-3514.69.5.797

[15] Margaret Shih, Todd L. Pittinsky, and Nalini Ambady, "Stereotype Susceptibility: Shifts in Quantitative Performance from Socio-Cultural Identification," Psychological Science 10, no. 1 (January 1999): 80–83.

[16] Amos Tversky and Daniel Kahneman, Judgment under Uncertainty: Heuristics and Biases. Science, New Series, Vol. 185, No. 4157. (September 27, 1974), pp. 1124-1131.

CASE STUDY: A GLOBAL MANAGEMENT CONSULTING COMPANY

The Situation: A division of a leading global management consulting company engaged Cook Ross to lead a group intervention for a business line of more than 50,000 employees working worldwide to increase the number of women in senior leadership by focusing on the role of unconscious bias in hiring.

The Cook Ross Work: The effort began by bringing together executive leaders and then a group of 150 senior leaders to engage in dialogue about the impact of unconscious bias on their organizational culture. They subsequently expanded the education effort to include leaders throughout their global system. In addition, an internal train-the-trainer program was created using videoed content and live facilitation. All leaders were exposed to Unconscious bias education. Unconscious bias education was also provided to their accounts, and account leads were held responsible for increasing the diversity on the account teams.

In addition to education, structures and systems were recreated. More jobs were posted so that others outside of those on top of mind could have the opportunity to apply. Each geographical group submitted a diversity strategic plan that they were accountable for delivering on and reporting on it monthly. They also were expected to put together teams to deliver on the plans. All of the human resources functions were tasked with realigning their processes to mitigate bias in the talent management process, and decision-tools were created to encourage more conscious talent management practices.

Top managers also began to make discussions about bias a part of every management meeting and top leaders were vocal in providing leadership for the effort by talking about how their worldview was shaped by their own biases. Individual leaders received coaching to assist them in transforming their leadership approaches.

The Outcome: The division's leadership pipeline gender spread has increased, including a three-fold increase in the number of women applying for, and being accepted into, senior leadership positions. Similar, though less dramatic, increases have been occurring among people of color. As a result, the company is now preparing leaders in most of the other business lines to focus on unconscious bias in talent management systems throughout the organization. This program has expanded to specifically focus on mitigating unconscious bias in the performance management process, as the organization's leaders want to ensure equity in this critical talent management process.

CONSCIOUS OR UNCONSCIOUS: GOOD OR BAD?

All of these manifestations of unconscious bias are operating in us and on us all of the time, without our conscious knowledge. Of course, the question still remains: does it really matter if bias is conscious or unconscious? After all, the net effect on the person whom the bias impacts may be the same. It needs to be made clear that it is necessary to develop both an awareness of our own biases and a rigor in addressing these biases. Too often, it is easier to see bias only in others. Fundamentally understanding the automatic nature of bias requires us to adjust the way we approach dealing with these issues, both with others and within ourselves.

Those who work in diversity have all too often traded in the currency of guilt, either feeling bad about ourselves for our biases or trying to make others feel guilty for theirs. In that context, the core driver

of the conversation has often been to find the "bad people" and cure them of their biases. The goal has been to eradicate bias. As we now can see, it is impossible to eliminate bias.

The goal should be to recognize bias and intervene when and where it interferes with personal, professional, and organizational effectiveness and productivity.

If we believe that it is important to create a just and equitable society and strive to create successful organizations in which everybody can fully contribute and have access to their fair measure of success, it is not consistent for some to people to be discriminated against based on their identification with a particular group. That clearly will not contribute to making smart business decisions, in talent management and other domains. But are the people who feel these biases, those who act this way in all the areas of life...all bad people? Are we bad people? The problem with the good person/bad paradigm is twofold:

- First, it virtually assures that on a collective and individual basis we will never "do diversity right" because every human being has bias of one kind or another.
- Second, it demonstrates a lack of understanding of the reality that bias is as natural to human beings as any function of the mind.

The bottom line is we need it to survive, so we have to work with it.

THE GOOD NEWS: WHAT WE CAN DO ABOUT IT!

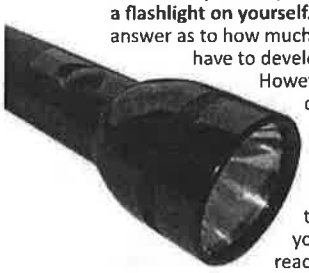
A combination of factors has led us to understand, and experience, that the mind is malleable. We seem to have an enormous capacity for neuroplasticity, which involves subtle changes in neural pathways and synapses, which are due to changes in behavior, environment, and experiences. In other words, the old saying "you can't teach an old dog new tricks" might not even be true for dogs! There appear to be a number of things that we can do to increase our ability to make more conscious decisions. Regardless of someone's position in an organization or society at large, everyone can take practical and meaningful steps to reduce the influence of unconscious bias on decision-making. Review the steps listed below, which are designated for either individuals or for people who manage others, and pick two or three that speak to you directly.

- **Perhaps the most important of all is this one: You have bias...yes, you...and so do I.** Biases evolve over the course of our lives based on our experiences and the things and people we are exposed to. However, the notion that we can *make* all bias go away is a fantasy. We all have it. All of us. If we didn't, we wouldn't survive. Our brains make decisions, and mistakes, without us even knowing it. The more we try to convince ourselves that we are without bias, the more likely we are to overlook and ignore our own blind spots. The more comfortable we become with the reality

of our biases, the more we move away from the notion that they are traits that only bad people possess. This recognition and awareness helps us develop behaviors that limit the negative impact of bias on our lives and the lives of others. As the Swiss psychologist Carl Jung said, "We cannot change anything until we accept it. Condemnation does not liberate, it oppresses!"

It might be helpful to think about our relationships with biases by using the metaphor of the clutch in a standard transmission vehicle. When a driver steps on the clutch to shift gears the engine never stops running. It doesn't even slow down. It keeps humming along as it always was. However, what the clutch does is to disable the engine's ability to move the car. I have found this to be a helpful way to look at bias. We do not have to eliminate it in order to mitigate its impact on our behavior. When we notice it, we have the opportunity to choose our behavior in new ways.

- **Consciously develop the capacity to shine a flashlight on yourself.** There is no clear answer as to how much real capacity we have to develop self-awareness. However, it is clear that checking in with ourselves and learning to watch ourselves in action can bring patterns to the surface. Do you notice yourself reacting consistently in particular ways or to particular kinds of people? Do certain things, people, or situations consistently trigger an emotional reaction? These kinds of observations can open up a path of exploration that leads to insight and transformation. Research in mindfulness demonstrates that when we slow ourselves down and exercise self-observation, we are more likely to generate awareness from our prefrontal neo-cortex rather than our more automatic limbic system. Perhaps one of the reasons that many of our most innovative ideas occur to us when we're in the shower!



- **Develop and practice constructive uncertainty.** We live in a culture that loves certainty. We are often convinced that the more certainty we feel or see expressed about something, the more likely it is to be true. This is why smart people may be more, rather than less, susceptible to unconscious biases. Our intelligence convinces us that we are right. The more we replace our exclamation points with question marks, the more likely we are to be able to see the irrationality of our decision-making.

  By observing ourselves in action, we are more able to thoughtfully consider our perspectives. One way to remind ourselves is by using this simple pneumonic, P.A.U.S.E:

  - **P**ay attention to what's actually happening, beneath the judgments and assessments.
  - **A**cknowledge your own reactions, interpretations, and judgments.
  - **U**nderstand the other possible reactions, interpretations, and judgments that may be possible.
  - **S**earch for the most constructive, empowering, or productive way to deal with the situation.
  - **E**xecute your action plan.

  See the following page for details about the P.A.U.S.E. pneumonic.

- **Explore awkwardness and discomfort.** Our tendency is to back away from situations that make us feel uncomfortable. Since it appears as though our brain's default mechanism is to assume "danger in the stranger," we would be well advised to notice those feelings of fear when they occur. Rather than allow our amygdala (the fear or "fight, flight or freeze" center of the brain) to hijack us, we should take some time to more deeply examine what we are reacting to. Who or what is this person reminding us of?

Pay attention to what's actually happening, beneath the judgments and assessments.

When we slow down and look at what's really happening, we have an opportunity to distinguish between an event and our interpretation of that event. For example, say somebody shakes your hand softly. Do you have a visceral reaction and association with weakness as many people in the United States do? ("Limp!" "Cold fish!") What actually happened is that they used less pressure in the handshake than you are used to with most people. The rest is your interpretation.

Acknowledge your own reactions, interpretations, and judgments.

This is where you have an opportunity to identify your interpretation as an interpretation. You might say something to yourself like, "I can see that when he shook my hand softly, I interpreted that as weakness." As soon as you notice an interpretation, as an interpretation, you have moved to a higher level of consciousness.

Understand the other possible reactions, interpretations, and judgments that may be possible.

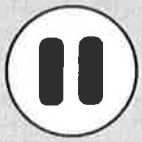
There may be any number of other reasons for the behavior. In the case of the handshake, the person may come from a different culture (a significant percentage of people in different parts of the world shake hands more softly than we do in the United States), or may have an injury, or be recovering from an injury. Or they may have arthritis, or—whatever! Looking at all the possibilities reinforces the dis-identification.

Search for the most constructive, empowering, or productive way to deal with the situation.

What makes the most sense? Should I assume that the person is weak because of my initial reaction to his handshake, or should I get to know him a little better before I make a definitive assessment? What should I say? What is the best way to handle the circumstance?

Execute your action plan.

Act consistently with what makes the most sense.



- **Engage with those people you consider "others."** Because of the nature of our lives, we often find ourselves living with, working with, and relating to people inside a relatively limited bandwidth of human difference. Consciously expanding that bandwidth can give us a broader perspective about people who are different from us. The United States is a more diverse country in 2013 than it was in 2007, and far more diverse than it was in 1997. The diversity of people is increasing, competing for jobs within a tight marketplace and yet, it is imperative that we find ways to engage with those who are different from us in positive ways. Remember that every one of us is an "other" to someone else.

The more we know people for who they are, the less we treat them as what they are.

- **Reframe the conversation to focus on equitable treatment, respect, and good decision-making, and away from only discrimination and "protected classes."** Review every aspect of the employment life cycle for patterns of hidden bias—screening résumés, interviews, onboarding (bringing new employees on board), assignment processes, mentoring and sponsorship, performance evaluation, identifying high performers, promotion and termination. Emphasizing the universality of bias allows people to interrelate from a sense of commonality rather than difference. It builds on the human tendency towards homophily, the "love of same," which leads us to feel more comfortable with people like ourselves.
- **Get feedback and data.** It is almost impossible to rationally look at our own patterns of bias. However, we can review our behavior. Gathering data and getting feedback can be very helpful in determining whether or not there are any patterns of bias in our behavior toward others. If the data show a potential pattern, it should at least be an invitation to look and see whether there is some bias at play. You may want to initiate a résumé study within your industry, organization or department to see whether those with roughly the equivalent education and experience are weighted equally relative to names, race, culture, etc. Conduct an assessment of your organizational unconscious to understand what issues of bias might exist in your workplace. Interviews and surveys with present and former employees also can be helpful in this process. Once people are outside of the culture they often are able to offer valuable insight.
- **Offer customized unconscious bias education based on the needs of different areas in the organization.** When it comes to training and awareness, one size does not fit all. Different functional areas have different cultures, needs, and requirements. In several client engagements Cook Ross has undertaken within the past few years, we have customized approaches to address the specific needs, sometimes even focusing on the specific vocabulary of recruiters, engineers, sales people, marketers, or executive leaders. We also have developed education programs to recalibrate structures for job interviews, performance reviews, and talent assignments/team selection.
- **Support activities that encourage positive images and experiences of members of non-dominant groups.** Research shows that

images, posters, newsletters, annual reports, speaker series, podcasts and other exposure can insert positive messaging that can serve to counter negative stereotyping when they are coupled with a genuine attempt to observe behavior and change it. In fact, "positive stereotyping" of this kind has been found to be among the most effective systemic interventions to address patterns of unconscious bias.

- **Reduce guilt and increase responsibility.** While the aversive emotional feeling associated with guilt may discourage an individual from performing a guilt-provoking (and presumably socially undesirable) act in the future, as a long-term strategy is a non-functional reaction. Guilt is what people feel because of what they have done. Responsibility represents an understanding of our impact on others and our commitment to change. When people feel guilty they generally react in one of two ways: by contracting or by feeling bad about themselves. Guilt and shame can make us react to, or get angry at, the source of our guilt. This is altogether unproductive. When we take responsibility, we are able to move forward to correct our mistakes.
- **Develop structures and systems that remove identifiers that might stimulate bias.** Removing names, pictures or other qualifiers can often create a greater sense of equity and inclusion in decision-making. For example, in the 1970s approximately ten percent of orchestra members were women. As a way to counter-balance this trend, blind auditions were widely developed in which the musician auditioned behind a screen and even walked in on a carpet to mask the sound of high heels.[17] By the mid-1990s, the percentage of women musicians had risen to 35%.
- **Make it a cultural thing.** This may be the most important of all. It is very difficult for an individual to tackle his or her own unconscious biases. If we create an organizational community of consciousness in which people collectively commit to support each other in addressing bias, we are far more likely to have dynamics that we are unaware of brought to our attention. Create environments where different views are welcomed. Build integrated teams and create policies that require colleagues to treat each other with respect and professionalism, not political correctness. In our experience this may be the most impactful result from unconscious bias training when it is done well. It opens up a new, more constructive way to engage in dialogue around issues that we sometimes struggle to talk about.

So far we have been mainly focusing on the ways that individuals can manage their own biases. Now let's look at some ways to build consciousness into the talent management process.

[17] Claudia Godlin and Cecilia Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, The American Economic Review, Vol. 90, No. 4. (September 2000), pp.715-741.

PRACTICAL STEPS IN THE HUMAN CAPITAL LIFECYCLE

By broadly including people in task groups, they can begin to see themselves as part of a larger, interdependent community in which everyone has skills and equitable opportunities to contribute. Together, as an organizational community, we can look at systems and structures that support better decision-making in areas like recruitment, bringing people on board, assessment and development. Structure creates behavior in organizations and the right structures can encourage more inclusive behaviors.

What are some of the specific behavior that can contribute to more conscious people management? Consider these ideas:

RECRUITMENT

- Note and evaluate your "first impressions."
- Do you notice an immediate like or dislike of the candidate?
- Do you have anchoring biases about experiences, schools, and personal preferences?
- Avoid distractions or "speed conversations" when talking with potential recruits. Short interactions tend to strongly favor people in dominant groups.
- Attempt to get a deeper understanding of the recruits' background and the path they took in getting to your door. Non-traditional paths may not show up in traditional ways.
- Make yourself available, both logistically and interpersonally to get a better sense of the potential recruit. Share a personal story. Let them get a better sense of you.
- Track your results for patterns that might reveal biases, including unconscious bias.

ONBOARDING

- Provide cultural, as well as logistic orientation. We often underestimate how important it is to help new employees (especially people from non-dominant groups) understand the organizational culture and how to successfully navigate it.
- Watch out for early assumptions about a person's performance. Some people are slower starters than others but they soon catch up and even move ahead of those who seem to be quick learners.
- Make time to personally connect with associates.
- Make yourself available, when possible, to check and see how they're doing.
- Be systemic, rather than intuitive, in providing opportunities for new associates. Keep track of job assignments and other similar opportunities. Be sure all new associates have multiple opportunities to succeed.

ASSESSMENT

- Make sure there are well-articulated expectations for behaviors and results that can be clearly monitored.
- Use data to balance your "gut" reactions.
- Watch for patterns of assessment among particular groups. Do certain groups tend to receive lower ratings than others?
- Get broad input from different people about an employee. One way to diminish the power of unconscious bias is to include more voices and perspectives in the process of collecting input.
- Be sure you are measuring against "success" rather than your own personal ways of doing things. We are often

unconsciously dismissive of other ways of doing things, not because they are less successful, but because they are not our ways.

- Create a mentorship or sponsorship relationship. Relationships like these not only benefit the protégé, but the mentor or sponsor as well.

DEVELOPMENT

- Expose employees to a broad range of educational and developmental opportunities.
- Create a career development process for your associates, including:
  - Job assignment strategies
  - Clear performance objectives
  - Regular feedback opportunities
  - Ongoing opportunities for growth and development
- Be aware that unstructured processes will tend to benefit the dominant group. Structure allows us to be sure that all employees have opportunities to grow and be successful.
- Monitor your own patterns in assigning tasks. It is easy to slip into patterns that benefit some employees to the exclusion of others.
- Encourage employees to take responsibility for their own development.

CONCLUSION

Unconscious patterns have an enormous impact on both our individual behavior and on organizational behavior. Only when we find the courage and curiosity to engage in a seemingly contradictory path – consciously becoming aware of and addressing something that is, by nature, concealed – can we begin to see more clearly into our blind spots. As Viktor Frankl wrote:

> *"Between stimulus and response, there is a space. In that space lies our freedom and power to choose our response. In our response lies our growth and freedom.*[18]"

Awareness and growth does not happen overnight. Increasing our diversity, inclusiveness, and cultural competency requires us to undertake a long journey of continuously challenging our perceptions and slowing down our impulse to judge instantaneously and reactively. This means we must continually confront unconscious bias. Ultimately, the result will be more conscious, inclusive and humane organizations with greater opportunity for all, more engaged individuals and higher profitability. Isn't that worth the effort?

[18] Frankl, Victor, Man's Search for Meaning: An Introduction to Logotherapy, Boston: Beacon Press, 1959.

To learn more about unconscious bias and how to address it in your life and organization, check out *Everyday Bias: Identifying and Navigating Unconscious Judgments in Our Daily Lives*, by Howard J. Ross, Published by Rowman and Littlefield, 2014 available at www.cookross.com or amazon.com.

Order now: www.cookross.com | 301.565.4035

ABOUT THE AUTHOR

Founder & Chief Learning Officer at Cook Ross Inc., a visionary at heart, **Howard Ross** has served more than 25 years as an influential business consultant to hundreds of organizations across the United States and in 21 other countries, specializing in leadership, diversity, and organizational transformation. As a recognized thought leader, Howard brings invaluable expertise and knowledge on the topic of exploring, revealing and addressing Unconscious Bias.He is the architect of several award-winning training and awareness programs, notably CultureVision and The Diversity Toolkit. He is also the author of *ReInventing Diversity: Transforming Organizational Community to Strengthen People, Purpose & Performance*, published by Rowman Littlefield in association with the Society for Human Resource Management. Howard was the 2007-2008 Johnnetta B. Cole Professor of Diversity-in-Residence at Bennett College for Women, the first time a white man has ever served in such a position at an HBCU (Historically Black Colleges and Universities). He is a frequently invited international speaker for organizations and at diversity and inclusion conferences. Howard can be heard monthly on NPR, as a regular guest on The Kojo Nnamdi Show.

ABOUT COOK ROSS INC.

Cook Ross has over twenty four years of experience in providing an innovative approach to diversity, inclusion, cultural competency, and leadership development through training and consulting products and services. Cook Ross is considered to be a thought leader in the practical application of academic research of the unconscious to organizational diversity & inclusion efforts. For more information, contact us at lookingforanswers@cookross.com.

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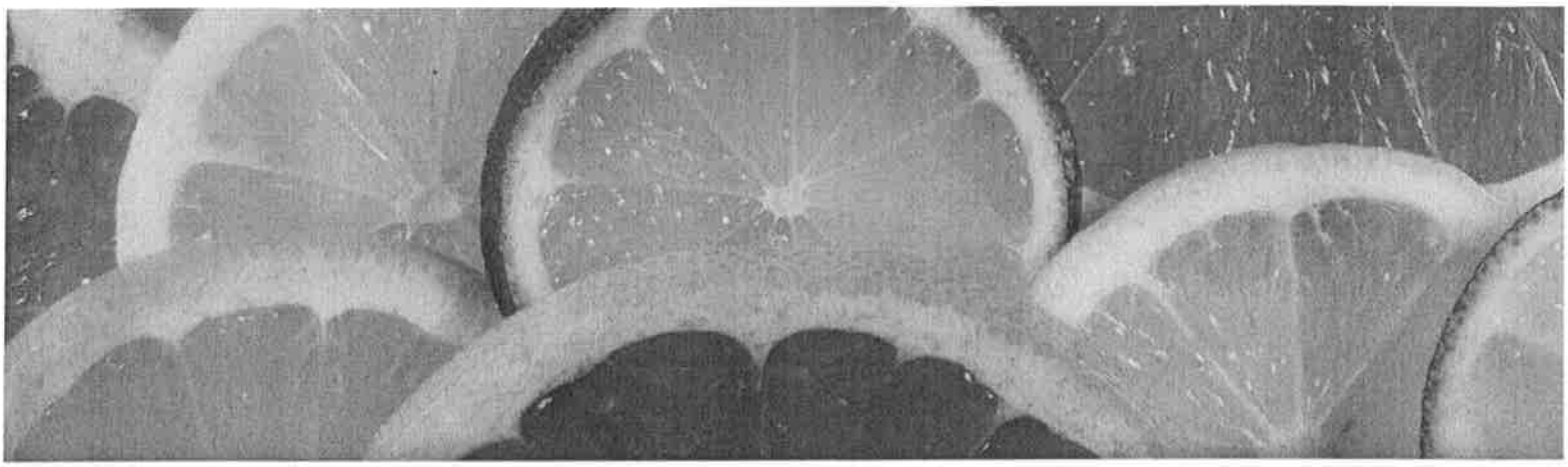
NOTES



NEXTIONS

THINK SMARTER | LEAD BETTER

Yellow Paper Series

Colored by Race:

Bias in the Evaluation of Candidates of Color by Law Firm Hiring Committees

The 2015 Update &
Summary of Data from 2005

Lead Researcher
Dr. Arin N. Reeves

Colored by Race:

Bias in the Evaluation of Candidates of Color by Law Firm Hiring Committees

2015 UPDATE

RESEARCH QUESTION:

Does race still color the way in which minority candidates are evaluated by hiring committees in large law firms and if so, how? [1]

"Colored by Race: The Evaluation of Candidates of Color By Law Firm Hiring Committees" — a research study conducted in 2005 — offered some empirical evidence that racial and ethnic bias (both conscious and unconscious) was indeed present in large law firm hiring processes, and it manifested itself in some predictable and some unexpected ways.

This 2015 Update of "Colored by Race" is the 10 year update of the 2005 study and is based on data gathered in 2015 from confidential telephone interviews with 63 partners[2] representing 49 large law firms[3] throughout the United States. All of the partners in this study were involved with the hiring process in their respective law firms for at least six months during their career as partners. In addition to the 63 partners, 18 diversity professionals/partners from large law firms were also interviewed. Of these 18 diversity professionals/partners, only 3 had been in the same or similar roles in 2005.

Our 2015 research findings reveal that racial bias does continue to color the ways in which:

- **Racial/ethnic minority law students' achievements and aspirations are evaluated;**
- **Minority candidates are penalized for the high attrition rate of minority practitioners from law firms;**
- **Comments are being made about minority candidates behind closed doors in the evaluation process.**

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[1] Since many firms have different names for the committees that engage in the evaluation of candidates for positions within the firms, we use the term "hiring committees" generally to mean any committee in which law student or lawyer candidates are evaluated for employment by that law firm.

[2] This study is based on telephone interviews conducted between January 1, 2015 and November 1, 2015 with 63 partners who served on their respective firms' hiring committees for at least six months as a partner. Of the 63 partners, 29 were male and 34 were female. 42 partners were white and 21 partners were minorities.

[3] For purposes of consistency, this study's sample of partners was derived only from law firms with at least 250 lawyers.

In addition to the above, the 2015 research findings also reveal that:

- **The economic downturn in 2008 and the subsequent layoffs of attorneys from law firms significantly impacted the recruiting and hiring of racial/ethnic minority attorneys, an impact from which we are just now beginning to recover;**
- **Lateral and law school recruiting and hiring are more separated than they were 10 years ago;**
- **Recruiting and hiring in general are more decentralized than they were 10 years ago;**
- **the volume at which firms are hiring from law schools has dramatically decreased from 10 years ago even though the numbers in 2015 were higher than they were in 2009 and 2010;**
- **The focus on diversity in recruiting and hiring has returned to pre-recession prioritization, but the language around "diversity as a threat to meritocracy" seems more intense than before given the decrease in overall hiring volume;**
- **There are more firms now than in 2005 that are now actively focused on recognizing unconscious biases as barriers to inclusive hiring practices;**
- **Diversity professionals are much more involved in recruiting and hiring of attorneys than 10 years ago, several of them in key leadership positions in the recruiting and hiring processes and impacting the processes positively;**
- **There are many more firms than in 2005 who had fully transitioned to or were beginning to transition to behavioral interviewing models to increase inclusiveness in their interviewing processes and achieving success through these models.**

This 2015 Update not only highlights the key findings from this study, but it also offers updated strategies that law firms can employ to address the challenges they face in creating and implementing an objective hiring process where differences are valued instead of tolerated and diversity is appreciated instead of exploited.

THE DIVERSITY PILE & THE TWO CONVERSATIONS IN 2015

[Click here to read the 2005 research on this topic in this report.]

In 2005, the research highlighted that candidates who were racial/ethnic minorities were immediately labeled as "diversity candidates" and discussed differently than their majority counterparts from the on-campus interviews all the way to final selection decisions. While this was done today as it was 10 years ago with the best of intentions to focus concentrated attention on attracting and hiring the "diverse" candidates, the

research continues to indicate that the ways in which "diverse" candidates are separated from majority candidates is a double-edged sword that can harm as much as it helps.

One diversity professional shared that "yes, diverse candidates are immediately separated from the rest. The pressure to hire diverse classes is heavy, and we separate them to make sure they don't get lost or slip through the cracks. But, because they are separated, they are talked about very differently. Difference may mean better, but often it means that the conversation on 'lowering standards' sneaks into these discussions in a way that it doesn't with white candidates."

Many of the majority and minority partners in the study concurred that treating minority candidates differently from the beginning may be doing some harm, but they cited lack of viable alternatives to focusing on diversity as the reason for continuing to create to piles of candidates. As one minority partner explained, "of course I see the problems it causes, but if we are going to talk about diversity, we have to identify the diverse candidates, and I don't have a suggestion for doing it differently."

The partners and the diversity professionals discussed the difficulty in talking about the "diversity" of a candidate without necessarily talking about the candidate differently in regards to his/her qualifications, and many of them acknowledged that the "diverse" candidates faced greater scrutiny because of this.

A few of the partners and diversity professionals also discussed how "diverse" candidates were often talked about as "great for the diversity of the class" and "great for the diversity of the firm," and this detracted from how they were talked about as good for the firm simply because they would be good attorneys as opposed to good for diversity.

Although a couple of white partners did say that there were some negative conversations about minority candidates that occurred when minority partners or staff were not in the room, the stories seem to indicate that the frequency and intensity of these conversations has decreased in the last 10 years.

In 2015, there continue to be 2 piles of candidates, and the piles, while considered separate but equal for well-intentioned purposes, don't seem to be treated equally for the most part.

THE "TAINT" OF AFFIRMATIVE ACTION IN 2015

[Click here to read the 2005 research on this topic in this report.]

In 2005, the research indicated that although firms were talking about diversity on the surface, there were "below the surface" conversations about "diverse candidates" and "affirmative action." Many of the respondents in 2005 discussed how often diversity and affirmative action were brought up together in discussing racial/ethnic minority candidates in order to explore if recruiting for diversity and inclusion was damaging the commitment to being a meritocracy. These discussions seemed to be rooted in affirmative action being a negative social construct that pitted diversity against merit.

In 2015, the direct mention of affirmative action seems to have decreased, but the conversations around "lowering standards" have stayed constant. The "affirmative action" term has been dropped, but the conversations about diversity as conflicting with excellence/high standards has continued and is quite prevalent in recruiting and hiring conversations.

Several of the diversity professionals in the study commented on how this conversation really increased after the economic downturn and how it has bled into conversations beyond hiring. Many of the majority and minority partners agreed with this sentiment. One partner noted that "the conversations on standards has always been there when it comes to diversity. It's changed some but it hasn't gone anywhere. I push back and ask why we don't have these conversations about white male candidates, and I get the response that we do this with everyone. But, we don't. I don't know if people don't see it or if they see it but won't acknowledge it."

FAILURE RISK & FLIGHT RISK IN 2015

[Click here to read the 2005 research on this topic in this report.]

The 2005 data revealed that racial/ethnic minority candidates were more often than not seen as high-risk candidates regardless of their qualifications. When these candidates were not highly exceptional, they were seen as failure risks in ways that their similarly qualified majority counterparts were not seen. On the other hand, if the minority candidates were exceptionally qualified, they were seen as flight risks in that they would have too many opportunities because they were "diverse" and thus were risky investments as hires.

The 2015 data was very much in line with the 2005 data with the only difference being that there was greater discussion about how the market for younger laterals had tightened thus making it harder for people to leave. That said, these failure and flight risk conversations were not being had about majority candidates in the same way that they were about the minority candidates.

The perceptions of these risks worked in tandem to create conversations about minority candidates that made them appear to be riskier investments. Consequently, they were hired because of diversity pressures, but they were not seen as foreseeably long-term additions to the firms into which they were being hired.

THE PERSISTENT PRESENCE OF BIAS IN 2015

[Click here to read the 2005 research on this topic in this report.]

In 2005, a majority of the bias examples shared in the study were examples of explicit bias. From insensitive comments to inappropriate questions, the examples illustrated tangible interactions that they felt were biased in some way.

The biggest difference from 2005 to 2015 is that the majority of the biases reported in 2015 are not tangible interactions; they are subtle differences in how people were treated and inexplicable differences in how people were evaluated in spite of being similarly qualified. Every single partner and diversity professional in the 2015 study talked about implicit/unconscious bias in some way although there is a large variance in regards to how various firms are talking about it and addressing it in their recruiting and hiring processes.

That said, there is still a significant cluster of explicitly biased comments reported in the 2015 data with the majority of these comments being rooted in commentary about people's appearance. Women of color are most likely to have comments made about their appearance with comments about their hair, physical body features and clothing style being the most common. The physical appearance of women is reportedly commented on at a rate far greater than the physical appearance of men, and several respondents stated that women who were commented on as "unattractive" were less likely to get offers than women who were specifically commented on as being "attractive." The same correlation did not exist for men.

Racial/ethnic minority candidates are also more likely to receive negative comments about their names, the lack of "polish" in their overall appearance, and their "comfort levels" in talking with people in the firm. "They all look alike" comments seem to still be alive in recruiting and hiring conversations even if these comments have decreased greatly since 2005.

In regards to unconscious biases, respondents reported that there are subtle but real differences in how resumes of different groups were assessed, how candidate characteristics are interpreted and how individuals are forecasted to "fit" in within the overall firm culture. A few of the examples shared by the respondents are below:

- *"Less than the best grades for white students weren't seen the same way as they were for minorities, especially if the candidate provided a reason for the grades...like illness or family issues. Even when we consider whites whose grades are right at or just below the cutoff, we never talked about lowering standards. We just talked about better understanding the whole candidate."*

- *"People seem to take special notice when Asian Americans are quieter, and that gets commented on, not directly but subtle references to their drive, their ability to compete come up."*

- *"I consistently see us asking questions about African Americans, especially African American women, in terms of how they will fit. We talk about it from the perspective of the groups they are about to enter, whether the groups will be inclusive and welcoming and we talk about what we need to do to help them fit better. I don't think we fully realize how much we continue to assume that they just won't fit."*

- *"There is a lot of unconscious bias about minority pipeline programs, I think. We take these candidates but we talk about them differently because they come to us from minority pipeline programs."*

While the presence of diversity professionals and active learning on unconscious bias was seen as possible by many of the partners in the study, they felt that the ever increasing pressure on recruiting/hiring committees continues to drive some of the biases because the focus on difference overrides the focus on other

characteristics. As one partner commented, "we are constantly asked about diversity of incoming classes to the point that we aren't asked about much else to the same degree, and we find ourselves constantly talking about things like the 'optics of the class.' We are facing a lot of stress, and we get discouraged because the numbers aren't out there, and diversity then becomes this uncomfortable depressing topic that we are always bringing up and feeling powerless to do anything about."

Unconscious bias training seems to be helping in creating more inclusive recruiting and hiring practices, but this was true only if the training was specifically tailored for these issues and included very specific practical strategies. The diversity professionals talked about how difficult it is for partners and associates to take general principles of unconscious bias awareness and translate them into action for themselves. "Specific strategies are critical in these trainings," emphasized one diversity professional, "and these strategies have to be simple enough to have a chance of actually being done."

THE STRATEGIES FOR CHANGE IN 2015 AND BEYOND

As the field of diversity and inclusion has evolved over the last decade, strategies for change have become more nuanced. More importantly, many strategies have been tested through time, and general recommendations can now be differentiated from proven solutions. The strategies outline below are a combination of solutions that study respondents have tested and solutions that Nextions has tested. No solution works for all firms exactly as tested, so please feel free to experiment and tweak as needed for your firm's unique needs.

- Conduct implicit/unconscious bias trainings that are specifically targeted for those involved in recruiting/hiring processes. These trainings should address bias in resume reading, interviewing, and candidate selection and be conducted on an annual basis in order to yield results.

- Conduct facilitated dialogues to develop skills for people in how to address possible explicit bias in comments, questions and assessments. The more people can practice what do to in these often uncomfortable situations, the more likely they are to intervene effectively.

- Transition as fully and consistently as possible to behavioral interviewing. Effective behavioral interviewing processes include clear competencies that are being sought in candidates, objective questions that are standardized across interviewers, increased focus on skills and decreased focus on "fit." The transition to behavioral interviewing requires an intensive training on the need for the transition, the change in the questions, and the expected change in candidate selection. Without adequate training, the behavioral interviewing model becomes a skeleton within which interviewing reverts back to "fit" interviewing that allows a lot of implicit bias back into the process.

- Develop and implement a confidential feedback mechanism through which candidates can provide feedback to the firm about their overall experiences. The more the feedback is gathered digitally, the higher the response rates will be. Minimize the use of anyone from the firm personally contacting the candidate for feedback; this yields very little data given the lack of perceived confidentiality. Use the feedback to iterate the recruiting/hiring process annually for constant improvement.

- Develop and implement a partially blind-graded process (after on-campus interviews) to minimize the impact of the "two piles" of candidates. Identify an initial screening mechanism to screen candidates without identifying backgrounds or other culturally identifying information. If the diversity of candidates is taken into consideration after this initial screening, the impact of viewed differently is diminished, but the value of the differences can still be considered. This is further enhanced when racial/ethnic minority candidates are referred to as racial/ethnic minority candidates instead of as "diversity candidates." The former refers to the identity of the candidate whereas the latter refers to the goal the firm is trying to achieve. Racial/ethnic minority attorneys will add to the diversity of law firm's attorney population, but no candidate is a "diversity candidate" per se.

2005 SUMMARY

(Go back up to 2015 Update)

RESEARCH QUESTION:

Does race color the way in which minority candidates are evaluated by hiring committees in large law firms? [4]

While anecdotal stories and individual examples have suggested for years that bias existed in the ways in which hiring committees evaluated candidates of color, these anecdotes have often been dismissed as atypical and not representative of a profession that says it is committed to diversity. "Colored by Race: The Evaluation of Candidates of Color By Law Firm Hiring Committees" — a research study conducted in 2005 — offers some empirical evidence that racial and ethnic bias is indeed present in large law firm hiring processes, and it manifests itself in some predictable and some unexpected ways.

The findings of "Colored by Race" are based on data gathered from confidential telephone interviews with 114 partners[5] representing 83 large law firms[6] throughout the United States. All of the partners in this study were involved with the hiring process in their respective law firms for at least six months during their career as partners. Research findings showed that racial bias did color the way racial/ethnic minority law students' achievements and aspirations were evaluated, that minority candidates were penalized for the high attrition rate of minority practitioners from law firms, and that there were still a significant number of inappropriate comments being made about minority candidates behind closed doors in the evaluation process.

This summary not only highlights the key findings from this study, but it also offers strategies that law firms can employ to address the challenges they face in creating and implementing an objective hiring process where differences are valued instead of tolerated and diversity is appreciated instead of exploited.

THE DIVERSITY PILE & THE TWO CONVERSATIONS

The data revealed that racial and ethnic bias, in conscious and unconscious ways presented itself in large law firm hiring processes at many levels. As one partner in the study explained, "You've got the regular candidates in one pile, and you have the diversity candidates in another pile. We have different conversations

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[4] Since many firms have different names for the committees that engage in the evaluation of candidates for positions within the firms, we use the term "hiring committees" generally to mean any committee in which law student or lawyer candidates are evaluated for employment by that law firm.

[5] This study is based on telephone interviews conducted between August 1, 2005 and March 31, 2006 with 114 partners who served on their respective firms' hiring committees for at least six months as a partner. Of the 114 partners, 68 were male and 46 were female. Eighty-one partner were white and 33 partners were minorities. The 114 partners interviewed represented 65.14 percent of the 175 individuals who were selected in this researched and weighted random sample.

[6] For purposes of consistency, this study's sample of partners was derived only from law firms with at least 250 lawyers.

about the diversity pile. We have different standards for the diversity pile even if we don't always acknowledge this. We have different expectations for the diversity pile. Sometimes it can feel like we are giving more breaks to the diversity pile, but we do that to get people in the door because there is so much pressure to have diverse classes."

The data from the study showed that the evaluations of minority candidates from law schools or the lateral market often focused first on the race/ethnicity of the candidate. The partners in the study attributed this primary focus on race/ethnicity to the client demand and hiring pressures felt by many law firms to increase their diversity numbers. Many of the partners did not feel that the focus on race was due in part to personal biases and perceptions, but they acknowledged that sometimes diverse candidates were discussed very differently than their majority counterparts. Furthermore, the majority of the responses by the white partners in the study illustrated that the focus on the race of a minority candidate extended beyond the conversations in the hiring committee meetings. According to many of the white partners in the study, there were often two sets of conversations held about minority attorneys.

The first set of conversations about candidates of color involved the formal evaluative dialogues about candidates held in the hiring committee meetings. These dialogues focused on the firm's need for additional diversity and the minority candidate's ability to contribute to that desired diversity increase.

The second set of conversations occurred outside of the parameters of the formal committee meetings and took place usually without any minorities present, including the minority members of the hiring committees. In these discussions, partners involved in the hiring process express variations of the following themes: 1) the perception that if the minority candidates had been subjected to the same qualifying criteria as their non-minority counterparts, they would not be hired; 2) resentment regarding the client and social pressures for inclusiveness that are driving down the standards of hiring, especially as the standards relate to attorneys of color; and 3) concerns that the minority candidates would most probably never be successful at the firm.

This second set of conversations, occurring almost exclusively in the absence of minority practitioners, reinforced the growing perception that minority attorneys were less qualified than their majority counterparts, but were more likely to be hired because of the pressures faced by law firms to increase their diversity numbers.

According to many of the white partners' observations, these complaints about the minority candidates occurred regardless of the actual objective qualifications: "I've noticed, and it's not right, but I've noticed that even if a diverse candidate is qualified on paper with regards to where they went to school or the grades they have, there is still a feeling like the attorney may not make it because, you know, most people in the past have not made it," said one white partner.

Even though the partners of color in the study had not been present during these second set of conversations, many of them expressed the perspective that they "had a feeling" that these conversations were taking place about the minority candidates.

One minority partner expressed her frustration by saying, "I almost don't want to recruit students of color here [into the firm] anymore. I bring these talented young people here, and I know that, behind the scenes, people are setting the stage for them to fail. No matter how qualified, no matter how much star quality these recruits have, they are going to be seen as people who will most likely not cut it. So, they are under the microscope from the first moment they walk in. And, every flaw is exaggerated. Every mistake is announced. And, it's like, aha. As soon as a minority makes a mistake, they immediately say that that's what they were expecting all along. How well do you think any of the white attorneys would come off if they were under the microscope like that?"

THE "TAINT" OF AFFIRMATIVE ACTION

The data illustrated that racial/ethnic bias colored the ways in which the achievements and aspirations of law students of color were evaluated. Even as law firms worked to increase the racial diversity in their attorney workforces, they worked equally hard, in their drive to be seen as fair and meritocratic, to ensure that their diversity programs were not equated to or associated with affirmative action. A significant majority of the partners in the study, both minority and white, stressed the importance of their hiring programs not resembling affirmative action in any way even though many of them had revealed that diverse candidates were evaluated differently than their majority counterparts. Affirmative action, as defined by the partners, implied that hiring standards were being lowered to hire minority candidates to increase the firm's diversity.

In spite of many of the firms' efforts to separate their diversity efforts from affirmative action programs, a significant majority of the partners in the study acknowledged that their firms' minority hires were often seen as affirmative action hires regardless of their qualifications. As one white partner summarized, "No matter how hard we work within the hiring committee to treat all candidates equally, there is something about the way we talk about diversity that just makes it seem like every minority we hire is tainted by affirmative action. It's not just us. We try to communicate to everyone who is going to work with the summer associates that everyone is qualified to be here, but I always hear comments during the summer about one or two minorities and some mistakes that they made and should we be lowering standards?"

According to some of the partners in the study, the "taint" of affirmative action colored the perception of a minority candidate even before he or she is formally evaluated by a hiring committee. One minority partner offered, "[The majority attorneys] believe that a lot of minorities are in the Harvards and the Yales because of affirmative action. So, they say they can only hire the best from the best. And, that's fine. But they go to Harvard, and they go to Yale, and they sit in front of a student of color, and they think that this student only got here because of affirmative action. And they come back to the firm thinking they have to interview this student because she is a minority from Harvard, but they start asking weird questions, like if this candidate is the 'right fit' for the firm or if she would just use the firm as a stepping stone for other things that she may want to do. And I just want to scream, because if she is using the firm as a stepping stone for other things that she wants to do, how is that different from why many of the white men come here?"

PENALIZED FOR OVERALL ATTRITION & VIEWED AS FAILURE RISK OR FLIGHT RISK

Racial/ethnic minority candidates are penalized for the high attrition of attorneys of color from law firms for decades even though that attrition had nothing to do with the candidates per se. Research by the National Association of Law Placement (NALP) and other notable organizations has consistently demonstrated that attorneys of color do indeed have dramatically higher rates of attrition than their white counterparts. However, research by the Minority Corporate Counsel Association (MCCA®), the American Bar Association (ABA), and other entities demonstrates that a large part of minority attorney attrition from law firms is due to the firms' not fully integrating minority lawyers into their folds and the minority practitioners not being afforded full and equal opportunity to the work, the resources, and the relationships that they require in order to succeed.

In spite of the abundance of research illustrating that minority attrition from law firms is a problem to be solved by law firms instead of an option selected casually by the minority attorneys, many of the partners in this study reported that minority candidates were often placed into two categories of high risk attrition: failure risk and flight risk.

Failure Risk

A significant majority of the partners in the study reported that minority candidates were far more likely than their white counterparts to be evaluated as "failure risks," regardless of their specific qualifications. One partner of color reported, "It's a vicious cycle of assuming that the history is one way so the future is going to be assumed to be the same way too. Except they are wrong about how the history went down. Supposedly, we've lost a lot of minority lawyers because their performance was weak, but the more I've looked into it, I'm not sure that that's what happened. These were strong candidates when we hired them, and I think it's easier for firms to say that people failed instead of saying we failed."

The history of attrition based on perceived inadequate performance by minority attorneys is used to label future minority hires as "failure risks." One white partner made this connection: "I'm not going to say that it is always your abilities as a lawyer that leads to poor performance, but there is something about the way minorities fit in here or the way we fit in with them that leads to bad results. So, it's reasonable that when we evaluate minority candidates, we are realistic in maybe thinking that it won't work out. But, we still have to try."

Flight Risk

If the risk of failure was reported by many to represent one side of the risk coin, then the risk of flight represented the other side. The interviewees reported that when minority candidates had excellent qualifications and a combination of a proven track record of success or a star personality, it was difficult to evaluate them as risks for failure. These candidates, then, were reportedly viewed as flight risks in that they would be highly sought after by recruiters, other firms, corporations, and myriad other sources of opportunities. Several of the partners focused on the fact that some minority candidates who should have been hired without any further consideration were often discussed as risky hires for the firm because they would be more likely than their counterparts to receive and accept other opportunities. One minority partner notes the self-fulfilling prophecy set up by many of the firms in defining star minority candidates as flight risks: "Talented people will always have many opportunities, but the firms seem to focus on the fact that talented minorities have many opportunities. I see the white lawyers leave all the time for better opportunities, but those departures are not seen as betrayals. They are not seen as a waste of investment by the firm. But if one minority lawyer leaves for a better opportunity, then everybody has to reevaluate the whole diversity initiative. Then, minorities are seen as not worth the investment because they are just going to leave. If you don't invest in people, of course, they are going to leave. If you do invest, they may leave anyway. But, when a white man that we invested in leaves, we don't say that white people shouldn't be invested in because they leave."

THE PERSISTENT PRESENCE OF BIAS

Even with all the good intentions of increasing diversity, we found a significant number of inappropriate comments being made about minority candidates in the recruiting and hiring process. In addition to the findings reported above that reflect on direct biases in the evaluation of minority candidates in law firm hiring processes, many partners, both white and minority, reported inappropriate comments being made by white partners that suggested deeper and perhaps more implicit biases.

For African American and Hispanic candidates, several partners reported hearing comments of surprise when these candidates' grades fell within the firm's grade requirements. One white partner reported another white partner as jokingly saying, "One of his parents must be white," about an African American candidate with very high grades who was being considered for a summer clerkship.

Comments about women of color contained aspects of race and gender inappropriateness and most often focused on a woman's physical characteristics. One minority partner reported a white partner asking her if "black women had to get suits in special stores" in the middle of a conversation about an African American female candidate and her "shapely physique." Another minority partner reported a white partner asking if a

South Indian female candidate could "teach a live seminar on the Kama Sutra" as part of the firm's diversity initiative.

Although the partners felt that many of these inappropriate comments were insensitive but not actionable, they did feel that when such comments were made, it affected the ability of the group to evaluate the candidates as objectively as they could have if the comments had never been made.

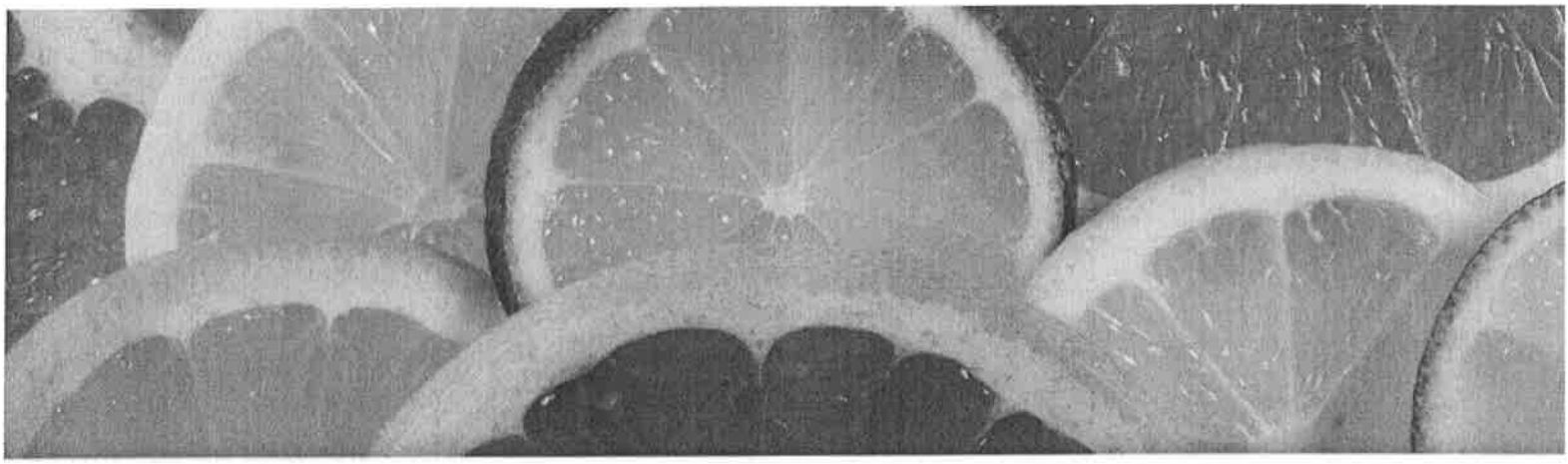
[Our hypothesis for the 2015 Update is that these forms of more explicit bias is where the greatest change has occurred over the last decade. We anticipate hearing less of these stories than we did 10 years ago.]

STRATEGIES FOR CHANGE

Existing research on best practices on the recruitment, retention, mentoring, professional development, and advancement of practitioners of color lays a solid foundation for critical strategies that law firms should integrate into their organizational practices to become and be more diverse. The strategies listed are not meant as substitutes for the broader work that needs to be done on diversity. Instead, these strategies offer focused steps for enhancing the hiring processes in law firms to enable firms to recognize the challenges that currently exist and address those challenges in a candid and informed manner.

- Acknowledge the realities of explicit and implicit racial biases. Racial bias cannot be removed unless its presence is first acknowledged.
- Provide specific training for hiring committee members and interviewers that focuses directly on recognizing and accounting for explicit and implicit personal biases in the evaluation of candidates.
- Provide specific training for hiring committee members and interviewers that focuses on developing the skills to confront the biases and comments when they arise in a constructive way that enables people to advance diversity within their firms.

Creating sustainable racial and ethnic diversity in law firms requires hard work and the courage to take a sincere look at every aspect of hiring, retaining, and advancing attorneys of color. Over the last decade, law firm recruiting practices have changed and expanded to increase the number of attorneys of color who enter firms as summer clerks and associates. This progress, however, has been limited and has not yet been able to match representation of minorities in law schools with their representation in law firms. This research highlights one of the key reasons for the lack of representational parity: Racial bias still colors the ways in which diverse candidates are evaluated and minority hires are perceived. Until firms acknowledge this possibility within their own hiring processes and create mechanisms to correct this bias, they will not achieve true progress with the diversity they profess to seek. Furthermore, in recognizing the inseparable connection between effective recruiting and eventual retention, it is important to recognize that bias in the hiring process does indeed translate into consequences for retention. Acknowledging and addressing bias in the way lawyers of color are recruited and hired will not only increase diversity in a law firm, but it will help sustain it for the long term.



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Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World

Serena Patel

ABSTRACT

This Article advocates for increased cross-cultural competency training for lawyers. With increasing diversity in society and among future lawyers, it is necessary for lawyers to be able to effectively communicate and create trusting relationships with clients from a variety of cultures and backgrounds. This Article recommends that a seminar be offered in law schools to develop and practice cross-cultural skills in line with *The Five Habits: Building Cross-Cultural Competence in Lawyers*, developed by Professors Susan Bryant and Jean Koh Peters. Implementation of the proposed seminar would help prepare law students to be culturally competent, successful lawyers.

AUTHOR

Serena Patel is a J.D. graduate from UCLA School of Law. While in law school, she was a Chief Comments Editor for the UCLA Journal of International Law and Foreign Affairs and participated in the National Moot Court Competition. Serena has a B.A. from UCSD, where she majored in Human Development and minored in Education Studies.

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INTRODUCTION

Esmeralda, your new client, walks in for her intake meeting. She is accompanied by her sixteen-year-old son, who explains that he is there to translate as his mother speaks only Spanish. From the prescreening process, you know that Esmeralda is seeking your advice related to a domestic violence incident involving her husband, who is also her son's biological father. In such a sensitive situation, how should you proceed? There are many factors to consider, including possible language and cultural differences between yourself and your client. These differences can act as barriers, affecting your relationship with your client and your ability to succeed in her case.

In our growing multicultural society, cultural competency is increasingly important for professionals to create effective working relationships with their clients and adequately address their clients' needs. The backgrounds of both clients and service providers can affect the quality of communication and the level of trust between them.[1] Many professions currently require cultural competence training.[2] For instance, many health care institutions and medical schools require their students to train in cultural competence.[3] These "[c]ultural competence educational initiatives in medical education vary widely and include language training, lectures and interactive sessions, workshops, elective courses, immersion programs, components within residency curricula and more."[4] By contrast, there is currently no formal equivalent for lawyers or law students.[5]

1. POVERTY, HEALTH AND LAW: READINGS AND CASES FOR MEDICAL-LEGAL PARTNERSHIP 141 (Elizabeth T. Tyler et al. eds., 2011).
2. Nelson P. Miller, *Beyond Bias—Cultural Competence as a Lawyer Skill*, MICH. BAR J. 38, 39 (2008), *available at* http://www.michbar.org/journal/pdf/pdf4article1367.pdf (pointing out that cultural competencies are taught to "educators, translators, social workers, nurses, missionaries, and a host of others who deal with diverse populations"); *see also* Annette Demers, *Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011*, 39 INT'L J. LEGAL INFO. 22, 23 (2011) (indicating that scholars in the area of business, education, nursing and social work are expanding their understanding of cultural competency and seeking to build cultural competency in their professionals).
3. POVERTY, HEALTH AND LAW, *supra* note 1, at 138.
4. *Id.* (New Jersey requires cultural competence training in accordance with guidelines set by the Association of American Medical Colleges (AAMC) as a requirement for graduation from medical school. Physicians licensed before June 29, 2007 are required to complete a six-hour continuing medical education program on cultural diversity before license renewal, unless the physician already completed cultural competency training in medical school.).
5. *Id.* ("In legal education, cultural competence training has not been offered in a systematic manner."); *see also* Miller, *supra* note 2, at 39 (mentioning that cultural competencies are taught to a variety of professions that deal with diverse populations, but "by and large, they are not taught to lawyers").

Since it is inevitable that lawyers will have clients from different cultural backgrounds,[6] it is important that lawyers also become culturally competent. Not only lawyers who work in pro bono settings, such as legal clinics, but also lawyers who work at law firms with paying clients would benefit from an increased cross-cultural competency.[7] For instance, lawyers working in a pro bono setting may have clients who have suffered trauma and feel uncomfortable discussing those experiences with a lawyer. At the same time, lawyers working for a large corporate firm may have international clients who are familiar with working with lawyers but adhere to particular customs when conducting business deals. These cultural norms and expectations can inhibit the lawyer-client relationship as much, or even more so, than language barriers.[8]

This paper advocates for the implementation of cultural competence training in law schools. Part I explains the goals of a training program that focuses on building cross-cultural competence in lawyers. The goals underscore the significance of cultural competency skills for law students' future careers as professionals working in our diverse society. Part II briefly explains the Five Habits outlined by Professors Susan Bryant and Jean Koh Peters, and their significance for increasing cross-cultural competence.[9] Lastly, Part III provides the basic structure for a proposed cross-cultural competency training seminar, and discusses how the Five Habits can be implemented in such a course at a law school. This cross-cultural training should be available in law schools to prepare law students to be culturally competent lawyers.

6. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 39 (2001).

7. Miller, *supra* note 2, at 40 (explaining that although the examples given involved pro bono settings with elderly clients, the cultural competencies described can be just as important in law firm settings with paying clients).

8. Robert L. Gegios & Stephen D. R. Taylor, *Cross-Cultural Competency: A Non negotiable Skill for Lawyers Involved in International Commerce*, *available at* http://www.primerus.com/business-law-articles/cross-cultural-competency-a-non-negotiable-skill-for-lawyers-involved-in-international-commerce-624201.htm ("[T]ransnational commerce inherently crosses cultural boundaries, raising the question of whether domestic assumptions that underpin traditional legal reasoning travel effectively. The answer is that, more often than not, such assumptions do not translate well, and the result is that sound advice in one culture may be far from beneficial in another. . . Cultural miscomprehension can alienate or confuse employees, partners, suppliers, customers, and key local constituencies. Needless misunderstandings or minor disagreements may be created or existing ones escalated into major crises resulting in significant costs and, sometimes, more lasting damage to future prospects. The scale of this challenge is significant. Differences in business culture may represent a greater obstacle to successful outcomes than even language differences.").

9. Bryant, *supra* note 6, at 33, 34.

I. THE GOALS OF CULTURAL COMPETENCY TRAINING

Culture can have a great impact on one's interactions with others. Culture can influence the way one views events; the importance one places on roles, hierarchy or personal relationships; priorities regarding the rights of individuals compared to the group; conflict resolution; emotions and the way emotions are displayed; and one's willingness to discuss intimate or embarrassing issues among other things.[11] For example, some cultures frown upon seeking psychological services, making members of that community unwilling to discuss sensitive, personal issues or to agree to go to therapy after suffering trauma. Another example highlighting the way business practices can vary based on cultural sensitivities and objectives is the following: ". . . in the United States, profit is seen as a legitimate goal, success in business can be measured empirically, and the work ethic is highly developed. For the Japanese, the focus may not be on the pursuit of profit alone, but on human efficiency; the group is superior to the individual."[12] Culture not only gives us our values and norms of behavior, but also affects how we judge and interact with other people.[13] Thus, it is important that lawyers know both how to gain a client's trust in a culturally sensitive way and how to attribute the client's intended meaning to her behavior and communication.[14]

"The goal of striving for cultural competence is to remove barriers to access" as cultural differences can obstruct communication and trust between a lawyer and her client.[15] Barriers to access occur when misunderstandings or miscommunication prevent successful representation. With increased cross-cultural competency, lawyers have a better ability to build trusting relationships and communicate with their clients. When lawyers and clients come from different backgrounds and cultural viewpoints, they often have a more difficult time creating a trusting lawyer-client relationship in which both parties feel comfortable sharing honest and accurate information.[16] For instance, a client's culture or past experiences might make her wary of trusting people who are not a part of her culture.[17] People sometimes prefer to seek services—whether legal, medical, or otherwise—from professionals who share their ethnicity. Or a client might not be

11. *Id.*
12. Gegios & Taylor, *supra* note 8.
13. Bryant, *supra* note 6, at 40.
14. *Id.* at 42–43 ("One important goal of cross-cultural training is to help students make isomorphic attributions, *i.e.*, to attribute to behavior and communication that which is intended by the actor or speaker.").
15. POVERTY, HEALTH AND LAW, *supra* note 1, at 141.
16. *Id.* at 52.
17. *Id.*

trusting of a lawyer because of a negative bias against lawyers. Since trust is an important part of creating any relationship, one of the goals of cultural competency training must be to teach students how to create trusting lawyer-client relationships with clients from different cultures than their own.

Furthermore, cross-cultural competency training has the goal of enabling lawyers and clients to understand each other's behaviors and communications.[18] When people come from different cultural backgrounds, they might attribute different meanings not only to the same set of facts but also to others' body language.[19] Lawyers must be taught about the potential for misattribution and develop strategies to check themselves and their interpretations of the facts given to them by clients.[20] They must also recognize differences in body language and take those differences into account so they do not judge their clients incorrectly.[21] For example, in some cultures diverting your eyes is a sign of respect while in others it signals dishonesty and direct eye contact shows honesty.[22] Using your left hand to give someone something is seen as disrespectful in those cultures where the left hand is considered dirty, while in other cultures it does not matter which hand is used. Lawyers should be aware of these differences in meaning so that they do not incorrectly conclude that their client is lying about the facts of a case or inadvertently disrespect their client. It is also helpful for lawyers to adapt their body language and communication style to facilitate communication with clients.[23] One way would be to speak to a client less formally, using less legal jargon, in order to make a timid client feel more comfortable and willing to talk. Howev-

18. *Id.* at 43; *see also* BUILDING COMMUNITY TRUST: IMPROVING CROSS-CULTURAL COMMUNICATION IN THE CRIMINAL JUSTICE SYSTEM, A.B.A. CRIMINAL JUSTICE SECTION 1, 59 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/bctext.authcheckdam.pdf (declaring that the correct interpretation of non-verbal cues, including "facial or postural cues such as eye contact, facial expression, posture, gestures, proximity, and vocal cues such as tone, volume, pitch, voice quality, or rate of speaking[,] is critical for effective cross-cultural communication") (alteration in original).
19. Bryant, *supra* note 6, at 43; *see also* BUILDING COMMUNITY TRUST, *supra* note 18 (explaining that "culture shapes a range of behaviors, including communication style. . . [and] [d]iffering communication styles can be a source of cultural collisions").
20. Bryant, *supra* note 6, at 43.
21. *Id.*; *see also* BUILDING COMMUNITY TRUST, *supra* note 18 (declaring that the lawyer's awareness of her "own nonverbal language and comfort level with different nonverbal communication patterns are critical aspects of successful cross-cultural communication").
22. Bryant, *supra* note 6, at 43.
23. Miller, *supra* note 2, at 39 (The author provides an example of a lawyer who, "[a]lthough he could not understand the Guatemalan client's Spanish . . . quickly discerned from her hesitancy and tearfulness that she was probably communicating only in an intimate (child to parent) or at best casual (close friend to close friend) register. The lawyer quickly adjusted accordingly, speaking much more like a parent or friend than the lawyer would have when using the typical consultative register with which all lawyers are familiar.").

er, a client who can understand legal jargon, perhaps if they have a lot of experience working with lawyers, could be insulted if a lawyer speaks to them less formally. Thus, the way a lawyer communicates verbally as well as through their body language is context-specific. Lawyers must adapt depending on their client and the situation, which can change throughout the lawyer-client relationship. It is important that lawyers ask questions, are aware of culturally specific body language cues, and respond flexibly when interacting with their clients.

These goals of improving the lawyer-client relationship and facilitating honest and accurate communication highlight the positive effect cultural competency training can have on law students' success working with clients both during and after law school. Successfully learning cross-cultural skills will aid law students in becoming effective lawyers.

II. THE FIVE HABITS

Bryant and Peter's Five Habits for building cross-cultural competence is a valuable model for cultural competency training for lawyers. The Five Habits, which are briefly described below, can be used by professors to implement cultural competency training in law schools as detailed in Section III.

A. Habit One: Degrees of Separation and Connection

The first Habit asks students to identify the similarities and differences between themselves and their clients. Similarities and differences can exist in regards to race, ethnicity, gender, socio-economic background, age, and sexual orientation. Once students have identified these features, the instructor then asks the class to analyze how these similarities and differences may influence the lawyer-client relationship, especially during the information gathering process.[24] This habit is useful because when law students identify similarities and differences between themselves and their clients, they are able to see how possible cultural misunderstandings, biases, and stereotyping might arise.[25] It is important that students not only focus on the differences but also look at the similarities in order to recognize shared connections they have with their clients.[26] Shared connections can help a student understand their client's situation and thereby be a better advocate for that client.

24. Bryant, *supra* note 6, at 64.
25. *Id.* at 52.
26. *Id.*

B. Habit Two: The Three Rings

The second Habit implicates a deeper inquiry into the possible effects of the similarities and differences that exist between the client, the legal decisionmaker, and the lawyer. These three individuals compose the "three rings."[27] This process involves considering what a successful client may look like to the legal decision maker, such as the judge, and how the actual client compares based on the client's similarities and differences.[28] The law students should brainstorm which implicit cultural values and norms in the law will be applied to their potential clients[29] and how that impacts the attorney-client relationship. For instance, the judge may have a biased perception or stereotype of an indigent, criminal client that could affect his or her decision. Being aware of this risk can prompt a lawyer to find out more information about the client's background and personal life, which the lawyer can present to the judge as mitigating circumstances. Law students should consider how similarities and differences between the three rings might affect their legal strategy for the client's case.[30]

C. Habit Three: Parallel Universes

The third Habit teaches students to explore alternative explanations for clients' behaviors by thinking of multiple interpretations or "parallel universes."[31] Brainstorming other possible reasons for a client's behavior is especially useful when a student might automatically judge a client or the client's actions negatively and can reduce the student's likelihood of making incorrect assumptions about the reasons for and meaning of a client's behavior.[32] For example, a lawyer might instinctively think that a client who does not readily provide details of an event relevant to her case is lying. The client may, however, feel uncomfortable discussing the details with a lawyer of the opposite sex, or may not know the specific words in English to describe the event. The client may have even suffered severe trauma or believe it is inappropriate to discuss the event based on her cultural or

27. *Id.* at 68.
28. POVERTY, HEALTH AND LAW, *supra* note 1, at 145.
29. *Id.*
30. Bryant, *supra* note 6, at 69.
31. *Id.* at 70–71.
32. POVERTY, HEALTH AND LAW, *supra* note 1, at 145; *see also* Bryant, *supra* note 6, at 70–71 (The author provides examples of multiple explanations for a client's failure to seek therapy for her child as advised by her lawyer, including that "the client has never gone to a therapist and is frightened; in the client's experience, only people who are crazy see therapists; the client has no insurance and is unable to pay for therapy . . . or the client did not think that she needed to get her child into therapy immediately, etc.").

religious beliefs. If a student thinks carefully, keeping in mind the similarities between the student and the client, the student may realize there are many alternative reasons that could explain a client's behavior rather than their initial, negative assumption.

D. Habit Four: Pitfalls, Red Flags, and Remedies

The fourth Habit promotes culturally sensitive interactions with clients and active attention to the process of lawyer-client communication through consideration of culture, scripts, rituals and client understanding.[33] While the first three Habits prepare students to think like a lawyer who integrates cross-cultural knowledge into her analysis of cases and interactions with clients, this fourth Habit focuses on cross-cultural communication.[34] Students identify "some tasks in a normal client-attorney interaction that may be particularly problematic in cross-cultural encounters as well as . . . signs of communication problems."[35] With conscious attention to the communication process and preparation before the client meeting, students can identify potential cross-cultural pitfalls and red flags, such as indications that the client is "disengaged, angry, actively uncomfortable or using the lawyer's terminology."[36] For example, students can prepare for interviews by developing an introductory ritual and script to explain the legal process. In doing so, students should take into account the client's culture and use the first three Habits to identify potential areas prone to misunderstandings. Additionally, in planning for potential red flags, students should prepare potential remedies to correct for misunderstandings and disconnects between the student and the client.[37] Having a list of these culturally sensitive correctives will help the student learn remedial strategies, such as directing the conversation to one of the client's stated concerns or asking the client for examples that illustrate the problem and show the type of solution they are seeking.[38]

33. POVERTY, HEALTH AND LAW, *supra* note 1, at 145; *see also* Bryant, *supra* note 6, at 73 ("Habit Four encourages culturally sensitive exchanges with clients, by identifying four areas on which students should focus carefully: (1) scripts, especially those describing the legal process, (2) introductory rituals, (3) client's understanding and (4) culturally specific information about the client's problem.").
34. Bryant, *supra* note 6, at 72.
35. *Id.*
36. *Id.* at 76.
37. *Id.* (emphasizing the importance of trying different approaches to correct problems, such as asking the client specific questions or asking for a narrative about a different situation, "if the client is not responding to a call for a narrative").
38. *Id.*

E. Habit Five: The Camel's Back[39]

Lastly, the fifth Habit involves student's self-reflection, exploring themselves as cultural beings and bringing awareness to their own biases.[40] This Habit is valuable because awareness of one's own stereotypes and biases can enable students to actively prevent, or at least attempt to prevent, their stereotypes and biases from negatively impacting their lawyer-client relationships. This reflection should also acknowledge outside factors, such as stress, that can interact with preexisting stereotypes and biases to negatively influence the interactions between lawyers and their clients.[41] Habit Five proposes two ways to work with biases and stereotypes: (1) creating settings in which bias and stereotype are less likely to govern, and (2) promoting reflection and change with the goal of eliminating bias.[42] For instance, since stress makes one more likely to react in ways that are based on stereotypes, students should lessen stress by, for example, taking breaks during interviews.[43] This process of self-analysis helps students learn to respect clients and respond to their clients' individual needs.[44]

III. IMPLEMENTATION OF CULTURAL COMPETENCY TRAINING IN THE LAW SCHOOL CURRICULUM

A. A Proposed Cultural Competency Seminar

Law schools should require, or at least offer, a cultural competency course for all law students in order to prepare them to be effective lawyers in our increasingly diverse world.[45] A semester-long seminar would be the preferable method

39. *Id.* at 77 (clarifying that "[l]ike the proverbial straw that breaks the camel's back, Habit Five recognizes innumerable factors that interact with bias and stereotype to negatively influence an attorney-client interaction").
40. *Id.*
41. POVERTY, HEALTH AND LAW, *supra* note 1, at 145.
42. Bryant, *supra* note 6, at 77.
43. *Id.* at 78.
44. *Id.*
45. While ideally, law schools would require or integrate cultural competence training into a required course, it is more realistic to advocate that schools offer an elective course to teach law students these important skills. *See* Katherine Frink-Hamlett, *The Case for Cultural Competency*, N.Y. L.J., Apr. 25, 2011, http://www.law.northwestern.edu/career/markettrends/2011/plebiuwle1po.pdf ("[T]here is little doubt that law students are better served by law schools that include cultural competency in their curricula" and remarking that Angela O. Burton, an associate professor at CUNY School of Law of New York, "considers cultural competency to be an extremely necessary skill that should be introduced to law students early on in their legal instruction and reinforced throughout their law school experience." At CUNY, not only is "cultural competency . . . taught as a distinct topic along with ethics, professional responsibility and substantive law courses," but also "the faculty at CUNY

of teaching cross-cultural lawyering because "[a]ttaining cultural competence is an ongoing process requiring a long term educational commitment. One does not 'become competent' at any one point. Instead, he or she becomes more knowledgeable, aware and sensitive in an attempt to reach competence."[46] Though a student would not gain complete, "unconscious competence"[47] in just fifteen weeks, one semester would be a sufficient time for students to gain at least some of the skills required for cultural sensitivity, which they can further develop in their subsequent clinical and real world experiences as lawyers. While a year-long course might allow for an even more thorough development of students' cross-cultural skills, the limitation on how many courses a single law student can take may render a semester-long course sufficient.

Moreover, consistent with the need to create an environment that is less judgmental towards students,[48] the small class size of a seminar would facilitate discussion and create a more comfortable environment for students to open up about their personal biases, stereotypes, and experiences working with clients of different backgrounds. Cross-cultural training theorists assert that it is important to create supportive learning environments where students are challenged to address issues of bias and power.[49] Support is important to decrease students' resistance to learning and help students cope with what can be a difficult experience, while challenge is necessary to educate students and prevent them from doing harm to their clients.[50] This need for support and challenge in addition to a com-

has studied the issue of cultural competency so that it is included in CUNY's curriculum in a deliberate and methodical way.").

46. POVERTY, HEALTH AND LAW, *supra* note 1, at 144.

47. Bryant, *supra* note 6, at 63 (explaining that "[t]he final stage of development is one of 'unconscious competence,' in which students unconsciously incorporate" cross-cultural skills and perspectives in their interactions with clients, and while lectures may be sufficient for students to move from the first stage of "unconscious incompetence" to the second stage of "conscious incompetence," more experiential learning is needed to move to the third stage of "conscious competence," and to the final stage of "unconscious competence"); *see also* POVERTY, HEALTH AND LAW, *supra* note 1, at 144 (defining cultural sensitivity as "'awareness plus': awareness that there are differences between cultures *and* without assignment of value to those differences").

48. Bryant, *supra* note 6, at 58.

49. *Id.*

50. *Id.* at 58–59 (arguing that the "support/challenge" components are both critical pieces of the overall goals of cross-cultural training; and indicating that if teachers allow racist, sexist or ethnocentric comments to go unchallenged, students may end up doing harm to their clients); *see also* Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability Into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 559 n.64 (1996). In ethnically, racially and gender-diverse educational groups, students who are members of oppressed groups, such as students of color and women, may not comfortably accept a learning environment that does not include challenges to racist and sexist comments.

fortable environment, in which students have the opportunity and time to learn cross-cultural skills, is best served by a small, semester long seminar class.

Providing a seminar to students the semester preceding or concurrently with a clinical course would be especially helpful. Clinics better prepare students to work with clients by giving them the opportunity to interact with real clients. Many clinical professors have acknowledged the importance of teaching diversity issues in clinics.[51]

The proposed course would be a fifteen-week seminar with a maximum of fifteen students.[52] Ideally the seminar would take place concurrently with a clinic and could be worth a total of five units. If students are not participating in the clinical component it could be worth two units and graded on a pass/no pass basis. The seminar component should take place once a week for three hours and be taught by an expert in cultural competency. Three hours would provide adequate time for the professor to teach a lesson including student participation, engage in practice exercises to develop and improve students' cross-cultural competency skills, as well as regroup and discuss what students experienced and learned during the exercises. Students would split into smaller groups with different partners each week for each exercise. This would enable them to learn from each other and experience working with different people who each bring a particular culture and experience of their own into the classroom. Also, the exercises should provide an opportunity for all students to practice being the lawyer as well as to pretend to be the client. This would enable students to better recognize and understand the similarities and differences between themselves and potential clients as well as their biases and stereotypes. If the resources are not available to have an expert teach the class or the clinical professor is also well educated in cultural competency, the clinical professor could teach the seminar as well.

While this model is especially helpful for students who are participating in clinics, it is still essential and can be modified for students who do not have any personal, prior, or concurrent experience working with clients. For instance, students who do not already have clients they can refer to can be given short descriptions of hypothetical clients. Using the facts of this fictional client, students without live clients can still complete learning exercises, such as identifying the similarities and differences they might share with their potential client and brain-

51. Bryant, *supra* note 6, at 35–36 (noting that "[a] number of presentations at AALS [(The Association of American Law Scholars)] Clinical Teachers Conferences and [even] entire conferences sponsored by AALS" have been dedicated to analyzing ways that "diversity can be taught in the clinic and [the] classroom").

52. These proposed guidelines are modeled after the structure of seminar classes at UCLA School of Law.

storming what questions and techniques they would use to create a trusting lawyer-client relationship despite cultural barriers. This version of the seminar or the use of these exercises as a component of a first-year lawyering skills class would also be useful for first-year students. It would be beneficial for law students to at least be introduced to the theory of cross-cultural competency as soon as possible in their law school training.

B. Applying the Five Habits in the Seminar Setting

A promising approach would be to base a cultural competency seminar on Bryant and Peter's Five Habits because the Habits were "designed to help develop analytical and interaction skills."[53] By adopting the Habits, professors can help law students develop cultural competency skills beyond mere cultural awareness.[54] The manner in which a professor will use the Habits, including which Habits are emphasized the most, can vary depending on both the professor and the students' backgrounds and skills.[55] Thus, the following includes an explanation of how a professor could implement the method, including exercises, from *The Five Habits*, with suggestions for application to a law school environment.

1. Recognizing Cultural Biases, Stereotypes, and Ways of Thinking

First, students need to gain an awareness of their own biases, such as a possible ethnocentric way of thinking, which influences the assumptions and judgments they make about their clients.[56] Consistent with Habits One and Two, students should brainstorm the similarities and differences between themselves and their clients as well as analyze the effects of the similarities and differences that exist between the client, the lawyer, and other actors in the legal system.[57] One way students can complete this exercise in line with Habit One is by creating a Venn diagram to map out the similarities and differences between themselves and their client.[58] This will enable students to recognize their own culture and biases.[59]

53. Bryant, *supra* note 6, at 87.
54. *Id.* at 78 (advocating that the "Habits are a way to gain greater knowledge and awareness as well as develop skills essential to cross-cultural lawyering").
55. *Id.*
56. *See id.* at 88.
57. *Id.*
58. Jyoti Nanda, *Training for Lawyering in a Multicultural Context* (Oct. 17, 2013), http://msmedia.law.ucla.edu:8082/mylaw/perm/LawyeringMulticulturalContextElCentro101713.wmv.
59. *Id.*

Then, due to the complexity of the factors and their interactions with the "three rings" in Habit Two, professors should give students a concrete and detailed illustration of a particular case.[60] With a given scenario, students can focus on particular facts to identify the problems that could lead to misunderstandings and come up with possible ways that they, as lawyers, could explain their client's behaviors or statements to a court that might not be familiar with their client's particular culture.[61] During this exercise, students should also compare the similarities and differences they recognized between themselves and their client to those recognized by other classmates. This will not only engage students with their classmates but make them aware of factors they might not have perceived themselves.

Habit Five can also be introduced by the professor when teaching Habits One and Two because Habit Five depends on the students' analysis of the similarities and differences between themselves and their clients as well as the negative effects of bias and stereotypes.[62] Students can discuss how their own behavior, biases, and ways of thinking impact their interactions and are influenced by their clients.[63] Focusing on a particular client, students should explore whether and how their thinking would differ if the cultural characteristics of their client were changed.[64] This is where having a small class size is important because quite often, the fewer the students there are, the more comfortable the students feel participating and sharing. It will be necessary for the professor to remind students that the seminar should be a safe space for students to share their feelings and beliefs without feeling judged and should try not to judge others. This is imperative to facilitate honesty in students' self-assessments and discussion about their own cultural experiences and biases.

2. Making Isomorphic Attributions to Understand Client Behavior

Next, it is important for students to learn how to be flexible and make isomorphic attributions, which can be taught using Habit Three.[65] The concept of attribution, which illustrates how lawyers might attribute a different meaning to the facts of a client's story or a client's behaviors during a cross-cultural interac-

60. Bryant, *supra* note 6, at 88.
61. *Id.* at 89.
62. *Id.*
63. Nanda, *supra* note 58.
64. Bryant, *supra* note 6, at 89–90 (explaining that the goal of this exercise is to provide students with sufficient "support and information" so they can challenge themselves to acknowledge their assumptions and biases).
65. *Id.* at 90.

tion, should be introduced before students are asked to imagine different reasons for the client's behavior.[66] For instance, the professor can show a video scenario, perhaps of a client coming to her intake meeting with her sixteen-year-old son. The students should think of their initial instinct as to why the client's son was present and then brainstorm and list alternate explanations.[67] There could be multiple reasons the client's son accompanied her and multiple decisions a lawyer would need to make regarding what actions to take.[68] Should the lawyer allow the client's son in the interview room or have him wait outside? Should the lawyer allow the client's son to serve as her interpreter or seek the services of the office's professional interpreter? There could be problems such as confidentiality issues that conflict with the culturally influenced norms and preferences of the client.[69] Students' initial interpretations of the situation are likely to be based on their own experiences, but parallel universe thinking encourages students to think of alternate explanations and realize they might need to tailor their behavior to conform to a culturally appropriate response.[70]

Once again, in a classroom setting, seminar students could be given hypothetical situations or reflect on experiences with their clinical clients in order to practice recognizing alternative reasons for client behavior. They should share their ideas with another student partner or in a class discussion so that they can learn from their classmates' interpretations as well.

3. Remaining Nonjudgmental in Cross-Cultural Interactions

Despite the judgmental nature of legal culture, lawyers must learn how to remain nonjudgmental in cross-cultural encounters.[71] Professors can teach the skill of remaining nonjudgmental using Habits Three, One and Five.[72] Exercises might include having students analyze a negative judgment they once made about a client, or might make about a fictional client, and using the parallel universe thinking of Habit Three to list different interpretations of that particular behavior that led to the student's negative judgment.[73] Exploring alternative explana-

66. *Id.*
67. *Id.* For instance, in this scenario, alternate explanations for why the client's son is present can include that he came to be her interpreter, or that he had to drive his mother to the clinic. He also could have accompanied his mother to make sure the she wouldn't reveal information he does not want her to reveal, or because he has knowledge of facts that are relevant to her case.
68. *See id.* at 91.
69. *Id.*
70. *Id.* at 91–92.
71. *Id.* at 92.
72. *Id.*
73. *Id.*

tions can expose students to the limitations of relying on their own experiences and prevent snap judgments when interpreting their client's behavior.[74] Having students think of the similarities between themselves and their client as well as address their own biases and stereotyping in a nonjudgmental way, in line with Habits One and Five respectively, are other useful ways to counter negative judgments.[75]

4. Building Cross-Cultural Communication Skills

Finally, Habit Four can be used to increase student's cross-cultural communication skills.[76] These skills can be taught through watching and interpreting videos of interviews, simulated role-playing in class, and student reflection.[77] For instance, students can identify various introductory rituals used by different cultures and integrate them into their simulated interviews.[78] They should also practice deep listening skills and interpreting their client's nonverbal cues, as both these skills are of heightened importance during cross-cultural interactions.[79] Comparing clients' behavior to their own and experiencing misunderstandings during role-play can help students recognize potential pitfalls and red flags, plus give them the opportunity to practice finding appropriate remedies.[80]

Differences and similarities between a lawyer and client also may influence the lawyer's questioning as people tend to ask follow up questions when someone's story is inconsistent with what they would have done themselves and refrain from asking questions when the other person's story is consistent with what they would have done or believed.[81] Students must be aware of differences and similarities and be sure to continue asking appropriate questions and refrain from making assumptions.

Through role-play, students should get the chance to experience being both the lawyer and the client. Students will learn not only from adapting their own behavior and tactics when playing the lawyer, but also from recognizing cultural norms and cues they give as the client. Getting feedback from their partner will also help students learn to recognize certain pitfalls and red flags. For example, after the exercise is completed the student-client can explain what cues and in-

74. *Id.* at 92–93.
75. *Id.* at 93–94.
76. *Id.* at 94.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 94–95.
81. Nanda, *supra* note 58.

formation she felt the student-lawyer picked up on and where the student-lawyer could have asked more relevant questions or avoided a misunderstanding. A discussion between the partners and practice in both roles will aid student reflection and with more practice in the classroom and subsequent clinics, students will become more familiar with recognizing cross-cultural competency issues and developing strategies to provide the best representation despite cultural barriers.

As described, Bryant and Peter's Five Habits can be successfully utilized in implementing cultural competency training in law schools and should be looked at as a model by law schools developing a cultural competency seminar.

CONCLUSION

Since it is highly unlikely that a lawyer will practice law without interacting with someone from a different cultural background at some point in his or her career—be it a client, witness, judge, or other lawyers—law students would greatly benefit from enhanced cultural competencies. Cross-cultural competency enables lawyers to create trusting relationships with their clients as well as effectively communicate with and understand their clients' needs. Considering the significant benefits of cross-cultural lawyering skills, cultural competence training should at minimum be offered through an elective course, if not required in the curriculum of all law schools across the country. Small seminars should be offered, in which professors can use Bryant and Peter's Five Habits to teach law students how to interact and solve problems that may arise when working with diverse clients. Regardless of which model is used, cultural competency skills should be taught in law schools, because the ability to effectively represent clients of diverse backgrounds will contribute significantly to the success of future lawyers.