AMY OPPENHEIMER

Understanding and Eliminating Unconscious Bias In the Legal Profession

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AGENDA

- What Are Unconscious Biases?
  - Implicit Biases and Stereotypes
  - Other Forms of Cognitive Biases
- How Do Biases Impact Our Decisions in the Legal Profession?
- What Can We Do To Help Eliminate Biases?

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Who wants to be unfair?

- Most people do not go into the law to treat people unfairly or make unfair decisions

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Start from the premise that we **want** to be fair.

But . . .

We make hundreds of decisions every day and like to think that they are not impacted by bias, lack of attention, assumptions and the like. But is that possible?

And how do we make decisions? What information do we miss and what biases do we factor in?

Are we being "fair"? Can being more conscious lead to more fairness?

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What Is a Bias?

- A preference
- Could be based on a "stereotype"
- Could be based in some reality
- But might not be

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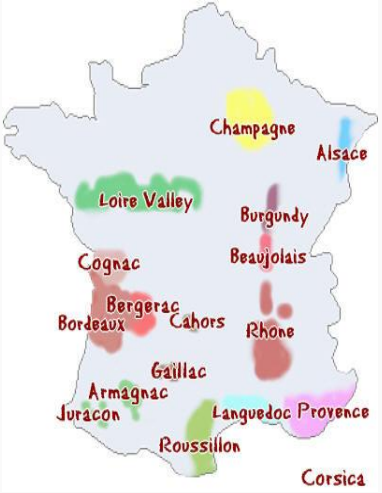
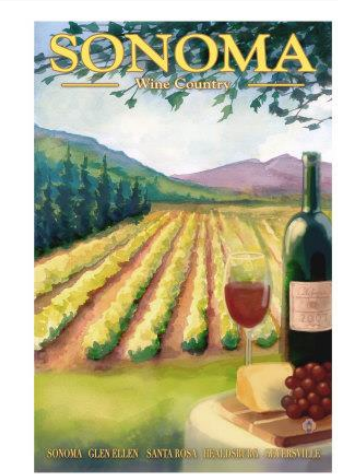
Which Country's Wine Is Best?





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What's Your Favorite Color?

BLUE RED

GREEN Yellow

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These Are Preferences

What is the difference between a bias and a preference and how do biases come about?

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The Origin of a Bias

- Stereotypes from the media
- Our own experiences
- The experiences of people around us
- Observations
- Assumptions

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The “Not Me” Effect

- We all have biases and act from these biases in unconscious ways.
- This does not make us “bad” people.
- The more open we are to this, the more we can overcome biases.
- People who explicitly know they have biases and admit to them show **less** implicit bias.



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The Two-Mom Minivan



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Stereotypes

- Two moms and minivans is a stereotype.
- What stereotypes do we maintain, at times without realizing it?
- The riddle of the father and son who are in a car accident where the father is killed and the son is injured. Who's the surgeon who can't operate because the son is the surgeon's son?
- **There is a difference between holding a bias and acting on that bias.**

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Limited Vision

Our brains also miss things - and focus on certain things and not others. We form assumptions based on what we hear and see and what we fill in to that scenario. We can never "process" all the information we get. So we process selectively and through our own lens. That lens is shaped by our history, culture, class, groups that we are part of, etc.

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Assumptions about what we hear



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Assumptions about what we hear

How many of each animal did Moses put on the ark?



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The human mind must think with the aid of categories. . . .Once formed, categories are the basis for normal prejudgment. We cannot possibly avoid this process. Orderly living depends on it.

- Gordon Allport

- Stereotyping is the unfortunate by-product of the otherwise immensely useful human ability to conceive the world in terms of categories.
- Stereotyping achieves the desirable effect of allowing us to rapidly perceive total strangers as distinctive individuals.
- But stereotypes are not distributed equally. People are not stereotyped by the members of their own in-group.

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Associations:

Name that **Color – not the Word**

- Blue
- Green
- Red
- Yellow
- Blue
- Green
- Red
- Yellow

- Red
- Yellow
- Blue
- Green
- Blue
- Red
- Yellow
- Green

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Now Try Again – name the COLOR

- Green
- Red
- Yellow
- Blue
- Yellow
- Blue
- Green
- Red

- Green
- Blue
- Yellow
- Red
- Yellow
- Blue
- Green
- Blue

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Why is it harder the second time?

Different parts of your brain are in conflict with each other.

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How biased do you think you are?

- Strong preference for young people over old
- Moderate preference for young people over old
- Slight preference for young people over old
- No preference between young and old people
- Slight preference for old people over young
- Moderate preference for old people over young
- Strong preference for old people over young

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A random sample believes . . .

- Strong preference for young people over old – 0%
- Moderate preference for young over old – 0%
- Slight preference for young people over old – 5%
- No preference between young and old – 37%
- Slight preference for old people over young – 28%
- Moderate preference for old over young – 30%
- Strong preference for old people over young – 0%

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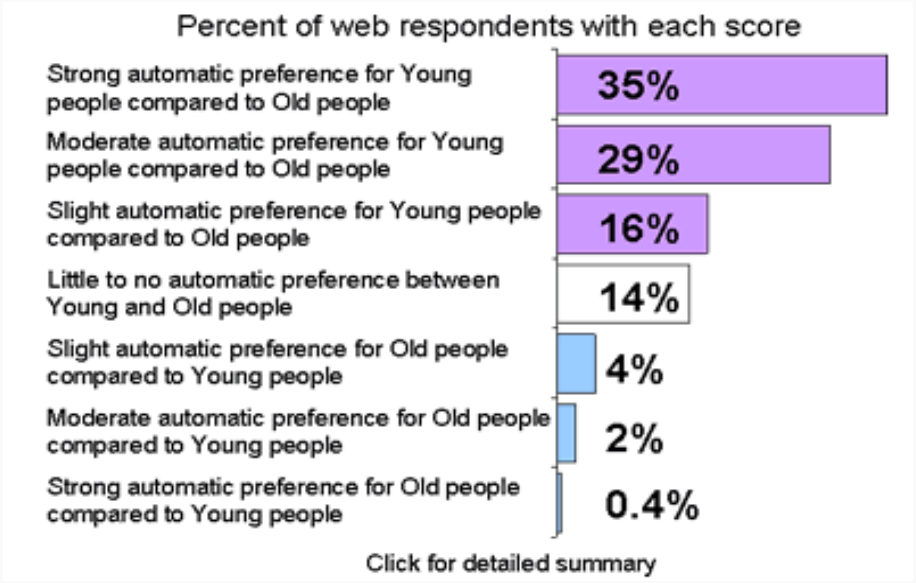

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Implicit Association Test (IAT)

Words and faces (black/white, old/young, etc):

Joy, love, peace, wonderful, pleasure, glorious, laughter, happy

Agony, terrible, horrible, nasty, evil, awful, failure, hurt

Or words and words:

Gender science:

Male: man, boy, father, male, grandpa, husband, son, male

Female: girl, female, aunt, daughter, wife, woman, mother

Science: biology, physics, chemistry, math, geology, astronomy

Liberal arts: philosophy, humanities, arts, music, history, English

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The Implicit Association Test

- Taken by over two million of people.
- Subjects first rate themselves on how they view their own biases.
- Subjects then take the IAT.
- There is a significant difference between the two ratings.
- People have far more bias than they realize.

See: www.implicit.harvard.edu

Greenwald, Anthony G. & Krieger, Linda Hamilton, *Implicit Bias: Scientific Foundations,* 94 California Law Review 945 (2006).

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Implicit Bias – Some Conclusions

- A normal cognitive process that operates without conscious intent.
- Often hidden from one's own conscious awareness.
- Most people have an implicit or unconscious bias against members of traditionally disadvantaged groups.

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Implications for hiring: Names on Resumes

Identical resumes were submitted in response to help wanted ads. The only differences were the names

Some were submitted with traditionally African American names (e.g. Tamika Jones) – others with traditionally white names (e.g. Emily Ryan).

The white names received 50 percent more responses across the board.

Bertrand, M. and Mullainathan, Sendhil, *Are Emily and Greg More Employable than Lakisha and Jamal, A Field Experiment on Labor Market Discrimination,* The American Economic Review, 94(4), 1-31 (2004)

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Implications for hiring: Names on Resumes

Raters were asked to evaluate recent PhD graduates for an assistant professor position. The resumes were the same but half had a female name and half had a male name.

Result? 79% deemed the male was worthy of hire and 49% deemed the female worthy of hire.

And there were 4X as many "doubt rating" comments for the female applicant (e.g. – "I would need to see proof of scholarship.")

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Implications for hiring: Blind Orchestra Selection

- Efforts to conceal the identities of musicians auditioning for spots in symphony orchestras significantly boost the chances of women to succeed.
- Blind auditions have been adopted by most American symphonies.
- Blind auditions increased the probability that a woman would advance from preliminary rounds by 50 percent. The likelihood of a woman's ultimate selection is increased several fold.

Study by Cecilia Rouse, and Claudia Goldin, American Economic Review, 2000.

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ABA Study of Partners at Law Firm Evaluating a Legal Memo

- The memo had 22 errors – 7 minor spelling or grammar, 6 substantive technical writing errors, 5 errors in fact and 4 errors in analysis.
- Reviewers participated in a "writing analysis study" – half were told the memo was written by an African American male and half by a white male.
- The white male received a 4.1 out of 5.
- The African American male received a 3.2 out of 5.
- More errors were found in the memo that was thought to be written by the African American.

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Implications for Hiring: Nonverbal Behavior and Race

White interviewers were videotaped interviewing White and Black job applicants. They:

- Spoke to and smiled more at the White applicants.
- Hesitated more and made more speech errors when speaking to the Black applicant (leading to the interviewee making speech errors due to “mirroring”).
- Sat further back, leaned away, gave shorter interviews with the Black applicants.

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Nonverbal Behavior and Race

When White interviewers were trained to act towards the White applicants the way they had towards the Black applicants, the White applicants performed worse, were more uncomfortable and judged the White interviewer to be less friendly.

Word, Carl O., Zanna, Mark P. and Cooper, Joel, *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. Experimental Soc. Psychol. 109 (1974).

McConnell, A. R., & Leibold, J. M. (2001). *Relations Between the Implicit Association Test, Explicit Racial Attitudes, and Discriminatory Behavior*, Journal of Experimental Social Psychology, 37, 435–442.

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Other Ways We Are Biased

- Not all biases are due to preferences or stereotypes
- Other forms of cognitive bias include:
  - Confirmation Bias
  - Observer Effects and Priming
  - The Halo Effect
  - Anchoring Effects
  - Deciding by Intuition vs. Deliberation

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Confirmation Bias

- Tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence.
- Done unconsciously.
- Impacts how we interpret information.



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Confirmation Bias

I will look at any additional evidence to confirm the opinion to which I have already come.
—Lord Molson, British politician (1903 – 1991)

Justification and confirmation bias are a deadly combination. The mind that comes to a quick decision will want to justify (confirm) that decision. MRI studies show that the reasoning areas of the brain shut down when people are confronted with dissonant information. The emotion circuits light up when consonance is restored.

Further reading: Mistakes Were Made (But not by *me*) by Carol Tavris and Elliot Aronson.

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Confirmation Bias

Fingerprint experts were less likely to find a match when facts provided about the case made a match seem less probable.

Dror, I. E., Charlton, D., & Person, A. E., *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, Forensic Science International (2006)

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Confirmation Bias

- Participants were asked to form a hypothesis of guilt before reviewing all the evidence in a case.
- Doing so caused them to look for reasons to find this person guilty, even when evidence tending to exonerate the individual was introduced.
- Some participants were then asked to explain **why the initial hypothesis might be wrong.**
- Others were asked to generate additional suspects.
- Those who considered why the first suspect they named might be innocent showed less confirmation bias than those asked to name two additional suspects.

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Reducing Confirmation Bias

- Thus, those who were asked early in the case to name a suspect and state why he might be guilty showed a greater tendency to confirm that hypothesis.
- However this was counteracted by explaining why this might be wrong.

O'Brien, Barbara, Prime Suspect: *An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations*, Psychology, Public Policy, and Law (2009).

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Observer Effects and Priming

How a “neutral” observer is impacted by extraneous information and/or attitudes.

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The "Creativity" Study

How "nice" was the assistant?

- Those **not** told the negative things: 9.33
- Those who were told negative information: 6.58.
- Those told the information and then told to disregard it - it was actually someone else they were thinking about: 8.09

Golding & Hauselt, *When Instruction to Forget Become Instructions to Remember*, 20 Personality & Soc. Psychol. Bull. 178 (1994).

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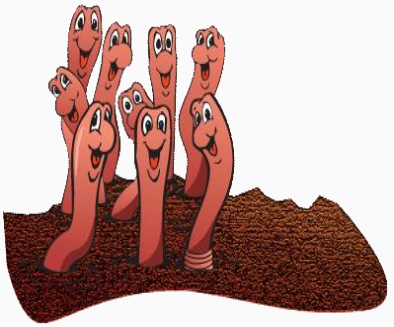
The Flatworm Study

Those led to expect a high incidence of turning and contracting recorded almost 5X the head turns and 20X the body contractions.

Does this make us question whether we could be “primed” to look for evidence that supported a certain hypothesis?



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Anchoring Effects

Based on same facts, group of judges who were told that the plaintiff wanted 10 million dollars awarded three times as much as those told the plaintiff wanted "a significant amount."



Wistrich, Guthrie & Rachlinski, 93 Cornell L. Rev 101 (2007) and *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, U. of Penn Law Review (2005)

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The Halo Effect

- Tendency to assume like goes with like – tall and attractive people are nice, smart and capable while short and unattractive people are mean, dumb and incapable.
- Ever wonder why most CEOs are above average in height?



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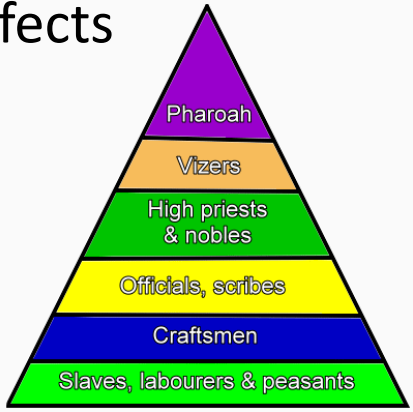
Conformity Effects

- Perceptions of others are influenced by the perception of relative social ranking.



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Attribution Effect

Shorten and add graphic

- People tend to attribute bad motive to explain other people's behavior, but not their own, so:
- The driver who cuts you off is rude or a bad driver but when you cut someone else off it is situational–you did not realize the traffic pattern changed or you had a legitimate reason to be in a rush–not a statement about who you are.
- As investigators, how often do parties attribute bad motives to acts that they would explain as rational if they had acted similarly?
- And how often do we, as investigators, become impatient with this phenomenon?

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How Do We Decide?
Deliberation or Intuition?



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Cognitive Reflection Test

- The CRT has a correct answer that is easy to discern upon reflection, but an intuitive but incorrect answer that immediately jumps to mind.
- The CRT responses provides evidence that ordinary adults possess dual-processing systems in which intuition tends to dominate, but can be overcome by deliberation.



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Answer This Question

- A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost?



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And the answer is . . .

- 5 Cents
- 10 Cents
- 90 Cents
- One dollar



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The Answer Is 5 Cents

- A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost?
- 5 cents

$1.05 $1.00
.05 .10
$1.10 $1.10
$1.00 more .90 more



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How Did the Judges Do?

- Three questions: Average was 1.23 out of possible 3.0
- Slightly higher than the average student at U. of Michigan and slightly lower than average student at Harvard.
- These results suggest judges tended to favor intuitive rather than deliberative faculties.



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Studies on Bias and Judges

- A study that involved violent felons in Detroit found that both Black and White judges imposed harsher sentences on Black defendants than White ones.

Spohn, Cassia, *How do Judges Decide? The Search for Fairness and Justice in Punishment* (2009) See also Spohn, Gruhl and Welch, *The Effect of Race on Sentencing: A Re-Examination of an Unsettled Question*, 16 Law & Society Review 71 (1981-1982).

- Other studies have revealed that judges set bail 25% higher for Black defendants than similarly situated White defendants and gave sentences that were 12% longer for Blacks than comparable Whites. Killers of White victims are more likely to be sentenced to death than killers of Black victims.

Rachlinski, Jeffrey J., Johnson, Sheri Lynn, Wistrich, Andrew J. & Guthrie, Chris, *Does Unconscious Racial Bias Affect Trial Judges?* Notre Dame Law Review, March 2009.

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The Myth of the Color-blind Judge

- Racial harassment plaintiffs are successful, on average, 22% of the time.
- With an African American judge presiding, they were successful 45.8% of the time.
- With a judge appointed by a Democratic 29.3%; Republican 17%.
- Female judges found for the plaintiff 25.6%; male 21.3%.
- Conclusion: African American judges as a group and white judges as a group perceive racial harassment differently (regardless of political affiliation)

Chew, Pat K. and Kelley, Robert E., *The Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, Washington University Law Review, 2009

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Impact of gender of judges

- In Title VII sex discrimination and harassment cases female judges were significantly more likely than male judges to find for plaintiffs.
- Furthermore, panels with a female judge were significantly more likely to find for the plaintiff than panels with no female judge.

Jennifer L. Peresie, Female Judges Matter: Gender and Collegial Decision-making in the Federal Appellate Courts, Yale Law Journal, 1759 (2005)

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Bias Against vs. Bias in Favor of

Hispanic judges imposed similar sentences on Hispanics and Whites whereas White judges gave more lenient sentences to Whites.

Conclusion: Anglo judges are not so much discriminating against Hispanics as favoring their own group.

M.D. Holmes et al, Judges Ethnicity and Minority Sentencing: Evidence Concerning Hispanics, 74 Soc. Sci. Q. 496, 502

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Are Ideal Litigators White?

One study examined whether biases in favor of whites and against Asian Americans would alter mock jurors' evaluations of a litigator's deposition.

The authors found stereotypes that the ideal litigator was white predicted worse evaluation of the Asian American litigator. By contrast, implicit stereotypes predicted preferential evaluation of the white litigator.

The study concluded that individuals were not “colorblind” towards even a "model minority," and that these biases produced racial discrimination.

Kang, Jerry, Dasgupta, Nilanjana, Yogeeswaran, Kumar & Blasi, Gary, *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. Empirical Leg. Studies, Dec. 2010.

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How Favoritism Leads to Different Treatment

Much of the impact of discrimination is not poor treatment against – it is good treatment for.

In-group favoritism – Carla's story (aka the quilter vs. the Yale University Professor).

Do we counteract this by "favoring" everyone, including those who look different and come from different backgrounds?

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Impacts Within the Legal Profession

- Who gets hired?
- Who gets mentored?
- Who gets the plum assignments?
- Who gets promoted?

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Impacts on Decision-Makers

- Intuition without deliberation leads to errors.
- Confirmation bias and priming impact not just “lay people.”
- Heavy workloads necessitate quick decisions that may be made using mental shortcuts.

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Reducing Bias – Exposure to Difference

Studies show that infants prefer familiar faces and sounds and that exposing infants to different faces and accents extends their ability to process different faces and their repertory of preferences.

Another study showed that if college age individuals are asked to take a few minutes to imagine what a strong woman is like, why she is considered strong and what she is capable of and enjoys doing, this exercise reduces the male=strong stereotype.

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Reducing Bias

- Find something that places the person in the same category as you.
- Surround yourself with images that defy stereotypes.
- Actively pursue relationships with different types of people.
- Make connections and focus on the positive!
  - –Working with someone who is a member of a group you harbor biases against reduces bias.

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Reducing the Impact of Bias

Determine criteria **before** making a decision.

In one study, resumes were created for the position of police chief. One applicant had more education and the other more experience. When there was no name on the resume, raters favored the one with more education. When names were attached, raters preferred the males – whether they had more education or experience – and justified their decision both ways.

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Thank You for Participating in this Seminar!

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