

Doing the Work: Fighting Racism in the Practice of Law

White Fragility was published in 2018 but jumped to the top of the New York Times best-seller list amid the protests following the death of George Floyd and the ensuing national reckoning about racism. DiAngelo has convinced university administrators, corporate human-resources offices, and no small part of the reading public that white Americans must embark on a self-critical project of looking inward to examine and work against racist biases that many have barely known they had.

I am not convinced. Rather, I have learned that one of America's favorite advice books of the moment is actually a racist tract. Despite the sincere intentions of its author, the book diminishes Black people in the name of dignifying us. This is unintentional, of course, like the racism DiAngelo sees in all whites. Still, the book is pernicious because of the authority that its author has been granted over the way innocent readers think.

--John McWhorter, "The Dehumanizing Condescension of *White Fragility*"

I. The law is characterized by injustice and bias

A. The United States is built on laws that are made to oppress certain groups of people.

1. Numerous laws upheld the legality of slavery
2. Constitutional requirements dictated that enslaved persons were only to be counted as 3/5 of a person, and required enslaved persons who escaped to be returned to their owners)
3. *Dred Scott v. Sandford* (1857)- US Supreme Court held that US Constitution did not extend citizenship to Black people—whether free or enslaved
4. *Plessy v. Ferguson* (1896)- Upheld the constitutionality of racial segregation
5. Jim Crow Laws/Black Codes- Local and state laws, enacted after the prohibition of slavery, that upheld racial segregation and denied the rights of Black people to vote, hold jobs, obtain education, or partake in other opportunities otherwise granted to citizens

B. Laws are applied in ways that adversely impact marginalized people.

1. Criminal laws disproportionately impact marginalized people, including being disproportionately enacted against already oppressed racial groups
2. In spite of prohibitions on discrimination in lending, marginalized people have been further oppressed by the denial of conventional loans and lower interest rates to certain races
3. Violence against marginalized people, especially when perpetuated by white people, has not been harshly punished and has even been sanctioned by government entities

4. Police violence against Black people goes largely unmitigated, and police often do not face consequences that match the crime of murdering Black people

II. The legal profession's dearth of diversity, equity, and inclusion highlight and mimic the overall race problem within the law

A. The race problem within the legal arena starts early—with law school and the supposedly neutral admissions policies of law schools, that still somehow disproportionately exclude students of color, a legal education model that mostly rewards those who have the financial resources or family/cultural connections to game the system, and law professors who are, to a large degree, not representative of their students

1. Professor Shaun Ossei-Owusu, a criminal law professor at the University of Pennsylvania, points out that law students “must sometimes reconcile legally sanctioned racial inequality that does not easily accord with their sanitized legal education.”
2. Professor Ossei-Owusu, explains that “the learning of law—particularly for racial minorities—can be intellectually violent.”
3. He acknowledges that the intellectual violence of a legal education, “pales in comparison to the structural and physical violence that people experience outside the ivory tower, but it is also unforgiving, can feel unrelenting and often goes unnamed.”

B. Law schools have a Race Problem

1. A 2020 Law School Survey of Student Engagement made the following findings:
 - a. 23% of Black law students nationwide say their schools do “very little” to create a supportive environment for race/ethnicity, compared to just 6.8% of white students
 - b. 32% of white students believe their schools do “very much” to support racial/ethnic diversity, compared to only 18% of their Black classmates
 - c. 37% of men believe their law school campuses are very supportive of racial/ethnic diversity; 26% of women law students share this belief, and 7.5% of those of another gender identity share this belief
 - d. 26% of Black women (more than any other raceXgender group, see their schools doing “very little” to create an environment that is supportive of different racial/ethnic identities; only 5.5% of white men believe their law schools are doing “very little” to create an environment that is supportive of different racial/ethnic identities; on the other hand 72% of white men believe their law schools do “quite a bit” or “very much” to support different racial/ethnic identities

C. The legal profession also has a race problem:

1. 2018 Report on Diversity in U.S. Law Firms, by National Association for Law Placement found (surveying diversity at 232 law firms):
 - a. Women of color make up 8.57% of all lawyers
 - b. Black women make up 1.73% of all lawyers
 - c. 1.8% of Black attorneys were partners
2. 2020 ABA Profile of the Legal Profession findings:
 - a. 86% of lawyers are white
 - b. 5% of lawyers are Black (unchanged from a decade ago; although 13.4% of population are Black)
 - c. 5% of lawyers are Hispanic
 - d. 3% of lawyers are Asian
 - e. These statistics have not changed over the past decade, even though the overall populations in U.S. have increased over that timeframe

III. Naming the Problem

A. Terms for actions and perceptions that discriminate against, marginalize and oppress individuals and groups of people:

1. Prejudice: Beliefs about a target group

Ex. EVERYONE who is [insert subpopulation group] is [adjective]. No exceptions.

2. Stereotypes: Expected or anticipated behavior due to group membership

Ex. EVERYONE who is [insert subpopulation group] will [insert verb]. No exceptions.

3. Discrimination: Inappropriate and often unfair treatment based on group membership

Ex. WE don't [insert verb] [insert subpopulation] despite qualifications

4. Explicit bias: Beliefs and attitudes that are deliberately expressed and include explicit acts of prejudice and stereotyping.

Ex. I will make a conscious decision to [insert verb] all [insert subpopulation group].

- B. Implicit bias: Attitudes, beliefs, and perceptions that impact the ways that actions, understandings, and decisions are carried out—even when not consciously acknowledged.
 - 1. Implicit bias has, in recent years, gained much attention. Within the legal arena, it is not unusual to have panel discussions, articles, seminars, and CLEs on the topic. There does seem to be a general recognition, that implicit bias deeply impacts the legal industry.
 - 2. One of the reasons that there may have been a general acceptance to theories about implicit bias is that the term is very safe. While “implicit bias” does have some negative connotations, the commonly accepted notion is that because the bias is implicit, it is not purposeful, the source of the bias sits in the subconscious, people may not even realize they possess bias, and can therefore escape some personal liability.
- C. Racism: A structural system, that marginalizes and oppresses individuals and groups of individuals based on race.
 - 1. Racism birthed implicit bias and continuously allows implicit bias to thrive.
 - 2. Without a recognition of racism, there cannot be a proper discussion of implicit bias.
 - 3. There is no “nice” way to talk about racism. It is not productive to claim to discuss discrimination, but at the same time diminish the impact of racism, only talk about discrimination in terms of unconscious or implicit bias, and/or ignore the structural foundations of systemic racism.
 - 4. There needs to be a recognition that racism, a very deliberate and purposeful system of oppression which is meant to deny rights to as well as threaten and intimidate certain groups of people, is the fuel for implicit bias. The various forms of discrimination do not exist in separate spheres. Instead, discrimination exists on a spectrum, and cannot be properly addressed without a full recognition of the deliberate a system of oppression which can, under certain circumstances, morph into unintended or unconscious forms of inequity.
- D. The distinctions between terms for discrimination does not lesson the harm of the oppression and marginalization which results from the discrimination
 - 1. Time spent on debates about how to classify discrimination takes away from time that could be spent on eliminating discrimination.
 - 2. For those who are harmed by discrimination, it usually does not matter whether the discrimination was intentional or unintentional, conscious or unconscious. What matters is how the discrimination, no matter what it is called, marginalizes, oppresses, intimidates, and/or incites violence against those who are its targets.

3. There needs to be a basic presumption that all people, even lawyers—even lawyers who supposedly do “good work”—possess some bias perspectives that are influenced by racism
4. Even those who fight against discrimination have been hesitant to use the term “racism” because it is believed that the term is so negative as to turn people off; and it is rightly assumed that no one wants to be accused of being a racist.
5. The harm of being accused of being a racist, even if the accusation is incorrect, pales in comparison to the harm actually caused by systemic racism.
6. The refusal to engage in discussions which explicitly name racism (or white supremacy) because of being uncomfortable with the word is privileged and biased because it allows perpetrators of discrimination and/or those who benefit for discrimination to control the narrative.

IV. Who Carries the Burden?

- A. One of the major problems with attempting to address and cure racism and other forms of bias is the failure to seek full participation from those who are most impacted by these societal ills.
 1. Those who are subjected to the negative impacts of racism/bias are too often told how to feel and informed what should be offensive. That perpetuates a narrative that is controlled by those who only seem willing to address injustice if it can be on their terms.
 - a. Solutions, not Saviors are needed to address racism in the practice of law
 - i. People who have not been personally impacted by racism and bias can surely be allies in the fight for equality, but they should not dictate to oppressed persons how or what to feel, they should avoid proclaiming themselves experts on all matters of race, and should not dehumanize or infantilize oppressed people in supposed efforts to seek equality.
 - ii. It is not uncommon for scholarship, workshops, writings, etc. which supposedly focus on bias influenced by racism to actually be absent of those voices which are personally impacted.
 - iii. Lawyers must be careful not to suffer from a “Savior complex” which is ultimately a form of racism in that it strips marginalized people of their autonomy.
 2. Lawyers can be at the forefront of the fight for justice and the elimination of bias influenced by racism, however, lawyers must acknowledge their own biases, as well as their racist acts and thoughts. Any lawyer who denies being bias, participating in racist narratives, or denies “seeing race/color” is part of the problem.

- a. As lawyers seek to fight bias influenced by racism, they should first take a look at their own workplaces, social/professional organizations, and personal/professional acts, if those are not free of bias and racism, the lawyers should start with those places in order to begin the process of combating bias and racism
 - b. Lawyers, particularly lawyers who dedicate their practices to civil rights and social justice work cannot use their law practices, their successful results on cases, or their study of race as proxy for actually doing the work to take meaningful steps to eliminate bias influenced by racism. In other words, just because a lawyer is doing “good work” does not mean that the lawyer is actually contributing to the elimination of bias influenced by racism.
 - c. Representing oppressed and marginalized clients does not necessarily make a lawyer an expert in the lives of those clients (or others in the clients’ demographic). Likewise, representing those people who have been discriminated against does not make a lawyer a “good” person or a person who cannot exhibit racism or bias.
- B. It is exhausting to experience racism; it is also exhausting for oppressed persons to have the burden of attempting to eliminate racism. The burden to “teach” or “inform” others about racism cannot rest solely on the shoulders of those who have endured the insidious effects of racism.
1. James R. Detert and Laura Morgan Roberts suggest the following steps to address racial injustice in the [legal] workplace:
 - a. Use allies and speak as a collective
 - b. Channel your emotions (but don’t suppress them!)
 - c. Anticipate others’ negative reactions
 - d. Frame what you say so that it’s compelling to your counterpart
 - e. Follow up
 - f. Final thought from Detert and Roberts:

“If you have attempted to implement these suggestions, and still see little to no progress, take stock of where you are and where you wish to be. It might be time to look around your organization for a new team or assignment with leaders and allies who are willing to join you in this work. Or, it might be time for you to find a new organization where you employ your talents among those more demonstrably committed to the changes you seek.”
2. Vivian Chen warns that the burden cannot be solely on minorities to combat racism. She notes that, “it often feels that it is the burden of people of color to raise awareness of bias—and it shouldn’t be.”

- a. Chen notes that Detert and Roberts give “sound advice” but points out that the advice is “so exhausting”.
 - b. Chen points out that: “It seems minorities have to walk on eggshells and perform jiu-jitsu to talk about racial injustice in their own workplace, lest they come off as too angry, strident or demanding. Then, they have to follow up on the conversation, because, chances are, management will need a lot of nudging on these issues.”
 - c. Pointing to Detert and Roberts last point about looking for organizations/teams who are willing to join in the quest for change, Chen concludes that this failure to change by addressing racial injustice is why Black lawyers don’t stick around.
3. Silence by racially oppressed individuals should never be taken to mean that there are no complaints about marginalization or that discrimination has been accepted.
- a. Silence must be understood within the framework of long-standing power dynamics, marginalized and oppressed persons may be consider it fruitless to complain within a power structure that has historically ignored the voices of the oppressed.
 - b. Attempting to eliminate racism, in any sphere, is exhausting. Being forced to take on this feat in all areas of life may cause persons who are discriminated against to make tough choices about when and where to challenge racism.
 - c. The famous work of poet Paul Laurence Dunbar can provide eloquent insight:

We wear the mask that grins and lies,
It hides our cheeks and shades our eyes,—
This debt we pay to human guile;
With torn and bleeding hearts we smile,
And mouth with myriad subtleties.

Why should the world be over-wise,
In counting all our tears and sighs?
Nay, let them only see us, while
We wear the mask.

We smile, but, O great Christ, our cries
To thee from tortured souls arise.
We sing, but oh the clay is vile
Beneath our feet, and long the mile;
But let the world dream otherwise,
We wear the mask!

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Doing The Work: Fighting Racism In The Practice Of Law

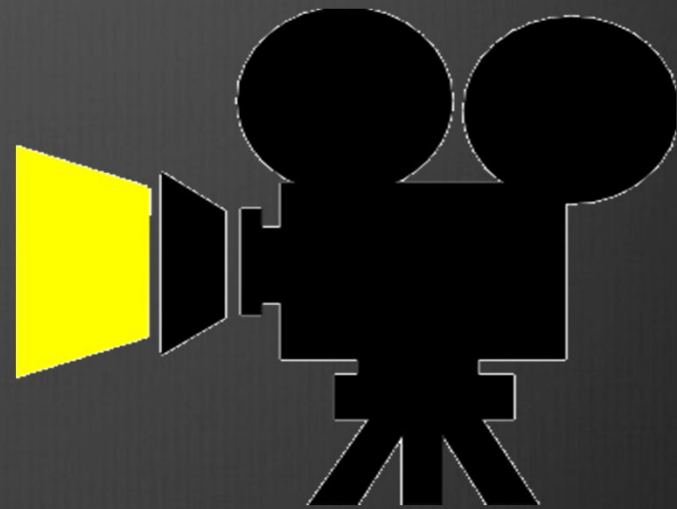
The Law Has a Race Problem

- Racism and bias are rampant in the law
- Laws have, in disproportionate manners, adversely impacted already marginalized demographics
- There is a lack of diversity within the legal profession
- Legal practitioners can often perpetuate bias—even when they claim to fight against bias



Lawyers and the Race Problem

- There is no requirement that lawyers be free of racial bias (or any other bias) to sit for the bar exam, meet character and fitness requirements, or continue to practice law
- Lawyers often carry their personal biases into their professional spheres
- The biases held by lawyers negatively impact their clients and colleagues
- Lawyers are hesitant to admit their own biases because they believe that this means that they are racist (or sexist, or homophobic, or any other of the “bad” words we are afraid to face)



Your mind is acting as a projector...

“... just imagine that your mind is a movie projector and its contents, at the conscious and subconscious levels, are being projected out from within you onto a screen that you perceive as your external reality of time and space. Nothing can show up on your screen that is not coming from within yourself. There is nothing outside of you but a projection of that which is inside you.”

~Robin Salter, [The Movie In Your Mind](#)





...which means any internal biases will
be projected outwardly.

How does the Mind Work?

(Banaji & Greenwald, 2016)



- The mind works automatically, unconsciously, and unintentionally.
- Sigmund Freud popularized the “unconscious mind” through his dream experimentations and interpretations.
- Our minds routinely predict what might go on in the minds of others in order to make social meaning.
 - We imagine the thoughts of other people.
 - We try to predict the actions of other people.
- As humans, we find it much easier to judge people’s character and *automatically* assume that our assessment is “right.”

Terms Often Confused with Unconscious Bias:

- 1) Prejudice → **Beliefs** about a target group
 - EVERYONE who is {insert subpopulation group} is {adjective}. No exceptions.
- 2) Stereotypes → Expected or **anticipated behavior** due to group membership
 - EVERYONE who is {insert subpopulation group} will {insert verb}. No exceptions
- 3) Discrimination → Inappropriate and potentially unfair **treatment** based on group membership
 - “WE don’t {insert verb} {insert subpopulation group}”; despite qualifications
- 4) Explicit Bias → Beliefs and attitudes that are **deliberately expressed** (explicit acts of prejudice and stereotyping)

Do you engage with others according to society's biased "script"?



Are **YOU** Biased?!

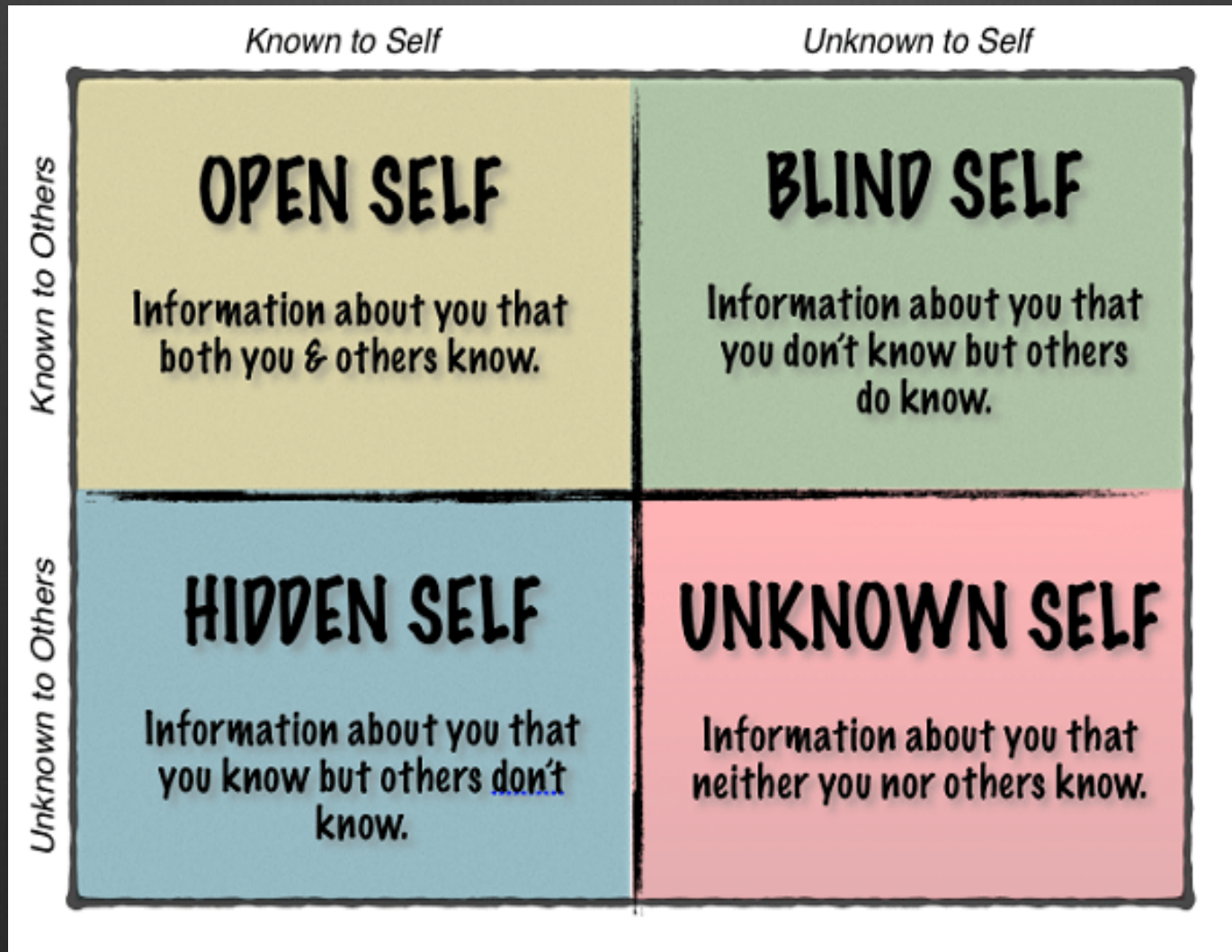
If I were to call anyone in the room “BIASED”, is that usually meant as a good thing or a bad thing?

Three things to remember with Bias:

1. **We all are biased** so we have to take the moral judgment off the term
2. If we can accept that we are all biased, **then we can let go of the myth** that we are all fair and impartial
3. The moment **you bring your biases to your awareness**, they can no longer lead you because biases are malleable



Johari's window:



Functions of unconscious Bias:

⦿ *Physical Survival*

- ❑ Danger detector; fight, flight, or freeze

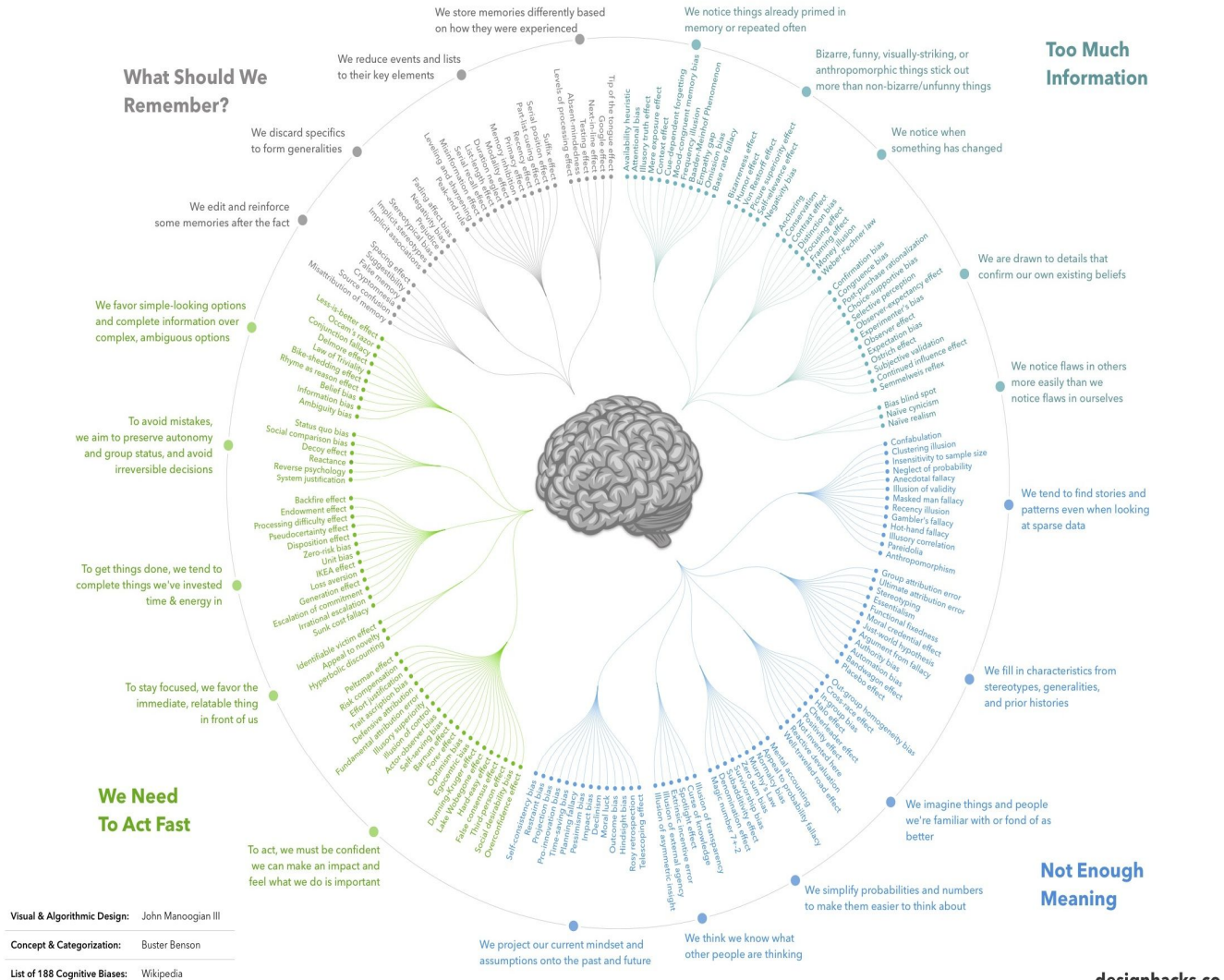
⦿ *Mental survival*

- ❑ Overload of stimulus, bias filters, make assumptions, decisions, forms memories

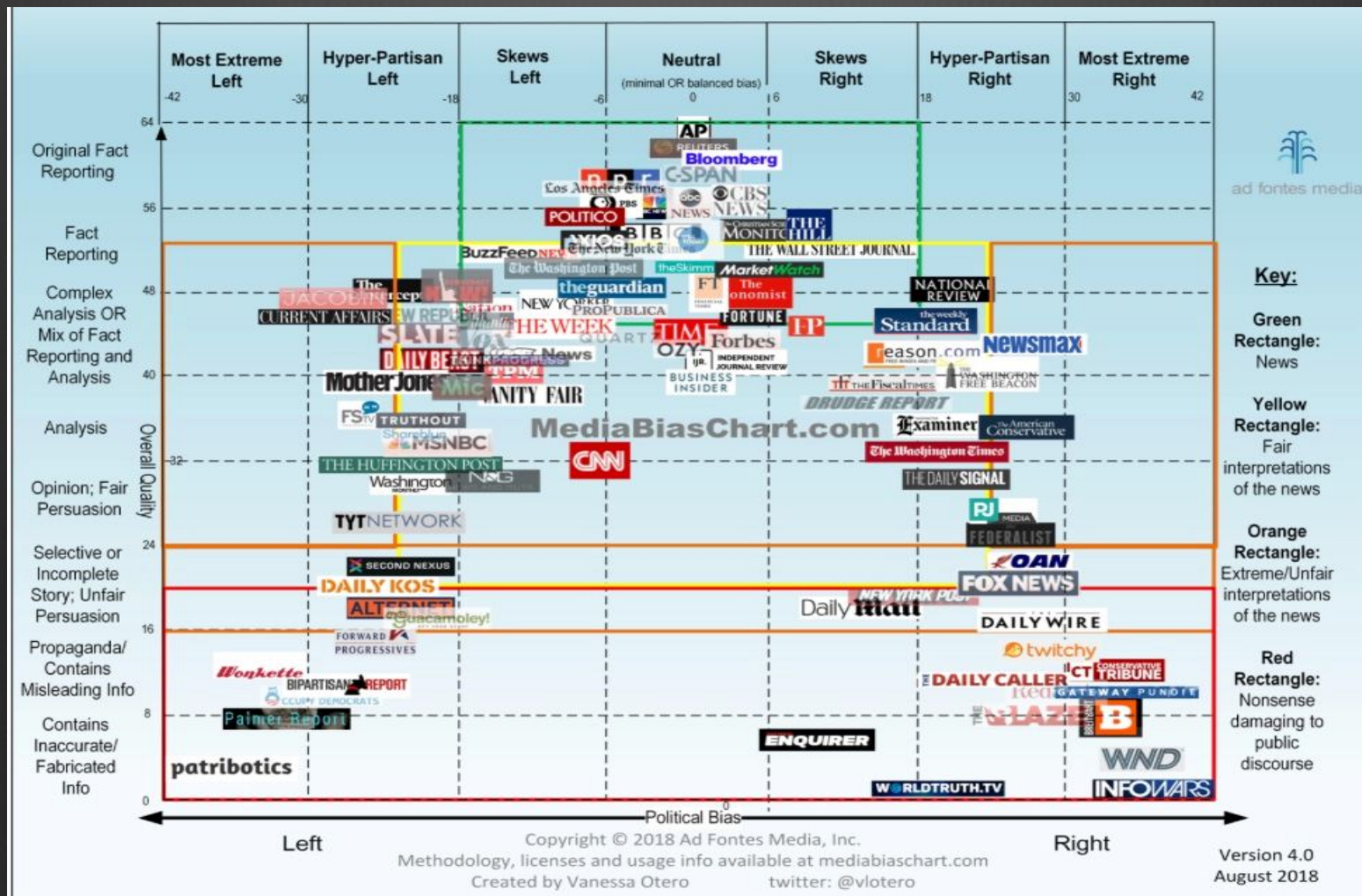
⦿ *Social Survival*

- ❑ Appropriate behavior, cultural norms

COGNITIVE BIAS CODEX



What we consume *confirms* our Bias.



<https://www.adfontesmedia.com/>

Microaggressions Explained:

DEFINITION: brief, everyday exchanges that send denigrating messages to certain individuals because of their group membership

3 TYPES:

1. Microassaults.

- ⦿ Microassaults are the most overt microaggressions. With microassaults, the person committing the microaggression acted intentionally and knew their behavior might be hurtful.

2. Microinsults.

- ⦿ Microinsults are more subtle than microassaults, but nevertheless have harmful effects on marginalized group members.

3. Microinvalidations.

- ⦿ Microinvalidations are comments and behaviors that deny the experiences of marginalized group members.

“Wow...s/he is so articulate!”

The Racial Politics of Speaking Well, NY Times, 2007, the writer examines the hurtful and insulting nature of words like “articulate” to describe black brilliance when those same words would never be used to describe the intelligence or poise of white people.

“The word perfectly conveys, to quote George Bush, the soft bigotry of low expectations. It literally comes down to that. When people say it, what they are really saying is that someone is articulate ... for a black person.”

~**Anna Perez**, former Deputy Assistant to President Bush

“People wants to be up in arms when someone uses the N-word, but subtle words like this are more insidious. It’s like weight loss. The last few pounds are the hardest to get rid of. The last vestiges of racism are the hardest to get rid of.”

~ **D. L. Hughley**, comedian and actor





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As big corporations say 'black lives matter,' their track records raise skepticism



A portrait of George Floyd is seen at a peaceful march after curfew in New York on June 6. (Holly Pickett for The Washington Post)

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D. THE BUSINESS CASE FOR STOPPING AND PREVENTING HARASSMENT [AND DISCRIMINATION]

“Let there be no mistake: Employers should care about stopping harassment because harassment is wrong - and, in many cases, it is illegal. Workplace harassment can produce a variety of harms - psychological, physical, occupational, and economic harms that can ruin an employee's life. These effects of harassment - on victims - are primarily why harassment must be stopped. So, again: Employers should care about preventing harassment because it is the right thing to do, and because stopping illegal harassment is required of them.

Moral obligation and legal duty are not the complete story, though. Based on what we have learned, employers should also care about stopping harassment because it makes good business sense.

D. THE BUSINESS CASE FOR STOPPING AND PREVENTING HARASSMENT [AND DISCRIMINATION] continued...

The business case for preventing harassment is sweeping. At the tip of the iceberg are direct financial costs associated with harassment complaints. Time, energy, and resources are diverted from operation of the business to legal representation, settlements, litigation, court awards, and damages. These are only the most visible and headline-grabbing expenses. They also only address employees who report harassment, which, as we explained, may account for only a fraction of the harassment that occurs.

The business case extends far deeper. It encompasses employees who endure but never report harassment, as well as coworkers and anyone else with an interest in the business who witness or perceive harassment in the workplace. When accounting for all those affected by it, harassment becomes more insidious and damaging. In addition to the costs of harassment complaints, the true cost of harassment includes detrimental organizational effects such as decreased workplace performance and productivity, increased employee turnover, and reputational harm.”

Implicit Bias in Jury Instructions:



- ⦿ They impact **every** aspect of a trial.
- ⦿ They give jurors their duties in the trial.
- ⦿ They shape the credibility of the witnesses.
- ⦿ While attorneys and judges are being made more aware of bias, the jurors do not receive guidance in implicit bias and flawed/lacking jury instructions don't help.

Implicit Bias Jury Instruction

By: Judge Mark W. Bennett

Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluations of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

**PRELIMINARY INSTRUCTION TO BE GIVEN
TO THE ENTIRE PANEL BEFORE JURY SELECTION**

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.

Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.

1.08 Implicit bias

We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of and others we might not be fully aware of, which is why they are called “implicit biases” or “unconscious biases.”

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must resist jumping to conclusions based on personal likes or dislikes. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or *[insert any other impermissible form of bias]*].

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist, and help each other to resist, any urge to reach a verdict that is influenced by bias for or against any party or witness.

Instruction, Notes on Use and Comment approved May 2018; Notes on Use revised May 2019.

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the witness's opportunity and ability to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

You must avoid bias, conscious or unconscious, based on the witness's race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender in your determination of credibility.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

**INSTRUCTION TO BE GIVEN
DURING CLOSING INSTRUCTIONS
(perhaps before 7.5 – Verdict Form)**

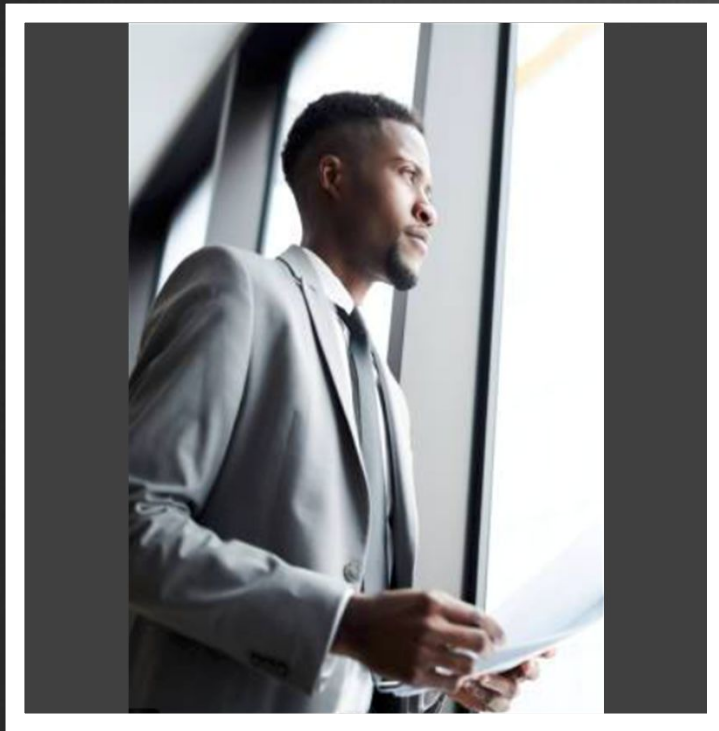
DUTY OF JURY

I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.¹ Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.²

Model Ninth Circuit Criminal Instruction 1.1 (modified). Criminal Instruction 1.1 is similar to Model Civil Instruction 1.1B.

Inequity in the Courts

A 2019 study conducted by the California Bar found racial disparities in probationary discipline, disbarment and discipline-related resignation, with large disparities between black and white male lawyers.



Specifically, the study found:

The **probation** rate for male lawyers was **3.2% for blacks**, 1.9% for Latinos, and 0.9% for whites.

The **probation** rate for female lawyers was **0.9% for blacks**, 0.5% for Latinos, and 0.4% for whites.

The **disbarment** rate for male lawyers was **3.9% for blacks**, 1.7% for Latinos, and 1% for whites. The disbarment rate for female lawyers was **0.9% for blacks**, 0.5% for Latinos, and 0.4% for whites.

Because the public files **complaints** against black male lawyers at a disproportionate rate, there is a greater likelihood that these lawyers will be investigated and disciplined.

“You don’t look like a lawyer!”

In the legal field, this is a popular refrain directed at women and people of color. It’s the idea that the norms of success, ability, & competence are tied to looking a certain way — usually white and male.

In order to “look the part” black women have to pay what may be referred to as an “inclusion tax” which refers to time & money spent to ensure their appearance more closely aligns with white standards of professional attire.

Both a [recent report](#) and a [recent survey of diversity at 232 law firms](#) found that black women specifically continue to be significantly underrepresented, making up 8.57% and 1.73% of all attorneys, respectively.

[*“You Don’t Look Like a Lawyer”*](#)
[Harvard Business Review](#)

