Book Review: Jennifer Eberhardt, Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do (New York: Viking, 2019).

by
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I. Introduction

In her recent book, *Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do*,[1] Jennifer Eberhardt, Stanford professor of psychology, powerfully examines implicit bias: "what it is, where it comes from, how it affects us, and how we can address it."[2] Dr. Eberhardt then advises the reader that implicit bias is "not a new way of calling someone a racist" but a "distorting lens" that is a product of "both the architecture of our brain and the disparities in our society."[3] For all the scientific definitions and explanations of implicit bias, however, I was struck by this statement as more precise than most explanations: "Our experiences in the world seep into our brain over time, and without our awareness they conspire to reshape the workings of our mind."[4] Thus, "bias leaks out between the words of scripted dialogue" and thereby "seeps" into everyday thoughts and lives in ways that may be unrecognizable or, at minimum, difficult to evaluate as to impact on the individual and society.[5]

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1 Jennifer Eberhardt, Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do (2019).

2 *Id* at 6.

3 *Id*.

4 *Id*. at 15.

5 *Id*. at 42.

The book is phenomenological, as she weaves her life experiences and those of her family through scholarship which undergirds implicit bias and decades of ever-more refined "dog whistles" which signal racism and bigotry to those so inclined. As a memoir by a scholar, her book, like Bryan Stevenson's narrative as a lawyer,[6] is sometimes painful to read. Yet, it is a powerful reminder that there is willingness to struggle with the blend of science, data, and human imperfections as a means to improve policy and practice.[7] I will leave to the reader the chance to find the "rest of the story," but I will offer two passages for this introduction: "My boys were going to grow older and they were going to be fearful and cops were going to be fearful-unless we all could find a way to free ourselves from the tight grip of history"[8] and "I led the graduates to Harvard Yard, where row upon row of white wooden chairs faced a stage built just for this purpose. The PhD students were seated near the front. When I took my seat, I felt a flush of relief-that I had carried the flag the entire way, that I had made it through six years of struggle, that I was no longer handcuffed to a wall."[9]

Her poignant message is written with the wisdom of a life versed in family, community, and academia while doing presentations, researching, and training law enforcement. From each of those experiences, Dr. Eberhardt retains an optimistic, albeit realistic, view that applied learning holds hope for positive change much more so than retrospective blame or bitterness. All of us enter our work as professionals with histories we may never share with others. These experiences carry and drive us to where we are as lawyers or psychologists; social workers or physicians; mediators and case workers; academics or researchers.

Although Dr. Eberhardt did not write this book for lawyers specifically, she did write about the impact of implicit bias on American society and its institutions. Explained in language ac-

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6 BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014).

7 It is important to heed a lesson of the past still active in our time. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 79 (1990) ("In an age not only of science but of hostility to almost all forms of authority, it is easy to forget how many of our beliefs, including scientific ones, are based on authority rather than on investigation.").

8 EBERHARDT, *supra* note 1, at 95.

9 *Id*. at 110.

cessible to professionals and laypersons (an art itself), she gathers reams of research proving the biological and environmental conditions which render bias so deeply embedded and seemingly, in certain periods of time, intractable to those of us less optimistic (or more Hobbesian) about human frailties than Dr. Eberhardt.[10] Of critical consequence, her aggregation of research makes visible the intersectionality of implicit bias as a means, for those with power and privilege, to utilize the law and legal systems to categorize others as worthy or unworthy of equal or even equitable protection.[11]

Applying research to implicit biases has the benefit of engaging moral and ethical decision making as intentional, rational,

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10 For anyone who wishes to argue that policy and law are accidental rather than intentional and instrumental, please take a few moments and read the background and history which required decades before enactment of S. 3178 (115TH), JUSTICE FOR VICTIMS OF LYNCHING ACT OF 2018, https://www.govtrack.us/congress/bills/115/ s3178/text. The U.S. Department of Justice issued its own training policy in 2016. *See* DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, DEPARTMENT OF JUSTICE ANNOUNCES NEW DEPARTMENT-WIDE IMPLICIT BIAS TRAINING FOR PERSONNEL (JUNE 27, 2016), https://www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel ("Through the new training, over 28,000 department employees will learn how to recognize and address their own implicit bias, which are the unconscious or subtle associations that individuals make between groups of people and stereotypes about those groups. Implicit bias can affect interactions and decisions due to race, ethnicity, gender, sexual orientation, religion and socio-economic status, as well as other factors. Social science has shown that all individuals experience some form of implicit bias but that the effects of those biases can be countered through training.").

11 The concept of "intersectionality" has important application when studying the impact of racial bias and governmental and organizational systems. *See* Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination within the LGBT Movement*, 2016 WIS. L. REV. 655, 659 ("In a robust body of scholarship spanning nearly four decades, intersectionality scholars have documented how identity-based movements tend to stake out priorities that address the concerns of more privileged movement constituents while overlooking the concerns of movement constituents experiencing multiple, intersecting forms of subordination. Pioneers of intersectionality theory in the legal academy have written extensively on this dynamic in the context of the antiracist and feminist movements."); Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 CONST. COMMENT. 377, 378 (2017) ("Intersectional harms often underpinned legal assaults on family status inequalities.").

and cognitive choice.[12] Thus, this book review, and the articles in this issue of the AAML Journal, are intended to recommend its reading and application to our professional field. Rather openly, it is also intended to challenge judges (who are lawyers), law professors (who are lawyers with students), as well as lawyers (who are lawyers with clients) about the intentional application of the science of bias when teaching and training lawyers and practicing law.[13] The legal system in the United States has struggled to implement more empirically-based knowledge as a means to reinforce advocacy and judicial decisions (and conduct) less prone to implicit bias errors.[14] The current generation of lawyers,

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12 *See* Thomas L. Shaffer, *Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231, 238 (1979) ("The lawyer who serves needs is ostensibly more a servant of the system than the lawyer who serves wants, but both are servants of the system. The moral justification for serving the system is that the system is a source of goodness. But generalized, principled fealty to the system is fealty to power, which assumes that power is the way to goodness."); William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 69 (1991) ("This discussion and its tensions among scholars is not new to the profession of law and teaching lawyers to be lawyers. The tragedy is that the professional aspiration to connect directly a commitment to general social values with everyday practical tasks is doomed to disappointment. The ethically ambitious lawyer comes to the profession attracted to the idea that she will contribute to justice in her day-to-day practice but then finds that her practice is governed by norms that frequently oblige her to do things that, if she dares to consider the issue, she believes are unjust.").

13 *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 VA. L. REV. 307, 315 (2009) ("Several commentators have considered the way implicit biases are either facilitated by the law itself or how legal decision-makers may unintentionally propagate these biases. These projects can be distinguished from studies of implicit bias in society because instead of considering how law should react to the implicit biases of societal actors, they consider how the law itself may propagate bias."); Chad Michael McPherson & Michael Sauder, *Logics in Action: Managing Institutional Complexity in a Drug Court*, 58 ADMIN. SCI. Q. 165, 188 (2013) ("Our findings remind us that court decisions are not made in legal vacuums and that focusing on standardized procedures and roles can only take us so far in explaining how legal decisions are constructed. Informal aspects of deliberations, especially the professional and institutional considerations in which the court is embedded, influence decision making and the severity of outcomes.'").

14 This is a very sensitive subject as it pertains to sustaining the public trust in objective judicial decision making but one that has been and should continue to be the subject of study and training. *See* Michele Benedetto Neitz,

including those who will follow as AAML Fellows, will benefit from reading the themes in this book because, as Dr. Eberhardt argues, "neither our evolutionary path nor our present culture dooms us to be held hostage by bias. Change requires a kind of open-minded attention that is well within reach."[15]

II. Bigotry and Prejudice

Dr. Eberhardt begins with seemingly simple questions related to various research methodologies, including neuroscience, social psychology, and well-established aptitude testing.[16] It is

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Socioeconomic Bias in the Judiciary, 61 CLEV. ST. L. REV. 137, 165 (2013) ("Studies showing the pervasive nature of implicit bias highlight the need to devote more attention to identifying socioeconomic bias in its implicit form. Indeed, a review of Fourth Amendment and child custody cases reveals that this bias is indeed present in American courts."); Gregory S. Parks, *Judicial Recusal: Cognitive Biases and Racial Stereotyping*, 18 N.Y.U.J. LEGIS. & PUB. POL'Y 681, 696 (2015) ("Judges are human. They suffer from the same frailties, flaws, and foibles that the rest of us do. That includes being subject to a whole host of cognitive biases. Given the extent to which the valuation of whiteness and devaluation of blackness permeates American society, it is no surprise that all racial groups tend to automatically or subconsciously preference whiteness over blackness.").

15 EBERHARDT, *supra* note 1, at 7. The tensions between approaches to law school education and its efficacy is not new. *See* Jerome Frank, *Why not a Clinical Lawyer-School?*, 81 U. PENN. L. REV. 907, 915 (1933) ("A medical school dominated by teachers who had seldom seen a patient or diagnosed the ailments of flesh-and-blood human beings or actually per formed surgical operations, would not be likely to turn out doctors equipped with a fourth part of what doctors ought to know. But our law schools are not doing as much for law students.").

16 The most well-known and studied of these tests is the implicit association test (IAT) which is "designed to measure associations that we don't even know we have." EBERHARDT, *supra* note 1, at 39. *See generally* Frederick L. Oswald, et al., *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCHOL. 171 (2013). The IAT has been used to test judges and lawyers in some recent research. The results are interesting but most studies do not relate to state family law judges, who may be elected or appointed, and the unique environment of child protection and child custody. *See* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2003); Justin D. Levinson, et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1 (2010).

relatively simple to look at explicit bias through the behavior and words of white nationalists and others who seek to justify and encourage lynching, genocide, mass deportations, encampments, and isolation as if the other group is a disease or not human at all.[17] Many of us, privileged by birth and opportunity, know the history of the last two centuries and how intolerance, hate, and violence, fed by the evil of ideologues and bigots, has so devastatingly harmed, and continues to harm, families and institutions.[18]

Dr. Eberhardt metaphorically describes her experiences with these different schemas as the "The Science of the Scary Monster"[19] drawn from a story about her elementary school son wondering what she did for work as a social psychologist. As she thought about eugenics and racism, she thought of it anew as a "monstrous bias so scary to me: it never seemed to die."[20] In the context of her research and the powerful connection to dehumanization and violence as that deeply embedded monster, she found herself "disheartened and weary"[21] with what is too often true: professionals may be more inclined to express bias as a function of research-talk such that "your dark skin is seen as a stain that no measure of progress can cleanly erase. And that many of my colleagues—the tribe of my profession—harbored those same associations."[22]

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17 This balancing of individual rights to free speech and the protection of groups from oppression and communities' rights to be free from violence and disruption is not merely a problem in the United States. *See* Jillian Rudge, *Australians' Right to be Bigoted: Protecting Minorities' Rights from the Tyranny of the Majority*, 41 BROOK. J. INT'L L. 825, 828 (2015) ("Consequently, while Australians are free to be bigoted under international and domestic human rights laws, those laws also guarantee Australians the right to be protected from discrimination, hate speech, and racial vilification through legal measures like the RDA [Racial Discrimination Act 1975].").

18 Few books can make that point as pessimistically concerning appeals to racism and its effectiveness when inciting a mob as clearly as HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 157 (1951) (new edition with added prefaces 1973) ("For no matter what learned scientists may say, race is, politically speaking, not the beginning of humanity but its end, not the origin of peoples but their decay, not the natural birth of man but his unnatural death.").

19 EBERHARDT, *supra* note 1, at 134.

20 *Id*. at 142.

21 *Id*. at 148.

22 *Id*.

Bias is not, however, the same as bigotry or prejudice. Some people might think that obvious, but really it is not since the terms are misused for political or tactical advantage in debate. Prejudice may be a preconceived opinion not based on reason or actual experience, but the terms "bias" and "prejudice" are not synonymous: neither is "mutually inclusive nor mutually exclusive. Prejudice may be more overt and forceful, while bias has a tendency to be less overt and more sublime."[23] Bigotry, *or the act and agency of being a bigot,* is the realm of the ideologue which generally means a rigid and unwavering reliance on categories of groups based upon strict inclusion and exclusion criteria.[24] In this way, the "other" is either in or out and pain and death and deprivation may be inflicted merely by that status of exclusion or the categorization of that group as property not persons.[25]

Bias, in its categorical forms, is different. Explicit biases are attitudes and stereotypes that are consciously accessible and, "if no social norm against these biases exists within a given context, a person will freely broadcast them to others," but such norms (outside a group which shares those norms) may mean that "explicit biases can be concealed to manage the impressions that others have of us."[26] By contrast, "implicit biases are attitudes and stereotypes that are not consciously accessible through intro-

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23 Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 3 (1994).

24 There are many sources for this point in social psychology and political science. *See John Corvino, Puzzles About Bigotry: A Reply to McClain,* 99 B.U. L. REV. 2587, 2599 (2019) ("One upshot of the account of bigotry sketched here is that it is an essentially internal vice. Observers have only indirect access to the operations of the alleged bigot's mind and heart. Naming bigotry thus calls for epistemic humility balanced by the urgency of containing its spread and mitigating its effects."); Ken McGrew, *Challenging Bigotry in the Freirean Classroom*, 33 INT'L. J. QUALIT. STUD. IN EDUC. 212, 214 (2020) ("The Merriam-Webster dictionary defines bigotry as the state of mind of a bigot, 'obstinately or intolerantly devoted to one's own opinions and prejudices,' synonymous with dogmatism, small-mindedness, and sectarianism. Fascism and white supremacy rely on the dogmatism and bigotry of those who advance them. Fascist and white nationalist leaders rely on the willful ignorance of their followers.").

25 For an integrated review of literature and various forms of bigotry, see KRISTIN J. ANDERSON, BENIGN BIGOTRY: THE PSYCHOLOGY OF SUBTLE PREJUDICE (2010); LINDA C. MCCLAIN, WHO'S THE BIGOT?: LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW (2020).

26 Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2011).

spection. If we find out that we have them, we may indeed reject them as inappropriate."[27] Of critical importance, Dr. Eberhardt explored the correlative research related to "transmission of bias" which means that, "unsurprisingly, studies confirm that biased parents tend to produce biased children who are biased as well."[28]

Implicit bias is by no means an excuse for explicit bias, prejudice, or bigotry. The crux of these findings, however, has a subtext from classroom to courtroom. What happens when a professional discipline transmits and imbues its culture with implicit biases which may be socio-economic, regional, or based upon stereotypes or differences from privileged norms? If so, how do we teach and train law students, lawyers, and judges to apply this rich body of science? As Dr. Eberhardt wrote in the context of race but applicable to a broader ideal, "When we're afraid, unwilling, or ill equipped to talk about race, we leave young people to their own devices to make sense of the conflicts and disparities they see. In fact, the color-blind approach has consequences that can actually impede our movement toward equality."[29]

In truth, implicit bias has more appeal as a defense for professionals because pointing at the unconscious seemingly negates a duty to reflect before acting tacitly or intentionally toward a targeted group.[30] This is not much of an argument as the research shows that implicit biases are formed by "implicit attitudes (unconscious preferences) and implicit stereotypes (nonconscious

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27 *Id*.

28 EBERHARDT, *supra* note 1, at 39.

29 *Id*. at 217–18.

30 The AAML Journal has published various articles pertaining to family law practice, experts, and implicit bias. *See* Benjamin D. Garber & Robert A. Simon, *Individual Adult Psychometric Testing and Child Custody Evaluations: If the Shoe Doesn't Fit, Don't Wear It*, 30 J. AM. ACAD. MATRIMONIAL LAW. 325, 334 (2017) ("We recognize the invisible and invasive effects of confirmational bias and the evaluator's associated need for checks and balances with regard to many types of cognitive and implicit bias."); Dana E. Prescott & Diane A. Tennies, *Bias Is a Reciprocal Relationship: Forensic Mental Health Professionals and Lawyers in the Family Court Bottle*, 31 J. AM. ACAD. MATRIMONIAL LAW. 427 (2018) (reviewing literature). For a recent article related to the implications of bias when using assessment tools (even as the authors phrase the point differently), see Tess M.S. Neal, et al., *Psychological Assessments in Legal Contexts: Are Courts Keeping "Junk Science" Out of the Courtroom?*, 20 PSYCHOL. SCI. IN PUB. INT. 135 (2019).

mental associations between a group and a trait)."[31] Implicit bias, for example, in family law court systems may be more socio-economic or gender-based given the volume of cases regarding child protection and non-married parents, though other demographic factors like race and mental health are often implicated or overlapping as well. As our current systems are structured, many of these parents appear before family courts with limited resources, often self-represented or with overwhelmed court-appointed lawyers and guardians ad litem and often without independent forensic experts or access to affordable and sustained mental health and alternative dispute resolution services.[32]

Nevertheless, implicit bias is not a static or one-size-fits-all event but may change with life experiences, social norms, and systemic pressures on sentencing or child custody decision making, for example.[33] Knowing that is a part of the human condition

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31 Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3099 (2017).

32 *See* Neitz, *supra* note 14 at 159 ("Judicial discretion, coupled with the fact that most judges are economically privileged and may 'exaggerate' the importance of wealth in a child's life, creates the potential for implicit socioeconomic bias in child custody cases."). The concern with gender bias in family court is an ongoing topic fraught with high stakes but beyond the scope of this book review. *See* Molly Dragiewicz, *Gender Bias in the Courts: Implications for Battered Mothers and Their Children*, 5 FAM. & INTIMATE PARTNER VIOLENCE Q. 13 (2012); Ana Jordan, *'Dads Aren't Demons. Mums Aren't Madonnas.' Constructions of Fatherhood and Masculinities in the (Real) Fathers 4 Justice Campaign*, 31 J. SOC. WELFARE & FAM. L. 419 (2009); Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 LAW & INEQ. 311 (2017).

33 *See* Todd Brower, *What Judges Need to Know: Schemas, Implicit Bias, and Empirical Research on LGBT Parenting and Demographics*, 7 DEPAUL J. WOMEN, GENDER & L. 1, 23 (2017) ("Second, judges, psychologists, social workers, evaluators, and others who have schemas about LGBT parents and their families may find that implicit bias unconsciously shapes those assessments about children's best interests. Indeed, courts have often used the best interests standard in ways that demonstrate bias against LGBT parents."); Sarah Valentine, *When Your Attorney Is Your Enemy: Preliminary Thoughts on Ensuring Effective Representation for Queer Youth*, 19 COLUM. J. GENDER & L. 773, 776-77 (2010) ("It is generally accepted that bias or prejudice against queers is both individualized and part of society at large. Multiple studies indicate that individuals who work in the legal system—whether they are judges, attorneys, clerks, or other administrative personnel—are susceptible to these biases. Sexual orientation bias may be explicitly evident as when a victim's sexual orientation is the reason behind a murderer's lenient sentencing, a mother

requires training and the cognitive, not emotional or visceral, capacity for reflection. The risk is that those "heuristics," or mental shortcuts, may connect to biases by finding solutions to problems quickly but concomitantly implicating the "vice of intellectual arrogance" because "the thinker remains unable to leave his or her own perspective."[34] Stated another way, negative attitudes toward certain social groups or personal characteristics may "often exist at the margins of awareness and are not easily accessible to individuals."[35]

The problem becomes particularly dangerous when those rules of thumb are "self-centered." This means that "self-centeredness is found in the general human tendency to use the self as an anchor against which the other is compared and the world is known" so that we "tend to assume too early that our memories, judgments, intuitions, and beliefs are sufficient for the epistemic task at hand."[36] As the authors concluded, self-centered thinking "is not, in-and-of-itself, intellectual arrogance," but such arrogance may be self-centered thinking when a person holds a belief despite the evidence.[37]

Blending bigotry and bias (and its variations) as synonyms, therefore, has serious consequences for the lawyer and the pro-

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losing her child or an eighteen-year-old disabled boy receiving a sentence thirteen times longer for having sex with an underage boy than he would have received if he had sex with an underage girl.").

34 Peter Samuelson & Ian M. Church, *When Cognition Turns Vicious: Heuristics and Biases in Light of Virtue Epistemology*, 28 PHIL. PSYCHOL. 1095, 1106 (2015); *see also* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 973-74 (2006) ("In cognitive psychology and behavioral economics, much attention has been devoted to heuristics, which are mental shortcuts or rules of thumb that function well in many settings but lead to systematic errors in others."); Mary Kynn, *The 'Heuristics and Biases' Bias in Expert Elicitation*, 171 J. ROYAL STAT. SOC'Y: SERIES A (STATISTICS IN SOCIETY) 239, 242 (2008) ("One explanation for these human deficiencies is that humans use a series of heuristics for judging probabilities, which may lead to serious bias. Heuristics are 'rules of thumb' that are used to find solutions to problems quickly. They may or may not find the best solution.").

35 William J. Hall, et al., *Implicit Racial/Ethnic Bias Among Health Care Professionals and Its Influence on Health Care Outcomes: A Systematic Review*, 105 AM. J. PUB. HEALTH e60, e61 (Dec. 2015).

36 Samuelson & Church, *supra* note 34, at 1106.

37 *Id*.

fession, as well as clients.[38] In the absence of intentional and iterative refinement of cognitive and emotional skillsets, implicit biases may cause lawyers to react emotionally and viscerally based upon the pressure to conform to the organizational heuristics of a profession demanding speed and volume. In practice, bias may generate alliances with a client against another parent based upon no data but the statements of one person. Bias may reject the intelligent and mindful use of multiple hypotheses to explain a family system or a child's distress. Unhinged bias by a group with power may create thought distortions at all levels of policy and practice and is worthy of discussion in courtrooms.[39] The fact that something like bias is part of the human condition does not make it an excuse for professionals failing to work systemically to reduce such errors when strategies and methods are available.

III. Implicit Bias and Injustice

The phrase "epistemic injustice" has found its way into some legal writing when discussing systemic problems with the treatment of minority or oppressed groups or the equitable allocation of resources and access to justice.[40] Nevertheless, because getting

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38 *See* David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached Out Lawyering*, 5 INT'L. J. LEGAL PROF. 141, 143 (1998) ("Proponents of bleached out professionalism assume that the current norms of professional responsibility were developed outside of the context of any particular identity. This is simply false. Despite pervasive appeals to neutrality and universality, current professional norms reflect the particular biographies, beliefs, and expectations of the narrow and relatively homogeneous group who created the modern American legal profession; a group from which blacks (as well as many others) were scrupulously excluded.").

39 *See* Kang, et al., *supra* note 26, at 1126 ("Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: What, if anything, should we do about implicit bias in the courtroom? In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls?").

40 For an interesting discussion concerning the role of supreme courts, see Federica Liveriero & Daniele Santoro, *Proceduralism and the Epistemic Dilemma of Supreme Courts,* 31 SOC. EPISTEMOLOGY 310 (2017). The international literature is robust and provides helpful guidance for examining forms or epistemic injustice in American family courts. *See* Dipika Jain & Kimberly M.

at the truth of contested facts is at the heart of our court system, "recent attention to epistemic injustice is of special interest to those concerned with the law."[41] There are many definitions, but for purposes of this book review this form of injustice occurs when "one's capacity as a knower is wrongfully denied."[42] For example, when "a hearer assigns a speaker less credibility than he or she deserves because of biases, as in our case, when a hearer does not rely on the testimony of a person with a mental disorder because he or she considers individuals with mental disorders to be incapable of rational reasoning."[43] This reality could substitute any number of demographics to make the same point about what may occur when speakers are seen as less credible by lawyers, judges, therapists, or forensic evaluators, among others operating in the family court system.

Legal, psychological, and sociological scholars have all examined judicial decision making to determine how judges decide cases.[44] The methods of analysis and theories posed are varied, rich, and complex. Some find that political agendas or background and experience inform decision making, while others argue that judges are influenced by precedent. One theme, however, that resonates throughout much of the literature is that judges, like all of us, are similarly "swayed by heuristic decision making, friendships, beauty, the strength of a case, public opinion, fear of reversal, and the normal set of cognitive biases to which we all are subject: expectation bias, hindsight bias, confir-

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Rhoten. *Epistemic Injustice and Judicial Discourse on Transgender Rights in India: Uncovering Temporal Pluralism*, 26 J. HUM. VALUES 30, 30 (2020) ("A court's inability to fully see and hear a litigant may (and often does) have significant effects on the successfulness of their claim. Further, to be legible as subject-citizens, and in order to receive remedy from the legal system, individuals must state a claim cognizable by the State. Legal legibility is, thus, essential to a complainant's claim; without the words to speak into being a recognized grievance, the court is a silent room.").

41 Michael Sullivan, *Epistemic Justice and the Law*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 294 (Ian James Kidd, et al., eds., 2017).

42 Rena Kurs & Alexander Grinshpoon, *Vulnerability of Individuals with Mental Disorders to Epistemic Injustice in Both Clinical and Social Domains*, 28 ETHICS & BEHAV. 336, 337 (2018).

43 *Id.*

44 *See supra* notes 32-33.

mation bias, tunnel vision, and so forth."[45] Or, as Dr. Eberhardt states, "speed and ambiguity are two of the strongest triggers of bias" such that when "we are forced to make quick decisions using subjective criteria, the potential for bias is great."[46]

For more than forty years, the complex world of fragile families has ensured a growing volume of cases that funnel parents and children through the adversarial portal. Lawyers, judges, clerks, security personnel, mediators, therapists, case managers, and many other professionals perform extraordinary feats every day managing many thousands of family transactions. Nevertheless, human thoughts and behaviors (professional and lay) gradually conform to such an adversarial environment and the rules, rewards, and sanctions imposed by those with authority. Yet the power of judges (and others with delegated expert or legal authority) to sanction or reward means a correlative duty to train and learn strategies to reduce the influence of implicit biases or heuristic thinking.[47]

If the most educated and privileged should know better but allow the language of science (think phrenology and eugenics)[48]

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45 Jane Campbell Moriarty *Will History Be Servitude: The NAS Report of Forensic Science and the Role of the Judiciary*, 2010 UTAH L. REV. 299, 317-18.

46 EBERHARDT, *supra* note 1, at 285.

47 *See* Jan L. Jacobowitz, *Lawyers Beware: You Are What You Post—The Case for Integrating Cultural Competence, Legal Ethics, and Social Media*, 17 SMU SCI. & TECH. L. REV. 541, 543 (2014) ("Some of our cultural differences are explicit and noticeable such as the differences in language, religious practice, gender, or age. However, some of our culturally influenced perceptions of our surroundings are so deeply ingrained that we are generally unaware of implicit biases that may influence our communication and reactions."); Prasad, *supra* note 31, at 3099 ("To reduce implicit racial biases' unfair effects, lawyers, judges, and jurors must be made aware of the existence and functioning of implicit racial biases, including their own. This will make it more likely that these actors will work toward controlling their biases and be cognizant of the impact implicit biases may have on their actions.").

48 I have a full-size phrenology skull which I bring with me to court on occasion to make a point. But that is another story for another day. For those interested in this topic, a thought-provoking article makes many of these points about the nature of law, *see* Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 917 (1997) ("Phrenology ultimately ran up against certain external barriers the brutal reality of physiological nature. In contrast, it is not altogether clear what cold, hard realities can keep the development of law or its discipline in check. Unlike phrenology, law and its discipline are well positioned to proliferate - to assert their rule with ever more").

as a foundation for epistemic injustice in various forms, then we need to weed that out before it invades the courts. As lawyers, we can react to protect others from these larger and more visible harms by employing rules and case law, and appealing to political bodies through collective action to challenge behavior violating constitutional and human rights. These are the rules that guide truth-finding, though with fair criticism for rigidity and sometimes looping silliness. What creates reflection for lawyers is the normative nature of simple questions drawn from our daily lives and those of clients who enter the judicial portal. As Dr. Eberhardt suggests as normal daily examples, think about these experiences before clients enter the office door or a legal clinic:

> Is clutching your purse when you see a black man a reflection of prejudice? Is presuming a Latino doesn't speak English logical or ignorant? Is it bias speaking when you ask a young black woman who was admitted to Harvard whether "that's the one in Massachusetts?" Or when you compliment an Asian student on those high math scores? When you think a teenager's music is louder that it is, is that bias? What about asking for a different nurse because yours has tattoos?[49]

Dr. Eberhardt challenges us with these questions as she brings science to the coarse strains of anti-intellectualism and anti-science dominant even today. What then can research teach us about answers to questions like "how do we know when we are being insensitive or unfair" and how "can we learn to check ourselves and mute the negative impact that bias can have?"[50] As she explored the story of Tiffany Crutcher and her twin brother's death in a shooting by a police officer, she watched the videotape following the officer's acquittal by jury and wrote that the "findings of years of research on implicit bias assume new clarity and gain new meaning."[51] As then noted, "the value of science is that it allows us to pull back from the isolated case and examine larger forces at work."[52] Those larger forces include the debate over epistemic injustice in the courts and the role of science and research in helping minimize harm and improve the probability of systemic justice.

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49 EBERHARDT, *supra* note 1, at 42.

50 *Id.* at 43.

51 *Id*. at 57.

52 *Id*.

Doing *epistemic justice*, therefore, is not just a matter of the appearance of impartiality but the delivery of procedures and outcomes, equitably and efficiently, for individuals and communities. As stated in the book's introduction, "Confronting implicit bias requires us to look in the mirror."[53] And this mirror has been held up to family courts and all who are privileged to be licensed as lawyers or sworn in as judges.[54] The structural aspects of lawyer education itself as a mirror may encourage implicit bias

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[53] *Id*. at 7. Courts in criminal cases have begun to consider specific jury instructions and voir dire relative to implicit bias. *See* State v. Williams, 929 N.W.2d 621, 644 (Iowa 2019) ("In addition, the advent of the large body of social psychology literature on implicit bias means that if a lawyer is to engage in effective voir dire, the advocate cannot skate over the surface with collective questions to jurors about explicit racial bias, which all will deny in any event. A more individualized approach is required if implicit bias is to be explored."); State v. Plain, 898 N.W.2d 801, 817 (Iowa 2017) ("While there is general agreement that courts should address the problem of implicit bias in the courtroom, courts have broad discretion about how to do so. One of the ways courts have addressed implicit bias is by giving jury instructions similar to the one proposed by Plain in this case. We strongly encourage district courts to be proactive about addressing implicit bias; however, we do not mandate a singular method of doing so.").

[54] Maine's attorney oath is purported to be the longest continuous one given in the United States (as drawn from Massachusetts when Maine became a state in 1820 but Massachusetts took a break for a bit as the story goes at swearing in ceremonies in Maine). It is still worth reading as an entire course could be taught from these very words:

> You solemnly swear that you will do no falsehood nor consent to the doing of any in court, and that if you know of an intention to commit any, you will give knowledge thereof to the justices of the court or some of them that it may be prevented; you will not wittingly or willingly promote or sue any false, groundless or unlawful suit nor give aid or consent to the same; that you will delay no man for lucre or malice, but will conduct yourself in the office of an attorney within the courts according to the best of your knowledge and discretion, and with all good fidelity, as well as to the courts, as to your clients. So help you God.

4 ME. REV. STAT. § 806 (2019). Family courts have also addressed the issue of implicit bias in custody decisions. *See* Khawam v. Wolfe, 214 A.3d 455, 461-62 (D.C. 2019) ("Ms. Khawam and amici contend that the necessaries doctrine must be read narrowly in order to reduce the effects of implicit bias on custody decisions, particularly where claims of domestic violence are raised. We do not doubt that implicit bias is a matter of real concern. *See, e.g.*, Styczynski v. MarketSource, Inc., 340 F. Supp. 3d 534, 550 (E.D. Pa. 2018) ("[T]he judiciary has come to recognize the challenges judges face in overcoming implicit bias

as a shorthand or heuristic for teaching how to give client advice under compression in a system with a shortage of resources.[55] The lawyer–client relationship is, after all, "a hierarchical one, with lawyers holding the reins of what story to tell and how to tell it. Class and race can complicate even the most well-intentioned lawyer's choices."[56] This means a more precise and profound duty to aspiring and current practitioners to assure that the skills to listen and receive information are as embedded in avoiding epistemic injustice as the need to understand the rules of evidence from the classroom to the courtroom.[57]

IV. Conclusion

The history of lawyer advocacy for civil rights is long and honorable, but the other asymmetrical side of that equation is filled with stories of lawyers defending racism and bias under the guise of zealous advocacy.[58] I do not mean lawyers taking on the

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. . . ." "We also do not doubt that implicit bias is a matter of concern in the particular context of family law.").

55 *See* Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QUINNIPIAC L. REV. 643, 656 (2004) ("One reason for our persistence on our current path is, I believe, that we have not incorporated into our teaching scientific discoveries over the past two or three decades about how people learn, what inhibits and enhances their effective use of what we teach, and the effective use of learning to address emerging problems, particularly when those problems are professionally threatening to them.").

56 Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57 FAM. CT. REV. 72, 83 (2019).

57 The education of lawyers is not limited to those who may find their way to courtrooms. Lawyers have a role in many forms of epistemic injustice which implicates policy and access to justice. *See* Michael Doan, *Epistemic Injustice and Epistemic Redlining*, 11 ETHICS & SOC. WELFARE 177, 183 (2017) ("Of course, advocates of the law insist that because the 'financial emergency' status is a politically neutral, essentially technical measure, the law is fair in the sense of being nondiscriminatory or non-prejudicial. The fact that its implementation just happens to have disproportionately impacted the state's African-American residents is simply due to the fact that African-Americans happen to live in fiscally distressed cities. But matters are not nearly so simple.").

58 *See* Deborah N. Archer, *There Is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a Post-Racial Society*, 4 COLUM. J. RACE & L. 55, 57 (2013) ("But the next generation of social justice advocates will not confront a post-racial world when representing people of

representation of the worst among us, since that function is at least as sacred to the right to justice in the literature and case law as representing the best among us.[59] Nor do I mean that we do not work with those who are decidedly unlikable and even incorrigible and who present a risk to themselves or the community. The public may not understand that value until they are faced with prosecution or loss of a child and then the constitutional right to zealous and competent advocacy means something much more tangible than just the age-old dinnertime question of how can "you" represent the guilty?

More to the point, narratives constructed by lawyers and judges about clients may appear in the language of blame, helplessness, and dependency. The client is seen as an object to be "molded and rehabilitated."[60] Every professional discipline, and each of us in our own sphere, must daily guard about such thinking though it is often hard to do in the reality of long days and sleepless nights permeated by compression. As Professor Lens wrote concerning family courts:

> Since most of the respondents were women, gender was always a subtext, as they were accused of violating the sanctity of motherhood and dominant beliefs about what constituted good mothering. There was little time or room for drawing out the complexity of the parents' lives,

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color. When I tell my clinic students that not only is race an issue in their case, but that their perspective on race is a detriment to their relationship with their client, I feel a little like a parent finally telling her child that there is no Santa Claus."); Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV.1165, 1175 (2005) ("This erroneous understanding of zeal makes an obvious mistake. 'Zealotry' is not a synonym for, but rather a pejorative twist on, the noun before us. One can no more fairly equate 'zeal' with 'zealotry' than one can call religious faith 'fanaticism,' precision 'nitpicking,' careful teaching 'pedantry,' a slender person 'emaciated,"' a sturdier one 'morbidly obese,' and so on. Lawyers, of all people, ought to take better care with their words.").

59 See David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 371, 376 (2000) ("The main premise of this essay is therefore that the person who is performing the lawyer's mission well through providing zealous and competent representation to the client is simultaneously a 'prince of darkness' and an 'angel of light.' The metaphor of the 'prince of darkness' does not stand for evil, but for the application of power and manipulation of people to gain the client's ends. Similarly, the 'angel of light' does not represent the pursuit of specific ends that everyone would consider "good," as opposed to legitimate ends that are allowed as legal by our society.").

60 Lens, *supra* note 56, at 78.

> which were reduced to the sum of a negative act, rather than the complex whole. And while most parents remained silent as narratives were constructed, some resisted, albeit unsuccessfully, to shift them.[61]

The same may be said as well of race, sexual orientation, and poverty.[62] Good intentions and youthful optimism (or its counterpart, old lawyer weary cynicism) may be eventually subsumed by volume and the press of human processing. Not Soylent Green,[63] of course, but an outcome-based *deus ex machina* because experience guides future prediction and that is, after all, a core role of a lawyer: intervention and interdiction to reduce harm. What matters is the still relevant warning from Justice Oliver Wendell Holmes a century ago. He saw, in stark terms, the impact of intellectual rigidity and emotional impulsiveness which generates conditions of war and the consequences to society:

> Certitude leads to violence. This is a proposition that has an easy application and a difficult one. The easy application is to ideologues, dogmatists, and bullies—people who think that their rightness justifies them in imposing on anyone who does not happen to subscribe to their particular ideology, dogma or notion of turf. If the conviction of rightness is powerful enough, resistance to it will be met, sooner or later by force. There are people like this in every sphere of life, and it is natural to feel that the world would be a better place without them![64]

Experience for lawyers matters, of course, as does adaption and flexibility for that is what clients need even when they choose to risk more based upon their own heuristics or emotions. In criminal cases it is plea bargaining and in child custody or

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61 *Id*.

62 *See* Leah A. Hill, *Do You See What I See—Reflections on How Bias Infiltrates the New York City Family Court—The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 531 (2006) ("That the Family Court is ill-equipped to address the needs of the hundreds of thousands of cases handled therein is not news. Exploding caseloads, complex problems, and minimal resources are just a few of the ingredients that combine to undermine the Court's ability to fulfill its promise. What has been given less attention until very recently is the extent to which the Family Court's failures disproportionately impact low-income families of color.").

63 For that meaning, see https://www.youtube.com/watch?v=6zAFAhamZ0.

64 *Oliver Wendell Holmes, Jr.,* GOOD READS, https://www.goodreads.com/quotes/360092-certitude-leads-to-violence-this-is-a-proposition-that-has (last visited Mar. 23, 2020).

child protection cases it is framed as maybe or probably *someday you will have a house, child will come back, you will be out of rehab, you will be. . .* or other formulations routine between lawyers and clients. This duty to acquire knowledge of implicit biases, so clearly described by Professor Eberhardt in other contexts, is a necessary part of *becoming and being* a lawyer today because ignoring implicit bias when giving that advice is no longer justified as a defense to epistemic injustice.[65]

Indeed, the need for teaching and sustaining that knowledge is now based upon decades of research. Professor Eberhardt reviews the substantial literature from business employment and promotion bias to conclude that, "the power of muscle flexing by a citizenry that is losing its tolerance for explicit displays of bigotry and racism. Implicit bias may not be as easy to recognize and fight, but it can be addressed."[66] Perhaps legal institutions need to consider implementation of what Joan Williams has labeled for business and academia as "bias interrupters" to facilitate organizational changes beyond just the temporary.[67] What the legal

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65 The complex role of lawyers when serving the "have-nots" and then taking on administrative roles is another example of the complexity of epistemic injustice within legal systems. *See* Beth Harris, *Representing Homeless Families: Repeat Player Implementation Strategies*, 33 LAW & SOC'Y REV. 911, 912 (1999) ("As lawyers collaborate with administrative actors and become increasingly integral to the implementation process, however, they may also compromise their own capacity to challenge the legality of official policies.").

66 EBERHARDT, *supra* note 1, at 293. In a recent and well-publicized case involving Harvard University's admission standards, the federal district court concluded that, "Notwithstanding the fact that Harvard's admissions program survives strict scrutiny, it is not perfect. The process would likely benefit from conducting implicit bias trainings for admissions officers, maintaining clear guidelines on the use of race in the admissions process, which were developed during this litigation, and monitoring and making admissions officers aware of any significant race-related statistical disparities in the rating process." Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 397 F. Supp. 3d 126, 204 (D. Mass. 2019).

67 *See* Joan C. Williams, *Hacking Tech's Diversity Problem*, 92 HARV. BUSINESS REV. 94 (2014). This concept was not familiar to me but was generously shared by Professor Nancy Levit who edits, with grace and patience, authors for the AAML Journal. The credit for its inclusion is important because, as I read the literature, there is a transferable body of knowledge which may benefit judicial and legal academic systems. *See* Cynthia L. Cooper, *Can Bias Interrupters Succeed Where Diversity Efforts Have Stalled?*, 25 PERSPECTIVES 4 (2017).

profession cannot ignore is the adoption of interventions which reduce the impact and intransience of implicit biases from classroom to office to bench trial in family matters given the high stakes for individuals and society.[68]

One of our most prominent AAML Fellows recently wrote that, "Lawyers are in the persuasion business, not the truth business. We generally do not know what the truth is: we get information from our clients and-as long as we have no reason to believe it is untrue-present it to the court."[69] For trial lawyers of our vintage that is what we were taught and practiced as functions of client loyalty and duty to the system itself. Times have changed. We need to remind newer lawyers of the historical role of trials and lawyers as advocates, its strengths and its limitations. We, as lawyers, do not, however, have the luxury of ignoring current research which establishes that the search for truth is more than just what clients say and we can reasonably rely upon. Truth is a function of voice and communication streamed live through the minds of lawyers and judges who then transform and interpret that truth.

In in an adversarial system which exercises power and authority over so many vulnerable populations, the legal profession is required to give explicit recognition to bias and its role in recycling systemic injustice. The concern is that not educating about implicit bias as part of a larger structural system excludes or devalues rather than amplifies voices of the oppressed and disenfranchised. All of this discussion does not mean biases by lawyers should not be grounded in a realistic measure of probabilities framed by law and guided by lawyer experiences with judges, colleagues, and the legal system.[70] It does, however,

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68 *See* Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1053 (2018) ("When one is a judge and a sole finder of fact, even if the decision maker is unaware that bias could be shaping the outcome, the consequences can be serious.").

69 Stephen Kolodny, *Challenging Retention Bias and Adversarial Allegiance in Expert Testimony*, FAM. LAW. MAG. Fall, 2019, at 15.

70 In an article which explores why caution is needed whenever science is being used for legal and social change, the author wrote concerning broad claims about the IAT, "These kinds of claims reflect a tradition within academia of somewhat mischaracterizing what has gone before in order to make one's claim for the startling originality of the Next Big Thing. No judgment: I have

mean that knowledge of implicit bias may avoid a visceral response to that client in a world where speed matters more than peaceful Zen-like thoughts before giving advice. As Professor Eberhardt generously shared her journey she finished her book with optimism: "So many people among us are probing, reaching, searching to do good in the best way they know how. And there is hope in the sheer act of reflection. This is where the power lies and how the process starts."[71] An excellent point and one worth replicating.

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used this traditional ploy myself. However, such histories bear about the same relationship to what actually happened that the American Law Institute Restatements bear to the law on the ground. Both are tales told to achieve a strategic goal." Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J. OF L. & GENDER 185, 220 (2014); *see also* note 16, *supra*.

71 EBERHARDT, *supra* note 1, at 302.