Joan Miro, Le Carnaval d'Arlequin (The Harlequin's Carnival), 1924-25. (Public Domain)

RECOGNIZING AND ADDRESSING IMPLICIT BIAS IN THE LEGAL PROFESSION

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THE SPEAKERS

Phyllis W. Cheng

Cynthia S. Sandoval

Joan Miro, Le Carnaval d'Arlequin
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COURSE OBJECTIVES

- To recognize implicit bias in the legal profession and society by reason of, but not limited to: sex, color, rage, religion, ancestry, national origin, physical disability, age, or sexual orientation.

- To focus on implicit bias and the promotion of bias-reducing strategies to address how unintended biases can undermine confidence in the legal system.

State Bar Rule 2.72

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OVERVIEW

1. Introductory video: [Hidden Injustice: Bias on the Bench](), produced by the ABA Diversity and Inclusion 360 Commission

2. Recognizing implicit bias, including:

   - Implicit Association Test (IAT)
   - Significance for leaders of legal profession and system of justice

3. Debiasing in the legal profession, including:

   - Hiring practices
   - Being in court
   - Dealing with clients
   - How it comes into play during dispute resolution

4. Conclusions

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1. INTRODUCTORY VIDEO

INTRODUCTORY VIDEO

Video: Hidden Injustice: Bias on the Bench, ABA Diversity and Inclusion 360 Commission

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Joan Miro, Le Carnaval d'Arlequin (The Harlequin's Carnival), 1924-25. (Public Domain)

2. RECOGNIZING IMPLICIT BIAS

Exercise: Cultural Groups

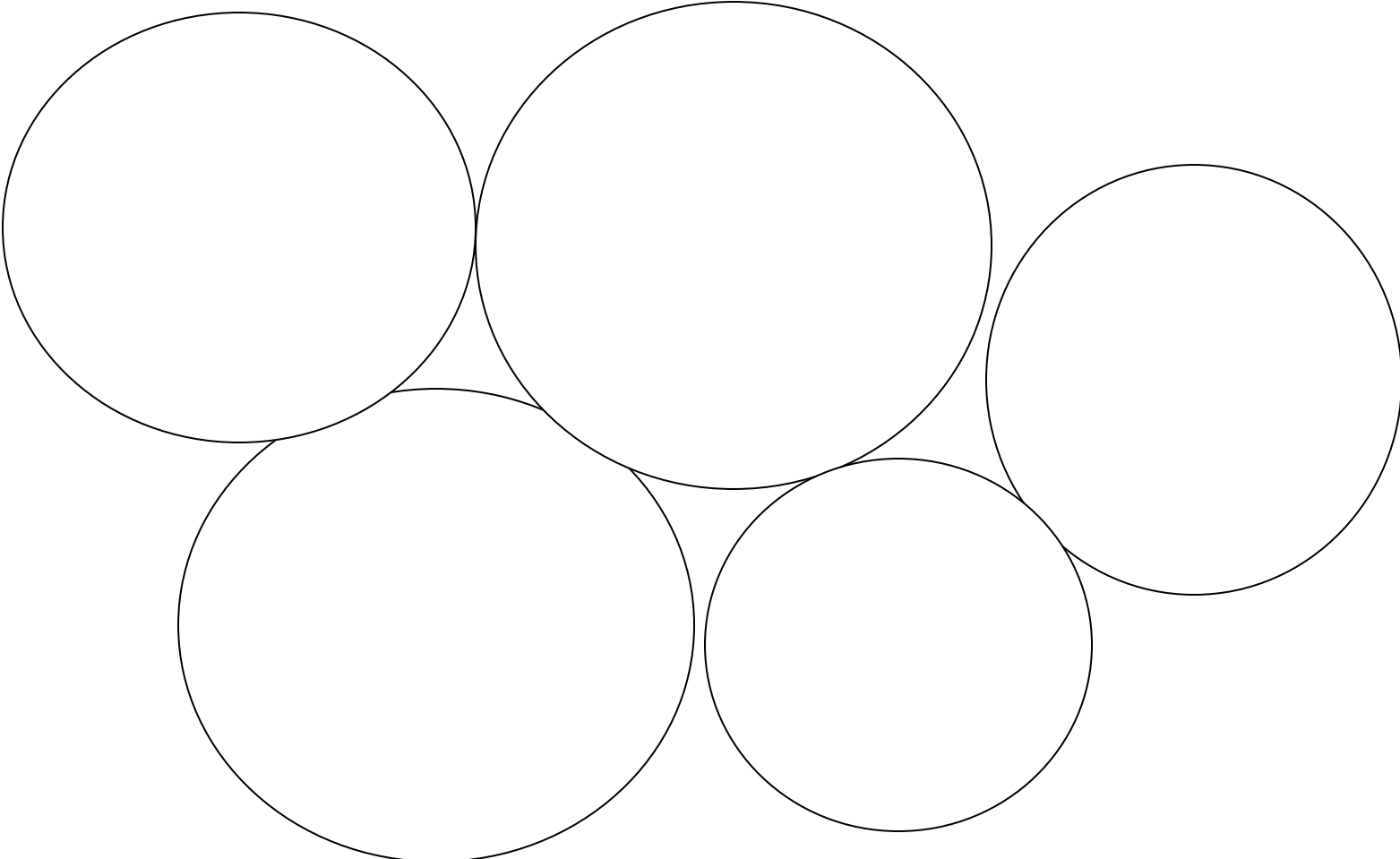What are your cultural groups?

"… groups of people who consciously or unconsciously share identifiable values, norms, symbols, and some ways of living that are repeated and transmitted from one generation to another."

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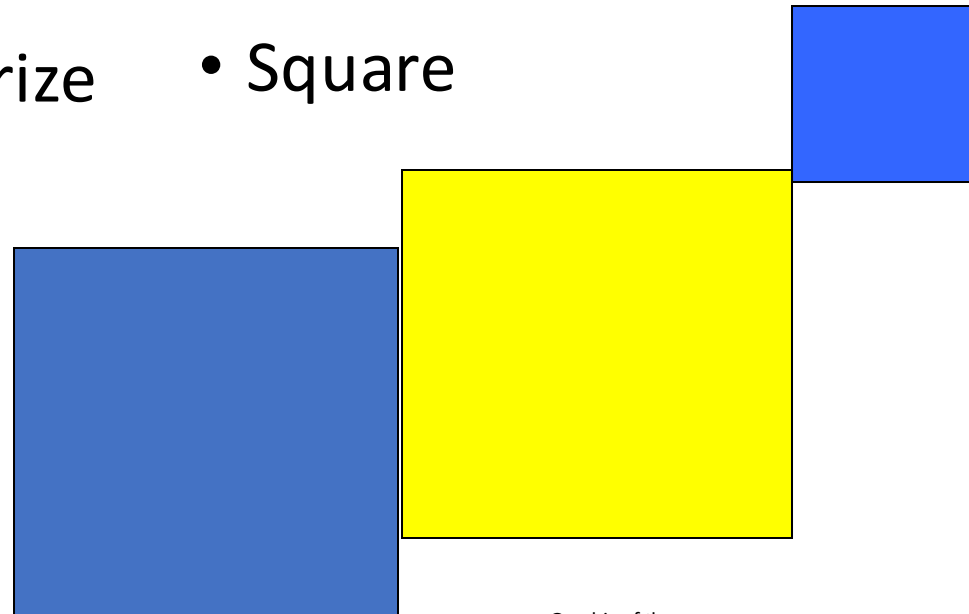# FIVE CIRCLES EXERCISE: CULTURAL GROUPS

Graphic of five circles

Joan Miro, Le Carnaval d'Arlequin
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IMPLICIT BIAS SCHEMAS

- DEFINITION

- Mental shortcuts

- Organize & categorize information

- Automatic

- EXAMPLE

- Four-equal sided figure

- Square

Graphic of three squares

PROFESSOR SCHEMA

- Know their subjects
- Prepare for and attend class
- Have office hours
- Give and grade assignments and exams

- Rely on schema to
  - predict and explain professor's actions
  - fill in gaps if professor's actions are ambiguous
- But may eventually change based on individual performance

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SHORTHAND SCHEMAS

Photo of person tying shoe lace

Photo of African-American man

Helpful in some situations, but…

…can lead to discriminatory behaviors, inequity, and unfairness.

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Implicit Social Categories | Cognition

FROM:
- Parents/Families
- Friends/Peers
- School
- Media

- Direct or vicarious experiences
- Positive or negative associations

Photos of African-American man, White or Latinx woman, and older White woman

Joan Miro, Le Carnaval d'Arlequin 1924-25 (Public Domain)

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IMPLICIT BIAS DEFINED

- EVERYONE HAS SCHEMA/IMPLICIT BIAS

  - a preference for a group (positive or negative)
  - often operating outside our awareness
  - based on stereotypes and attitudes we hold
  - that tend to develop early in life
  - and tend to strengthen over time

Attitudes

Evaluative feelings that are positive or negative

Stereotypes

Traits we associate with a category

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Stroop Test

Box of words about color printed in the same colors

Box of words about color in different colors from what is described

ADR SERVICES, INC.
Your Partner in Resolution

Implicit Association Test

Computerized test, 2 keys:

- Typically 2 social and 2 evaluative categories, e.g., White/Black and pleasant/unpleasant;
- Closely associated categories, easier & quicker to sort together…
- So faster reaction times show implicit connections.

Alternating photos of the same White or Latinx man and African-American woman

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IMPLICIT ASSOCIATION TEST

TAKE THE TEST

- Project Implicit
- https://implicit.harvard.edu/implicit/
- ANSWER QUICKLY!

QWERTY letters printed on different color backgrounds

Q W E R T Y U I O P

IMPLICIT BIAS   EXPLICIT BIAS

Two-sided arrow

Implicit biases sometimes differ substantially from stereotypes and attitudes we expressly self-report.

- Some research shows IAT is a better predictor of behavior than explicit self-reports

- **BUT STILL DOESN'T NECESSARILY MEAN you act with your implicit biases**

Systemic Concerns & Implications

- The profession is 90% White

- Implicit bias can affect every decision point in a case

- Employment
- Litigators
- Prosecutorial discretion
- Juvenile justice
- Shooter bias
- Judge's opinions
- Sentencing
- Jury selection
- Evidence
- Mediators
- Arbitrators
- ADR processes

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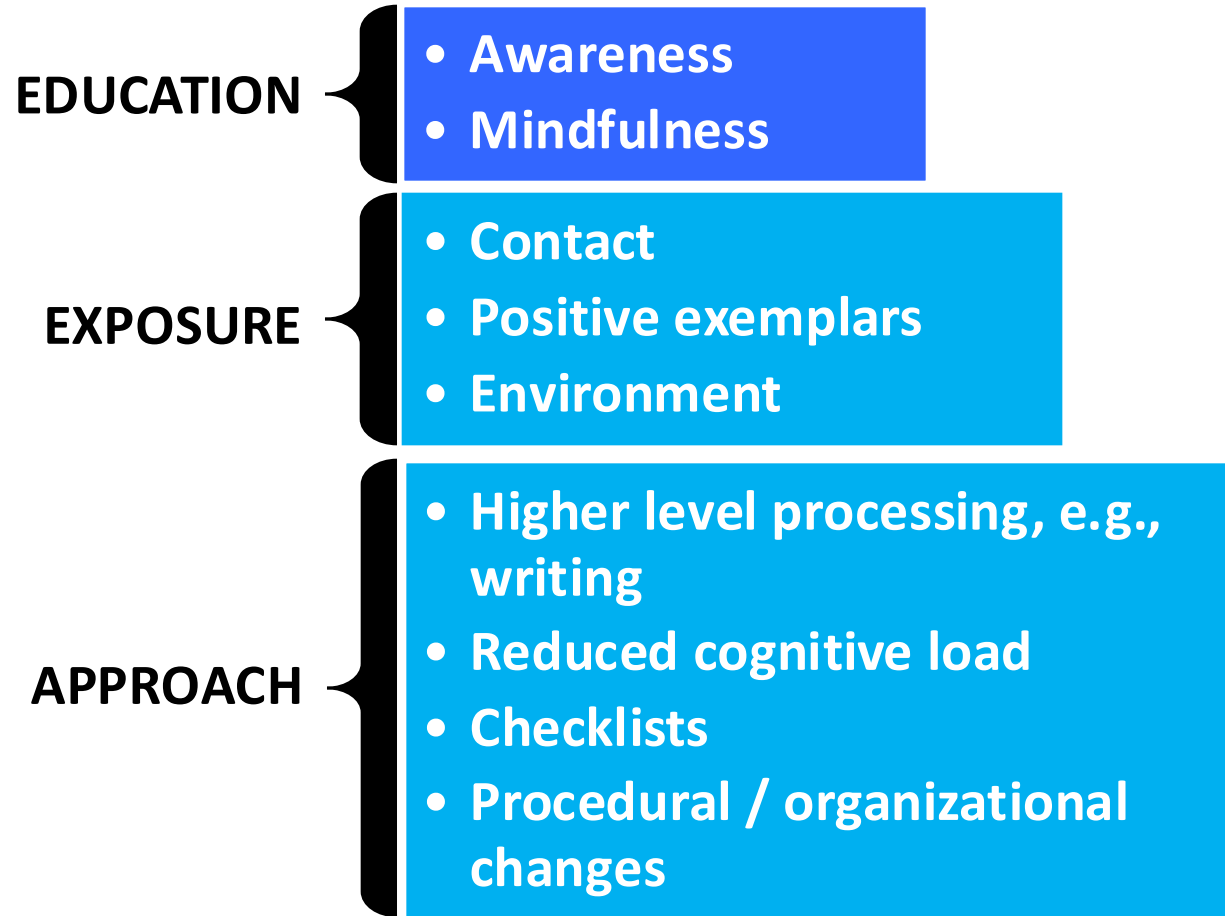Joan Miro, Le Carnaval d'Arlequin (The Harlequin's Carnival), 1924-25. (Public Domain)

3. DEBIASING IN THE LEGAL PROFESSION

THE GOOD NEWS

Motivation to be fair makes a difference

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DEBIASING

EDUCATION
- **Awareness**
- **Mindfulness**

EXPOSURE
- **Contact**
- **Positive exemplars**
- **Environment**

APPROACH
- **Higher level processing, e.g., writing**
- **Reduced cognitive load**
- **Checklists**
- **Procedural / organizational changes**

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EDUCATION

- **Awareness**
- **Mindfulness**

For example, take and consider IAT results.

Be aware and remain mindful; intuition and implicit responses are valuable, but some decisions require a more explicit kind of thinking, a stare not a blink.

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EXPOSURE

- **Contact**
- **Positive exemplars**
- **Perspective taking**

Make contact with positive, diverse colleagues and exemplars and practice taking the "other" perspective; all contribute to decreasing implicitly biased response.

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APPROACH

- **Higher level processing**
- **Reduced cognitive load, slower decision-making**
- **Checklists**
- **Procedural / organizational changes**
- **Micro-messaging**

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APPROACH: STARE NOT BLINK

- Use checklists

- Consider explicit pre-determined criteria

- Write instead of discussing off-the-cuff

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APPROACH: CHANGE PROCESS

- Consider procedural or organizational changes.

- Insist on appropriate accountability.

	2022	2023
Recruit	✔	✔
Retain	✔	✔
Promote		✔
Messaging		✔
Environment		✔
Mentors Exemplars	✔	✔
Etc.		

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NOTICE YOUR MESSAGE & ENVIRONMENT

Photos of sculptures of Suffragettes Elizabeth Cady Stanton, Susan B. Anthony, and Lucretia Mott, President George Washington, President James Garfield, President Abraham Lincoln, and Sir William Young

Small messages can be affirming or inequitable.

Joan Miro, Le Carnaval d'Arlequin 1924-25 (Public Domain)

RESOURCES: IMPLICIT BIAS TRAINING

Implicit Bias Training:

- The American Bar Association's comprehensive implicit bias tool box includes a glossary of terms.

- The American Bar Association Section of Litigation's Implicit Bias Initiative offers materials for further reading and review.

- The AALS Law Deans Antiracist Clearinghouse Project offers a space for our collective voices as leaders of law schools to engage our institutions in the fight for justice and equality.

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RESOURCES: ABA RECOMMENDED READING LIST

ABA Recommended Reading List:

- Jerry Kang, National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts, Implicit Bias - A Primer for Courts (August 2009).

- Shawn Marsh, The Lens of Implicit Bias,Juvenile and Family Justice Today (Summer 2009).

- Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 Cornell L. Rev. 1 (2007).

- Shankar Vedantam, See No Bias, The Washington Post Magazine 12, January 23, 2005.

For two very readable popular press books, you may also want to read:

- Malcolm Gladwell, Blink: The Power of Thinking Without Thinking (2007).

- Shankar Vedantam, The Hidden Brain (2010).

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RESOURCES: IMPLICIT BIAS SCHOLASTIC RESEARCH

Implicit Bias Scholastic Research:

- Chris Chambers Goodman & F. Jason Far-Hadian, Promoting Inclusion and Diversity in the Intellectual Property Bar and Beyond (MCLE Self Study Article), California Bar Journal (2020).

- Chris Chambers Goodman, AI/Esq.: Impacts of Artificial Intelligence in Lawyer-Client Relationships, 72 OKLA. L. REV. 149 (2019) SSRNHeinOnline.

- Chris Chambers Goodman, Identifying, Discussing, and Responding to Gender Bias in the Legal Profession, 37 (No. 1) CAL. REAL PROP. J. 28 (2019) SSRN.

- Chris Chambers Goodman, The Civil Rights Act, THE MARIN LAWYER, June 2019, at 19.

- Chris Chambers Goodman, Class in the Classroom: Poverty, Policies, and Practices Impeding Education, 27 J. GENDER SOC. POL'Y & L. 95 (2019) SSRN HeinOnline.

- Chris Chambers Goodman, Shadowing the Bar: Attorneys' Own Implicit Bias, 28 LA RAZA L.J. 18 (2017) SSRN HeinOnline.

- Chris Chambers Goodman, Nevertheless She Persisted: From Mrs. Bradwell to Annalise Keating, Gender Bias in the Courtroom, 24 WM. & MARY J. WOMEN & L. 167 (2017) SSRN HeinOnline.

Joan Miro, Le Carnaval d'Arlequin (The Harlequin's Carnival), 1924-25. (Public Domain)

THANK YOU

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