CHALLENGING *RACIAL INEQUALITY AND IMPLICIT BIAS* IN FAMILY LAW

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RACIAL INEQUALITY, PREJUDICE, AND DISCRIMINATION HAVE BEEN DEEPLY WOVEN INTO THE AMERICAN FABRIC FOR CENTURIES and continue to flourish in the United States despite the adoption of civil rights laws and the end of legal segregation.[1] While racism continues to impact our daily lives, we especially see it embedded in the law—permeating every aspect of the legal profession. Race and poverty directly correlate to a person's access to financial services and other needs like health care, education, and employment. These social injustices also directly affect an underserved litigant's chances to receive fair and just legal representation and a successful outcome to their legal matter.

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It is important to recognize and discuss the challenges that underserved and poverty-stricken litigants—particularly persons of colors—face when dealing with the court system, including challenges to access, racial implicit bias, and the ability to represent themselves in court when legal representation is either unavailable or unaffordable to them.

What is Implicit Bias? According to the American Psychological Association, implicit bias is defined as a negative attitude, of which one is not consciously aware, against a specific social group. Implicit bias is thought to be shaped by experience and based on such factors as race and/or gender, ethnicity, age, socioeconomic status, education, and sexual orientation.[2] Implicit bias exists in all of us and is a normal reaction to people whose characteristics we deem different from ours. It is imperative that we confront our own biases, recognize the consequences they hold, and combat those negative reactions by learning to replace them with non-prejudiced responses.

Implicit bias is clearly inherent in our court systems and can affect the work and decisions of judges, magistrates, attorneys, jurors, parties, and other persons involved with a case. The family law arena is often more susceptible as cases often are decided on assumptions and factors lending themselves to more negatively impactful biases.

For example, Black families and other families of color are more likely to be stereotyped within the family courts than their white counterparts. In custody cases, Black men often are seen as deadbeat fathers who are lazy and avoid meaningful work and, even worse, are seen as individuals who have no interest in their families or their children and, therefore, are incapable of caring for them. People of color are also more likely to be stereotyped as criminals.

Family law judges require not only knowledge of the law but also an understanding of people and cultures and how to support them with sensitivity and fairness.[3] Still, racial biases exist throughout the family court system. For example, child protective service agencies exhibit biases in their investigations. Black families and other families of color are more likely to be investigated for allegations of child abuse and neglect than their white counterparts and are more likely to have their children removed from the family home and placed in foster care. These agencies often fail to address the root causes—such as incarceration, poverty, food insecurity, poor housing, and inadequate childcares—of the suspected abuse or neglect during their investigations.

As a result, implicit racial bias has become a significant concern for stakeholders and those of us whose goal is to protect against racism. To ensure fairness and equality within the family law court system, it is crucial that external factors as well as internal standards and practices be thoroughly examined to mitigate negative beliefs and behaviors that can lead to poor outcomes for our marginalized communities who access the family law court and, in turn, promote reform.

What should the courts do? At times, even those of us who embrace the principles of a fair justice system may unknowingly make crucial decisions and act in ways that are unfair. Diminishing the impact of implicit bias requires intentional behavior on the part of the decision-maker, no matter what their role. The question is, "How do we address this, and what are the solutions?"

☑ By creating and implementing organizational and research-based strategies that promote organizational changes and improvements in all areas of the family law court, including guidelines and protocols to overcome implicit bias with those who decide and make rulings in family law matters.

☑ By providing training and education on implicit bias to all those involved in the family law court system. This should include diversity equity inclusion (DEI) training to assist each employee in the workplace in developing awareness and fostering harmonious collaboration among coworkers. This training also must promote an understanding of the concept of implicit bias and its effect on multicultural groups and communities while encouraging the concept that all people are equal and deserve to be treated as such under the law.

☑ By developing pathway services and collaborating with stakeholders and other pro bono public service providers and legal organizations to mitigate implicit bias across the legal profession. These pathways require interconnected actions such as education, provision of services, and dialogue that support social justice and address inequities, and develop new resources, knowledge, and infrastructure that promote reasonable accessibility to the legal system for all.

☑ By developing guidelines and protocols to help decision-makers avoid the pitfalls of implicit bias in their decision-making and rulings.

☑ By becoming aware of our own biases and avoiding or reducing stress and other distractions that could lead to biased thinking and decision-making.

☑ By countering stereotypes and reducing environmental triggers related to implicit bias that may exist in the workplace, such as signage, pamphlets, brochures, manuals, background music, or any other verbal or visual communications in the court that may unintentionally lead to implicit biases.[4]

More persons of color and underserved individuals are going to court pro se to address these issues and, as a result, are experiencing worse outcomes, especially if decisions are being made simply based on a person's color. These continued biases, if continued, can dilute the effectiveness of the family court and its decision-making and create distrust within these individuals, compromising their ability to be successful in court.

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1 Frank W. Munger and Carroll Seron, Race Law, and Inequality, 50 Years After the Civil Rights Era, Ann. Rev. of Law and Social Science, Vol. 13, 2017.

2 American Psychological Association, Implicit Bias, Topic, 2022. In APA Dictionary of Psychology. Retrieved July 31, 2023, from www.APA.org.

3 Anderson, J., Brown, Z. and Brown, V. (2022). Teaching about Race and Family Law: Black Families Overlooked, Misunderstood, and Underserved in the Family Courts. American Bar Association Journal, Family Law Quarterly, 56 (1). Black Families Overlooked, Misunderstood, and Underserved in the Family Courts (americanbar.org)

4 See Anderson, J., et.al., supra note 3.

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