



Eliminating Bias

Next steps towards a positive view

ADR Services, Inc. MCLE Day

January 19, 2022

Justice Nathan Mihara (Ret)

- Justice of the California Court of Appeal, 6th Appellate District
- Mediator/ Arbitrator ADR Services, Inc.

After serving over three decades as a judicial officer, including 27 years on the Court of Appeal and 8 years on the Santa Clara County Superior and Municipal Courts, Justice Mihara joined ADR Services, Inc. to resolve disputes as a neutral in 2020. In addition, Justice Mihara is a frequent lecturer and panelist for many judicial education programs, bar association seminars, and law schools, including Hastings College of the Law, UC Davis King Hall Law School, UC Berkeley Law, Stanford Law School, and Santa Clara Law School.

Claudia
Hagadus Long

- Mediator, ADR Services, Inc.

Ms. Long has been a practicing attorney for over 35 years, both as an exceptionally skilled mediator who has mediated over 1500 cases, including employment matters with the Department of Fair Employment and housing, and as a civil litigator in both large and small law firms and in-house counsel at a large multinational bank. Fluent in Spanish and French, she can conduct mediations entirely in Spanish when necessary. She is trusted to resolve complex disputes with multifaceted and multidisciplinary legal, organizational, cultural and personal issues.

What are we
covering?

- The objective of this course is to revisit the types of negative bias that affect us in the legal profession, and to suggest positive ways to reduce the likelihood that such bias will adversely affect your practice of law.

We are unique

- Uniquely analytical
- Uniquely thoughtful
- Integral, active human beings

Three Silent Exercises

- 1. Personally experienced negative bias.
- 2. Personal attempt to reduce your own bias against another group.
- 3. When you were a witness—what did you do? What could you have done?

Definitions

- What is bias?
- Bias towards what or whom?
- Racial, ethnic, cultural, religious, political, socio-economic, gender, orientation

Discrimination
may be the act,
and
Prejudice may be
the feeling.

- Legally: Pollock v. Tri-Modal Distribution Services, Inc.
11 Cal. 5th 918 (2021)

“Our precedent explains that the primary difference between discrimination and harassment is that discrimination claims ‘address only explicit changes in the terms, conditions, or privileges of employment [citations omitted]; that is, changes involving some official action taken [by the employer.]... Harassment claims, on the other hand, focus on situations in which the social environment [of the workplace] becomes intolerable because the harassment...communicated an offensive message...”

Negative vs. Positive Bias

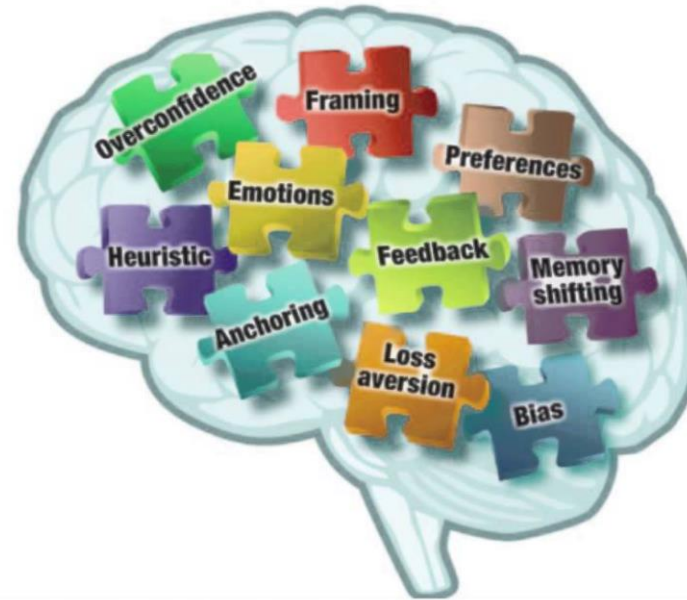
- Bias towards helping others who are disadvantaged or marginalized because of race, religion, socio-economic position...

Cognitive Errors

- Different forms of cognitive errors
- “Adaptive”
- Social constructs
- Confirmation bias

We all know it's
there

Cognitive Errors and Bias



STIEGLER & TUNG, 2014

A Conversation With Marjorie Stiegler, M.D. and Sara Goldhaber-Fiebert, M.D.

An unreadable definition



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Cognitive bias

From Wikipedia, the free encyclopedia

A **cognitive bias** refers to a systematic pattern of deviation from norm or rationality in judgment, whereby inferences about other people and situations may be drawn in an illogical fashion.^[1] Individuals create their own "subjective social reality" from their perception of the input.^[2] An individual's construction of social reality, not the **objective** input, may dictate their behaviour in the social world.^[3] Thus, cognitive biases may sometimes lead to perceptual distortion, inaccurate judgment, illogical interpretation, or what is broadly called **irrationality**.^{[4][5][6]}

Some cognitive **biases** are presumably adaptive. Cognitive biases may lead to more effective actions in a given context.^[7] Furthermore, cognitive biases enable faster decisions when timeliness is more valuable than accuracy, as illustrated in **heuristics**.^[8] Other cognitive biases are a "by-product" of human processing limitations,^[9] resulting from a lack of appropriate mental mechanisms (**bounded rationality**), or simply from a limited capacity for information processing.^[10]

A continually evolving **list of cognitive biases** has been identified over the last six decades of research on human judgment and decision-making in **cognitive science**, **social psychology**, and **behavioral economics**. Kahneman and Tversky (1996) argue that cognitive biases have efficient practical implications for areas including clinical judgment.^[11]

Psychology



[Outline](#) · [History](#) · [Subfields](#)

Basic types

- [Abnormal](#) · [Biological](#) · [Cognitive](#) · [Comparative](#) · [Cross-cultural](#) · [Cultural](#) · [Differential](#) · [Developmental](#) · [Evolutionary](#) · [Experimental](#) · [Mathematical](#) · [Neuropsychology](#) · [Personality](#) · [Positive](#) · [Quantitative](#) · [Social](#)

Applied psychology

- [Applied behavior analysis](#) · [Clinical](#) · [Community](#) · [Consumer](#) · [Counseling](#) · [Educational](#) · [Environmental](#) · [Ergonomics](#) · [Forensic](#) · [Health](#) · [Humanistic](#) · [Industrial and organizational](#) · [Interpretive](#) · [Legal](#) · [Medical](#) · [Military](#) · [Music](#) · [Occupational health](#) · [Political](#) · [Religion](#) · [School](#) · [Sport](#) · [Traffic](#)

Lists

The many faces of bias

- Overt bias
- Implied bias
- Implicit bias
- Fashionable bias

The many faces of bias

- Overt bias
 - Life Examples
 - Jim Crow Laws repealed
 - Equal Credit Opportunity Act of 1974 (!)
 - CCR's
- Fashionable bias

Personal
experience
defining behavior

- **LET'S GET PRACTICAL!**
- **Going back to exercise 1, Real Life experiences and teachable moments.**
- **What can we teach ourselves from each one?**

What we can do

- **WHAT THEY'RE TEACHING JUDGES**
- **WHAT WE'RE LEARNING AS MEDIATORS**
- **HOW THE LAWS ARE CHANGING**
 - California CCP 1002.5, effective January 1, 2020, prohibits “No Rehire” clauses in settlement agreements where an employee sues an employer and settles the case. (AB 749)
 - Civil Code 3361, effective January 1, 2020, prohibits the estimation, measure or calculation of past, present or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death from being reduced based on race, ethnicity or gender. (SB 41)

What can we
do?

- It's more than a meme.
- Make sure you know what you're facing
- If you experience bias in the courtroom
- Turn your negative bias experience into positive impact

When you
witness it

- What can you do when you see it in yourself?
 - Bias towards equality
 - Bias towards living an ethical life
 - Bias towards generosity and kindness
 - Bias towards open listening

And yet they say
it doesn't work!

- Recent NYTimes opinion: “Such training would be worth fighting for if it had a record of success in changing discriminatory behavior, but it doesn’t. ...studies of anti-bias training show that even the best programs have short-lived effects on stereotypes and no discernable effect on discriminatory behavior.” (The Absurd Side of the Social Justice Industry, Nov. 16, 2021)
- Taking the long view: Change is always too slow for the ones suffering. But each increment betters ALL of our lives. When we look back on what we now take for granted, and how long and hard the fight has been, can we really believe there’s no “record of success”?



Thank you!

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SB-41 Civil actions: damages.(2019-2020)

[Text](#) [Votes](#) [History](#) [Bill Analysis](#) [Today's Law As Amended](#) [Compare Versions](#) [Status](#) [Comments](#) [To Author](#)

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Date Published: 07/30/2019 09:00 PM

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Bill Start

Senate Bill No. 41

CHAPTER 136

An act to add Section 3361 to the Civil Code, relating to damages.

SB-41

[Approved by Governor July 30, 2019. Filed with Secretary of State July 30, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

SB 41, Hertzberg. Civil actions: damages.

Existing law authorizes a person who suffers a loss or harm to that person or that person's property, from an unlawful act or omission of another to recover monetary compensation, known as damages, from the person in fault. Existing law specifies the measure of damages as the amount which will compensate for the loss or harm, whether anticipated or not, and requires the damages awarded to be reasonable.

This bill would prohibit the estimation, measure, or calculation of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death from being reduced based on race, ethnicity, or gender.

Digest Key

Vote: MAJORITY Appropriation: NO Fiscal Committee: NO Local Program: NO

Bill Text

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1.

The Legislature finds and declares the following:

- (a) The principals of equal protection and due process are fundamental to our democracy and the concept of civil liberty.
- (b) California has been a pioneer in civil rights, leading the way in prohibiting discrimination on the basis of race, ethnicity, gender, and other protected categories.
- (c) However, in tort actions around the state and country, race, ethnicity, and gender are routinely used in calculating damage awards that are meant to provide restitution to victims. For example, since women in America earn lower wages, on average, than men, the damages awarded to women are substantially lower than those received by men.
- (d) Nearly one-half of economists surveyed by the National Association of Forensic Economics said they consider race, and 92 percent consider gender, when projecting earning potential for an injured person, including children. Future lost earning potential is a significant component of the damages awarded in tort actions.
- (e) To determine projected lost earning potential, court experts typically rely on the Bureau of Labor Statistics' Current Population Survey. The results are a reflection of gender pay gaps and workforce

SB-41

SB-41

discrimination, and they fail to account for possible progress or individual achievement.

(f) The consequence of this bias—to use averages that represent generations of discriminatory practices—is to perpetuate systemic inequalities. These practices disproportionately injure women and minority individuals by depriving them of fair compensation.

(g) Using race and gender-based tables can, by some estimates, under-value women and minorities by hundreds of thousands of dollars, including children who have not yet had the opportunity to work or identify career options. Specifically, these practices greatly disadvantage children of color, who are more likely to be impacted by environmental hazards created by the industrial facilities and factories located in low-income communities.

(h) Any generalized reduction of civil damages using statistical tables alone, based on a plaintiff's membership in a protected class identified in Section 51 of the Civil Code, is counter to the public policy of the State of California.

(i) This act shall not be construed to explicitly permit the generalized reduction of damages for lost earnings or impaired earnings capacity based on protected classifications not identified in the Bureau of Labor Statistics' Current Population Survey unless otherwise permitted by existing law.

SEC. 2.

Section 3361 is added to the Civil Code, to read:

3361.

Estimations, measures, or calculations of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender.

AB 749

Assembly Bill 749 – Settlement agreements: restraints in trade.

Prohibits "No Rehire" clauses in settlement agreements. Employees who settle their claims against their employers are often required to agree that they will never again work for the same employer or its related entities. Such provisions are punitive and can have a devastating impact on an employee, forcing some to leave their field or severely limiting their future employment prospects. The use of "no rehire" provisions often leads to the perverse outcome where victimized employees are forced out of their jobs while harassers continue to be employed.[1]

AB 749 prohibits and invalidates all provisions in settlement agreements that prevent workers from obtaining future employment with the settling employer or its affiliated companies. Through newly created Code of Civil Procedure section 1002.5, it makes such provisions in agreements entered into on or after January 1, 2020 void as a matter of law and against public policy. Section 1002.5 provides as follows:

1002.5. (a) An agreement to settle an employment dispute shall not contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer. A provision in an agreement entered into on or after January 1, 2020, that violates this section is void as a matter of law and against public policy.

(b) Nothing in subdivision (a) does any of the following:

(1) Preclude the employer and aggrieved person from making an agreement to do either of the following:

(A) End a current employment relationship.

(B) Prohibit or otherwise restrict the settling aggrieved person from obtaining future employment with the settling employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault.

(2) Require an employer to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.

(c) For purposes of this section:

(1) "Aggrieved person" means a person who has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.

(2) "Sexual assault" means conduct that would constitute a crime under Section 243.3, 261, 262, 264.1, 286, 287, or 289 of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes.

(3) "Sexual harassment" has the same meaning as in subdivision (j) of Section 12940 of the Government Code. "An agreement to settle an employment dispute shall not contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division,

affiliate, or contractor of the employer. A provision in an agreement entered into on or after January 1, 2020, that violates this section is void as a matter of law and against public policy."

AB 749