



**20** EMPLOYMENT LAW  
**24** Conference  
Off to work we go!

***Understanding Implicit Bias in the Workplace  
and Its Impact on Costly Discrimination Claims***





# *Welcome*

## DISCLAIMER

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# WHAT IS BIAS AND HOW DOES IT PERTAIN TO ME?

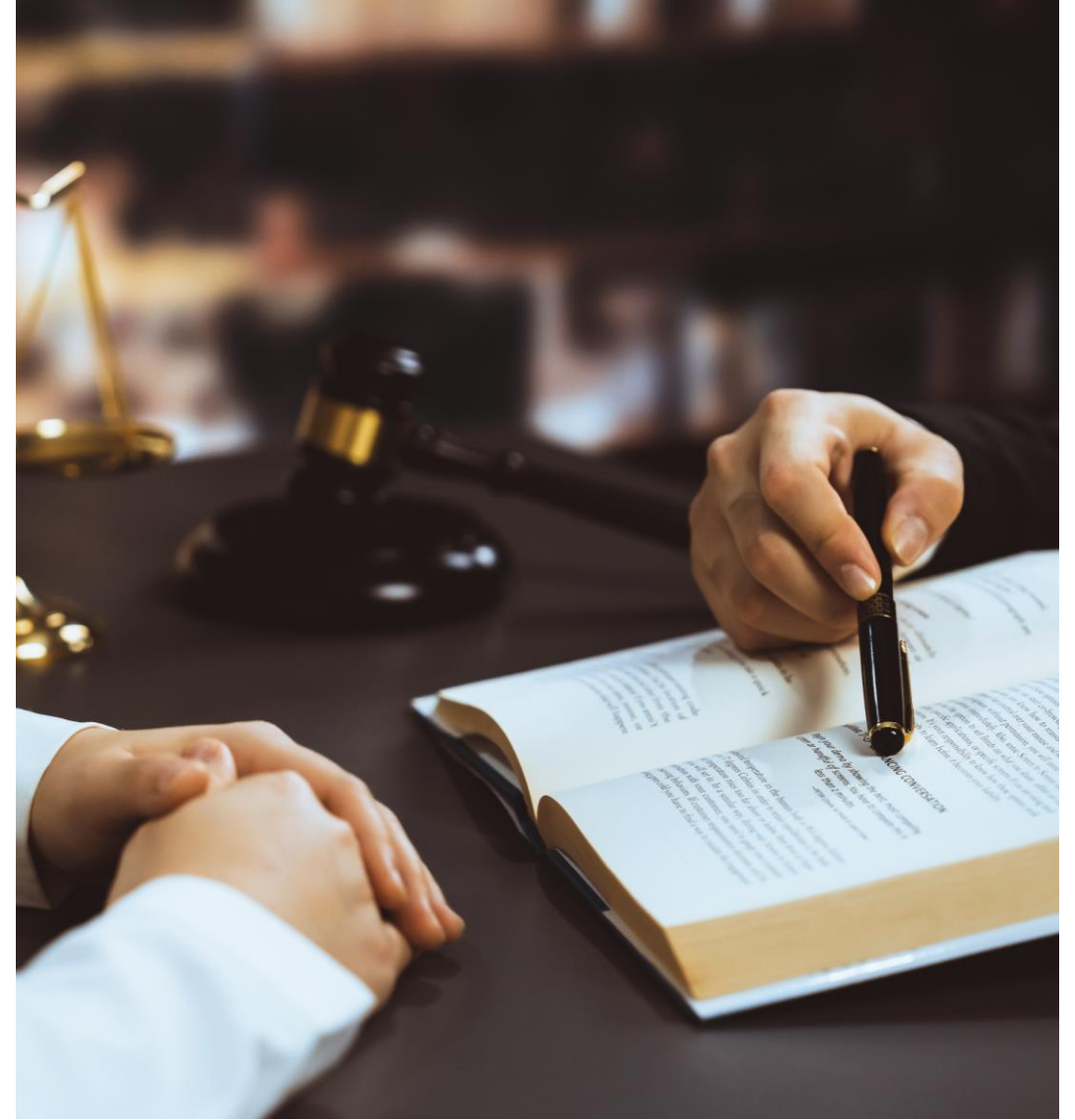
Prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.

## Examples of Unlawful Discrimination:

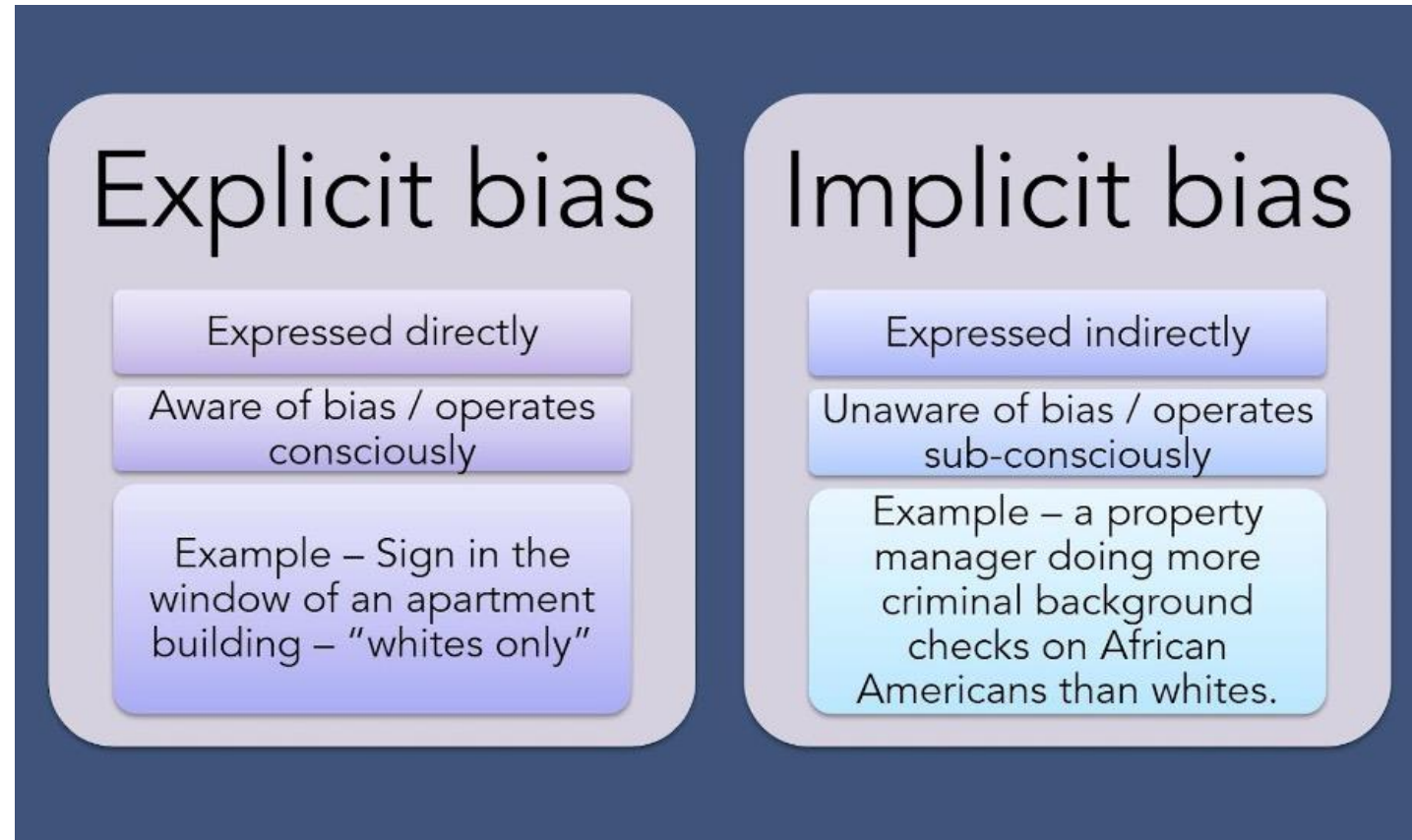
- The Model Rules of Professional Conduct prohibit attorneys from exhibiting bias or prejudice “based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, . . . when such actions are prejudicial to the administration of justice.”
- When an attorney says that he/she has no biases they are lying to themselves and potentially put clients and their own livelihoods at risk.

# DISCRIMINATION MAY BE IN VIOLATION OF:

- Americans With Disabilities Act (ADA)
- Equal Employment Opportunity Commission (EEOC)
- Fair Employment and Housing Act (FEHA)
- Civil Rights Act



# IMPLICIT VS. EXPLICIT BIAS





# IMPLICIT BIAS CONT.

- 2014 Study - Dr. Arin Reeves “Written in Black and White, Exploring Confirmation Bias in Racialized Perceptions of Writing”
- Hypothesis: There are commonly held racially-based perceptions about writing ability that unconsciously impact our ability to objectively evaluate a lawyer’s writing.

# IMPLICIT BIAS EXAMPLES

- Gender Bias: While either gender can be preferred, gender bias is more likely to happen with men. This may mean that male candidates are preferred over female candidates for jobs, or for promotions, even when both have similar qualifications. Includes Non-Binary/Transgender.
- Confirmation Bias: When you make an assumption about someone and then look for evidence that that assumption is true, whether or not it is.
- Similarity/Affinity Bias: Individuals tend to be more comfortable with people who are more like themselves.





## IMPLICIT BIAS EXAMPLES CONT.

- Ageism – People of a certain age are more/less capable. Can be either toward older or younger people.
- Ableism – People who are disabled are somehow less capable.
- Beauty Bias – Conventionally attractive people are smarter, better workers, clients etc.

# IMPLICIT BIAS EXAMPLES CONT.

- Conformity Bias - In a group, people are more likely to ignore or downplay their individual beliefs and instead act the way the rest of the group does. Also known as peer pressure.
- Halo Effect - When you attribute certain abilities to someone simply because of an accomplishment, such as graduating from a top caliber college or having an impressive job title. You may assume that the person has abilities that he or she does not, or give the individual more credit than he or she deserves.



# IMPLICIT BIAS



- Implicit Association Test (IAT)
- [www.projectimplicit.net](http://www.projectimplicit.net)
- “Non-profit organization and international, collaborative network of researchers investigating implicit social cognition, or thoughts and feelings that are largely outside of conscious awareness and control.”

# IMPLICIT ASSUMPTION TEST

HONORABLE MARK W. BENNETT

- “I was eager to take the test. I knew I would “pass” with flying colors. I didn’t. . . . After much research, I ultimately realized that the problem of implicit bias is a little recognized and even less addressed flaw in our legal system . . . . I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. Implicit biases cause subtle actions, . . . [b]ut they are also powerful and pervasive enough to affect decisions about whom we employ, whom we leave on juries, and whom we believe. Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.”
- Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POL’Y REV. 149, 150 (2010).

# COGNITIVE SCIENCE BEHIND BIAS

- A Dual Process Cognitive System
- System 1: Rapid, Intuitive, Error Prone
- System 1 relies on Cognitive Schemas or “Mental Blueprints” or “Scripts”.
- Mental Blueprints sort our experiences and acquired knowledge and organize them into categories that function like containers.
- When you meet someone they fall into one of your “containers” which can create stereotypes.

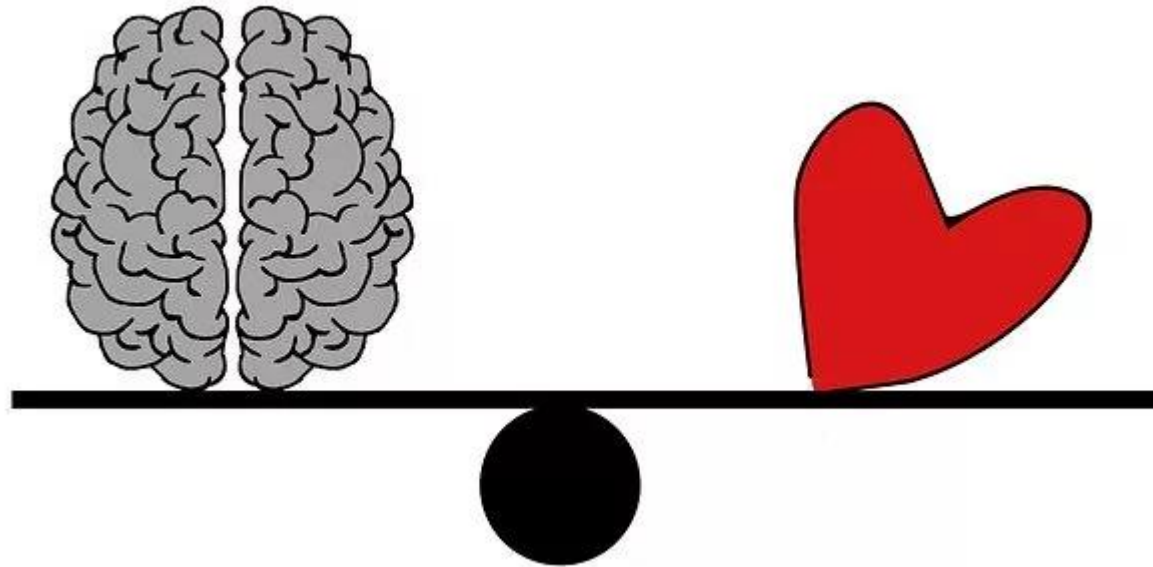
# COGNITIVE SCIENCE BEHIND BIAS CONT.



- We use our containers when we meet new people and when we are in new situations.
- i.e. a Dog:
  - Container #1: An animal
  - Container #2: Soft and cuddly?
  - Container #2 alternate: Dangerous and mean?
- Prior to the encounter, your perception depends on previous information, experience, etc.
- Containers create stereotypes.

# COGNITIVE SCIENCE BEHIND BIAS

- System 2: More deliberative, calculative, slower, and is often more likely to be error-free. We want to process our perceptions with people using System 2 if we can. We want to be more aware of our System 1 thinking.





# INTERVIEWING CLIENTS AND BIAS

- Psychological research demonstrates that people usually remember and reveal more information when they feel at ease, and they may be more willing to accept professional advice when they trust their advisor.
- Implicit biases can impede our ability to establish rapport because if a person harbors implicit biases about a particular group it may exhibit negative behaviors.
- When talking to a person or interviewing a job applicant who is a member of a stigmatized group, a person unaware of his/her implicit biases and their effects could unconsciously send signals of distrust or disinterest to the candidate with his/her tone of voice, demeanor, eye contact, facial expressions, and body language. UNCONSCIOUS

# HOW TO MITIGATE BIAS- I.M.P.L.I.C.I.T.

**Introspection:** Explore and identify your own prejudices by taking implicit association tests or through other means of self-analysis.

**Mindfulness:** Since you're more likely to give in to your biases when you're under pressure, practice ways to reduce stress and increase mindfulness, such as focused breathing.

**Perspective-taking:** Consider experiences from the point of view of the person being stereotyped. You can do this by reading or watching content that discusses those experiences or directly interacting with people from those groups

# HOW TO MITIGATE BIAS- I.M.P.L.I.C.I.T.

## Cont.

- **L**earn to slow down: Before interacting with people from certain groups, pause and reflect to reduce reflexive actions. Consider positive examples of people from that stereotyped group, such as public figures or personal friends.
- **I**ndividuation: Evaluate people based on their personal characteristics rather than those affiliated with their group. This could include connecting over shared interests.
- **C**heck your messaging: As opposed to saying things like “we don’t see color,” use statements that welcome and embrace multiculturalism or other differences.



## HOW TO MITIGATE BIAS- I.M.P.L.I.C.I.T. Cont.



- *Institutionalize fairness:* Support a culture of diversity and inclusion at the organizational level. This could include using an “equity lens” tool to identify your group’s blind spots or reviewing the images in your office to see if they further or undercut stereotypes.
- *Take two:* Resisting implicit bias is lifelong work. You have to constantly restart the process and look for new ways to improve.



# BIASES FROM A LAWYER'S PERSPECTIVE

- The human brain can process 11 million bits of information every second. But our conscious minds can handle only 40 to 50 bits of information a second. So, our brains sometimes take cognitive shortcuts that can lead to unconscious or implicit bias, with serious consequences for how we perceive and act toward other people.
- Where does unconscious bias come from? How does it work in the brain and ultimately impact society?

# HOW CAN IMPLICIT BIAS BE HELPFUL AT TIMES?

Implicit bias is present in almost everything we do. Humans have been taught to rely on it as a natural (almost instinctive) survival skill, and our brains are hardwired to use it. A great deal of implicit bias is actually helpful and very necessary. We use it in the absence of complete information, so we especially use it to make quick decisions. This is a major aspect of essential heuristic decision making.

“A heuristic is a mental shortcut that allows people to solve problems and make judgements quickly and efficiently...[They] allow people to function without constantly stopping to think about their next course of action.” – Kendra Cherry



- Explicit Bias

- Deliberate, slow
- Can be controlled

Implicit Bias

Automatic / Fast Paced

\*Difficult to control





# IMPLICIT BIAS

\*Some social psychologists believe:

- Impossible to control
- Decades of de-programming



# HOW TO START REDIRECTION OF IMPLICIT BIAS

- Fight bias with bias
- Formally change your environment
- Change your social networks



# WHAT MAKES IMPLICIT BIAS MORE PRONOUNCED



- Impulsive behavior
- Fatigue
- Emotional state

# WHAT IS THE FUTURE?

- Does/will AI have implicit bias embedded within its processing?
- Is implicit bias “required” in the accuracy of its basis function?

AI will determine conclusions from facial gesture recognition, voice inflection, accents and vocabulary to determine background information regarding geographical, cultural, educational.

# CAUTION

- Do not use any AI product in hiring process. (EPPA)
- Advise not to interview in person or over Zoom.



# CREATE PICTURES

- Create pictures from prompts from data available.
  - i.e. Ask to create picture of attorney giving advice to clients. Male, white, older, attractive.

# BIAS TENDENCY



Our brains have evolved too quickly to categorize people into “in-groups” and “out-groups” as an ancient survival mechanism when resources were scarce. This tendency to form biases is hard-wired.

The amygdala, a region of the brain, reacts when we encounter someone from a perceived “out-group”, triggering implicit biases and stereotyping.





# IMPLICIT BIAS

Implicit biases operate at an unconscious level and are different from our conscious, explicit beliefs about equality and fairness.

While the learning process of forming associations is innate, the specific biases we develop are shaped by the culture, stereotypes and narratives we absorb from society.

# IMPLICIT BIAS, CONT.

Our malleable brains can unlearn implicit biases over time through conscious effort, but the underlying tendency to categorize people is hard-wired as an evolutionary relic.



# TAKE AWAY

Be aware that we all have deep rooted implicit biases that affect our thoughts on an unconscious level.



# IMPLICIT BIAS



- Implicit biases were necessary for our survival.
- For millions of years, unpredictability and uncertainty were tantamount to danger.



# IMPLICIT BIAS, CONT.

Realize that we are hardwired with implicit bias. They are necessary as shortcuts for cognitive processing.

## IMPLICIT BIAS, CONT.



You are not responsible for the first thought that comes into your head...  
but you are for the second one.

# COGNITIVE BIAS

- Action Bias
  - *Why do we prefer doing something to do nothing?*
- Affect Heuristic
  - *Why do we rely on our current emotions when making quick decisions?*
- Ambiguity Effect
  - *Why do we prefer options we know?*
- Anchoring Bias
  - *Why do we compare everything to the first piece of information we received?*
- Attentional Bias
  - *Why do we focus more on some things than others?*

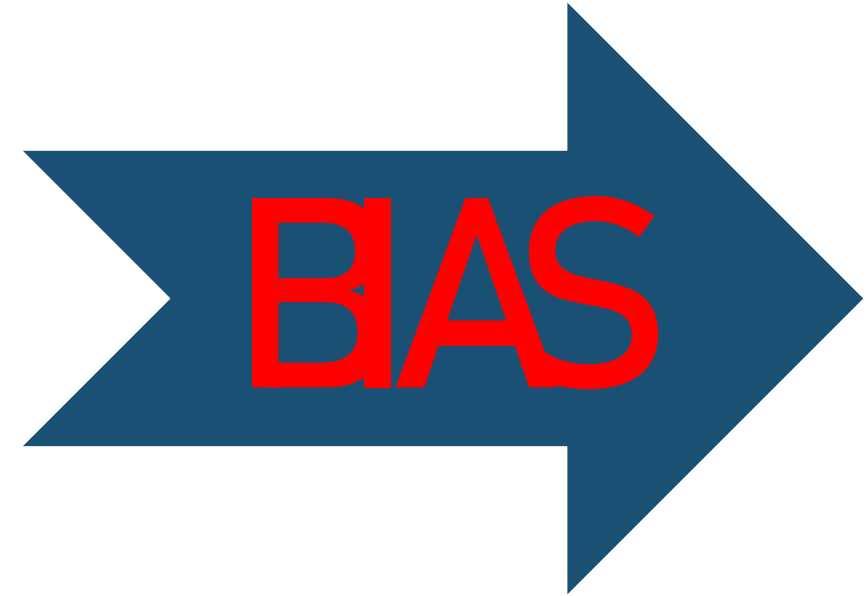


# COGNITIVE BIAS, Cont.

- Authority Bias
  - *Why do we always trust the doctor, even though they might be wrong?*
- Availability Heuristic
  - *Why do we tend to think that things that happened recently are more likely to happen again?*
- Bandwagon Effect
  - *Why do we support opinions as they become more popular?*
- Barnum Effect
  - *Why do we believe our horoscopes?*
- Base Rate Fallacy
  - *Why do we rely on specific information over statistics?*
- Belief Perseverance (The Backfire Effect)
  - *Why do we maintain the same beliefs, even when we are proved wrong?*

# COGNITIVE BIAS, Cont.

- Benjamin Franklin Effect
  - *Why do we like someone more after doing them a favor?*
- Bikeshedding
  - *Why do we focus on trivial things?*
- Bottom-Dollar Effect
  - *Why do we transfer negative emotions about being broke on items that we purchase.*
- Bounded Rationality
  - *Why are we satisfied by “good enough”?*
- Bundling Bias
  - *Why do we value items purchased in a bundle less than those purchased individually?*
- Buy-Now Effect
  - *Why are we likely to spend more after reading the word “buy”?*

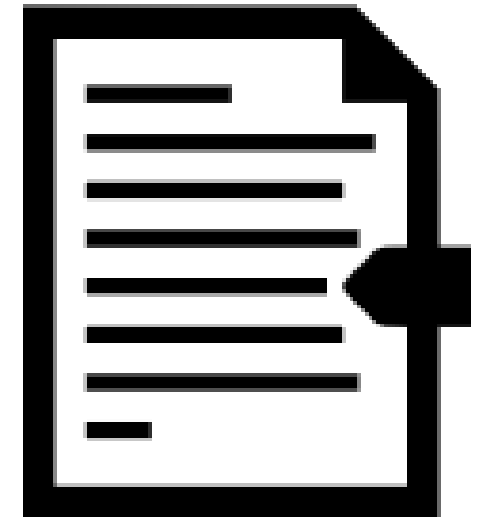


# COGNITIVE BIAS, Cont.

- Cashless Effect
  - *Why does paying without physical cash increase the likelihood that we purchase something?*
- Category Size Bias
  - *Why do we think we are more likely to win at the big casino versus the small one?*
- Choice Overload
  - *Why do we have a harder time choosing when we have more options?*
- Cognitive Dissonance
  - *Why is it so hard to change someone's belief?*
- Commitment Bias
  - *Why do people support their past ideas, even when presented with evidence that they're wrong?*
- Confirmation Bias
  - *Why do we favor our existing beliefs?*

# COGNITIVE BIAS, Cont.

- Decision Fatigue
  - *Why do we make worse decisions at the end of the day?*
- Declinism
  - *Why do we think the past is better than the future?*
- Decoy Effect
  - *Why do we feel more strongly about one option after a third one is added?*
- Disposition Effect
  - *Why do we tend to hold on to losing investments?*
- Distinction Bias
  - *Why do we view options as more distinct when evaluating them simultaneously?*
- Dunning-Kruger Effect
  - *Why can we not perceive our own abilities?*



# COGNITIVE BIAS, Cont.

- Einstellung Effect
  - *Why do our past experiences prevent us from reaching the best possible outcome?*
- Empathy Gap
  - *Why do we mispredict how much our emotions influence our behavior?*
- Endowment Effect
  - *Why do we value items more if they belong to us?*
- Extrinsic Incentive Bias
  - *Why do we think others are in it for the money, but we are in it for the experience?*
- False Consensus Effect
  - *Why do we overestimate agreement?*
- Framing Effect
  - *Why do our decisions depend on how options are presented to us?*

# COGNITIVE BIAS, Cont.

- Functional Fixedness
  - *Why do we have trouble thinking outside the box?*
- Fundamental Attribution Error
  - *Why do we underestimate the influence of the situation on people's behavior?*
- Gambler's Fallacy
  - *Why do we think a random event is more or less likely to occur if it happened several times in the past?*
- Google Effect
  - *Why do we forget information that we just looked up?*
- Halo Effect
  - *Why do positive impressions produced in one area positively influence our opinions in another area?*
- *Hard-Easy Effect*
  - *Why is our confidence disproportionate to the difficulty of a task?*



# COGNITIVE BIAS, Cont.

- Heuristics
  - *Why do we take mental shortcuts?*
- Hindsight Bias
  - *Why do unpredictable events only seem predictable after they occur?*
- Hot Hand Fallacy
  - *Why do we expect previous success to lead to future success?*
- Hyperbolic Discounting
  - *Why do we value immediate rewards more than long-term rewards?*
- IKEA Effect
  - *Why do we place disproportionately high value on things we helped to create?*
- Identifiable Victim Effect
  - *Why are we more likely to offer help to a specific individual than a vague group?*

# COGNITIVE BIAS, Cont.

- Illusion of Control
  - *Why do we think we have more control over the world than we do?*
- Illusion of Transparency
  - *Why do we feel that others can read our mind?*
- Illusion of Validity
  - *Why are we overconfident in our predictions?*
- Illusory Correlation
  - *Why do we think some things are related when they are not?*
- Illusory Truth Effect
  - *Why do we believe misinformation more easily when it is repeated many times?*
- Impact Bias
  - *Why do we overestimate our emotional reactions to future events?*



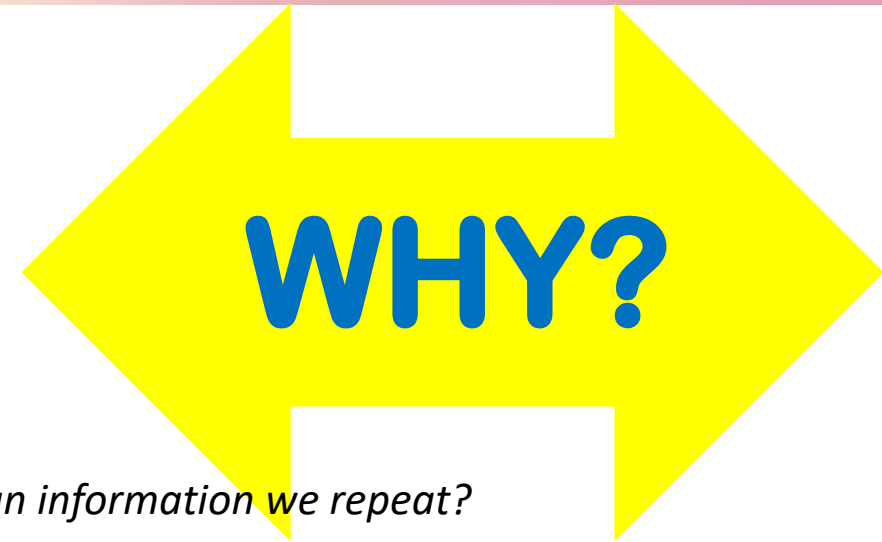


# COGNITIVE BIAS, Cont.

- In-Group Bias
  - *Why do we treat our in-group better than we do our out-group?*
- Incentivization
  - *Why do we work harder when we are promised a reward?*
- Just-World Hypothesis
  - *Why do we believe that we get what we deserve?*
- Lag Effect
  - *Why does spacing out the repetition of information make one more likely to remember it?*
- Law of the Instrument
  - *Why do we use the same skills everywhere?*
- Less-is-Better Effect
  - *Why do our preferences change depending on whether we judge our options together or separately?*

# COGNITIVE BIAS, Cont.

- Leveling and Sharpening
  - *Why do we exaggerate some details of a story, but minimize others?*
- Levels of Processing
  - *Why do we remember information that we attach significance to better than information we repeat?*
- Look-Elsewhere Effect
  - *Why do scientists keep looking for a statistically significant result after failing to find one initially?*
- Loss Aversion
  - *Why do we buy insurance?*
- Mental Accounting
  - *Why do we think less about some purchases than others?*
- Mere Exposure Effect
  - *Why do we prefer things that we are familiar with?*



# COGNITIVE BIAS, Cont.

- Messenger Effect
  - *Why do we find some people more credible than others?*
- Motivating Uncertainty Effect
  - *Why are we more motivated by rewards of unknown sizes?*
- Naïve Allocation
  - *Why do we prefer to spread limited resources across our options?*
- Naïve Realism
  - *Why do we believe we have an objective understanding of the world?*
- Negativity Bias
  - *Why is the news always so depressing?*
- Noble Edge Effect
  - *Why do we tend to favor brands that show care for societal issues?*

# COGNITIVE BIAS, Cont.

- Normalcy Bias
  - *Why do we believe that nothing bad is going to happen?*
- Nostalgia Effect
  - *How do our sentimental feelings for the past influence our actions in the present?*
- Observer Expectancy Effect
  - *Why do we change our behavior when we are being watched?*
- Omission Bias
  - *Why don't we pull the trolley lever?*
- Optimism Bias
  - *Why do we overestimate the probability of success?*
- Ostrich Effect
  - *Why do we prefer to ignore negative information?*



# COGNITIVE BIAS, Cont.

- Overjustification Effect
  - *Why do we lose interest in an activity after we are rewarded for it?*
- Peak-End Rule
  - *How do our memories differ from our experiences?*
- Pessimism Bias
  - *Why do we think we are destined to fail?*
- Planning Fallacy
  - *Why do we underestimate how long it will take to complete a task?*
- Pluralistic Ignorance
  - *Why do we think our beliefs are different from the majority?*
- Primacy Effect
  - *Why do we only remember the first things on our grocery list?*

# COGNITIVE BIAS, Cont.

- Priming
  - *Why do some ideas prompt other ideas later on without our conscious awareness?*
- Projection Bias
  - *Why do we think our current preferences will remain the same in the future?*
- Reactive Devaluation
  - *Why is negotiation so difficult?*
- Recency Effect
  - *Why do we better remember items at the end of the list?*
- Regret Aversion
  - *Why do we anticipate regret before we make a decision?*
- Representativeness Heuristic
  - *Why do we use similarity to gauge statistical probability?*



# COGNITIVE BIAS, Cont.

- Response Bias
  - *Why do we give false survey responses?*
- Restraint Bias
  - *Why do we overestimate our self-control?*
- Rosy Retrospection
  - *Why do we think the good old days were so good?*
- Saliency Bias
  - *Why do we focus on items or information that are more prominent and ignore those that are not?*
- Self-Serving Bias
  - *Why do we blame external factors for our own mistakes?*
- Serial Position Effect
  - *Why do we better remember items at the beginning or end of a list?*

# COGNITIVE BIAS, Cont.

- Sexual Overperception Bias
  - *Why do men think that women are always flirting with them?*
- Social Norms
  - *Why do we follow the behavior of others?*
- Source Confusion
  - *Why do we forget where our memories come from?*
- Spacing Effect
  - *Why do we retain information better when we learn it over a long period of time?*
- Spotlight Effect
  - *Why do we feel like we stand out more than we really do?*
- Status Quo Bias
  - *Why do we tend to leave things as they are?*





# COGNITIVE BIAS, Cont.

- Suggestibility
  - *Why is yawning contagious?*
- Survivorship Bias
  - *Why do we misjudge groups by only looking at specific group members?*
- Take-the-Best Heuristic
  - *Why do we focus on one characteristic to compare when choosing between alternatives?*
- Telescoping Effect
  - *Why do some things “seem like they just happed yesterday”?*
- The Illusion of Explanatory Depth
  - *Why do we think we understand the world more than we actually do?*
- The Pygmalion Effect
  - *Why do we perform better when someone has high expectations of us?*

# COGNITIVE BIAS, Cont.

- The Sunk Cost Fallacy
  - *Why are we likely to continue with an investment even if it would be rational to give it up?*
- Zero Risk Bias
  - *Why do we seek certainty in risky situations?*





# QUESTIONS?



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THANK YOU

