

## CHAPTER 8

# THE LIMITS OF COMMON SENSE: A SOCIAL-PSYCHOLOGICAL APPROACH TO RESEARCH ON DECISIONAL BIASES IN LABOR AND EMPLOYMENT ARBITRATION<sup>1</sup>

GRACE DEASON & EUGENE BORGIDA\*

“The trouble with people is not that they don’t know, but that they know so much that ain’t so.” Josh Billings, 1874.<sup>2</sup>

“Common sense may be plenty common, but it is not always sense.” Mahzarin R. Banaji, 2008.<sup>3</sup>

### I. Introduction

Labor and employment arbitrators are fact finders and decision makers who handle a wide variety of procedural and substantive issues in the context of the workplace. As any arbitrator knows, the arbitration decision context can be complex. Arbitrators must find and process the information that they need to make a decision on a given case, routinely exercise broad discretion in their decisions, and balance competing expectations held by their “customers” with concerns of fairness and justice. Despite the complexity of the decision task that arbitrators face, and the importance of the outcome for employers and grievants, surprisingly little is known

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\*Grace Deason is Assistant Professor of Psychology at the University of Wisconsin, La Crosse. Eugene Borgida is Professor of Psychology and Law at the University of Minnesota. He is a Morse-Alumni Distinguished Professor of Psychology and held the Fesler-Lampert Chair in Urban and Regional Affairs for 2002–2003.

<sup>1</sup>The paper was solicited for publication in the 2007 edition of *The Proceedings*, but publication was deferred pending the results of NAA-funded further research into the arbitration decision-making process. Professor Borgida presented a discussion of that research at the Academy’s fall 2010 education conference in Cleveland, Ohio, under the session title “Subtle influences, significant effects: Understanding arbitration decision-making in order to guard against bias.”

<sup>2</sup>Josh Billings (Henry Wheeler Shaw, American humorist), *Encyclopedia of Wit and Wisdom*, 1874.

<sup>3</sup>Mahzarin R. Banaji, “Foreword,” in Eugene Borgida & Susan T. Fiske (eds.), *Beyond Common Sense: Psychological Science in the Courtroom*. Oxford: Blackwell Publishing, p.xxv.

about the decision process and its consequences.<sup>4</sup> Arbitrators have the latitude to incorporate any number of characteristics of the case into their final decision, and the factors considered and the weight placed on each vary a great deal between decision makers.<sup>5</sup> While the arbitration literature often includes statements about how “most” arbitrators decide cases, empirical support for these generalizations is seldom provided.<sup>6</sup> The importance of these outcomes for employers and employees, along with their high degree of variability, has motivated empirical efforts to understand the underpinnings of arbitrators’ decisions.

Past research shows that arbitrator decision-making is influenced by features of the fact pattern under consideration, as well as characteristics of grievants and arbitrators. Of course, the fact that circumstances of the particular case at hand and past offenses by the grievant affect an arbitrator’s decision on a case is perfectly appropriate and rational. Characteristics of grievants, such as a grievant’s race and gender, and arbitrator factors, like political ideology, philosophical orientation to business and employees, and gender, however, are influences that arbitrators usually try to avoid. Despite arbitrators’ best intentions, the race or gender of the grievant and psychological, ideological, or personal aspects of the arbitrators themselves may affect arbitration decisions outside the arbitrators’ awareness. Alternatively, the expertise of most arbitrators and their motivation to arrive at a fair and just decision may eliminate biases based on these factors. Recent theory and research in social psychology can illuminate the processes and outcomes surrounding each of these possible scenarios. Understanding these factors and their impact on arbitral decision-

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<sup>4</sup>Brian S. Klaas, Douglas Mahoney & Hoyt N. Wheeler, “Decision-Making About Workplace Disputes: A Policy-Capturing Study of Employment Arbitrators, Labor Arbitrators, and Jurors,” 45 *Ind. Relat.* (2006), 68. Of course, commentators work to develop overarching rules to describe aspects of the decision process, and empirical research is underway. For example, Marvin Hill, “Employee Conduct After Imposition of Discharge but Before the Arbitration Hearing: Facts in Search of a Theory,” in *Arbitration 2009: Due Process in the Workplace, Proceedings of the Sixty-Second Annual Meeting of the National Academy of Arbitrators* (BNA Books), proposes a theory of the use of post-discharge conduct as part of a just cause determination, based on case examples. Klaas and colleagues develop a decision model to examine decision processes among different types of fact finders. Also see Stephen F. Befort, Mario F. Bognanno & Laura J. Cooper, “How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Examination,” in *Arbitration 2007: Workplace Justice for a Changing Environment, Proceedings of the Sixtieth Annual Meeting, National Academy of Arbitrators* (BNA Books), in which the authors examine arbitrators’ use of the “seven tests” and “quantum of proof” as decision guides.

<sup>5</sup>Robert J. Thornton & Perry A. Zirkel, “The Consistency and Predictability of Grievance Arbitration Awards,” 43 *Ind. Lab. Relat. Rev.* (1990), 294.

<sup>6</sup>Befort, Bognanno & Cooper, *supra*.

making is the best possible foundation for remedying any biases that are demonstrated.

We examine the following questions: (1) To what extent is arbitrator decision-making vulnerable to bias as a function of grievant and arbitrator characteristics like gender and race? (2) What findings in psychological science can inform our understanding of this question? (3) What are the implications of the psychological science for preventing or remedying bias in arbitrator decision-making? To address these questions, we review past empirical research on arbitration decisions, which sheds light on the current understanding of the role of gender and other characteristics of grievants and arbitrators in arbitration decisions. Next, we review three areas of research from psychological science pertinent to understanding arbitration decision-making on the basis of the grievant's race and gender. First, we discuss the nature of race and gender prejudice as revealed by research in psychological science and contrast this understanding with "commonsense" notions of what prejudice looks like. Second, we review research on the role of subjectivity and discretion in the appraisal process, a characteristic that is a feature of most arbitration cases. Next, we review the science of implicit bias, whose findings also run counter to many commonsense ideas of prejudice. Finally, we consider the implications of this research for preventing or remedying bias in arbitration decisions, and directions for future empirical research.

## II. Overview of Past Research

In this section, we review past empirical research on the factors that influence arbitrators' decisions. First, we discuss characteristics of the body of research in general, and then we describe in greater detail the specific findings of research on the influence of the facts of the case, grievant characteristics, and arbitrator characteristics on arbitration decisions. We allocate more space to discussing the influence of grievant and arbitrator characteristics than to discussing the influence of fact patterns not because these are the primary influences in arbitrators' decisions, but in order to allow us to contrast those approaches with our discussion of the psychological study of gender bias in Section III.

The literature on the determinants of arbitration outcomes utilizes two main methodological approaches, with distinct strengths and weaknesses. The majority of research studies are content

analyses that examine the characteristics of existing cases and their relationship to decision outcomes. Research conducted “in the field” in this manner has the advantage of using real case materials as the subject of study, and relating results directly to arbitrators themselves. This method is problematic, however, because researchers are unable to ensure equality between the cases, introducing error into the study.<sup>7</sup> Experimental research using fictional cases in which the factors of interest are systematically varied avoids the problems of field studies by controlling for case facts. In addition, experiments allow researchers to determine not only whether grievant gender is *associated* with a tendency to decide arbitration cases in a particular way, but also whether gender *caused* a particular decision. Unfortunately, most experiments have been conducted on student samples<sup>8</sup> or non-random arbitrator samples with response rates as low as 10 percent<sup>9</sup> using hypothetical case scenarios, so the consistency of their results with arbitrators’ real decisions is questionable. Existing studies have not reached a consensus about the factors that influence arbitrator decision making, and they have seldom employed interactional analyses or theory-testing to examine their research questions, relying instead on an exploratory approach.

### A. Research on the Influence of Fact Patterns on Decisions

The research on arbitration decision making examines factors that arbitrators explicitly consider in their decisions, as well as factors that may play a role in the decision-making process at a sub-conscious level. The first set of factors consists of aspects of cases that the arbitrator uses to thoughtfully weigh the parties’ arguments against one another and come to a decision. Bankston proposed a decision model to examine the effect of the specifics of the parties’ contract, the facts of the case, the quality of the parties’ evidence, and arbitrators’ values and attitudes on decision outcomes. In an examination of existing cases and the arbitration literature, he finds that although arbitrators’ values and attitudes do play a role in decisions, case-related factors like

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<sup>7</sup>Stephen B. Caudill & Sharon L. Oswald, “A Sequential Selectivity Model of the Decisions of Arbitrators,” 14 *Managerial Dec. Econ.* (1993), 261.

<sup>8</sup>*E.g.*, William J. Bigoness & Philip B. DuBose, “Effects of Gender on Arbitrators’ Decisions,” 28 *Acad. Manage. J.* (1985), 485.

<sup>9</sup>*E.g.*, Patricia A. Simpson & Joseph J. Martocchio, “The Influence of Work History Factors on Arbitration Outcomes,” 50 *Ind. Lab. Relat. Rev.* (1997), 252.

the quality of the evidence receive primary attention.<sup>10</sup> Similarly, Simpson and Martocchio conducted an experimental study on a sample of arbitrators to assess the impact of work history factors on arbitrator decisions in absenteeism discharge cases. They found that due process procedures by management, the grievant's previous absence and disciplinary record, and his or her job performance and seniority all appropriately played a role in arbitrators' decisions.<sup>11</sup>

## **B. Research on the Influence of Grievant Characteristics on Decisions**

The arbitrator focuses on legitimate features of the fact pattern as he or she explicitly considers their role in the case. Other factors beyond arbitrators' attention, however, may play a role in their decisions. Studies have examined characteristics of grievants and arbitrators as additional factors affecting the decision outcome. Unlike the facts of the case, which are carefully examined, characteristics of grievants and arbitrators most likely influence decision making outside the arbitrator's awareness. Some "person factors" that have been empirically studied include the gender of the grievant and the arbitrator, the age or experience of the arbitrator, the arbitrator's training background, and the arbitrator's personal values and attitudes. There is mixed evidence for the influence of these personal characteristics, suggesting that they may affect decision outcomes under certain conditions.

The characteristic that has received the most research attention is the gender of the grievant. Competing hypotheses from the criminology literature have spurred investigations into differential treatment of women grievants in arbitration hearings. The first is the *chivalry-paternalism thesis*, which posits that men view themselves as the protectors of all women, who are innocent and defenseless.<sup>12</sup> In this case, women are expected to receive more favorable treatment in a hearing, at least from male arbitrators. An alternative is the *evil woman thesis*, which argues that women who commit offenses have violated not only the law, but also the

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<sup>10</sup>Eddie W. Bankston, "Value Differences Between Attorney and Economist Labor Arbitrators," *Proceedings of the Twenty-Ninth Annual Winter Meetings* (Atlantic City, September 16–18, 1976). Madison, WI: Industrial Relations Research Association, 151.

<sup>11</sup>Simpson & Martocchio, *supra*.

<sup>12</sup>Brian Bemmels, "Gender Effects in Discipline Arbitration: Evidence from British Columbia," 31 *Acad. Manage. J.* (1988), 699.

gender stereotype for women, and so will receive harsher penalties than male grievants.<sup>13</sup> These hypotheses map on to the social psychological concept of “ambivalent sexism.”<sup>14</sup> Research on ambivalent sexism reveals two forms of sexism: *benevolent sexism*, in which women are regarded as more virtuous than men, but also incompetent and in need of protection, and *hostile sexism*, in which women are the targets of outright hostility because of role-incongruent behavior such as career ambition or radical feminism. Extensive research in psychology confirms that men and women around the world internalize these forms of sexism and that both hostile and benevolent sexism are associated with negative outcomes for women in the form of prejudice, disparate treatment, and sexual harassment.<sup>15</sup>

Research in the arbitration context has not provided an answer as to whether individual differences in arbitrators’ levels of hostile and benevolent sexism affect arbitrator decisions, but it has tested the chivalry-paternalism and evil woman hypotheses. Studies of grievant gender have found support for both of these hypotheses: in some cases, men are shown to fare better than women in arbitration hearings, and in others women have an advantage. Other studies have found no evidence of gender differences in either direction. For example, Bemmels analyzed discipline and discharge cases in both the United States and Canada, and found that women were more likely than men to have their grievances sustained<sup>16</sup> and more likely to receive a reinstatement.<sup>17</sup> Other studies find that grievant gender affected male arbitrators’ decisions, but not those of female arbitrators.<sup>18</sup> Experimental studies using hypothetical case scenarios also found that female grievants were more likely to have a termination overturned<sup>19</sup> and received more lenient penalties, although in one study, preferential treatment of female grievants occurred only among arbitrators who

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<sup>13</sup>*Id.*

<sup>14</sup>Peter Glick & Susan T. Fiske, “The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism,” 70 *J. Pers. Soc. Psychol.* (1996), 491.

<sup>15</sup>*Id.*

<sup>16</sup>Brian Bemmels, “The Effect of Grievants’ Gender on Arbitrators’ Decisions,” 41 *Ind. Lab. Relat. Rev.* (1988), 251.

<sup>17</sup>*Id.* Bemmels, *supra*.

<sup>18</sup>Brian Bemmels, “Gender Effects in Discharge Arbitration,” 42 *Ind. Lab. Rel. Rev.* (1988), 63. Dan R. Dalton & William J. Todor, “Gender and Workplace Justice: A Field Assessment,” 38 *Personnel Psychol.* (1985), 133. Allen Ponak, “Discharge Arbitration and Reinstatement in the Province of Alberta,” 42 *Arbitration J.* (1987), 39.

<sup>19</sup>Caudill & Oswald, *supra*.

were politically liberal.<sup>20</sup> In contrast, Rogers and Helburn<sup>21</sup> found support for the evil woman thesis in a small sample of arbitration cases about disputes at petroleum refineries: female grievants were less likely than their male counterparts to be reinstated in that masculine workplace context. In a study of labor arbitration cases in the public sector, Mesch<sup>22</sup> found that women were likely to lose more cases than men, even controlling for the severity of the grievance.

Still other studies found no evidence of gender bias in arbitrator decision making. Bigoness and DuBose<sup>23</sup> asked undergraduate students to make a decision on a hypothetical discharge case, varying the grievant's gender, and found no differences based on the gender of the grievant or the arbitrator. Similarly, Oswald and Caudill<sup>24</sup> administered a hypothetical sexual harassment discharge case to a sample of practicing arbitrators, and found no effect of gender. Several studies of existing arbitration cases have also failed to find gender differences.<sup>25</sup> The contradictory findings on grievant gender in this area, like in many other areas of research, are likely due to differences in methodology and the context and scope of the particular arbitration cases examined. Studies may fail to see effects because they only examine the effect of gender alone, when in fact, gender discrimination is likely to be a product of multiple factors, and is better detected through an interactional approach. That is, gender may only have an effect on decisions when other factors are also present—for example,

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<sup>20</sup>Brian Bemmels, "Attribution Theory and Discipline Arbitration," 44 *Ind. Lab. Rel. Rev.* (1991), 548. Monica Biernat & Martin H. Malin, "Political Ideology and Labor Arbitrators' Decision Making in Work-Family Conflict Cases," 34 *Personality Soc. Psychol. Bull.* (2008), 888.

<sup>21</sup>Robert C. Rogers & I. B. Helburn, "The Arbitrariness of Arbitrators' Decisions," *Proceedings of the Thirty-Seventh Annual Meeting* (Dallas, December 28–30, 1984). Madison, WI: Industrial Relations Research Association.

<sup>22</sup>Debra J. Mesch, "Arbitration and Gender: An Analysis of Cases Taken to the Public Sector," 24 *J. Collective Negotiations in the Public Sector* (1995), 207.

<sup>23</sup>Bigoness & DuBose, *supra*.

<sup>24</sup>Sharon L. Oswald & Stephen B. Caudill, "Experimental Evidence of Gender Effects in Arbitration Decisions," 4 *Employee Responsibilities and Rights J.* (1991), 271.

<sup>25</sup>Dan R. Dalton, Debra J. Mesch, Crystal L. Owen & William D. Todor, "The 'Iron Law of Paternalism' in Employee Grievances and Arbitration? A Comparison of Disciplinary and Non-Disciplinary Cases," 10 *Employee Responsibilities and Rights J.* (1997), 291. Clyde Scott & Elizabeth Shadoan, "The Effect of Gender on Arbitration Decisions," 10 *J. Lab. Res.* (1989), 429. Perry A. Zirkel, "A Profile of Grievance Arbitration Cases," 38 *Arbitration J.* (1983), 35. Perry A. Zirkel & Philip H. Breslin, "Correlates of Grievance Arbitration Awards," 24 *J. Collective Negotiations in the Public Sector* (1995), 45. Befort, Bognanno & Cooper, *supra*.

only when a woman holds a position in a traditionally masculine field, or only when she is a mother.<sup>26</sup>

Researchers have studied grievant characteristics other than gender that may affect arbitration decisions outside arbitrators' awareness. Eylon, Giacalone, and Pollard<sup>27</sup> experimentally examined the effect of the grievant's impression management strategy—whether the grievant made apologies or excuses—in a sample of arbitrators. They found that when an apology was used, the company was found to be less responsible than when an excuse was used. Apologies also resulted in more lenient arbitrator rulings, but only in the case of minor injuries. Other research examined the effect of the type of job the grievant holds. In analyses of existing discharge cases, Bingham<sup>28</sup> and Block and Steiber<sup>29</sup> found that white collar or skilled employees fared better in arbitration than blue collar or unskilled employees. In an experiment conducted on an arbitrator sample, Biernat and Malin examined the effect of grievants' parental status on arbitration outcomes. They found that the inclusion of childcare problems in an arbitration fact pattern cued different patterns of gender bias among liberal and conservative arbitrators, such that liberal arbitrators favored women grievants, and conservative arbitrators favored men.<sup>30</sup>

### C. Research on the Influence of Arbitrator Characteristics on Decisions

In some studies, the gender and the experience of the arbitrator have been shown to affect arbitration decisions. Bemmels,<sup>31</sup> Bingham and Mesch,<sup>32</sup> and a more recent study by Southey and Innes

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<sup>26</sup>Biernat & Malin, *supra*. Alice Eagly & A. M. Koenig, "Gender Prejudice: On the Risks of Occupying Incongruent Roles," in *Beyond Common Sense: Psychological Science in the Courtroom* (E. Borgida & S. T. Fiske, eds.).

<sup>27</sup>Dafna Eylon, Robert A. Giacalone & Hinda Greysen Pollard, "Beyond Contractual Interpretation: Bias in Arbitrators' Case Perceptions and Award Recommendations," 21 *J. Org. Behav.* (2000), 513.

<sup>28</sup>Lisa B. Bingham, "The Repeat Player Effect in Employment Arbitration," 1 *Employee Rights and Employment Pol. J.* (1997), 189.

<sup>29</sup>Richard N. Block & Jack Steiber, "The Impact of Attorneys and Arbitrators on Arbitration Awards," 40 *Ind. Lab. Rel. Rev.* (1987), 543.

<sup>30</sup>Biernat & Malin, *supra*. Also see Joan C. Williams, "Work/Family Conflict: The Arbitrator's Role," in *Arbitration 2005: The Evolving World of Work, Proceedings of the Fifty-Eighth Annual Meeting, National Academy of Arbitrators* (BNA Books 2006), for a review and analysis of arbitration cases involving work/family conflict.

<sup>31</sup>Bemmels, "Gender Effects in Discharge Arbitration," *supra*.

<sup>32</sup>Lisa B. Bingham & Debra J. Mesch, "Decision Making in Employment and Labor Arbitration," 39 *Ind. Rel.* (2000).



in an Australian sample of arbitration decisions<sup>33</sup> found that arbitrator gender interacts with grievant gender such that male arbitrators treat female grievants more favorably than male grievants. In an experimental study, Caudill and Oswald<sup>34</sup> found that female arbitrators were less likely to reinstate grievants of either gender. Many other studies found no effect of arbitrator gender.<sup>35</sup> Several studies have shown that it may not be in a union's best interest to choose a more experienced arbitrator. More experienced arbitrators were found to systematically favor management in their decisions, although it should be noted that arbitrator experience is highly correlated with age.<sup>36</sup> The arbitrator's professional training background may also play a role. Experimental studies that compare decisions about termination cases made by labor arbitrators, employment arbitrators, and jurors have found that labor arbitrators were most likely to rule in favor of the employee, and employment arbitrators were least likely to do so.<sup>37</sup>

A smaller number of studies have examined psychological characteristics of arbitrators. In an experimental study of arbitrators, Simpson and Martocchio examined the moderating role of arbitrators' fairness orientation, that is, the degree to which he or she strives to be impartial.<sup>38</sup> They found that when management's case was strong, arbitrators with a fairness orientation are less likely than other arbitrators to uphold management's disciplinary action, and more likely to come to a compromise decision. Another finding by Judge and Martocchio, however, indicated that fair-minded arbitrators issued more severe disciplinary decisions.<sup>39</sup> Biernat and Malin examined the role of the arbitrators' political ideology, and found that ideology interacted with gender such that conservative arbitrators favored male grievants, and

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<sup>33</sup>Kim Southey & Peter Innes, "Gender and Firmographic Effects in Unfair Dismissal Arbitration," Proceedings of the 10th Annual Pacific Employment Relations Association Conference.

<sup>34</sup>Caudill & Oswald, *supra*.

<sup>35</sup>Bigoness & DuBose, *supra*. Scott & Shadoan, *supra*. Brian Bemmels, "Arbitrator Characteristics and Arbitrator Decisions," 11 *J. Lab. Res.* (1990), 181. Block & Steiber, *supra*. Oswald & Caudill, *supra*.

<sup>36</sup>Nels E. Nelson & Earl M. Curry Jr., "Arbitrator Characteristics and Arbitral Decisions," 20 *Ind. Rel.* (1981), 312. Oswald & Caudill, *supra*. Caudill & Oswald, *supra*.

<sup>37</sup>Klaas, Mahoney & Wheeler, *supra*. Bingham & Mesch, *supra* at 671.

<sup>38</sup>Simpson & Martocchio, *supra*.

<sup>39</sup>Timothy A. Judge & Joseph A. Martocchio, "The Effect of Work Values on Absence Disciplinary Decisions: The Role of Fairness Orientation and Supervisor Attributions," Center for Advanced Human Resource Studies Working Paper Series, Working Paper 92-3 (1992). Available at <http://digitalcommons.ilr.cornell.edu/cahrswp/317>.

liberal arbitrators favored female grievants.<sup>40</sup> In contrast to these findings, a review of decisions on discharge and suspension cases by Bemmels provided no evidence for differences in decision making based on arbitrator characteristics.<sup>41</sup>

#### D. Summary

Research on arbitration decisions has examined features of the fact pattern, grievants, and arbitrators that are likely to affect the outcome of arbitration cases. Appropriately, the facts of the case, the strength of the evidence, and the grievants' prior work record all influence arbitrators' decision strategies. In addition, some of the evidence suggests that arbitrators may be influenced by the gender and other characteristics of the grievant, or by the arbitrator's gender, experience, fairness orientation, or political ideology. Although many of these findings are mixed and contradictory, they warrant further investigation into the determinants of arbitration decisions, which affect the lives and livelihoods of grievants as well as the fates of their employers. We argue that theory and research in social psychology on the operation of gender prejudice and discrimination can deepen our understanding of gender bias in arbitration decisions, and why it may appear in some cases, and not others. In order to achieve such an understanding, however, it is necessary to confront some commonsense assumptions about prejudice and discrimination.

### III. Challenges to Commonsense Views of Gender Bias

The research studies reviewed in Section II provide valuable information about the factors affecting decisions in the arbitration domain. They have identified a variety of factors that affect arbitration decisions, and have begun to identify general processes and principles that are at play as arbitrators make decisions. Moreover, the use of both experimental and field research methods is a strength of the research that has been conducted so far. With

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<sup>40</sup>Biernat & Malin, *supra*. Also see Andrew James Patterson, "Employment Ideology and Grievance Adjudication: An Empirical Examination of Adjudicators' Ideological Predispositions, Other Characteristics, and Personal Grievance Case Determinations," Master's Thesis, available at <http://hdl.handle.net/10524/16> (2010), for an examination of the effects of ideology in a sample of New Zealand students. Patterson finds that ideology affects the amount of compensation awarded to grievants, but had no effect on other measured outcomes.

<sup>41</sup>Bemmels, "Arbitrator Characteristics and Arbitrator Decisions," *supra*.

research on the arbitration decision process already well underway, what new insights does psychological science have to offer? Unlike the studies reviewed above, which seek to understand the thoughts and behaviors of one particular group of people (arbitrators) in one particular context (an arbitration case), research in social psychology seeks to identify general principles of human thought and behavior that apply to all people, in all contexts. As such, scientific findings in psychology can offer general insights into human thought and behavior that are also likely to apply to arbitrators in the context of an arbitration hearing. In addition, social psychological research is perhaps most useful when it contradicts commonsense beliefs about the way we think and behave, and there are many contradictions between social psychological findings, on the one hand, and popular beliefs about the effect of race and gender on our thoughts and actions, on the other hand. In this section, we broadly review research in social psychology on race and gender prejudice and discrimination, highlighting the ways in which the scientific findings differ from commonsense views. In Section IV, we discuss the implications of the research for the arbitration context.

### A. Commonsense Beliefs About Prejudice

Definitions of prejudice in social psychology have evolved a great deal over the years as scientific research has advanced our understanding of the phenomenon. All can agree that prejudice is an undesirable quality because it results in discrimination against certain individuals on the basis of their group membership. But what exactly is prejudice, this psychological construct that leads to unfair treatment? In his influential book *The Nature of Prejudice*, published in 1954, Gordon Allport defined prejudice as “antipathy based on a faulty and inflexible generalization” (p. 9) and as “thinking ill of others without sufficient warrant” (p. 7).<sup>42</sup> This early social psychological view overlaps with current lay views of prejudice captured, for example, in the *Merriam-Webster Online Dictionary*: “an adverse opinion or leaning formed without just grounds or before sufficient knowledge.”<sup>43</sup> Both definitions claim that prejudice is a *negative attitude* about a person or group, and

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<sup>42</sup>Gordon W. Allport, *The Nature of Prejudice* (1954), Perseus Books.

<sup>43</sup>Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/prejudice>.

that it is based on *false or incomplete information* about that group or person. Together, these two characteristics form the core of what we will refer to as commonsense beliefs about prejudice.<sup>44</sup> These definitions also lead to the presumption that only negative attitudes will produce unfair outcomes for targets of prejudice, and that prejudice can be corrected if more information is available. The natural remedy to such prejudice, then, would be to change negative attitudes to be more positive, and to expose people to members of other groups in order to correct their false beliefs.

Another commonsense belief about prejudice is that it is a characteristic of a particular, “prejudiced” individual that is *constant across time and place*. That is, if a person has a negative attitude about an individual based on his group membership on one day, he or she will also have a negative attitude about that individual on the following day, and probably weeks or even months later. This lay belief about prejudice is illustrated in legal doctrine involving the same-actor inference.<sup>45</sup> Since the 1991 case of *Proud v. Stone* [945 F.2d 796 (4th Cir. 1991)], employers have been able to defend against individual disparate treatment suits under Title VII of the Civil Rights Act of 1964 by arguing that discrimination could not have occurred because the person who terminated an employee is the same person who hired him or her, and that the hiring and firing occurred within a relatively short time span.<sup>46</sup> The doctrine states that “in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.”<sup>47</sup> The rationale, stated by the Fifth Circuit in the context of a later case, is that “claims that employer animus exists in termination but not in hiring seem irrational. From the standpoint of the putative discriminator, it hardly makes sense to hire workers from a group one dislikes ... only to fire them once they are on the job.”<sup>48</sup> Clearly, this doctrine is based on a belief that prejudice against members

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<sup>44</sup>Also see Eagly & Koenig, *supra*.

<sup>45</sup>Linda Hamilton Krieger, “Behavioral Realism in Law: Reframing the Discussion About Social Science’s Place in Antidiscrimination Law and Policy,” in *Beyond Common Sense: Psychological Science in the Courtroom* (E. Borgida & S. T. Fiske, eds.), 2008, Oxford: Blackwell Publishing.

<sup>46</sup>C. Scott Schwefel, “The Same-Actor Inference: A Look at *Proud v. Stone* and Its Progeny,” 6 *Employment Lab. Rel. Law* 3 (2008).

<sup>47</sup>*Proud*, 945 F.2d. at 797.

<sup>48</sup>*Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996) (quoting *Proud*, 945 F.2d at 797).

of a certain group is a stable characteristic of an individual. If this is the case, then there should be a clear and consistent pattern of discrimination in decisions made by a prejudiced person across different situations.

A fourth commonsense belief about prejudice is that it is a *consciously held attitude* about a group, and that prejudiced people discriminate intentionally against members of groups that they dislike. This commonsense belief is exemplified in most legal scholars' and courts' typical interpretation of Title VII of the Civil Rights Act of 1964.<sup>49</sup> Most scholars and courts believe that conscious racism or sexism is a necessary element of a viable Title VII claim, which leads to courts denying Title VII claims in cases where discrimination may in fact have occurred.<sup>50</sup> For example, in the case of *Thomas v. Troy City Board of Education*, the court found that Willie Thomas had not presented evidence that proved he was a victim of hiring discrimination, but the judge did note that "[t]he judicial focus on the search for unconstitutional discriminatory animus obscures the fact that it is possible that the board chose the individual it perceived to be the 'best' candidate and, yet still, that Thomas was subjected to discrimination; the two are not mutually exclusive."<sup>51</sup> Legal scholar Melissa Hart characterizes the typical approach to Title VII as "either-or": either the decision maker's explanation is honest and the decision was not discriminatory, or the decision maker is lying, and discrimination did occur.<sup>52</sup> Although judges may recognize that social categories like race and gender affect decision making in some cases, the "either-or" approach that guides their legal reasoning ensures that conscious intent remains central to the legal definition of discrimination.

## B. The Social Psychological View of Prejudice

At first, commonsense beliefs about prejudice may appear sufficient to capture the nature of the concept. After all, most people experience prejudice as an inaccurate, negative attitude about a group that is likely to result in discrimination, is a consistent pat-

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<sup>49</sup>42 U.S.C. §§ 2000e to e-15 (2004).

<sup>50</sup>Melissa Hart, "Subjective Decisionmaking and Unconscious Discrimination," 56 *Alabama L. Rev.* 741 (2005).

<sup>51</sup>*Thomas v. Troy City Bd. of Educ.*, 302 F. Supp. 2d 1309 (M.D. Ala. 2004).

<sup>52</sup>Hart, *supra*. Hart goes on to describe ways in which social science evidence of unconscious prejudice and discrimination are consistent with alternative interpretations of Title VII as it is written.

tern for certain prejudiced people, and is consciously held and exercised by those individuals. When Allport spearheaded the social psychological study of prejudice more than five decades ago, he began with the same set of assumptions. Social psychology research, however, has produced findings that contradict these commonsense beliefs about prejudice, and we review those findings here along with the general theoretical principles that they support. We argue that these scientific challenges to commonsense beliefs about prejudice are important for arbitrators to understand in order to avoid race and gender bias in their decisions and also in order to accurately recognize and effectively remedy race and gender bias in workplace settings when it arises.

### *1. Prejudice Is Not Always Based on Faulty Information*

First, social psychology researchers have largely abandoned the idea that prejudice is based on inaccurate information or that prejudiced attitudes are fundamentally irrational. In order to clarify the question of accuracy, social psychologists distinguish between the characteristics of groups (on average, as compared to other groups) and individual members of these groups. Often, they have found, stereotypes about a social group as a whole are quite accurate, but are inaccurately applied to individual members of the group. For example, the widely held stereotype that women are more communal and nurturing has found wide support in studies that compare the characteristics of women to those of men.<sup>53</sup> When this stereotype is applied to an individual woman (e.g., Cindy is a woman, so she must be nurturing), errors often result. Certainly, not all beliefs about the characteristics of groups are accurate, and groups with whom perceivers have less contact, such as minority racial and ethnic groups, are likely to be perceived more inaccurately than familiar groups are. The central point, however, is that prejudice does not have to be based on faulty information in order to produce discriminatory behavior.

Because stereotypes about a group are sometimes accurate, and because even accurate stereotypes can produce discriminatory behavior when they are applied erroneously to individuals,

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<sup>53</sup>Alice H. Eagly, "On Comparing Men and Women," 4 *Feminism and Psychol.* (1994), 513. Alice H. Eagly & Wendy Wood, Explaining Sex Differences in Social Behavior: A Meta-Analytic Perspective, 17 *Pers. Soc. Psychol. Bull.* (1991), 306. Janet K. Swim, "Perceived Versus Meta-Analytic Effect Sizes: An Assessment of the Accuracy of Gender Stereotypes," 66 *J. Pers. Soc. Psychol.* (1994), 21.

increasing one's exposure to members of a social group and gathering information about those people as individuals may not be sufficient to reduce prejudice and discrimination. Social psychological theory and research suggest that our impressions of others range from being completely category- (i.e., stereotype) based to completely personal or individuated (i.e., unbiased by group membership).<sup>54</sup> Stereotypes dominate impressions of others when there is little individuating information available about a person, or when it is ambiguous and can be interpreted in line with the stereotype. In contrast, clear, unambiguous information gathered about a person *can* undermine stereotyping and lead to more individualized perception of a group member.<sup>55</sup>

The fact that individuating information can attenuate stereotyping, however, should not be interpreted to mean that individuating information *always* succeeds in this task, or that stereotypes do not produce discrimination in real-world contexts.<sup>56</sup> As already mentioned, to the extent that stereotypes are accurate, perceivers may rarely encounter individuating information that clearly contradicts a stereotype.<sup>57</sup> If a person with stereotypical views of women encounters few women who are not communal and nurturing, the stereotype is likely to persist and to be applied to women he or she meets. In addition, several powerful information-processing tendencies are likely to interfere with reduction of bias via individuating information. First, people have a tendency to solicit and attend to information that confirms their stereotypes and existing attitudes about group members, rather than disconfirms it.<sup>58</sup> We are also likely to interpret information through stereotypic lenses in a way that is consistent with our existing stereotypes.<sup>59</sup> In addition to these cognitive tendencies, individuals whose behavior is clearly counter-stereotypical are often evaluated negatively

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<sup>54</sup>Marilyn B. Brewer, "A Dual-Process Model of Impression Formation," in *Advances in Social Cognition* (T. K. Srull & R. S. Wyer Jr., eds.), Hillsdale, NJ: Erlbaum. Susan T. Fiske & Steven L. Neuberg, "A Continuum of Impression Formation, From Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation," in *Advances in Experimental Social Psychology*, Vol. 23 (Mark P. Zanna, ed.), 1990, San Diego, CA: Academic Press.

<sup>55</sup>Susan T. Fiske, "Stereotyping, Prejudice, and Discrimination," in *The Handbook of Social Psychology* (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey, eds.), 1998, New York: Oxford University Press.

<sup>56</sup>Laurie A. Rudman, Peter Glick & Julie E. Phelan, "From the Laboratory to the Bench: Gender Stereotyping in the Courtroom," in *Beyond Common Sense: Psychological Science in the Courtroom* (E. Borgida & S. T. Fiske, eds.).

<sup>57</sup>Fiske, *supra*.

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

for having violated the stereotype, which limits the benefits of individuating information.<sup>60</sup> For example, a woman must exhibit counter-stereotypical agentic behavior in order to be perceived as competent at a traditionally masculine job, but when she does she is likely to be perceived as abrasive and unlikable by her co-workers and to experience “backlash” effects.<sup>61</sup>

Further, even if stereotypic thinking about an individual group member can be avoided, prejudice toward other members of the group and attitudes toward the group as a whole are likely to persist because of the phenomenon of sub-typing. Sub-typing refers to the tendency to re-categorize members of a group who don't fit the stereotype. For example, because lesbians tend to violate the overall stereotype for women, they often are considered separate from other women. Sub-typing allows stereotypes about a group to persist in the face of individuating information about group members.<sup>62</sup> In sum, while commonsense beliefs suggest that prejudice is based on faulty information about a group that can be corrected through contact with its members, research has revealed that the process is much more complex, and that prejudice is often likely to persist in the face of exposure to individuating information about specific group members.

## **2. Both Positive and Negative Prejudicial Attitudes Produce Discrimination**

Second, research in social psychology indicates that prejudice does not necessarily originate only in negative attitudes about social groups. Some social groups are evaluated quite positively, but are still the targets of discrimination. For example, Eagly and Mladinic have documented a “women are wonderful” effect, in which women are evaluated more favorably than men on a wide range of attitude measures. In addition, the stereotypical characteristics of women (communality or warmth) are evaluated more positively than the stereotypical characteristics of men (agency or

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<sup>60</sup>Rudman, Glick & Phelan, *supra*.

<sup>61</sup>Laurie A. Rudman & Julie E. Phelan, “Backlash Effects for Disconfirming Gender Stereotypes in Organizations,” 28 *Res. Org. Beh.* (2008), 61. Laurie A. Rudman, “Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management,” 74 *J. Pers. Soc. Psychol.* (1998), 629. Daniella Fuchs, Melinda M. Tamkins, Madeline E. Heilman & Aaron S. Wallen, “Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks,” 89 *J. App. Psychol.* (2004), 416.

<sup>62</sup>Ziva Kunda & Kathryn C. Olesen, “Maintaining Stereotypes in the Face of Disconfirmation: Constructing Grounds for Subtyping Deviants,” 68 *J. Pers. Soc. Psychol.* (1995), 565.



competence).<sup>63</sup> The women are wonderful effect sounds positive, but it can have detrimental effects for women. Eagly and Mladinic determined that people evaluate women more positively than men largely because the positive qualities associated with nurturance and a communal orientation are assigned to women much more frequently than to men.<sup>64</sup> Thus, people evaluate women positively because they think about them in traditional ways (i.e., as homemaker and nurturer). Women with different qualities and roles are evaluated quite differently from one another, depending on whether they behave consistently with communal expectations for women.

In a different line of research, Fiske and Glick have identified the two distinct types of prejudice toward women described in Section II, both of which can lead to discrimination. Hostile sexism, the more traditional type, involves “antipathy toward women based on an ideology of male superiority, and a hostile form of sexuality (in which women are treated merely as sexual objects).”<sup>65</sup> In contrast, benevolent sexism involves “subjectively positive, though sexist attitudes that include protectiveness toward women, positively valenced stereotypes of women (e.g., nurturance), and a desire for heterosexual intimacy.”<sup>66</sup> Together, these types of sexism are called *ambivalent sexism*. Perhaps surprisingly, hostile and benevolent sexism have been shown to co-occur such that individuals who hold generally positive or benevolent attitudes toward women—they think, in essence, that “women are wonderful”—are more likely to hold negative or hostile attitudes toward women.<sup>67</sup> Like research on the “women are wonderful” effect, research on ambivalent sexism shows that prejudice occurs because positive stereotypes and attitudes associated with benevolent sexism reflect beliefs that women are communal, thus, benevolent attitudes are not likely to extend to women outside traditional roles or who exhibit counter-stereotypical traits. Both research programs show

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<sup>63</sup>Alice H. Eagly & Antonio Mladinic, “Gender Stereotypes and Attitudes Toward Women and Men,” 15 *Pers. Soc. Psychol. Bull.* (1989), 543. Alice H. Eagly & Antonio Mladinic, “Are People Prejudiced Against Women?: Some Answers From Research on Attitudes, Gender Stereotypes, and Judgments of Competence,” 5 *Eur. Rev. Soc. Psychol.* (1994), 1. Alice H. Eagly, Antonio Mladinic & Stacey Otto, “Are Women Evaluated More Favorably Than Men? An Analysis of Attitudes, Beliefs, and Emotions,” 15 *Psychol. Women Q.* (1991), 203.

<sup>64</sup>Eagly & Mladinic, “Gender Stereotypes and Attitudes Toward Women and Men,” *supra*.

<sup>65</sup>Susan T. Fiske & Peter Glick, “Ambivalence and Stereotypes Cause Sexual Harassment: A Theory With Implications for Organizational Change,” 51 *J. Soc. Issues* (1995), 96.

<sup>66</sup>*Id.*

<sup>67</sup>Fiske & Glick, *supra*.

that, contrary to commonsense beliefs about prejudice, positive attitudes as well as negative attitudes can lead to discriminatory behaviors.

### 3. *Prejudice Is Contextual*

Third, social psychology research challenges the commonsense belief, embodied in the same actor inference, that prejudice is a characteristic of particular individuals that is constant across time and situations. Instead, research suggests that prejudice and discrimination are rooted in the context in which they occur: they result from a mismatch between stereotypes and the roles that stereotyped individuals hold in the workplace. Eagly and Karau's Role Congruity Theory<sup>68</sup> provides a broad explanation of how inconsistency between the content of gender stereotypes associated with an individual's group and the characteristics of the role the individual holds can produce biased judgments and discrimination. According to the theory, such inconsistency gives rise to two distinct forms of prejudice.

The first form of prejudice occurs when women are potential occupants of a role, such as when they apply for a job. To the extent that there is conflict between the communal qualities that are stereotypically associated with women and the characteristics of the job, prejudice and discrimination will result.<sup>69</sup> Studies that vary the sex of the applicant on a resume, keeping all other information consistent, have supported this claim, showing that equally qualified men are preferred over women for jobs that are rated as more masculine, but not for feminine sex-typed jobs.<sup>70</sup> The second type of contextual prejudice occurs when a woman is already an occupant of a role, for example, while a woman occupies a position in the workplace. Women who are effective in masculine sex-typed jobs often exhibit agentic behaviors in the context of their work that are incongruent with gender stereotypes for women. These violations of gender stereotypes can lead to lower evaluations for women in leadership and management positions

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<sup>68</sup>Alice H. Eagly & Steven J. Karau, "Role Congruity Theory of Prejudice Toward Female Leaders," 109 *Psychol. Rev.* (2002), 573. Also see Anne M. Koenig, Alice H. Eagly, Abigail A. Mitchell & Tiina Ristikari, "Are Leader Stereotypes Masculine? A Meta-Analysis of Three Research Paradigms," 137 *Psychol. Bull.* (2011), 616, for recent evidence supporting the theory.

<sup>69</sup>*Id.*

<sup>70</sup>Heather K. Davidson & Michael J. Burke, "Sex Discrimination in Simulated Employment Contexts: A Meta-Analytic Investigation," 56 *J. Vocational Beh.* (2000), 225.

compared to men who perform the same behaviors.<sup>71</sup> Such findings confirm that rather than being consistent across situations, prejudice is most likely to arise when stereotypes are at odds with role requirements.

In addition to considerations of the “congruity” between the content of stereotypes about an individual’s group and the role that he or she holds, researchers have identified a variety of features of situations that increase or reduce the incidence of prejudice and discrimination. These moderating conditions underscore the point that prejudice is not a constant, but changes based on the context in which an interpersonal judgment is made. One of the most important features is subjectivity in the appraisal process: the extent to which evaluative judgments require inference because they are based on criteria that require interpretation.<sup>72</sup> Subjectivity is a function of the degree of ambiguity present in the decision process; ambiguity creates the need for inference, and so the more ambiguity there is in the process, the more subjective the decision.<sup>73</sup> Subjectivity leads to discrimination in performance appraisals because it allows expectations—stereotypes about an individual based on group membership—to affect evaluative judgments. Feldman identified three cognitive operations that make up the performance appraisal process: (1) attending to evaluation-relevant information, (2) organizing and storing the information so that it can be accessed later, and (3) recalling the information and using it in judgment.<sup>74</sup> Research has shown that stereotypes, in the form of expectations for behavior, are more likely to influence each stage of this process when subjectivity is present.<sup>75</sup>

In a recent review, Heilman and Haynes identified several sources of ambiguity in the typical workplace decision context.<sup>76</sup> First, ambiguity may appear in the information available to the evaluator. Information that is incomplete or unclear has been found to facilitate the use of stereotypes in judgment. Unless information is

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<sup>71</sup>Eagly & Karau, *supra*.

<sup>72</sup>Madeline E. Heilman & Michelle C. Haynes, “Subjectivity in the Appraisal Process: A Facilitator of Gender Bias in Work Settings,” in *Beyond Common Sense: Psychological Science in the Courtroom* (E. Borgida & S. T. Fiske, eds.), 2008, Oxford: Blackwell Publishing. Veronica F. Nieva & Barbara A. Gutek, “Sex Effects on Evaluation,” 5 *Acad. Manage. Rev.* (1980), 267.

<sup>73</sup>Heilman & Haynes, *supra*.

<sup>74</sup>J. M. Feldman, “Beyond Attribution Theory: Cognitive Processes in Performance Appraisal,” 66 *J. App. Psychol.* 2 (1981), 127.

<sup>75</sup>Heilman & Haynes, *supra*.

<sup>76</sup>*Id.*

relevant to the job and diagnostic of job performance, it produces evaluations that are similar or more stereotypical to those made with no information at all.<sup>77</sup> In addition, ambiguous evaluative criteria can contribute to subjectivity in the process. Evaluative criteria can be ambiguous because of the nature of the performance outcomes that are measured or observed, and also in regard to how evaluative criteria are combined to produce a judgment.<sup>78</sup> It is easier to avoid ambiguity when judging objective performance outcomes, such as dollar earnings or physical work output; judgments of a worker's charisma or overall leadership ability require more inference. The vaguer the judgment criteria, the more room there is for expectations in the form of stereotypes to influence evaluation. Further, research suggests that evaluative criteria may be combined differently for each individual who is evaluated, and that negative performance expectations can weigh more heavily in such combined evaluations.<sup>79</sup>

Heilman and Haynes also note that there may be ambiguity about the definition of the job to be performed.<sup>80</sup> Most jobs are made up of different types of activities, some of which are central to the job, and others that are discretionary or outside the job description, but still contribute to a positive work environment. Research suggests that some job behaviors are not equally discretionary for both men and women; women are expected to help others at work as part of their job, while for men such activities are optional and their absence does not damage performance evaluations.<sup>81</sup> Ambiguity may also arise for team tasks, when it is unclear who is responsible for a positive (or negative) outcome. When this type of ambiguity arises, stereotype-based expectations help people fill in the blanks in order to assign credit for the performance. Research has shown that when a woman works with a

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<sup>77</sup>Madeline A. Heilman, "Information as a Deterrent Against Sex Discrimination: The Effects of Applicant Sex and Information Type on Preliminary Employment Decisions," 33 *Org. Beh. Human Dec. Processes* (1984), 174. Anne Locksley, Eugene Borgida, Nancy Brekke & Christine Hepburn, "Sex Stereotypes and Social Judgment," 39 *J. Pers. Soc. Psychol.* (1980), 821.

<sup>78</sup>Heilman & Haynes, *supra*.

<sup>79</sup>Michael D. McIntyre & Lawrence R. James, "The Inconsistency with Which Raters Weight and Combine Information Across Targets," 8 *Human Performance* (1995), 95. Boris B. Baltes & Christopher P. Parker, "Reducing the Effects of Performance Expectations on Behavioral Ratings," 82 *Org. Beh. Human Dec. Processes* (2000), 237. Cara C. Bauer & Boris B. Baltes, "Reducing the Effects of Gender Stereotypes on Performance Evaluations," 47 *Sex Roles* (2002), 465.

<sup>80</sup>Heilman & Haynes, *supra*.

<sup>81</sup>Madeline E. Heilman & Julie J. Chen, "Same Behavior, Different Consequences: Reactions to Men's and Women's Altruistic Citizenship Behavior," 90 *J. App. Psychol.* (2005), 431.

man on a joint task, she is likely to receive less credit for a positive outcome unless the contribution of both members of the team is undeniable, that is, unless ambiguity about the source of the work is reduced.<sup>82</sup>

Taken together, Role Congruity Theory and research on subjectivity in the appraisal process challenge the commonsense idea that prejudice is constant across contexts. Instead, they highlight the fact that prejudice and discrimination are most likely to occur when there is a mismatch between the content of stereotypes about an individual's group and characteristics of the individual's role, and when there are no objective criteria available for evaluation.

#### ***4. Prejudice Can Be Unconscious and Can Lead to Unintentional Discrimination***

As discussed above, research shows that people associate communal characteristics with women and agentic characteristics with men. These stereotypes are stored in memory and can be retrieved when necessary, that is, people are able to report them when asked. Conscious retrieval and use of stereotypes to guide judgments is consistent with the commonsense belief that prejudice is consciously chosen and leads to discrimination only when an individual intends for it to do so. In many instances, however, gender stereotypes may affect evaluations and behaviors outside of conscious awareness. Researchers study "implicit" or unconscious prejudice using a variety of methods, which range from more traditional experimental designs that conceal the true purpose of the study to reaction-time measures of mental associations.<sup>83</sup> The most commonly used measure of implicit stereotyping and prejudice involves the use of response latencies, that is, the amount of time (measured in milliseconds) that participants take to respond to certain stimuli. Response latencies show how closely related two concepts are to each other. Concepts that are associated ("linked") in a person's mind should facilitate recognition of one another, such that presenting one of the concepts decreases the amount of time needed to recognize the other. Therefore, stereotyping can be inferred from certain patterns of facilitation (e.g., responding

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<sup>82</sup>Madeline E. Heilman & Michelle C. Haynes, "No Credit Where Credit is Due: Attributional Rationalization of Women's Success in Male-Female Teams," 90 *J. App. Psychol.* (2005), 905.

<sup>83</sup>Russell H. Fazio & Michael A. Olson, "Implicit Measures in Social Cognition Research: Their Meaning and Use," 54 *Ann. Rev. Psychol.* (2003), 297.

more quickly to women's names after exposure to traditionally feminine characteristics).

In one common paradigm, the lexical decision task, participants view a prime (e.g., a word or picture) that activates a certain concept (e.g., women or men). Next, participants view a string of letters—the “target”—and judge whether it is a word or a non-word. The time participants take to make a judgment on the target is the response latency. To the extent that the primed social category (e.g., women or men) is cognitively connected to the target word, response times are faster. In another paradigm, the Implicit Association Test (IAT), participants simultaneously categorize words that fall along two separate, but related, dimensions.<sup>84</sup> For example, a person may categorize names as “male” or “female” while simultaneously categorizing other words as “agentic” or “communal.”<sup>85</sup> Reaction-time tools like these allow researchers to study stereotypes and prejudice that are inaccessible to the respondent and therefore cannot be reported using traditional methods. Although they have been criticized on the grounds that differences in reaction times bear little resemblance to meaningful social behaviors and thus have no bearing on legal matters,<sup>86</sup> research using these methods has made important contributions to psychology and such measures are generally accepted in the field.

Implicit measures of attitudes toward racial, ethnic, and class-based groups show strong in-group biases among members of high-status groups, and weak in-group biases and sometimes out-group favoritism among members of low-status groups.<sup>87</sup> In addition, implicit attitudes toward low-status out-groups are typically more negative than attitudes reported on traditional measures. This is probably due in part to respondents' desire to appear unprejudiced, which inflates measures of explicit prejudice that

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<sup>84</sup>Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, “Measuring Individual Differences in Implicit Cognition: The Implicit Associations Test,” 74 *J. Pers. Soc. Psychol.* (1998), 1464.

<sup>85</sup>Laurie A. Rudman & Stephen E. Kilianski, “Implicit and Explicit Attitudes Toward Female Authority,” 26 *Pers. Soc. Psychol. Bull.* (2000), 1315.

<sup>86</sup>See, for example, Hal R. Arkes & Philip E. Tetlock, “Attributions of Implicit Prejudice,” 15 *Psychol. Inquiry* (2004), 257; Hart Blanton & James Jaccard, “Arbitrary Metrics in Psychology,” 61 *Amer. Psychol.* (2006), 27; Hart Blanton, James Jaccard, Jonathan Klick, Barbara A. Mellers, Gregory Mitchell & Philip E. Tetlock, “Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the Race IAT,” 94 *J. App. Psychol.* (2009), 567; Philip E. Tetlock & Gregory Mitchell, “Calibrating Prejudice in Milliseconds,” 71 *Soc. Psychol. Quart.* (2008), 12.

<sup>87</sup>Laurie A. Rudman & Peter Glick, *The Social Psychology of Gender: How Power and Intimacy Shape Gender Relations*, 2008, New York: Guilford Press.

are subject to introspection and conscious control, but does not affect implicit measures. However, the divergence between implicit and explicit attitudes about low-status groups is also likely to stem from honest differences between the two types of attitudes. For example, many Americans have consciously egalitarian attitudes toward blacks, but harbor negative emotions toward members of the group that continue to affect their implicit attitudes.<sup>88</sup> Implicit attitudes toward minority racial groups are thought to affect behaviors in a diverse array of contexts.<sup>89</sup>

The findings for implicit gender attitudes differ from implicit attitudes for other social distinctions. While implicit attitudes about racial, ethnic, and class groups tend to be more negative than explicit attitudes, implicit gender attitudes and implicit gender stereotypes are largely consistent with explicit reports.<sup>90</sup> On reaction-time measures of gender attitudes, men show a weak in-group bias or neutral implicit gender attitude, while women show a strong in-group bias toward women.<sup>91</sup> Thus, implicit measures of attitudes toward women also show the well-documented “women are wonderful” effect. Implicit gender stereotypes, in which the categories “male” and “female” are associated with stereotypical traits and activities, also mirror explicit reports of stereotypes, associating women with warmth and caregiving activities, and men with agency and competence.<sup>92</sup> As with explicit gender stereotypes, however, the general finding that women are perceived as wonderful does not preclude women from experiencing prejudice and discrimination when they step outside traditional roles.

If implicit gender attitudes and stereotypes show the same pattern as explicit attitudes and stereotypes, why is it important to consider them? Scientifically, psychologists distinguish between implicit and explicit gender attitudes and stereotypes because they stem from different life experiences and psychological processes.<sup>93</sup> Practically speaking, implicit gender attitudes and stereotypes are

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<sup>88</sup>Samuel L. Gaertner & John F. Dovidio, “The Aversive Form of Racism,” in *Prejudice, Discrimination, and Racism* (John F. Dovidio & Samuel Gaertner, eds.), 1986, San Diego: Academic Press.

<sup>89</sup>E.g., decisions whether to shoot an armed suspect: Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler & Tracie Keese, “Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot”; behavior toward black job candidates in a hiring interview: John F. Dovidio & Samuel L. Gaertner, “Aversive Racism and Selection Decisions: 1989 and 1999,” 11 *Psychol. Sci.* (2000), 315.

<sup>90</sup>Rudman & Glick, *supra*.

<sup>91</sup>*Id.*

<sup>92</sup>*Id.*

<sup>93</sup>*Id.* Laurie A. Rudman, “Sources of Implicit Attitudes,” 13 *Curr. Dir. Psychol. Sci.* (2004), 79.

important to consider because of their power to affect behavior outside of awareness. A meta-analysis combining the results of hundreds of studies revealed that implicit, rather than explicit, attitudes better predict behavior toward members of stereotyped social group categories.<sup>94</sup> Because of commonsense beliefs that prejudice is consciously held and discrimination is intentionally exercised, however, individual perceivers and decision makers are often unaware that implicit gender stereotypes are influencing their judgments and behavior. Of course, arbitrators are not the only group who are subject to such biases; the effect of implicit attitudes on decisions and behavior has been found in a wide variety of samples, including a recent study of judges.<sup>95</sup> From social psychologists' perspective, knowing that implicit attitudes and stereotypes exist and how they operate is the first step to finding ways to prevent and combat them.

### C. Summary

A review of the social psychological theory and research on race and gender bias reveals the potential for social psychology to supplement and enrich the existing findings in the arbitration literature about the effects of gender, and other characteristics of grievants and arbitrators, on arbitration decision outcomes. Moreover, a consideration of the social psychological findings suggests some fruitful avenues for future research; we discuss some possible future directions below, in Section IV.C. Perhaps most notably, our review underscores the importance of keeping arbitrators abreast of pertinent research from psychological science that challenges the ways that commonsense understandings of race and gender bias are insufficient to understand decision-making dynamics in the arbitration context. Without an understanding of the nuanced ways in which race and gender prejudice and discrimination really operate in work domains, arbitrators will be unable to detect and correct prejudice and discrimination by supervisors when it appears in the facts of an arbitration case. They will also be unequipped to detect and challenge their own, often unconscious, biases.

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<sup>94</sup>Anthony G. Greenwald, T. Andrew Poehlmann, Eric Luis Uhlmann & Mahzarin R. Banaji, "Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity," 97 *J. Pers. Soc. Psychol.* (2009), 17.

<sup>95</sup>*Id.* Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, "Does Unconscious Racial Bias Affect Trial Judges?" 84 *Notre Dame L. Rev.* (2009).



#### IV. Preventing and Remediating Bias

Social scientists often study race and gender bias in order to identify effective remedies for them. In the context of arbitration, bias may be present in decisions made in the workplace by supervisors, and/or in arbitrators' decisions once a dispute has occurred. Thus, arbitrators play an important role in identifying race and gender bias when they are present in case facts, but a more difficult challenge may be the identification and correction of their own biases in the arbitration process. In this section, we discuss remedies for prejudice and discrimination that have been identified in social psychological research, and discuss ways they could be applied by arbitrators to prevent and attenuate biases in the workplace and in their own decisions.

##### A. Using Arbitration Decisions to Remedy Existing Bias in the Workplace

If arbitrators know the form that gender and racial biases take in the modern workplace, they will be more sensitized to detect such biases in their examination of case facts. As we argue in previous sections, social psychological research has much to offer arbitrators who are interested in learning more about the psychological dynamics and behavioral manifestations associated with prejudice and discrimination. Arbitrators can look to current employment discrimination law for a model of how their decisions may be informed by social psychological research on race and gender prejudice and discrimination. Scientific testimony is routinely admitted into court in the form of a *social framework analysis*, in which an expert witness draws on quality, peer-reviewed social science to provide a general context for fact-finders' reasoning about a particular case.<sup>96</sup> Like the science we reviewed in the

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<sup>96</sup>Eugene Borgida, Corrie Hunt & Anita Kim, "On the Use of Gender Stereotyping Research in Sex Discrimination Litigation," 13 *J. Law & Policy* (2005), 613. David L. Faigman & John Monahan, "Psychological Evidence at the Dawn of the Law's Scientific Age," 56 *Ann. Rev. Psychol.* (2005), 631. David L. Faigman, Michael J. Saks, Joseph Sanders & Edward K. Cheng, "Gender Stereotyping: Legal Issues," in *Modern Scientific Evidence: The Law and Science of Expert Testimony* (D. Faigman, D. H. Kaye, M. J. Saks, J. Sanders & E. K. Cheng, eds.), 2007, St. Paul, MN: Thomson West. Susan T. Fiske, Donald N. Bersoff, Eugene Borgida, Kay Deaux & Madeline E. Heilman, "Social Science Research on Trial: Use of Sex Stereotyping Research in *Price Waterhouse v. Hopkins*," 46 *Amer. Psychol.* (1991), 1049. John Monahan & Laurens Walker, *Social Science in Law: Cases and Materials*, 1998, Westbury, NJ: The Foundation Press. John Monahan, Gregory Mitchell & Laurens Walker, "Contextual Evidence of Gender Discrimination: The Ascendance of 'Social Frameworks,'" 17 *Virginia L. Rev.* (2008), 1715. Melissa Hart & Paul M. Secunda,

sections above, social framework testimony can highlight the ways that scientific findings are at odds with popular understanding of psychological concepts, facilitating but not usurping the fact finder's decision-making role. Although labor and employment arbitrators typically do not have access to a social scientific expert to provide testimony in a particular case, accessible reviews of the social psychological literature on this topic can serve a similar purpose.

Given the subtle nature of modern prejudice, it is particularly important that arbitrators be aware of the existence of *implicit* race and gender biases, and consider how they may be detected (or fail to be detected) in any given arbitration fact pattern. Research suggests that people are unable to detect any but the most blatant discrimination when they encounter gender biases on a case-by-case basis.<sup>97</sup> Given this finding, arbitrators may be hard-pressed to identify subtle discrimination when it manifests, but knowing which aspects of an organizational environment make implicit biases more likely to occur (e.g., subjective evaluation criteria) is a first step toward raising arbitrators' awareness. When arbitrators do suspect the presence of implicit bias, they must next decide whether employers should be held responsible for supervisors' biases when they are, by definition, outside the decision makers' awareness. Legal scholar Joan Williams highlights a popular defense strategy employed by companies in the face of accusations of implicit bias: the cluelessness defense.<sup>98</sup> In essence, employers argue that it is inappropriate to punish discriminators who did not intend to discriminate. Implicit biases that lead to discrimination should not, perhaps, be weighed as heavily as intentional discrimination. The documented importance of the workplace environment in the production of implicit biases, however, leads many to argue that companies can and should be held accountable for the environments that they create, to the extent they lead to demonstrable discriminatory outcomes.<sup>99</sup>

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"A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions," 78 *Fordham L. Rev.* No. 1 (2009), 37. John Monahan, Laurens Walker & Gregory Mitchell, "The Limits of Social Framework Evidence," 8 *Law, Probability, and Risk* (2009), 307.

<sup>97</sup>Diana I. Cordova, "Cognitive Limitations and Affirmative Action: The Effects of Aggregate Versus Sequential Data in the Perception of Discrimination," 5 *Soc. Just. Res.* (1992), 319.

<sup>98</sup>Joan C. Williams, "The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the 'Cluelessness' Defense," 7 *Emp. Rights & Emp. Pol. J.* (2003), 401.

<sup>99</sup>*Hart & Secunda, supra* n.96.

## B. Awareness, Motivation, and Ability Help Ensure Arbitrator Neutrality

Familiarity with social-psychological research on stereotyping can also assist arbitrators in detecting and correcting their own subtle biases when making decisions. Specifically, dual process theories in social psychology show that in order to combat the biasing effect of stereotypes, people must be *aware* that stereotypes are influencing judgment and behavior, and have a somewhat accurate understanding of how that influence is occurring. In addition, a perceiver must be *motivated* to correct the bias, that is, he or she must have a desire to form an accurate and/or egalitarian impression, and have the *ability* to do so, in the form of attention capacity or “cognitive resources.”<sup>100</sup> Arbitrators, by and large, have a professional commitment to accuracy and fairness, and are accustomed to processing and integrating complex information to make a decision. These characteristics and experiences indicate that as a group, arbitrators have the necessary motivation and ability to combat the effects of stereotypes in their decision making. Increased awareness that stereotypes play a role in perceptions of others, and an understanding of how stereotypes affect decisions, will help arbitrators use these psychological factors to their greatest advantage.

The knowledge that motivation and ability play a key role in preventing stereotypic thinking is only a first step. After all, even the most focused and attentive arbitrator may find it impossible to continuously attend to stereotype suppression amid the myriad considerations of a specific decision. Fortunately, the Stereotyping Self-regulation Model suggests a process by which this type of control becomes habitual so that conscious correction is no longer required to prevent bias.<sup>101</sup> In one example of the research supporting this model, egalitarian participants were informed that their responses to a previous survey revealed an anti-gay bias. The participants felt guilt and ruminated over the experience, and as a result, they evaluated anti-gay jokes more negatively.<sup>102</sup> The model predicts that after several repetitions of the experience, the

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<sup>100</sup>Gordon B. Moskowitz, *Social Cognition: Understanding Self and Others*, 2005, New York: Guilford Press.

<sup>101</sup>Margo J. Monteith, “Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice Reduction Efforts,” 65 *J. Pers. Soc. Psychol.* (1993), 469.

<sup>102</sup>*Id.* Also see Gordon B. Moskowitz, Peter M. Gollwitzer, Wolfgang Wasel & Bernd Schaal, “Preconscious Control of Stereotype Activation Through Chronic Egalitarian Goals,” 77 *J. Pers. Soc. Psychol.* (1999), 167.

instinct to suppress bias will become more automatic and effortless. Thus, dual-process models and the study of stereotyping self-regulation suggest that awareness and conscious reflection on stereotypes may have the long-term beneficial effect of reducing bias.

### **C. Future Directions for Psychologically Informed Research on Arbitration Decisions**

In addition to informing arbitration practices, these psychological insights can be used to guide future empirical research into the process of arbitration decision making. An expanded database can only be a positive development for practitioners. Future research may indicate that arbitrators behave similarly to laypeople in their decision making, or it may reveal important differences as a result of arbitrators' characteristics and experience. As described above, some of the empirical work to date suggests that arbitrators are influenced by the gender and other characteristics of the grievant, or by the arbitrator's gender, experience, fairness orientation, or political ideology. Many of these findings are mixed and contradictory, but theory and research in social psychology on the operation of gender prejudice and discrimination has the potential to deepen our understanding of gender bias in arbitration decisions, and explain why it may appear in some cases and not others. In particular, the consideration of arbitrators' individual differences and situational moderators would advance our understanding of the factors affecting arbitration.

Previous research has considered a variety of psychological characteristics of arbitrators, but these should be expanded to include attitudes and beliefs that research on stereotyping and prejudice has shown are important. For example, beliefs about gender roles and the legitimacy of the status quo are expected to play a role in gender bias, but have not been measured in previous studies of the arbitration context. In addition, theory and research in social psychology indicate that implicit psychological characteristics of arbitrators—such as their implicit attitudes toward men, women, companies, and workers—are expected to influence arbitration decisions outside of awareness. Such factors should be examined, not as a means to single out and punish arbitrators with errant attitudes, but to better understand the decision process in general, and to determine whether and how arbitrators' decisions follow the same processes as laypeople's.

Psychological research has also identified external constraints that increase individuals' motivation to form accurate impressions of others and arrive at correct decisions. In particular, accountability to others has been shown to increase the motivation to be accurate and improve decision quality in some contexts.<sup>103</sup> This line of research suggests that additional oversight into arbitration decision making, such as a review panel or an agreed-upon set of decision rules, would reduce bias by attenuating the subjectivity of the decision context and increasing motivation. Like individual attitudes, however, these situational factors may operate differently for arbitrators than for the typical research participant. Arbitrators are already highly motivated to form accurate perceptions when engaged with a case, and so they may be less affected by external accountability pressure than are laypeople. Other aspects of arbitrators' training and experience may go further to bolster arbitrators' motivation and ability to make accurate decisions. If this is the case, then a better understanding of how arbitrators come by this expertise could help decision makers in other contexts to avoid bias.

Our own program of research has begun to examine some of these questions, with the goal of better understanding the psychology of decision making, and the arbitration decision process in particular. We conducted an online study in which students and professional arbitrators completed measures of implicit and explicit attitudes toward men and women, and then were randomly assigned to an "accountability" or "no accountability" condition of an experiment. In the accountability condition, participants were told that their decision would be reviewed by a panel of arbitrators who would then discuss the decision with them; whereas participants in the no accountability condition were simply given instructions. All participants were then asked to make a decision on two truncated but realistic arbitration cases designed to capture a range of behaviors that led to an employee's termination. The study design allowed us to examine the role of professional expertise, by comparing professional arbitrators' decisions to those of student "laypeople," and the effects of accountability in mitigating any gender bias that may appear in the decision patterns. Results of this initial study showed that students, but not arbitrators, were more likely to uphold the termination of female

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<sup>103</sup>Jennifer S. Lerner & Philip E. Tetlock, "Accounting for the Effects of Accountability," 125 *Psychol. Bull.* (1999), 255.

grievants, compared to male grievants. Moreover, hostile sexism influenced the decisions of students and less experienced arbitrators, but did not affect the decisions of the most experienced arbitrators in our sample. In contrast, participants showed equivalent gender bias in their decisions, regardless of whether they were motivated to be accountable.<sup>104</sup> Our line of research is but one example of how psychologically informed empirical work can shed light on the decision process, possible effects of gender and other social characteristics, and importantly, avenues for improving the quality of arbitration outcomes.

## V. Conclusions

In conclusion, this paper reviewed past empirical research on arbitration decisions, three areas of psychological science useful for understanding gender bias, and the implications of this research for preventing or remedying bias in arbitration decision making. We find that psychological findings often contradict “commonsense” notions of what prejudice looks like, and that features of the decision context may influence arbitrators’ thought processes outside of their conscious awareness and despite their egalitarian beliefs. Specifically, the study of subjectivity and discretion in the appraisal process provides new insights into the nature of stereotyping. Further, our review of the social psychological theory and research on race and gender bias reveals the potential for psychology to supplement and enrich the existing findings in the arbitration literature about the effects of gender and other characteristics of grievants, arbitrators, and situations on decision outcomes. A full and accurate understanding of how race and gender prejudice and discrimination operate in work domains will allow arbitrators to detect and correct prejudice and discrimination by supervisors when it appears in the facts of an arbitration case and to identify and challenge any of their own, often unconscious and subtle, biases.

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<sup>104</sup>Erik J. Girvan, Grace Deason & Eugene Borgida, “Gender prejudice in employment arbitration: Experience, not accountability, attenuates prejudice,” unpublished manuscript. Erik J. Girvan, Grace Deason & Eugene Borgida, “No royal road for reducing prejudice: Experience, not accountability, attenuates gender bias in employment-arbitration decisions,” presentation given at the American Psychology and Law Society Conference, March 2–5, 2011.