



## 2019 Annual Conference

Hyatt Regency Denver at Colorado  
Convention Center • Denver, CO  
June 23 – 26, 2019

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# Implicit Bias: How to Recognize It and What Campus GCs Should Do About It

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# IMPLICIT BIAS: WHAT IS IT AND WHAT CAN GENERAL COUNSELS DO ABOUT IT?

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I.	What is Implicit Bias? .....	1
II.	Implicit Bias in Corporations and Elementary and Secondary Education.....	2
III.	Higher Education Institutions as Employers.....	3
	A. Implicit Bias in Hiring, Grant Making, and Assignments .....	3
	B. Employment Law Implications.....	4
IV.	Higher Education Institutions as Educators .....	5
	A. Admissions.....	5
	B. Discipline and Title IX.....	6
	C. Other Aspects of Campus Life.....	6
V.	Lesson Points for College and University Counsel .....	7
	A. Slow Down and Be Mindful .....	7
	B. Counter-stereotypes Keep Blind Spots in Check.....	7
	C. Debiasing Processes to Prevent Systemic Bias.....	8
VI.	Dual Process Thinking and Implicit Bias .....	9

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Like it or not, implicit bias creeps into the hearts and minds of all humans -- even well intentioned general counsels working in higher education. In an article published in the *Chronicle of Higher Education* in November 2017, author David Gooblar notes that educators will accept that the placebo effect is real; yet when it is suggested that the placebo effect would work on them, there is great cynicism.<sup>1</sup> Like placebos, many in today's society are able to accept that implicit bias is real, but few admit their own vulnerability. Yet, more and more studies have confirmed that implicit bias can influence both big and small decisions and play a part in individual and even institutional unfairness. This paper will address some of the ways in which implicit bias may affect diversity, inclusion, and justice in higher education.

## I. WHAT IS IMPLICIT BIAS?

Implicit biases are an unconscious product of our encounters from childhood through adulthood, influenced by everything from geographic location to social class, mental abilities, profession, age, gender, family and marital status. These ingrained impressions are further colored by our own observations, the media and stereotypes.

It works like this: our brains develop what are called "schema" or mental frameworks to allow our minds to apply shortcuts in sorting data into broad categories for quick mental processing. For example, no matter what shape, the human eye can generally recognize a book, and an individual need not process and determine what a book is each time he or she encounters one. The ability to quickly characterize objects and things in one's everyday life is essential. However, these schema also operate below the conscious radar, influencing how we see and treat other people and groups, no matter our determination to be fair and objective. These biases have a real impact on individuals who may be associated with a less than favorable implicit association. Many public conversations have occurred around implicit bias in the last ten years as a result of high profile police shootings of African American men. However, implicit bias has become a focus in many realms beyond the justice system, including in private employment and education.

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<sup>1</sup> David Gooblar, "Yes, You Have Implicit Biases, Too," *Chronicle of Higher Education*, November 20, 2017, available at <https://www.chronicle.com/article/Yes-You-Have-Implicit-Biases/241797>.

## II. IMPLICIT BIAS IN CORPORATIONS AND ELEMENTARY AND SECONDARY EDUCATION

A growing number of large and small companies are taking real steps to educate their employees about implicit bias to combat its effect. In 2016, Price Waterhouse Coopers' U.S. Chairman linked arms with a likeminded group of CEOs to create the CEO Action for Diversity and Inclusion initiative, which launched in 2017. Among the original members were Cisco, Dow Chemical, HP, The Home Depot, Merck, Morgan Stanley, Staples, Target and Walmart. In addition to training their own workforces, they launched a branded mobile unit, called "Check Your Blind Spots," which is a traveling inclusion experience that has trained 5,000 people in a gamified version of a bias-mitigation curriculum.<sup>2</sup> Other large companies, like Starbucks, only recently learned the value of providing implicit bias training to its employees. Last year, as a result of an incident in which two black men were arrested at a Starbucks in Philadelphia after failing to make a purchase and asking to use the restroom, Starbucks closed nearly 8,000 stores for a day to train all employees on identifying and addressing implicit bias.<sup>3</sup>

Implicit bias has also garnered a lot of attention in education. The Kirwin Institute for the Study of Race and Ethnicity at the Ohio State University has studied implicit bias in K-12 public education and found that racial discipline disparities are widespread. In fact, the Institute found that African American students are suspended and expelled at rates three times higher than their white peers.<sup>4</sup> The Institute focuses on how implicit bias may be the cause of these statistically significant disparities and how strategies to combat implicit bias could improve these statistics. In an article entitled, "Why Teachers Must Fight Their Own Implicit Biases," the author reminds teachers that their assumptions about students in the first days of the school year based on the students' race, appearance and other factors, may impact how the teacher interacts with students throughout the year and lead to unfair treatment, including unfair discipline.<sup>5</sup>

Institutes of higher education are not immune from the impacts of implicit bias. Ways in which implicit bias may be at work in higher education include the same ways other employers are vulnerable to bias (recruiting, hiring, interviewing, and performance evaluations), as well as many of the ways in which primary and secondary education and/or the justice system are hotbeds of implicit bias (including but not limited to admissions and student discipline, including serious disciplinary issues like alleged Title IX violations). Below, we will explore the ways in which institutes of higher education may struggle with implicit bias as an employer and as educational system.

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<sup>2</sup> Ellen McGirt, "The CEO Action for Diversity and inclusion Turns Two," *Fortune*, June 8, 2018, available at <http://fortune.com/2018/06/08/thceo-action-diversity-inclusion/>.

<sup>3</sup> Yuki Noguchi, "Starbucks Training Focuses on the Evolving Study of Unconscious Bias," *npr*, May 17, 2018, available at <https://www.npr.org/2018/05/17/611909506/starbucks-training-focuses-on-the-evolving-study-of-unconscious-bias>.

<sup>4</sup> "Implicit Bias and School Discipline," The Ohio State University, Kirwan Institute for the Study of Race and Ethnicity, available at <http://kirwaninstitute.osu.edu/researchandstrategicinitiatives/school-discipline/>.

<sup>5</sup> Melissa Garcia, "Why Teachers Must Fight Their Own Implicit Biases," *Education Week TEACHER*, July 25, 2018, available at <https://www.edweek.org/tm/articles/2018/07/25/why-teachers-must-fight-implicit-biases.html>.

### III. HIGHER EDUCATION INSTITUTIONS AS EMPLOYERS

#### A. Implicit Bias in Hiring, Grant Making, and Assignments

As employers of often thousands of employees, colleges and universities need to be aware of the impact of implicit bias on their respective employment decisions. Implicit bias impacts employment decisions even from the initial review of resumes. In one study, six major research universities (three private and three public) were asked to rate a one-page resume of a recent college graduate on various criteria. The resumes were identical but half were assigned a male name (John), and half were assigned a female name (Jennifer). The applicant was a promising, but not stellar, candidate for a laboratory manager position. John received an average rating of 4/7 for competencies and was offered an average salary of \$30,328. Jennifer received an average rating of 3.3/7 and offered \$26,508. John was also viewed as a more favorable candidate for both hiring and mentoring.<sup>6</sup> The lead researcher noted that although previous studies had demonstrated the prevalence of similar implicit hiring bias in other fields, she believed scientists would perform differently because they are trained to analyze objective data rationally. She was disappointed to find that this was not the case.

In another more recent study published in *The Lancet*, gender bias in health sciences was studied. Researchers looked at almost 24,000 scientific grant applications to the Canadian Institute of Health Research (CIHR), which provides about \$1 billion in science grants each year. CIHR has two methods to review grants: one that focuses on the proposed research (will this research lead to a cure for Alzheimer's?), and one that focuses on the potential of the researcher (how likely is this researcher to find a cure for Alzheimer's given his or her experience?). The study found that when the focus of the grant making was the proposed research itself, "John" and "Jane" have an equal chance of being funded. However, when the focus of the grantmaking is the individual researcher, "John" is 1.4 times more likely to be funded than "Jane," all other factors being equal. Notably, more women than men file grant applications in the field of public health, yet male researchers were awarded more than twice as many grants as women.<sup>7</sup>

Colleges and universities across the globe are exploring ways to address these implicit biases. As reported in a recent article in *Inside Higher Ed*, a new approach to university hiring is being piloted in Britain - one where CVs and interviews are being omitted.<sup>8</sup> The Recruiting for Difference approach is an attempt to address gender, racial and ethnic implicit bias in university recruiting and hiring. Applicants in the process report the journals they have published in and the roles they played in the papers. Names and current university employment are also omitted.

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<sup>6</sup> Kenneth Chang, "Bias Persists for Women of Science, a Study Finds," *The New York Times*, September 24, 2012, available at <https://www.nytimes.com/2012/09/25/science/bias-persists-against-women-of-science-a-study-says.html>; see also John vs. Jennifer: A Battle of the Sexes, Margaretta Midura, *Yale Scientific*, February 19, 2013.

<sup>7</sup> Kim Elseser, "New Study Reveals What We Already Knew: Unconscious Bias Favors Men at Work," *Forbes*, February 8, 2019, available at <https://www.forbes.com/sites/kimelsesser/2019/02/08/new-study-reveals-what-we-already-knew-unconscious-bias-favors-men-at-work/#13a7030717d9>.

<sup>8</sup> John Morgan, "Trying to 'De-Bias' Faculty Recruiting," *Inside Higher Ed*, January 31, 2019, available at <https://www.insidehighered.com/news/2019/01/31/new-effort-britain-tries-remove-bias-faculty-recruiting>.

Interviews have been replaced with simulations around teaching, presenting research and related discussion simulations.

Of course, the potential for the impact of implicit bias does not stop when a candidate is hired, in higher education or elsewhere. The University of Maryland has undertaken a research project called “The Faculty Workload and Rewards Project,” which is funded by the National Science Foundation. The goal of the project is to “improve organizational policies and practices that shape equity in workload for all faculty, including women and underrepresented minority faculty.”<sup>9</sup> The Project was undertaken by academic department teams to “study their own workload data, consider and then adopt policies and practices to ensure equity in how teaching and service is taken up, assigned, and rewarded.”<sup>10</sup> As noted by the Project, research confirms that women and minority faculty engage in a disproportionate amount of teaching, mentoring, and service work (all other factors being equal). The Project allows Department teams to participate in activities intended to share the latest research on implicit bias related to how work in higher education is assigned and rewarded, and help shine a light on the practices and policies that may lead to a disproportionate allocation of the workload.

Research on implicit bias in higher education and elsewhere has clearly exposed often institutionalized inequitable processes and outcomes; but does that inequity give rise to a legal claim or is it simply a result that we must live with because its cause is arguably unintentional?

#### B. Employment Law Implications

The most widely used “test” for evaluating implicit bias in individuals is the Implicit Association Test (“IAT”). And despite many advocating for the use of IAT tests and other methods of evaluating unconscious bias as evidence of discrimination in Title VII and other discrimination cases, courts have not taken a uniform approach to whether such evidence should be admissible or relevant in these cases. The primary barriers to considering implicit bias as evidence of discrimination is the language of Title VII and the rules of evidence. With respect to Title VII, it is difficult to link one’s implicit bias to discriminatory intent and action, which is the hallmark of a Title VII intentional discrimination case. To the extent that a discriminatory impact theory is advanced, the claim requires that a specific employment practice be identified that results in a discriminatory impact on a protected class. With respect to the rules of evidence, some courts have felt constrained by *Daubert* and requirements of relevance.<sup>11</sup>

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<sup>9</sup> The Faculty Workload and Rewards Project,” “About the Project,” University of Maryland, available at <https://facultyworkloadandrewardsproject.umd.edu/about.html>.

<sup>10</sup> The Faculty Workload and Rewards Project,” “Home,” University of Maryland, available at <https://facultyworkloadandrewardsproject.umd.edu/index.html>.

<sup>11</sup> Much has been written analyzing the cases where courts have accepted evidence of implicit bias, those that have not, and those that argue for a shift in how claimants frame their use of this evidence to make it more likely that it will be admissible. See Camille A. Olson et al, “Implicit Bias Theory in Employment Litigation, Practical Lawyer,” 63 No. 5 Prac. Law 37 (October 2017); Anthony Kakoyannis, “Assessing the Viability of Implicit Bias Evidence in Discrimination Cases: An Analysis of the Most Significant Federal Cases,” *Florida Law Review*, 69 Fla. L. Rev. 1181 (July 2017); Sabreena El-Amin, “Addressing Implicit Bias Employment Discrimination: Is Litigation Enough?” *Harvard Journal of Racial & Ethnic Justice Online*, 2015 Harv. J. Racial & Ethnic Just. Online 1; Tryon P. Woods, “The Implicit Bias Theory,” *Drexel Law Review*, 10 Drexel L. Rev. 631

Since 2006, the EEOC's Compliance Manual has made clear that the EEOC believes that racially biased decision-making is not always conscious and that Title VII applies not only to decisions "driven by racial animosity, but also decisions infected by stereotyped thinking or other forms of less conscious bias."<sup>12</sup> Thus, despite the fact that case law has only recently been addressing implicit bias and the admissibility of certain types of evidence of implicit bias (such as the IAT), it has long been the EEOC's position that implicit bias can lead to actionable employment discrimination claims. This focus by the EEOC is likely to heighten as the EEOC begins to gather and use "big data" obtained through the EEO-1 reports to demonstrate statistical disparities in organization's employees by race, ethnicity, gender and other characteristics. Former Chair of the EEOC Jenny R. Yang stated in 2016, "Big Data has the potential to drive innovations that reduce bias in employment decisions and help employers make better decisions in hiring, performance evaluations, and promotions . . . . At the same time, it is critical that these tools are designed to promote fairness and opportunity, so that reliance on these expanding sources of data does not create new barriers to opportunity."<sup>13</sup>

#### IV. HIGHER EDUCATION INSTITUTIONS AS EDUCATORS

In addition to the implications on higher education institutions as employers, implicit bias may impact the ability of higher education institutions to educate in a fair and just manner, throughout the education process.

##### A. Admissions

Researchers at the University of California, Berkley researched bias among college admission staff related to student grades. The study examined job-hiring decisions and graduate school acceptances in a hypothetical experiment. Admissions data from 30,000 applicants at four selective MBA programs were examined and found that students who attended schools where grades were inflated were more than 30 percent more likely to be admitted to MBA programs than students with similar aptitudes from schools where GPAs were not inflated. While implicit bias related to admitting students whose grades were inflated does not implicate traditional notions of bias against disadvantaged groups, it does demonstrate how bias affects various aspects of the admission process and can have real effects on the students who are admitted and rejected to programs and jobs.

Most recent in the forefront of the discussion of college admissions and bias is the 2014 case against Harvard related to the admission rates of Asian-American students. While this case

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(2018); Michael Selmi, "The Paradox of Implicit Bias and a Plea for a New Narrative, *Arizona State Law Journal*, 50 Ariz. St. L. J. 193 (Spring 2018).

<sup>12</sup> EEOC's Compliance Manual, Section 15: Race and Color Discrimination (citing *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42, 59-61 (1st Cir. 1999) (holding layoff could be found unlawful where performance evaluations on which layoffs were based were racially biased, and discussing the longstanding recognition that unlawful discrimination can stem from stereotyping and cognitive bias, as well as from conscious animus and citing Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," 39 Stan. L. Rev. 317 (1987)).

<sup>13</sup> "Use of Big Data Has Implications for Equal Employment Opportunity, EEOC Website, Panel Tells EEOC," October 13, 2016, available at <https://www.eeoc.gov/eeoc/newsroom/release/10-13-16.cfm>.



is postured as one related to intentional efforts by the university to affect the admissions rates of applicants of certain races (affirmative action), at the core of the case lies allegations about stereotyping of Asian-Americans. Allegedly, Harvard's own research office produced reports finding that the college's admissions policies result in "negative effects" for Asian Americans. "One report noted Asian Americans received consistently lower scores for their personal traits — things like 'humor' and 'grit' — than did applicants of other races."<sup>14</sup> In addition to these revelations, other documents filed in the lawsuit show that Harvard trains its admissions officers on how they should weigh race in their admissions process. Regardless of the outcome of the Harvard case, it is clear that university admissions personnel are grappling with how to use information regarding an applicant's background to fill the ranks of their incoming classes, and the effect of implicit bias is only one part of that complex decision making process.

## B. Discipline and Title IX

There are numerous studies, including the findings of the Kirwan Institute cited above, that confirm that African-American students in K-12 are far more likely to be targeted for discipline, including suspensions and expulsions. Unfortunately, there is far less data regarding the equal or unequal application of disciplinary processes at the college and university level.

An article published in the Nevada Law Journal in 2017 argues that university discipline procedures discriminate against minority students, especially in the wake of the increased enforcement of Title IX in schools.<sup>15</sup> However, unlike in elementary and secondary schools, universities do not keep publicly available data on the demographics of students subject to discipline by the university, which prevents examination of how implicit racial bias might impact that process. The article concludes that the U.S. Department of Education should use its authority under Title IX to require colleges and universities to collect and publish the same kind of data that is available in elementary and secondary schools. Without access to this data, one may only extrapolate using data from secondary schools and the justice system that similar types of inequity may be at play in higher education.

## C. Other Aspects of Campus Life

An article by the same author of the *Nevada Law Journal* article was published by the Washington Post in April 2018.<sup>16</sup> Noting that college and university students, faculty, and staff are just as prone to implicit bias as the rest of us, Ben Trachtenberg cites a study where professors received emails from students with unsolicited requests for advice. The emails were identical but some were from individuals with traditionally "black names" and others from those

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<sup>14</sup> "Five Things You Need to Know About the Harvard Admissions Lawsuit," Delando R. Franklin and Samuel W. Zwickel, *The Harvard Crimson*, Sept. 4, 2018.

<sup>15</sup> Ben Trachtenberg, "How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students," Nevada Law Journal, 18 Nev. L.J. 107 (Fall 2017).

<sup>16</sup> Ben Trachtenberg, "Racial Bias in Campus Discipline: When Will Universities Look in the Mirror?" *The Washington Post*, April 22, 2018 (citing Katherine L. Milkman, Modupe Akinola, and Dolly Chugh "What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway Into Organizations," *Journal of Applied Psychology*, 2015, Vol. 100, No. 6, 1678–1712 available at <https://www.apa.org/pubs/journals/releases/apl-0000022.pdf>).



with traditionally “white names.” The professors were much more likely to respond to the messages when they believed they were from white students than from those of other races.

The study from the Journal of Applied Psychology cited in The Washington Post article discusses the difference between discrimination at the “Gateway” versus in the “Pathways.” “Gateways” are defined entry points into valued organizations, such as admissions and hiring. “Pathways” are more complex; they involve informal and tacit environmental factors along the way, such as mentoring, assignments and the like. The authors of the study hypothesize that when women and minorities experience discrimination (intentional or implicit) along the Pathways to success in academia, they may be deterred from entering the pool of applicants for doctoral programs. Without going into further detail of this very lengthy study, it suffices to say that the effects of implicit bias can be significant not only at the defined points that are more prevalently examined (the Gateways), but also in the critical points of Pathways, which can be more complex to diagnose and address.

## **V. LESSON POINTS FOR COLLEGE AND UNIVERSITY COUNSEL**

Implicit bias is no doubt on the minds of college and university attorneys. Beyond the legal risks and discriminatory effects, implicit bias can diminish decision making to the point of eroding a university’s culture. The advice and counsel of the college and university attorney is an integral part of reinforcing culture through leadership and accountability.

### **A. Slow Down and Be Mindful**

Implicit bias can be curbed by slowing down and being mindful.<sup>17</sup> Mindfulness is the process of being present and aware. The brain makes decisions in one of two modes: System 1 is quick, unconscious, instinctive, automatic, and emotional; System 2 is slower, conscious, more logical, and deliberative.<sup>18</sup> Surprisingly, the brain tends to rely on autopilot System 1 thinking for most decisions.<sup>19</sup> In order to maximize efficiency and enhance performance, System 1 thinking dominates decision-making. Generally, System 1 thinking is essential and very productive; however, it has bias. In situations that need more attention, before providing legal advice and guidance, slow down and take sufficient time to analyze or reflect. The best approach is finding the right balance between System 1 and System 2 thinking.

### **B. Counter-stereotypes Keep Blind Spots in Check**

Although our implicit biases are shaped by years of experiences, in *Blindspot: Hidden Biases of Good People*, authors Mahzarin R. Banaji and Anthony G. Greenwald describe several research studies that successfully improved results on the IAT by exposing test takers to counter-

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<sup>17</sup> “Mindfulness Mitigates Biases You May Not Know You Have,” Nicole Torres, *Harvard Business Review*, December 24, 2014, available at <https://hbr.org/2014/12/mindfulness-mitigates-biases-you-may-not-know-you-have>.

<sup>18</sup> Daniel Kahneman, *Thinking, Fast and Slow* (2011).

<sup>19</sup> “Why You’re Pretty Much Unconscious All the Time,” Jeffrey Kluger, *Time Magazine*, June 26, 2015, available at <http://time.com/3937351/consciousness-unconsciousness-brain/>.

stereotypes. In one simple exercise, IAT test takers were asked to visualize a strong woman and identify specific traits they perceived as strong. The exercise noticeably weakened an IAT-measured stereotype that Male = Strong. This suggests that implicit biases can be immediately weakened; however, long-term effects are yet to be determined. Nevertheless, the results of these experiments are promising and demonstrate that simple processes can modify implicit attitudes and stereotypes.

### C. Debiasing Processes to Prevent Systemic Bias

It is important to recognize one's own contributions to a university's culture and apply best practices to mitigate creating systemic bias. Systemic bias is conscious or unconscious bias that is institutionalized through policies, practices, and culture.<sup>20</sup> At the institutional level, when examining institutional risk and systemic bias, prioritize the work based on processes and policies that are more likely to result in a disparate impact or discrimination. Once risk areas have been identified, collaborate with institutional leaders and appropriate stakeholders. The specific stakeholders will depend on the organizational structure of the institution. At minimum, implicit bias training should be provided to staff with decision making authority for student and employee matters. Processes related to hiring, admissions, discipline, grading, evaluations, and terms of employment should be reviewed to ensure that they are standardized and objective. Finally, policies and procedures should be consistently applied and enforced.

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<sup>20</sup> Mark Kaplan & Mason Donovan, *The Inclusion Dividend: Why Investing in Diversity & Inclusion Pays Off* (2013).

## VI. DUAL PROCESS THINKING AND IMPLICIT BIAS

System 1	System 2
<p>Characteristics:</p> <ul style="list-style-type: none"><li>• Fast</li><li>• Intuitive</li><li>• Effortless</li><li>• Unconscious</li><li>• Emotion</li><li>• Autopilot</li><li>• Reactive</li><li>• 95% of decisions made in this system</li></ul>	<p>Characteristics:</p> <ul style="list-style-type: none"><li>• Slower</li><li>• Analytical</li><li>• Reflective</li><li>• 5% of decisions made in this system</li></ul>
<p>Advantages:</p> <ul style="list-style-type: none"><li>• Efficient</li><li>• Productive</li><li>• Short-cuts</li></ul>	<p>Advantages:</p> <ul style="list-style-type: none"><li>• Better for higher difficulty tasks</li><li>• Less influence of bias</li></ul>
<p>Disadvantages:</p> <ul style="list-style-type: none"><li>• Not always appropriate</li><li>• Has bias</li><li>• Emotional</li><li>• Susceptible to higher error rate</li></ul>	<p>Disadvantages:</p> <ul style="list-style-type: none"><li>• Slower</li><li>• Not efficient for basic tasks</li></ul>
<p>Suggestions:</p> <ul style="list-style-type: none"><li>• Recognize when System 2 thinking is needed and slow down for important or complicated decisions.</li></ul>	<p>Suggestions:</p> <ul style="list-style-type: none"><li>• Practice techniques that engage System 2 thinking such as mindfulness.</li><li>• Develop processes that include others to create a checks and balance on decisions (i.e. hiring committees).</li><li>• Use objective criteria and standard processes when appropriate.</li></ul>

Daniel Kahneman, Thinking, Fast and Slow (2011).