

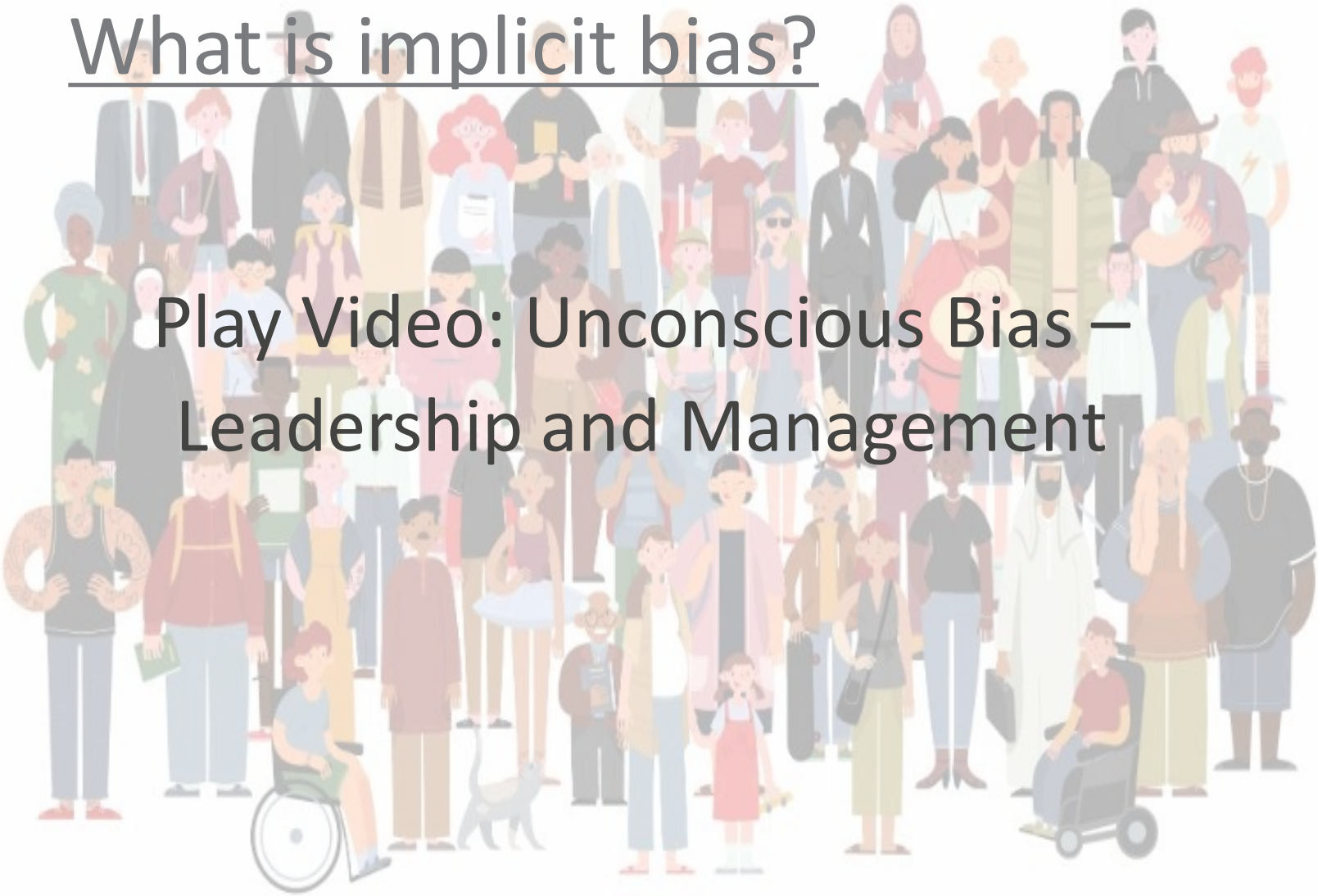
Implicit Bias: Use in Courts

Office of the City Attorney

Agenda

- Define implicit bias
- How courts are ruling
- Tips for confronting implicit bias testimony and training

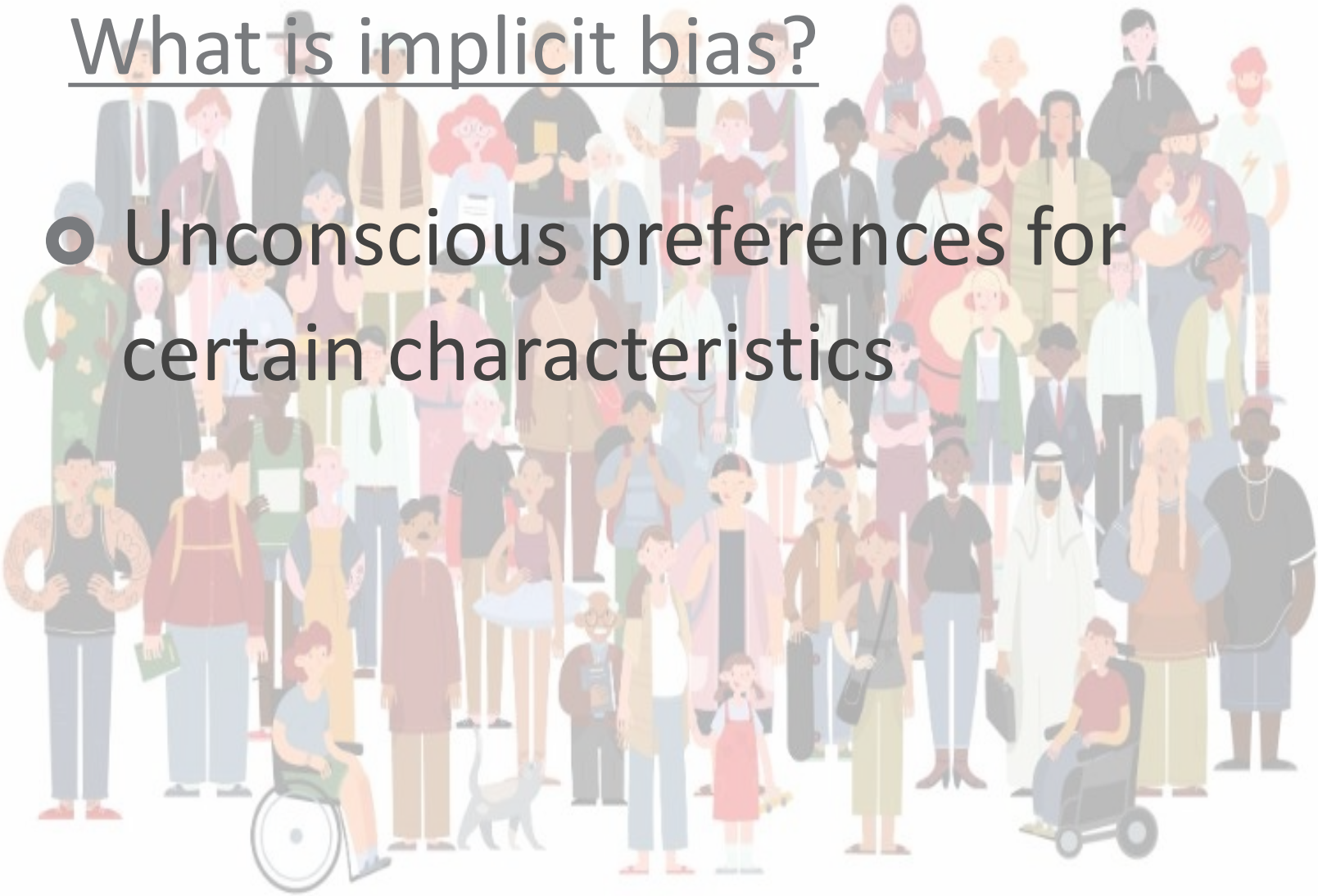
What is implicit bias?



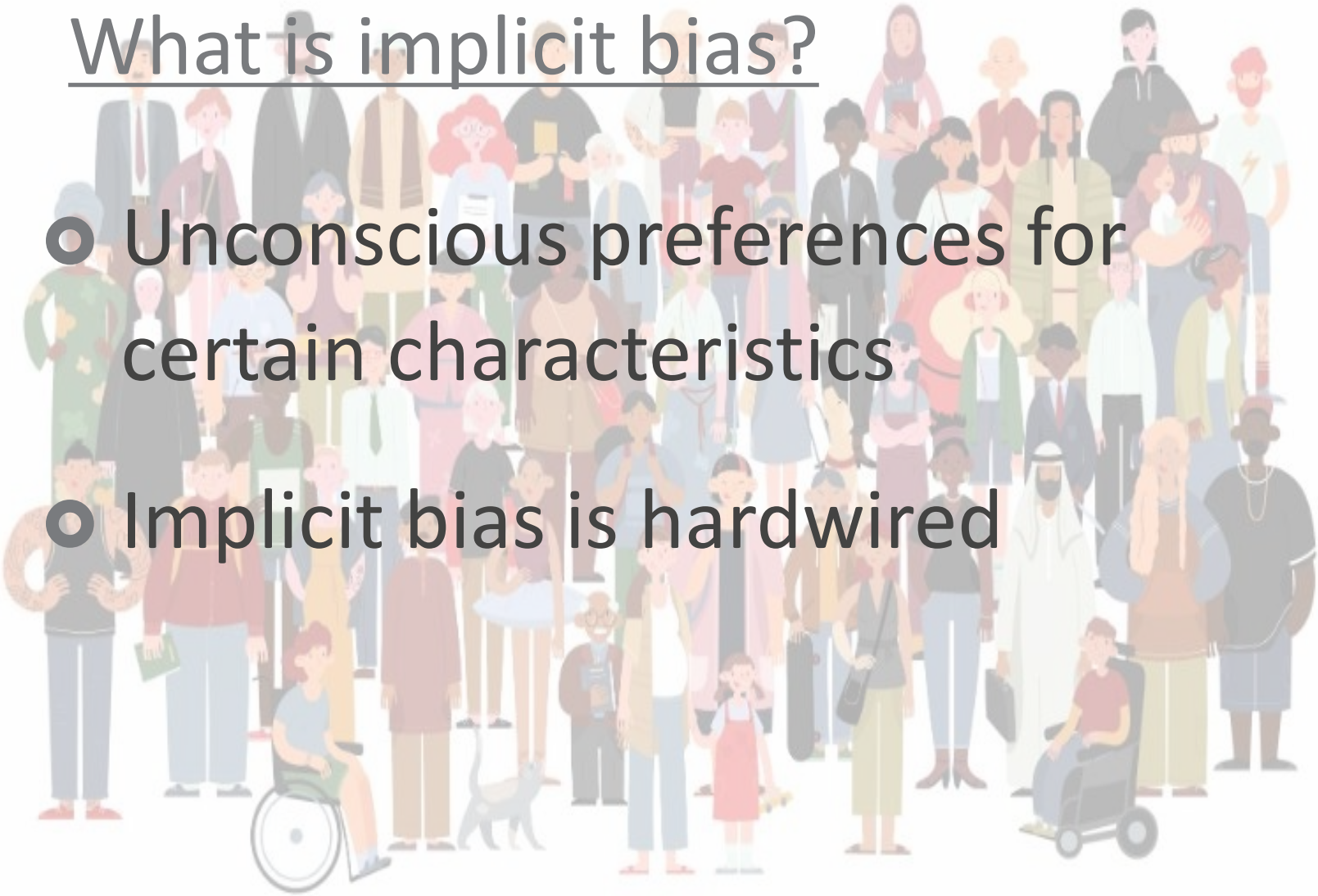
Play Video: Unconscious Bias – Leadership and Management

What is implicit bias?

- Unconscious preferences for certain characteristics

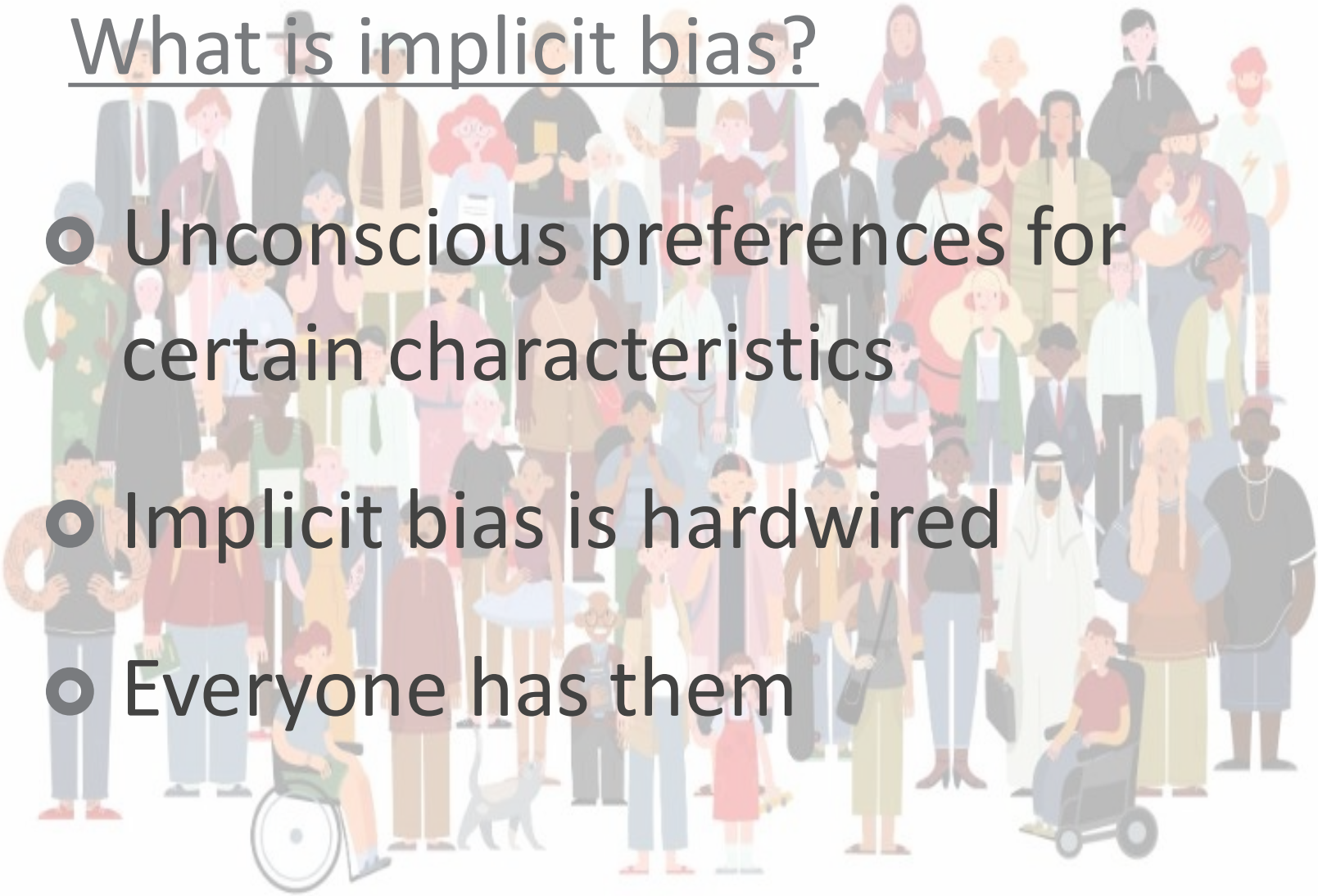


What is implicit bias?



- Unconscious preferences for certain characteristics
- Implicit bias is hardwired

What is implicit bias?



- Unconscious preferences for certain characteristics
- Implicit bias is hardwired
- Everyone has them

Implicit Association Test (IAT)





Good	Glorious, Cheer, Friendship, Excellent, Attractive, Fantastic, Magnificent, Happy
Bad	Failure, Gross, Yucky, Selfish, Tragic, Rotten, Horrific, Hate

Implicit Association Test (IAT)

Press "E" for

Bad

or

White people

Press "I" for

Good

or

Black people

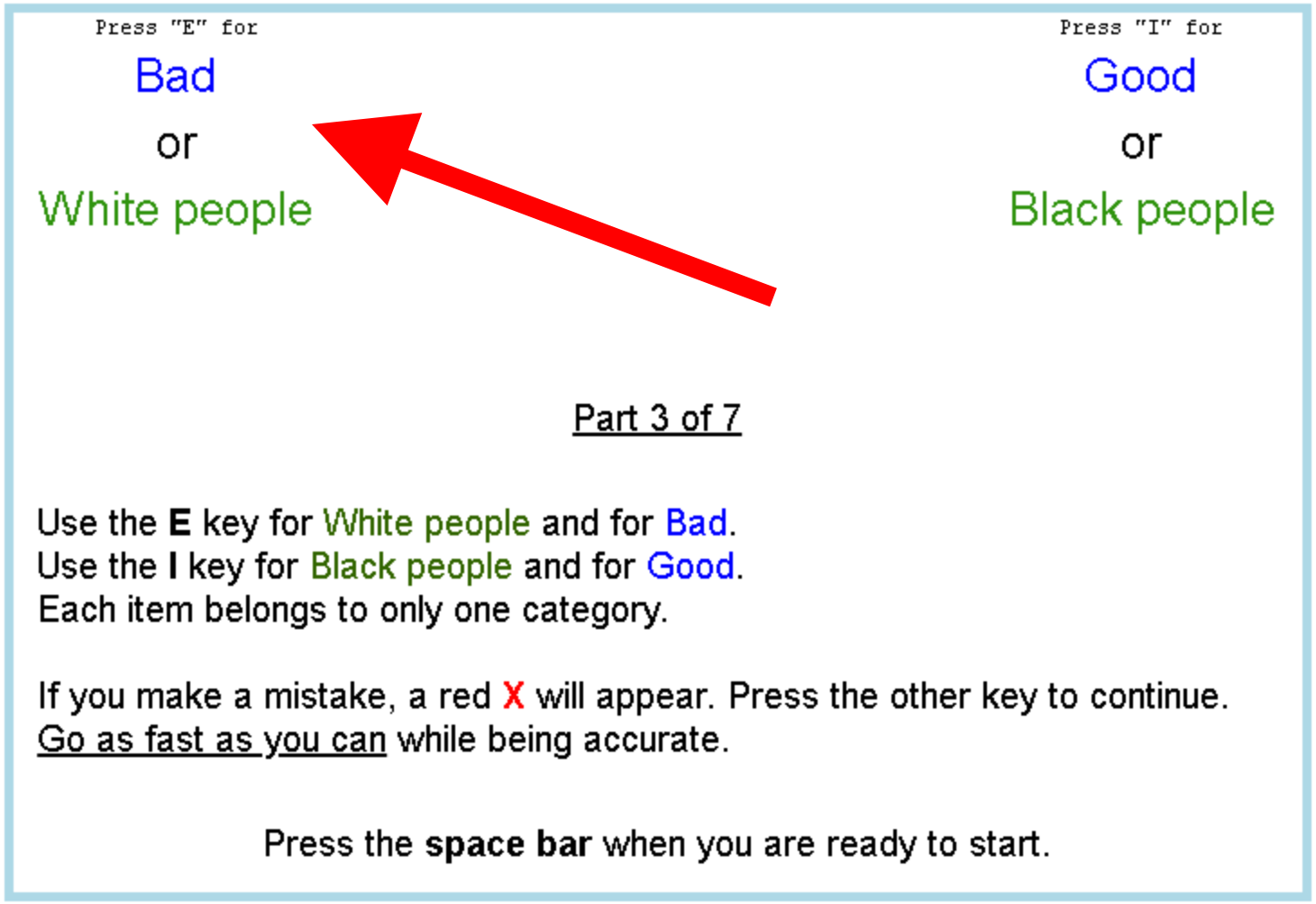
Part 3 of 7

Use the **E** key for White people and for Bad.
Use the **I** key for Black people and for Good.
Each item belongs to only one category.

If you make a mistake, a red **X** will appear. Press the other key to continue.
Go as fast as you can while being accurate.

Press the **space bar** when you are ready to start.

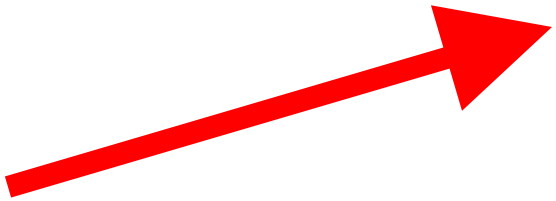
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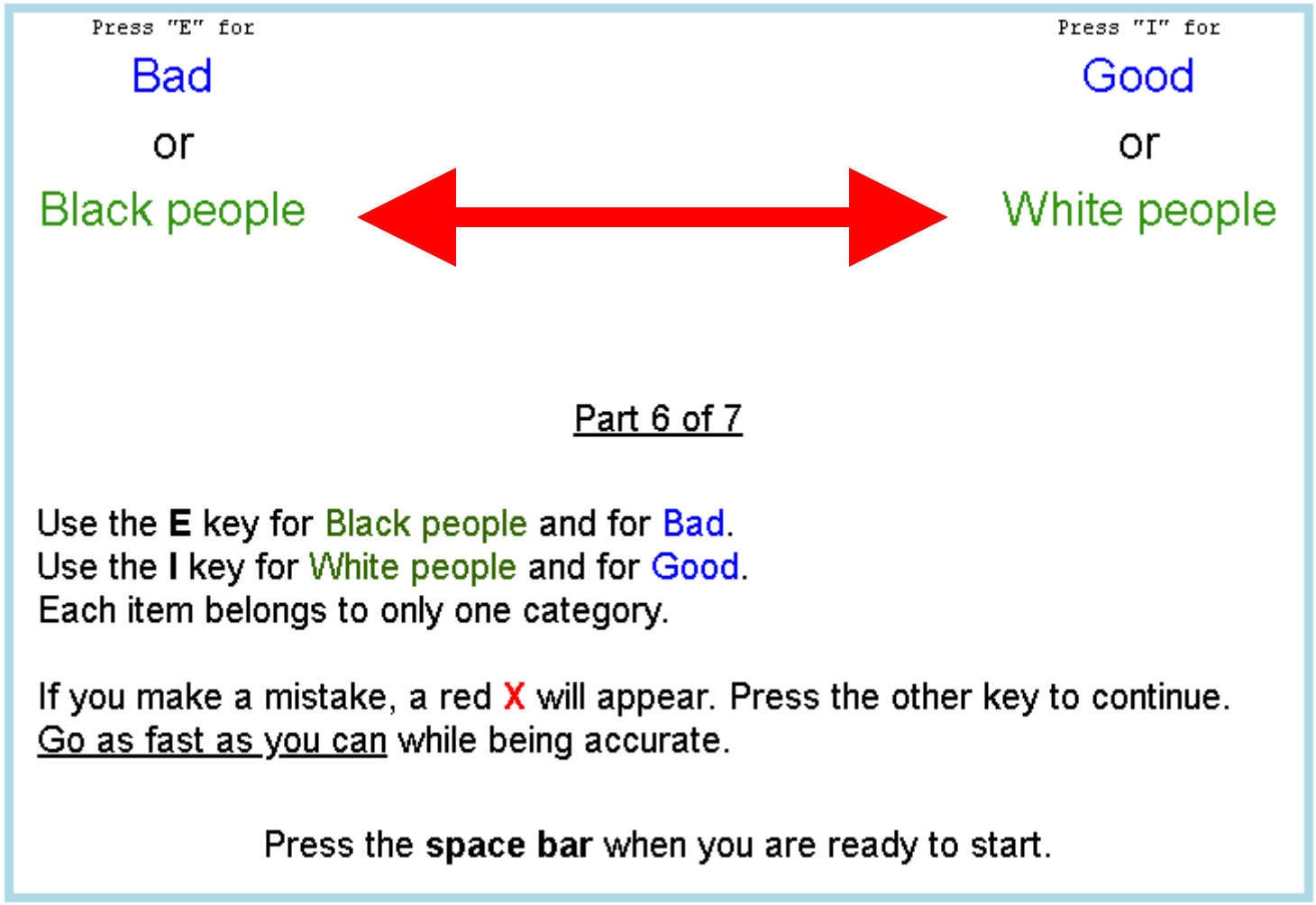
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Reliability: instrument gives same results each time; consistent; dependable

Implicit Association Test (IAT)

Reliability: instrument gives same results each time; consistent; dependable

Validity: how accurately a study answers the question or conclusion

How plaintiffs use it

"[Implicit bias] is now established as signaling discriminatory behavior. It predicts discriminatory behavior…."

--Anthony Greenwald and Mahzarin Banaji

Courts tacitly approve

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

- Stereotyping evidence allowed
- "merely icing"

Courts tacitly approve

Thomas v. Eastman Kodak, 183 F.3d 38 (1st Cir. 1999)

Race discrimination can be based on "unthinking stereotypes or bias"

Courts tacitly approve

Green v. USX Corp., 843 F.2d 1511 (3d Cir. 1988)

Congress could not have intended "to allow unarticulated biases or unconscious prejudices to result in discriminatory hiring practices"

Wal-Mart v. Dukes

- Class certification



Wal-Mart v. Dukes

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- "social science research" showed "strong corporate culture" was "vulnerable" to "gender bias"

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- Doesn't show commonality because "could not calculate whether 0.5 percent or 95 percent" of decisions were influenced by stereotypes

Wal-Mart v. Dukes

- Class certification
- "social science research" showed "strong corporate culture" was "vulnerable" to "gender bias"
- Doesn't show commonality because "could not calculate whether 0.5 percent or 95 percent" of decisions were influenced by stereotypes
- Class cert denied on commonality

Some courts have allowed implicit bias expert testimony…



Samaha v. Wash. DOT

- Dr. Anthony Greenwald
  - 70% of Americans are implicitly biased
  - Implicit bias is prevalent in employment context
  - Significant majorities of Americans prefer European-Americans over Arab ethnicities

Samaha v. Wash. DOT

- Defendants moved to keep it out
  - Not fact-specific as required under FRE 702
  - No support that implicit bias played a role in decisions at issue
  - Implicit bias doesn't make existence of intentional discrimination more or less likely (relevance)

Samaha v. Wash. DOT

- Validity and reliability of the IAT unchallenged
- Does not apply the "traditional" test of FRE 702 requiring that principles and methods is applied to the "facts of the case"
- Applies Advisory Committee Notes test of general education

Samaha v. Wash. DOT

"[I]t might also be important in some cases for an expert to educate the factfinder about general principles without ever attempting to apply these principles to the specific facts of the case."

- Blood clotting
- Thermodynamics
- How financial markets respond to corporate reports

Samaha v. Wash. DOT

Court finds:

- Greenwald qualified (unchallenged)
- Reliable methodologies (unchallenged)
- "Testimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee."

Martin v. FE Moran

- Allowed opinions on "general psychological principles" to help "contextualize the other evidence"
- Distinguished Dukes as class cert
- BUT: could not testify that adverse employment actions were caused by implicit bias – only that implicit bias existed at defendant

Martin v. FE Moran

- Defined implicit bias
- "Remarkably" resistant to change
- Workplace "contained racial stereotypes"
- "Corporate culture…fosters implicit bias"
- "Decision-making process susceptible to the influence of implicit bias"

Martin v. FE Moran

- "Goes to motive and whether [implicit bias] may have tainted the adverse employment decision"
- Implicit bias could have affected decisions but did not show it did
- Corporate culture cannot be imputed to decision makers
- Failed to tie "implicit bias to the individual circumstances"

Approving implicit bias

- Salami v. Von Maur, Inc., 881 N.W.2d 470 (Iowa 2016)

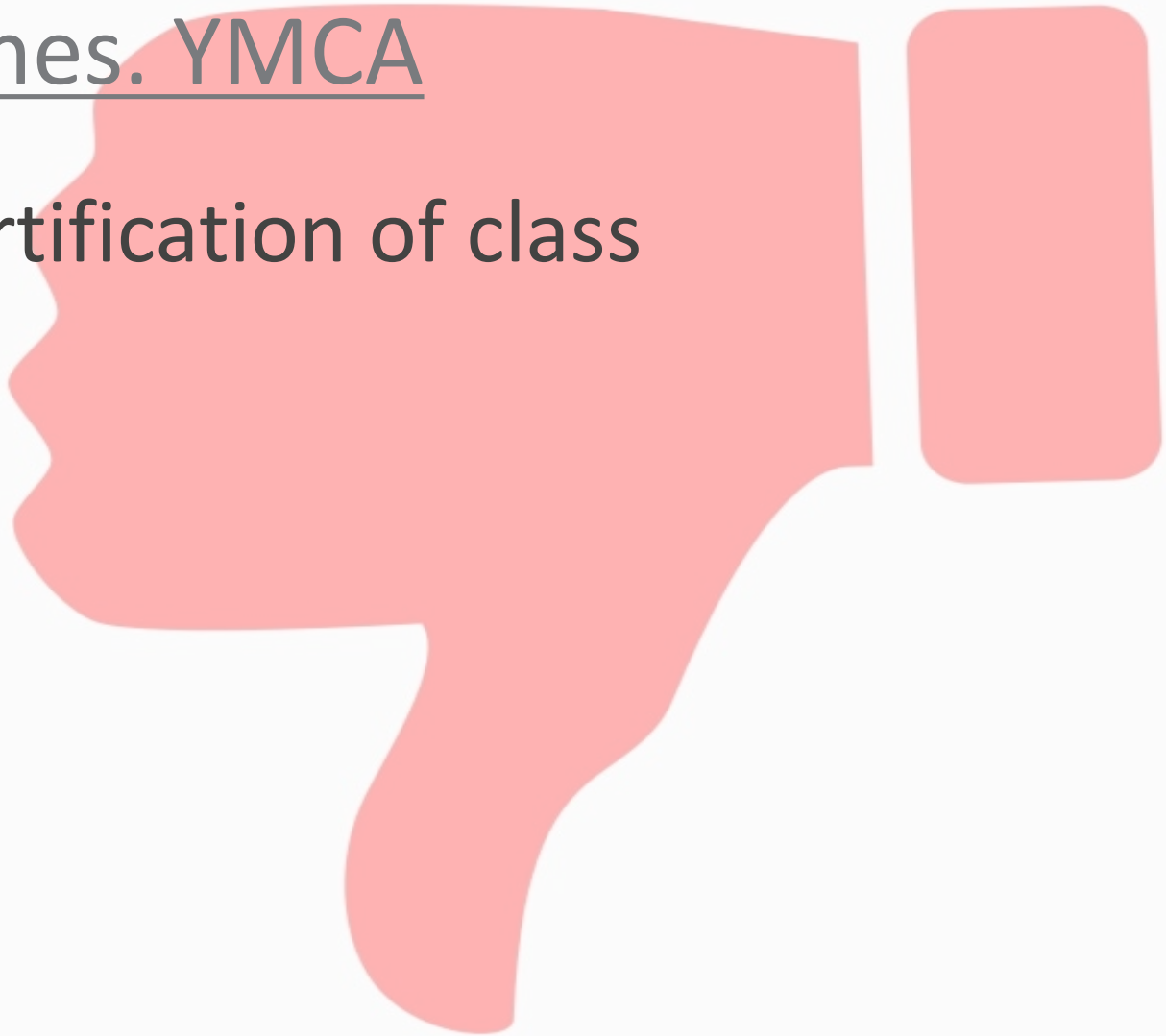
- Kimble v. Wisc. Dep't of Workforce Dev, 690 F.Supp.2d 765 (E.D. Wisc. 2010)



But some courts are rejecting implicit bias expert testimony…

Jones. YMCA

- Certification of class



Jones. YMCA

- Certification of class
- Dr. Anthony Greenwald
  - Define implicit bias
  - 70% of Americans favor whites over blacks
  - Can cause “adverse impact”
  - Manifests in subjective criteria

Jones. YMCA

- Defendants moved to keep it out
  - Opinions not reliable or relevant
  - Hadn't considered the facts of this case or workplace
  - Laboratory expertise didn't extend to "complex environment" of the workplace
  - Offered competing expert

Jones. YMCA

- Magistrate recommends:
  - Failed to do factual investigation of this employer
  - Rejects "general education" test because cannot show IAT translates to workplace and cannot measure intent a manager uses in making employment decisions

Jones. YMCA

- Court finds:
  - Adopts recommendation
  - Plaintiffs trying to “backdoor” causation with testimony
  - Rejects that laboratory experiment can apply to workplace where employers bound by policy and law

Karlo v. Pitt. Glass Works

- Dr. Anthony Greenwald
  - Implicit bias is pervasive
  - 80% have implicit bias on age
  - Implicit bias is a source of discrimination in employment

Karlo v. Pitt. Glass Works

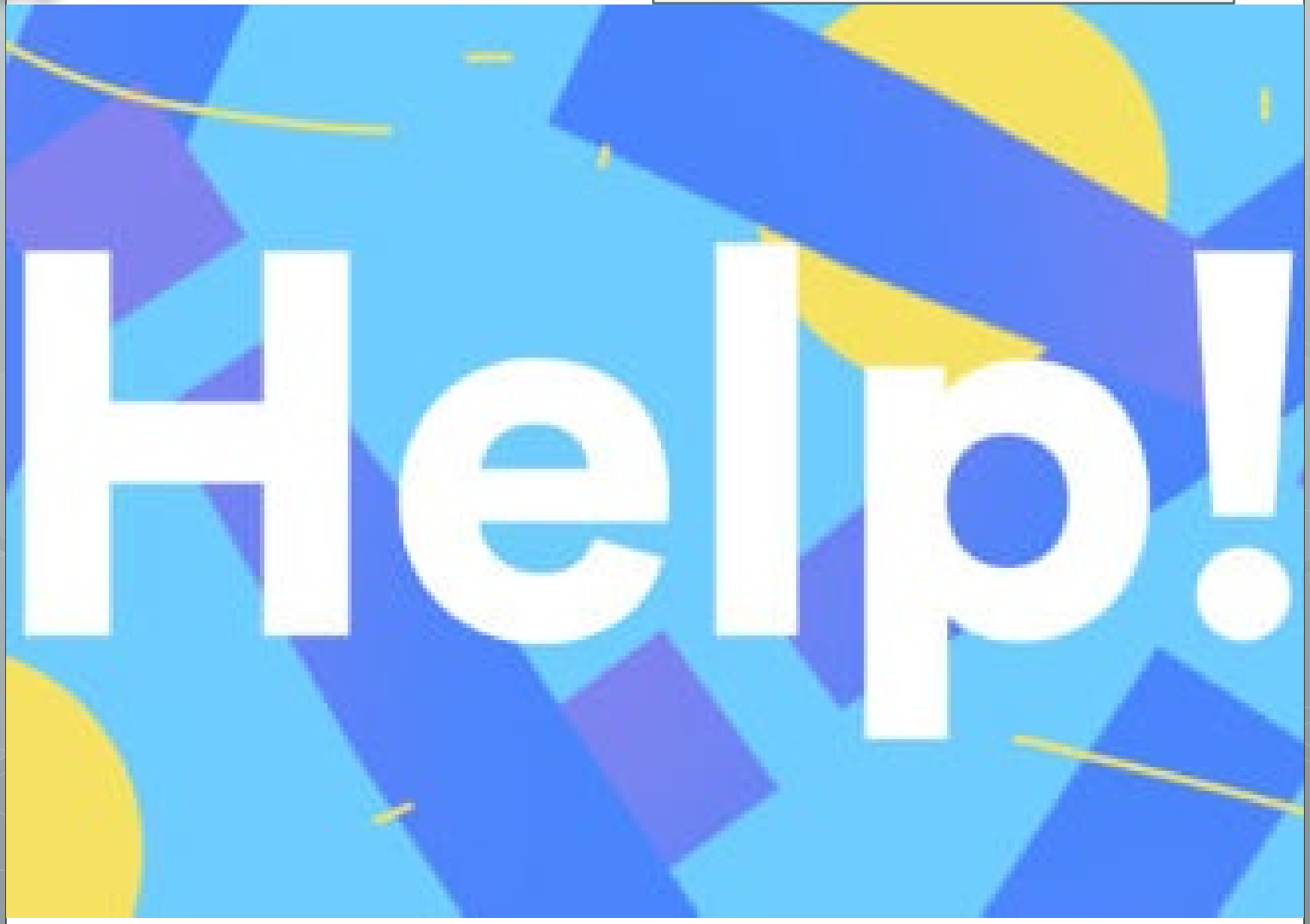
- Dr. Anthony Greenwald
  - Implicit bias is pervasive
  - 80% have implicit bias on age
  - Implicit bias is a source of discrimination in employment
- Defendants move to strike on reliability and application to facts of the case

Karlo v. Pitt. Glass Works

- Court finds:
  - No application of theory to facts
  - Attacks validity of IAT: not representative of population (or of defendant)
  - Applied "motivating" factor, not "but for" cause of ADEA
  - Intentional discrimination incompatible with implicit bias

And more!!

- Johnson v. Seattle Pub. Utils.
- White v. BNSF
- Benson Cooper v. KSHB-TV
- Jackson v. Scripps Media
- Haydar v. Amazon
- Pippen v. State
- Maciel v. Thomas J. Hastings


Help!

Handling IB Testimony

- Mount a challenge!!
- Does IB fit the case theory?
- Get an expert
- Beware the “analytical gap”
- Attack the IAT
- IAT isn’t the workplace

Handling IB Testimony

- Watch for causation in disguise
- Don't forget other objections
  - FRE 401
  - FRE 403
  - FRE 404
- DO NOT LET THEM TEST YOUR DECISION MAKERS

Advising Your Client

Implicit bias training is exp$ive

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Advising Your Client

Non-monetary costs

"(a) **loss of trust** among employees and management due to increased suspicion that bias contaminates decisions and due to stigmatizing managers and employees as persons likely to engage in discrimination, (b) more **impersonal and uncomfortable interactions** among members of different groups, and (c) compensatory measures aimed at **promoting particular groups at the expense of merit**-based decision-making."

Gregory Mitchell, *An Implicit Bias Primer*, 25 Va. J. Soc. Pol'y & L. at 54-55.

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Advising Your Client

Implicit biases won't change

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Advising Your Client

If you do train, don't test!

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Advising Your Client

1. Set and uniformly apply criteria
2. Decrease subjective decisions
3. Define subjectivity when it is necessary


QUESTIONS