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GENDER NONCONFORMING EXPRESSION AND BINARY THINKING: UNDERSTANDING HOW IMPLICIT BIAS BECOMES EXPLICIT IN THE LEGAL SYSTEM, CONSIDERING THE SHOOTING DEATH OF PHILANDO CASTILE

By Patrick C. Brayer*

INTRODUCTION

While lawyers and activists fighting for transgender rights have been temporarily halted in their efforts, theorists, poets, and artists are taking the lead in advancing the conversation about gender fluidity and the plight of people with non-binary gender identities.¹ This essay is about what practitioners who combat implicit bias in the legal profession can learn from artists and thinkers on the cutting edge of gender-nonconforming expression. Understanding how individuals stigmatize, and at times discriminate against, people who are gender fluid by limited and binary thinking is an important progression in comprehending how implicit bias (specifically against people of color) becomes explicit and influences legal actors including law enforcement, jurists, and jurors.

Our country imposes strong societal norms on how individuals should express their gender identity. As a people we are dominated by a cultural belief system that demands gender expression be separated by a strict binary boundary that clearly delineates femininity and masculinity.² When individuals defy these social norms gender expression becomes fluid and nonconforming. Individuals who are gender nonconforming resist “pressure to engage in gender-stereotypical appearance and behaviors and are sanctioned when they do not.”³

In May 2017, the President of the American Bar Association (ABA) affirmed the legal profession must contain “voices capable of speaking on behalf of those marginalized for their gender.”⁴ Artists who protest this type of marginalization can educate lawyers and judges on how to challenge all forms of bias and discrimination. The evolving mission of the ABA is to foster an “understanding and respect for transgender and gender-nonconforming people,” assuring the “legal system is better prepared to handle the needs of these clients.”⁵ Conversely, it is the transgender and gender nonconforming client, and the artists who protests on their behalf, who will educate the profession in ways yet imagined. The tragic shooting of Philando Castile demonstrates how the gender protest can inform the legal profession as to why implicit bias against people of color can become explicitly deadly in a matter of moments.

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¹ See, e.g., McGraw *infra* note 41.

² Bianca D.M. Wilson et al., *Characteristics and Mental Health of Gender Nonconforming Adolescents in California*, The Williams Institute and UCLA Center for Health Policy Research (2017).

³ *Id.*

⁴ Brief of American Bar Association, *infra* note 25, at 7.

⁵ *Id.* at 28.

In the past year, artists who created works protesting the persecution of people identifying outside the male/female gender binary informed my trial practice greatly.⁶ This protest revealed how society “makes deviant” human expressions of gender that exist beyond the binary (of female or male) and present on complex and unclassifiable spectrums.⁷ As I viewed the work and listened to the thoughts of one artist— -who used an “outlaw” perspective to expose the branding of deviance⁸—I was reminded how many of my clients are similarly categorized by a binary of race (respectful or disrespectful), of poverty (good or bad) and of class (hardworking or lazy). I reflected on how many of my young African-American clients, who presented complex and nonconforming lifestyles, are labeled as criminals (or outlaws) because their circumstances were not understandable by a legal system influenced by both implicit and explicit biases, and by beliefs that embrace conformity. The artistic expression of a gender protest can inform trial attorneys and legal practitioners as we develop professional skills to combat binary thinking in ourselves and others.

First, I will outline the evolving political and legal landscape of our nation, which makes relevant and topical any discussion of how individuals conceptualize the gender binary of others. Next, I will explore how human beliefs about the gender binary and racial identity are connected and how protest art informs the understanding of that relationship. Additionally, I discuss a jury selection topic designed to detect race-based binary thinking by exposing juror expectations of how my client “should” act regardless of legality; similarly, the artists of the gender protest confront society’s expectation of how gender “should” present.

In writing this essay, I questioned whether gender nonconforming protest art could effectively inform practitioners as they confront the legal issues of the day. That said, is this essay an academic exercise or does the idea of implicit bias, evolving into binary thinking thus causing an action of legal consequence, have value as an analytical tool? Furthermore, is it of import to consider whether “should” thinking is evidence of a biased hidden belief system becoming explicit? As I reflect on conversations between investigators and police officer Jeronimo Yanez, recorded the day after he fatally shot Philando Castile in July of 2016,⁹ I become more convinced of this model’s significance. In June of 2017, Yanez was acquitted and soon after, his transcribed conversations with investigators were released, lending insight into how implicit bias and binary thinking by law enforcement can lead to deadly results.¹⁰ Throughout this essay, portions of Yanez’s statement and statements from media coverage are used to illustrate how implicit bias becomes explicit and how binary thinking reduces an individual’s identity to either good or bad. Why was Castile’s humanity reduced to the binary of lawful versus lawless thus framing him as dangerous in the mind of Yanez? Freestanding quotations placed throughout this piece

⁶ See, Saint Louisan, “HOLLY MCGRAW| MFA16,” YouTube, published May 17, 2016, https://www.youtube.com/watch?v=3dWbREX_cBw.

⁷ *Id.*

⁸ *Id.* (McGraw presents gender fluid models wearing traditional symbols of the outlaw like the bandana or hockey mask).

⁹ Mark Berman, *What the police officer who shot Philando Castile said about the shooting*, WASH. POST, (June 21, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/?utm_term=.f2bf0d75e409.

¹⁰ *Id.*

demonstrate how the Yanez case is relevant to the themes of the essay but read independently from the surrounding text.

I. 2016-2017 Years of Tragedy, Disappointments, and Protest

In 2017, advocates for the progressive gender identity movement experienced a number of setbacks in eliminating laws, policies, and regulations negatively impacting people who are transgender, gender fluid, and non-binary. On March 6, 2017, the United States Supreme Court reversed an earlier order by vacating a Fourth Circuit decision¹¹ that was in favor of a Virginia transgender high school student seeking to use a school bathroom consistent with his gender identity, sending the case back to the lower court for further consideration.¹² The Court's action diminished the likelihood Justices would consider the issue of transgender rights in that or this current term, thus delaying the prospect of recognizing constitutional rights for people who are transgender.¹³ Lessening the probability of the Court granting relief, the Trump administration withdrew guidance previously established by the Obama administration's Department of Education, declaring any treatment of students inconsistent with their gender identity a violation of Title IX's¹⁴ ban on discrimination in schools that receive federal funding.¹⁵ Title IX was enacted to prevent discrimination, the denial of participation or the denial of benefits based on sex by institutions that receive federal funding for educational programs.¹⁶ As recent as February of 2018 the Department of Education announced, the separation of restrooms and locker rooms on the basis of sex is not a violation of Title IV and the Department would no longer take complaints from transgender students seeking to use accommodations that corresponds to their gender identity.¹⁷

The efforts of gender identity advocates were also weakened in April of 2017 when the Trump administration's Department of Justice filed a notice of dismissal of a law suit (filed under the previous administration) against North Carolina as a response to the state's repeal of a provision under House Bill 2. "North Carolina's bathroom bill, also known as House Bill 2 or HB 2, was signed [in 2016] and immediately set off a firestorm because of its transgender bathroom provisions and language reversing local ordinances expanding protections for LGBT people."¹⁸ "In May 2016, the federal government stepped in, [filing a lawsuit](#) that said the bill discriminated against transgender people and violated the federal civil rights statutes."¹⁹ The original provision in the bill required transgender individuals to use public restrooms consistent with the sex on their birth certificate.²⁰ Critics of the Department of Justice's actions cited North Carolina's replacement provision removing the restroom usage restriction but implementing a ban on cities

¹¹ *G. G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).

¹² Adam Liptak, *Supreme Court Won't Hear Major Case on Transgender Rights*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/us/politics/supreme-court-transgender-rights-case.html?_r=0.

¹³ *Id.*

¹⁴ Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et. seq. (Title IX).

¹⁵ Liptak, *supra* note 12.

¹⁶ *See*, Title IX, *supra* note 14.

¹⁷ Corey Turner & Anya Kamenetz, *The Education Department Says It Won't Act On Transgender Student Bathroom Access*, nprED (Feb. 12, 2018), <https://www.npr.org/sections/ed/2018/02/12/585181704/the-education-department-says-it-wont-act-on-transgender-student-bathroom-access>.

¹⁸ Mark Berman, *bill*, 15' WASH. POST (Apr. 14, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/04/14/justice-dept-drops-federal-lawsuit-over-north-carolinas-bathroom-bill/>.

¹⁹ *Id.*

²⁰ *Id.*

from passing their own anti-discrimination protections until 2020.²¹ On the political front, President Trump announced on July 26, 2017 his intentions to implement a ban on people who are transgender serving in the military.²² Reversing a previous decision by President Obama, the White House confirmed, President Trump believes that the open military service of transgender people “erodes military readiness and unit cohesion.”²³ 2017 proved to be a year of disappointments for progressive gender activists seeking relief from the President, Supreme Court, Department of Justice, Department of Education, and state legislatures.

In the wake of such political and legal setbacks, artists and theorists of the gender nonconforming (“outlaw”) protest movement²⁴ assumed a more significant role in addressing and altering public perceptions about gender fluidity and “traditional” binary thinking. Through their efforts, a new intellectual paradigm has emerged in the fight to eliminate all forms of explicit and implicit bias. By placing value in this paradigm, the legal profession will move closer toward the stated mission (as asserted in the May 2017 ABA brief supporting the Virginia transgender student) of, “fostering [] a bar better able to see past stereotypes.”²⁵

The Supreme Court’s consideration of the transgender student’s case was initiated by the Virginia school board’s filing of a July 13, 2016, application to recall and stay the original Fourth Circuit order.²⁶ One week before the filing of the application for stay, seemingly unrelated but arguably connected by the existence of bias, Philando Castile was shot and killed in a North Minneapolis suburb.²⁷ On July 6, 2016, Diamond Reynolds and her daughter were passengers in an automobile driven by her boyfriend, Philando Castile.²⁸ As Castile proceeded down Larpentuer Avenue in Falcon Heights, Minnesota, he was engaged in a traffic stop by St. Anthony, Minnesota police officer Jeronimo Yanez.²⁹ Reynolds reported Yanez shot Castile multiple times after Castile informed the officer he was in possession of a firearm and was in the process of producing his identification.³⁰ Castile died as a result of Yanez’s actions, and Reynold’s immediate reaction to the shooting was broadcast live on Facebook.³¹ Investigators found Castile was in possession of a 40-caliber handgun found in his pocket; “the gun had a loaded magazine, but no round chambered,” and a permit for the firearm in his wallet.³² Yanez told investigators he pulled Castile over because he matched the description, made days earlier, of a robbery suspect and Yanez smelled marijuana as he approached the automobile.³³ Dash-cam video of the shooting revealed Yanez ordering Castile not

²¹ *Id.*

²² Julie Hirschfeld Davis, Helene Cooper, *Trump Says Transgender People Will not be Allowed in the Military*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html>.

²³ *Id.*

²⁴ See Aoki, *infra* note 45 (“For me, being an outlaw, being a class of person that the law does not address, means thinking beyond oppressed and oppressor. Outlaws are more than victims or charity recipients. Because we exist outside the laws, we shed light on the arbitrariness of these very laws.”).

²⁵ Brief of American Bar Association as Amici Curiae Supporting Appellant G.G. at 28, *GG v. Gloucester Cty Sch. Bd.*, (No. 15-2056) (May 15, 2017), <http://pdfserver.amlaw.com/nlj/aba-brief-transgender-20170515.pdf>.

²⁶ Amy Howe, *Gloucester County School Board v. G.G.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/gloucester-county-school-board-v-g-g/>.

²⁷ Berman, *supra* note 9.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

to reach for the gun and Castile and Reynolds responding Castile was not reaching for a gun.³⁴ None of the video recordings captured Castile's movements inside the automobile.³⁵ Yanez is Hispanic, Castile was Black.³⁶ Yanez was subsequently charged with second-degree manslaughter and was acquitted on June 16, 2017.³⁷ Despite the verdict, the question remained: why did police officer Jeronimo Yanez, reportedly a respected, approachable, polite, award-winning, model student in law enforcement,³⁸ shoot seven times and kill Philando Castile, reportedly a warm, gentle, and adored Montessori Magnet school cafeteria manager,³⁹ on a relatively peaceful street in a North Minnesota suburb?

II. The Identity Binary Narrative

*“Under our Constitution, the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of...”*⁴⁰

Artist Holly McGraw's visual and performance protest depicts the “outlaw” nature of traditional identity defiance, specifically when individuals resist an established gender binary.⁴¹ The work confronts a “cultural climate” that stigmatizes gender fluidity by way of labeling the complex performance of identity as deviant.⁴² McGraw explains:

“Each role a person plays adds to their complexity. To have my identity reduced to just a female or just an artist would deny me of that complexity. The same concept applies to gender performance. No longer does one have to pass as one sex or another, or feel shame for their own identity. This idea is insulting to the gender spectrum.”⁴³

McGraw informs us how those who confronted with the “counter-culture” of uncertain identity “default to their understanding of gay/lesbian/pan culture as a coping mechanism.”⁴⁴ In the legal field, when a legal actor reduces a person's varied actions and desires to understandable components, the actor moves

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*; See generally Vedantam, *infra* note 50, at 72–73 (suggesting that in the field of implicit bias, research shows people of color are not immune from the “force of [a] cultural message” that identifies white individuals as having more positive character traits than black individuals).

³⁷ Berman, *supra* note 9.

³⁸ T. Rees Shapiro, *Minn. Police Officer Who Shot Philando Castile Was Model Student, Educator Says*, WASH. POST (July 10, 2016), https://www.washingtonpost.com/national/officer-who-shot-castile-was-model-student-educator-says/2016/07/10/0421e942-46cb-11e6-90a8-fb84201e0645_story.html?tid=a_inl&utm_term=.2f6df441f979; see also Nydailynews.com, *infra* note 49.

³⁹ Emma Brown, *‘He knew the kids and they loved him’: Minn. shooting victim was an adored school cafeteria manager*, WASH. POST (July 7, 2016), https://www.washingtonpost.com/news/education/wp/2016/07/07/he-knew-the-kids-and-they-loved-him-minnesota-shooting-victim-was-an-adored-school-cafeteria-manager/?tid=a_inl&utm_term=.9d7581cc6ad2.

⁴⁰ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring) (“Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.”).

⁴¹ Holly McGraw, *Shady Ladies: Femininity Across the Gender Spectrum*, at 3, WASH. UNIV. IN ST. LOUIS GRADUATE SCH. OF ART THESES (2016), http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1067&context=samfox_art_etds.

⁴² *Id.* at 3.

⁴³ *Id.* at 25.

⁴⁴ *Id.* at 13.

individuals outside of the law by “omission” and “exclusion,” thus becoming “outlaws by omission.”⁴⁵ Writer and poet Ryka Aoki noted how “in this sense, people of color, the poor, the differently abled, and women are outlaws by default.”⁴⁶ Furthermore, Aoki observes how Rosa Parks was a more relevant and effective outlaw than Jesse James “because she rode a bus.”⁴⁷ Arguably, persons are placed into “outlaw” status when, in the words of Justice Kennedy, the government ignores the “dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means.”⁴⁸

*“Less than 24 hours after the shooting, Gov. Mark Dayton declared that police likely wouldn’t have fired if Castile had been white. Dayton later said he stood by his statement, even though he angered some in law enforcement.”*⁴⁹

McGraw and Aoki’s compositions expand our understanding of how a person’s need for identity clarity in others is the explicit reductionist mechanism that brings implicit bias to life. Our brain wants to tell a story and rationalize why our implicit thoughts communicate people of color, or as in McGraw’s work people who resist a binary gender identity, are different.⁵⁰ Arguably, the recognition of a binary identity narrative is how we cope when confronted with the illogical hidden messaging of unconscious bias against human beings who present or perform as different. Artists and activists are creating works and performances that weaken “bipolar ideologies” and advance the social justice message of identity expression.⁵¹ Specifically, McGraw captures the complexity of the gender fluid model, as they wear the stereotypical garb of the “outlaw,” thus confronting the stereotypical belief system of the viewer.⁵² Identity complexity is the tool that subverts the use of the binary.⁵³ However, such a presentation of complexity in a legal arena is fraught with danger when the coping mechanism of the legal actor—the judge, juror, prosecutor, or any legal professional—initially defaults to equating a complex identity to an “outlaw act” or “practice.”⁵⁴ In short, we criminalize what we cannot define or categorize, and the binary of identity recognition, unfortunately, has failed to evolve (for many) beyond understandable versus criminal.

⁴⁵Ryka Aoki, *On Living Well and Coming Free*, GENDER OUTLAWS THE NEXT GENERATION, 143, 145–46 (Kate Bornstien & S. Bear Bergman ed.) (2010).

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Parents Involved*, 127 S. Ct. at 2797.

⁴⁹*Jeronimo Yanez, Minnesota cop who killed Philando Castile, was reacting to ‘presence of a gun,’ not his race: lawyer*, Nydailynews.com (July 9, 2016), <http://www.nydailynews.com/news/national/minn-shot-philando-castile-reacted-presence-gun-article-1.2705548>.

⁵⁰ SHANKAR VEDANTAM, THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVES OUR LIVES 72 (2010); *see also* McGraw, *supra* note 41, at 3.

⁵¹Esme Rodriguez, *Glitter, Glitter, on the Wall, Who’s the Queerest of them All?*, GENDER OUTLAWS THE NEXT GENERATION, *supra* note 45, at 163, 168, and 291.

⁵² Saint Louisan, “HOLLY MCGRAW | MFA16,” YouTube, published May 17, 2016, https://www.youtube.com/watch?v=3dWbREX_cBw.

⁵³ *See* McGraw, *supra* note 41, at 25.

⁵⁴ *Id.* at 3 and 5.

*“The officer told investigators later that the marijuana smell remained in his mind, saying that because of the odor, he didn’t know whether Castile had the gun “for protection” from a drug dealer or people trying to rob him.”*⁵⁵

When confronted with new information about race, human beings select a racial identity status that helps protect their ego, influencing how they interact with people from a race different from theirs.⁵⁶ The adoption of either a relatively mature or immature racial identity status helps the individual protect their “sense of well-being or self-esteem.”⁵⁷ Individuals will develop “new schemata and behaviors” when they are unable to cope with new information about race.⁵⁸ This information can lead to the development of a new and more mature racial identity status.⁵⁹ Unfortunately, in the context of a legal proceeding, it is just as likely the new information that challenges a person’s racial belief system will initially force the legal actor to revert to the (either/or) reductionist binary of understandable versus “outlaw.”⁶⁰ It is my belief when an individual has a less mature identity status they will expect that people of color are either good or bad (law-abiding or criminal) in the same way many individuals expect that all people must present as male or female. What I learned from the gender protest was if a person is not definable but complex, or different in identity or lifestyle, many will default to characterizing them as criminal, bad, disrespectful, and “outlaw.”

*“I just knew it was dark, and I could barely see, and I thought it was a firearm, and I thought he was gonna shoot and kill me and I thought he was gonna shoot and kill my partner right after that.”*⁶¹ - Jeronimo Yanez

The existence of the binary default narrative in the mind of a person, who confronts others of different or undefined identities, including different races, cultures, religions, national origins, sexual orientations, and uncertain gender expressions, is confirmed by analyzing studies on group diversity.⁶² Research shows when diverse groups first come together they experience a lack of “cohesion” and “morale” with some participants attempting to drop out or leave.⁶³ However, once group members learn to work together the impact of diversity on morale diminishes over time, and the group becomes more creative and performs better than homogeneous groups.⁶⁴ Specifically, “[w]hites demonstrated more complex thinking when assigned to a diverse group than when assigned to an all-white group.”⁶⁵ Pertinent to the impact on the legal profession, researchers found diverse juries performed the same as diverse groups. “[T]hey deliberated longer and discussed more information, diverse groups made fewer factual

⁵⁵ Berman, *supra* note 9.

⁵⁶ See Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL’Y 133, 166–67 (2004).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See McGraw, *supra* note 41, at 3.

⁶¹ Berman, *supra* note 9.

⁶² See generally Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberation*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006).

⁶³ *Id.* at 598.

⁶⁴ *Id.*

⁶⁵ *Id.* at 598.

errors than all-white groups. Moreover, inaccuracies were more likely to be corrected in diverse groups.”⁶⁶

The initial conflict that presents when diverse groups first come together is evidence of how the mind first copes with difference. It is my belief, low group moral, lack of group cohesion and individuals wanting to leave a newly formed diverse group are all examples of how our human mind will first resist the intake of new information from individuals who identify differently from us. To cope with this new information, implicit bias initially moves the brain to the false binary identity narrative of stereotype, for example, how: a “good” person of color identifies versus a stereotypical bad person of color; an identifiable woman versus a stereotypical unidentifiable gender “outlaw;” or a hardworking immigrant versus a stereotypical dangerous immigrant.⁶⁷ Arguably, the more immature the identity status of the actor, the more strict, stereotypical, and binary their identity narrative becomes when confronting others who present differently. Exposing a person to impactful diverse interactions causes a necessary challenge to the simplicity of the identity binary, forcing the individual into a creative conflict with their implicit beliefs.⁶⁸ In my opinion, this creative conflict explains the phenomena of low morale and lack of cohesion when diverse members of groups first begin to interrelate. The creative conflict occurs when the strict identity binary narrative in the mind of the viewer is challenged, and the identity spectrum of the person who presents differently expands in the eyes of the actor, allowing for a more nuanced, complex, and mature approach when characterizing others.⁶⁹

III. Impact of Binary Thinking on Racial Bias in the Legal Profession

Researchers have found the legal system treats youth of color more harshly than white youth. And, youth of color are “more likely to be arrested, detained, formally charged, transferred to adult court, and confined to secure residential facilities.”⁷⁰ In the year 2000, research found African American youths were six times more likely to be sent to youth prisons than similarly situated white youths who committed identical crimes.⁷¹ As the decade progressed, studies revealed bias had played a role in the disproportionate percentage of African American youths arrested, transferred to adult court, and sent to adult prison.⁷² “One in every fifteen people born in the United States in 2001 is expected to go to jail or prison; one in every three black male babies born in this century is expected to be incarcerated.”⁷³

In an attempt to explain this tragedy, researchers noted evidence of both conscious and unconscious bias in decision-making by prosecutors, evidenced by how prosecutors “describe black and

⁶⁶*Id.* at 608.

⁶⁷ See VEDANTAM, *supra* note 50, at 72–73, for an example of how conscious binary thinking (influenced by implicit messaging) presents in children when racial views are discussed.

⁶⁸ See *id.* at 81 (“If children can be encouraged to form loyalties to groups that transcend race - to a nation or a school or even a sports team - parents and educators can harness the automatic biases of the mind to drive children from different races together, rather than apart.”).

⁶⁹ See *id.* at 82–83.

⁷⁰ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 118 (2012).

⁷¹ *Id.*

⁷² *Id.*

⁷³ BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 15 (2015).

white offenders differently.”⁷⁴ For some legal actors, “[b]lack committed crimes because of internal personality flaws such as disrespect. Whites did so because of external conditions such as family conflict.”⁷⁵ When comparing principles of binary bias to research on how legal actors describe offenders, it becomes evident many legal decision-makers are trapped in the simple narrative of black teens being either respectful/good or disrespectful/bad and white teens are conferred a complexity of character that defies simple identity classification.⁷⁶

“As I was giving him direction about what to give me and to keep his hand in view um like I said I felt that he had no regard to what I was saying. He didn’t care what I was saying. He didn’t want to follow what I was saying, so he just wanted to do what he wanted to do.”⁷⁷ - Jeronimo Yanez

The late Justice Antonin Scalia candidly admitted to the existence of a binary bias in the legal system when he acknowledged, “all groups tend to have particular sympathies and hostilities—most notably, sympathies towards their own group members.”⁷⁸ As alarming as this statement first appears, when viewed in the context of a self-reflection, Justice Scalia’s words are a rare admission of how legal actors are influenced by binary thoughts of “hostility” versus “sympathy” as they encounter others who present differently from themselves.

Kelly said Yanez, who is Latino, is "overcome with sadness" over the shooting in the St. Paul suburb of Falcon Heights, a mostly white community of 5,000 that is served primarily by the nearby St. Anthony Police Department.⁷⁹

IV. Fighting Binary Thinking by Exposing the “Should”

My most impactful mentor, Dr. Edith Brayer, a Marriage and Family Therapist and also my mother, would occasionally remind me “there are no shoulds in life.” She derived this philosophy from a belief in the principles of *Systems Theory*, a multidisciplinary approach used in the fields of therapy, management, and biology, avoiding an intellectual avoidance of a reductionist paradigm.⁸⁰ The basic tenant behind this advice served me over years of legal practice. Her statement informed me how each of my clients lived unique, complex, and individualized lives and their identity was resistant to the simple reduction of good versus bad as defined by how they “should” act.

It was the uniqueness of each of my clients that made them interesting, but at times it also made them unexplainable to a judge, jury, and prosecutor, as their actions walked the fine line between what they should be doing (in the eyes of others) and what legally was required. Binary thinking, when influenced by implicit bias, confuses the concept of a societal “should” with legality in the mind of many legal actors. I detected this type of reductionist thinking in many lawyers, including myself at times. Further, I saw how judges and prosecutors reduced clients who presented with a different race and who

⁷⁴ ALEXANDER *supra* note 70, at 118.

⁷⁵ *Id.*

⁷⁶ Compare McGraw *supra* note 41, at 25 with ALEXANDER *supra* note 70, at 118.

⁷⁷ Berman, *supra* note 9.

⁷⁸ *Powers v. Ohio*, 499 U.S. 400, 424 (1990) (Scalia, J., dissenting).

⁷⁹ Nydailynews.com, *supra* note 49.

⁸⁰ See FRITJOF CAPRA, *THE WEB OF LIFE: A NEW UNDERSTANDING OF LIVING SYSTEMS* 29–30 (1996).

lived very different lives from these legal actors to the simple binary of bad versus good. This simple binary allowed judges and prosecutors to consider these clients as less complex and more understandable.

I better understood what steps could be taken to combat implicit bias in the minds of professionals and jurors when finally introduced to the art and ideas of gender-nonconforming expression (challenging the idea: gender “should” present as either male or female). For me, it was exposing the “should” in the thinking of my targeted audience, since the “should” or “should not” of my client’s actions (regardless of legality) equated to the binary of good versus bad. In trial, it became more important for our team to speak with jurors in voir dire about non-legal expectations or what they think my client “should” have done differently, regardless of the law. “Should” a young African American male be off the streets before midnight? “Should” my client have stayed in high school rather than drop out? “Should” he have shown respect to the police? Each answer of “yes” from potential jurors exposed a potential hidden danger for my client. These voir dire questions helped my team detect the hidden belief system of each person in jury selection by exposing how they prescribed to the simple binary of non-complex thinking that could be detrimental to my client.

“As that was happening as he was pulling at, out his hand I thought, I was gonna die and I thought if he’s, if he has the, the guts and the audacity to smoke marijuana in front of the five-year-old girl and risk her lungs and risk her life by giving her secondhand smoke and the front seat passenger doing the same thing then what, what care does he give about me.”⁸¹ - Jeronimo Yanez

Artists and litigators share a common technique as they draw a “distinction between controlling and mediating a message,” and allowing jurors (and viewers of art) to bring something “new to the table.”⁸² Trial attorneys can mediate their message of the case more effectively by utilizing practices that eliminate the non-binary thinking by jurors at every phase of a trial, thereby allowing each fact finder to explore their own complex experiences, emotions, and biases. The litigator facilitates this exploration by first identifying the undeniable “should” behavior (regardless of legality) by their client, then discusses with jurors in jury selection if and why people should act differently. The “should” behavior is then contextualized by presenting the client’s story in opening remarks, lending perspective to the client’s actions. Finally, the litigator can guide the client in acknowledging or clarifying the “should behavior” by conducting a direct examination of authentic and genuine testimony. In the same way an expression of art challenges a viewer, an open dialogue in voir dire with potential jurors is a method that promotes individual exploration, triggers the creative conflict between the conscious and implicitly biased minds of fact finders, and ultimately can open minds.⁸³ The jury selection strategy of addressing the potential “should” in a juror’s mind is one example of how an artistic expression of a gender protest influenced my practice of law.

V. Considering the Hidden Belief System of Jeronimo Yanez

What is difficult to conceptualize about race-based binary thinking is how it manifests in events and actions of legal actors and law enforcement. At each stage of drafting this piece, I reflect on the task

⁸¹ Berman, *supra* note 9.

⁸² See e-mail from Holly McGraw, Artist, to Patrick Brayer, Author (Apr. 21, 2017) (on file with author).

⁸³ See Patrick C. Brayer, *Hidden Racial Bias: Why We Need to Talk with Jurors about Ferguson*, 109 NW. U. L. REV. ONLINE 163, 165 (2015).

of demonstrating happenings influenced by the explicit binary of implicit prejudice. How do I inform the reader that an outlaw perspective towards people of color becomes explicit every day on the streets and in the courthouses of our nation? Moreover, can I demonstrate how implicit beliefs germinate into a simple binary choice classifying a targeted individual as good or evil, and thus, dangerous when events are "tense, uncertain, and rapidly evolving,"⁸⁴ and a decision needs to be made? Sadly, this summer, my task was simplified when the nation again turned its attention to the 2016 deadly interaction between Jeronimo Yanez and Philando Castile.⁸⁵ Yanez reduced Castile's unique human complexity to the simple identity of "outlaw"⁸⁶ as his binary thoughts (arguably motivated by an implicit belief system) convinced him that a "split second"⁸⁷ decision needed to be made.

Jurors in the case were never allowed to consider the subjective thoughts of Jeronimo Yanez or the impact implicit beliefs had on his decision to pull the trigger.⁸⁸ Conversely, jurors were instructed, police make judgments "under circumstances that are tense, uncertain, and rapidly evolving."⁸⁹ Subjectively for Yanez, the situation was all those things as he engaged in a binary analysis of Castillo being good versus evil. By taking that specific fact-finding mission away from the jury, the court validated any decision made by the officer as objectively reasonable. If given a chance the Yanez jury may have found the use of force to be unreasonable if they found the situation was not objectively tense or uncertain or rapidly evolving.

Was Yanez controlled by the racially motivated binary thought of Castile being good versus evil? Did Yanez engage in "should" thinking when Castile told him he had a gun?⁹⁰ Did his hidden or explicit mind ask, "should a black man have a weapon regardless of legality?"⁹¹ The court's instructions failed to ask jurors if the situation was objectively calm and stable.⁹² If asked that question, the jurors may have considered why Yanez's implicit beliefs became explicit in a moment, accelerating the situation from routine to deadly, reducing the complexity and humanity of Castillo to the simple identity of being an outlaw and dangerous. It was an artist, not a law school professor, who taught me how our culture stigmatizes gender fluidity and led me to understand how implicit bias against people of color can become explicitly deadly in a matter of moments.

⁸⁴ See *Graham v. Connor*, 4904 U.S. 386, 396 (1989).

⁸⁵ See Martin Kaste, *Cop Shooting Death Cases Raise Question: When Is Fear Reasonable?*, NPR (June 30, 2017), <http://www.npr.org/2017/06/30/534992121/cop-shooting-death-cases-raise-question-when-is-fear-reasonable> ("In cases involving police officers, juries are usually given instructions that refer to a 1989 Supreme Court ruling called *Graham v. Connor*, which says you can't judge a cop with "20/20 hindsight.").

⁸⁶ See Aoki, *supra* note 45, at 145–46, 150–151 (being an outlaw is "a debasing, life threatening condition, in which the law doesn't consider you").

⁸⁷ Kaste, *supra* note 85 ("In the Yanez case, for instance, the jurors were told that police officers are often forced to make split-second decisions — and those decisions should be evaluated based only on what the cop knew at that moment.").

⁸⁸ Jury Instructions, Star Tribune, <http://stmedia.startribune.com/documents/Final-Jury-Instructions.pdf>; see also, Kaste, *supra* note 85.

⁸⁹ *Id.*

⁹⁰ "Whether or not a black man is legally in possession of a gun might not matter in the tense moments of an encounter with an officer, said Philip Smith, president and founder of the National African American Gun Association. 'They're not getting any kind of the benefit of the doubt,' Smith said.", *Nydailynews.com, supra* note 49.

⁹¹ *Id.*

⁹² See Jury Instructions, *supra* note 88.

CONCLUSION

What eluded me after years of research and legal practice was a theoretical mechanism explaining how implicit bias presented when it explicitly surfaced in legal actors. By comparing the voir dire practices my team utilized to expose “should” thinking in jurors with the theoretical and artistic works of gender identity protesters, I was able to understand the tragic impact a non-complex identity narrative had on the binary branding of other races. More training and education is needed for lawyers on how to detect and prevent the marginalization of individuals who are gender nonconforming. Additionally, more gender activist, need to join our profession and guide our community in a dialog on the elimination of bias and discrimination. By better understanding how gender fluidity is stigmatized, legal professionals can expand skills and develop techniques in law enforcement, litigation, negotiation, and client counseling that directly confronts binary thinking and helps eliminate the impact of explicit and implicit bias on our profession.