

Session 1/Monday AM

Welcome to the Judicial College seminar on decision-making! These materials will be a guide to you for the next few days, so be sure to keep them with you during class and when working on homework assignments. We hope they will be a useful reference after the course is over, but they're important for another reason too. In a seminar about decision-making, observing what your particular brain does is a critical skill. During this course, we'll often remind you to pause and notice your own thoughts -- and to make a quick note about what you're noticing. We'll also be asking you to complete short written exercises, both in our Zoom classroom and as part of small group work. Taking time to put our thoughts in writing actually makes a big difference in how we process information. Be assured, though, that we will never ask you to share what you've written. That's between you, your notebook, and your brain!

Off to a Good Start! Chief District Court Judge Jay Corpening (Pender & New Hanover Counties/12 min.)

A Quick Overview (all instructors/15 min.)

Our Expectations & Agreement with You (Elizabeth/15 min.)

Agreements for communication:

- I will listen for understanding.
- I will ask for clarification if I am confused.
- I will speak from my own experience without generalizing.
- I will make room for other voices, and remember that we all have relevant experience.

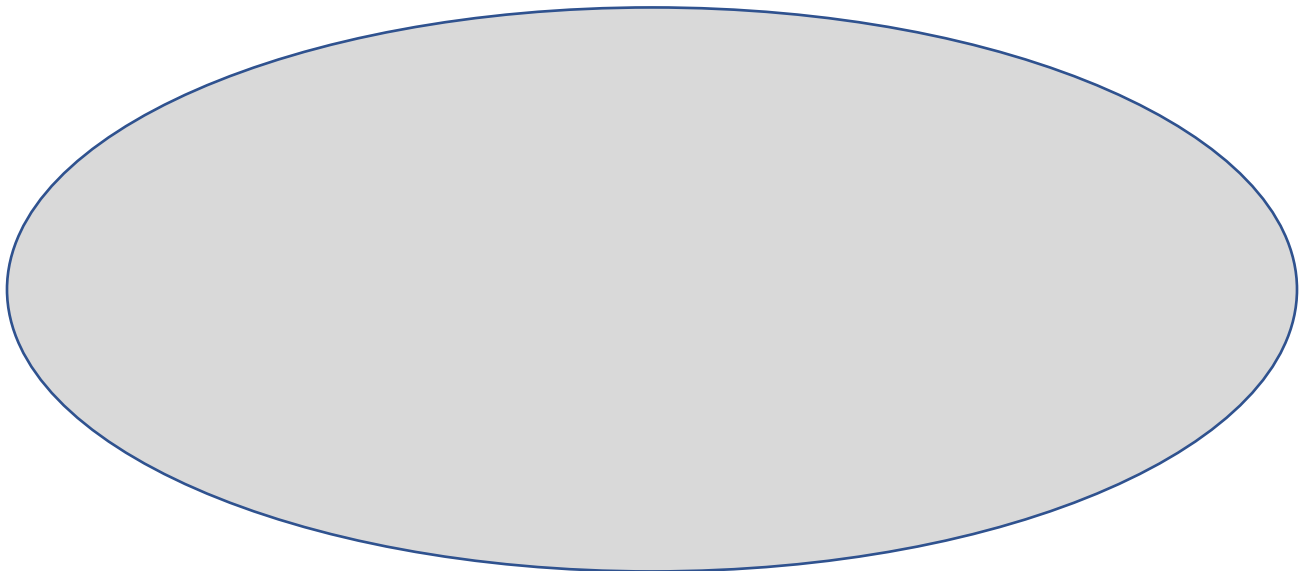
Small Group Exercise (2-person groups/3 min./6 min)

You and your partner will have a few minutes to get to know one another with this exercise. (*The person whose last name comes first alphabetically goes first.*) Follow the directions below and be disciplined about managing your time.

First 3 minutes: Silently reflect and write down notes that will help you make an introduction that you think will tell the person the details that are necessary to understand who you are.

We all make guesses about people as soon as we meet them. Take a moment to notice and write down the ideas you have at this moment about your partner. Obviously, you don't know them yet, but your brain makes guesses anyway, and noticing that is the point of this exercise. So, go ahead and take your best guess about what they're like or what's important to them. (These observations of your own thinking are for your eyes only and **will not be shared with your partner**).

Next 6 minutes: One partner introduces themselves while the other writes down the keywords or whatever stands out as important to you (this will be shared with your partner) in the oval shape below. After one person speaks and the other takes notes, switch places for the next two minutes. When your two minutes are up, **stop talking!**



Final 2 minutes: Take turns reading the keywords you captured in the circle to your partner, so you both know what stood out to the other person.

STOP HERE. DO NOT TURN THE PAGE UNTIL INTRODUCTIONS ARE COMPLETE.

Whole group processing (3 minutes solo) Take a moment to think about (1) what you decided to include to best describe yourself, and (2) what information your partner used. Then answer the following questions.

Check which of the following categories you hit on:

- ☐ Family
- ☐ Educational background
- ☐ Politics
- ☐ Sports
- ☐ Groups/affiliations
- ☐ Hobbies
- ☐ Geographic info
- ☐ Religion
- ☐ Ethnic background
- ☐ Other _____

Which did you both mention?

- ☐ Family
- ☐ Educational background
- ☐ Politics
- ☐ Sports
- ☐ Groups/affiliations
- ☐ Hobbies
- ☐ Geographic info
- ☐ Religion
- ☐ Ethnic background
- ☐ Other _____

Which were included by one of you but not the other?

- ☐ Family
- ☐ Educational background
- ☐ Politics
- ☐ Sports
- ☐ Groups/affiliations
- ☐ Hobbies
- ☐ Geographic info
- ☐ Religion
- ☐ Ethnic background
- ☐ Other _____

Which categories did you leave out of your introduction and why? **(This is for your eyes only)**

[illegible]

Reflection Exercise: (Jim/4 min)

Using the structure of fast thinking and slow thinking, list several (at least five) examples of when you are using fast thinking and five examples of when you are using slow thinking.

Fast Thinking	Slow Thinking

What is one example of your using fast thinking (either appropriately or inappropriately) in your work as a magistrate? _____

Whole group reflection for 4 minutes

Dona reads aloud:

Take 3 minutes after I read the prompts below to jot down some thoughts in response to share with your group members. There are many questions, but you're not expected to respond to all of them. They're provided just to get you started thinking about the particular associations your own individual brain may have developed when you were young.

Some of our most fundamental associations develop when we are young and our brains are developing. There's a saying that (unless you are a twin) every child grows up in a different home. Take a few minutes to think about your first 12 years of life. Choose 3 of the following questions to answer on the lines that follow.

- *How would you describe the (small) world you grew up in?*
- *What about that world were significant contributors to the associations your brain was forming?*
- *Consider how much and what kind of media you were exposed to.*
- *What were the predominant ideas surrounding you about what was important?*
- *What ideas/beliefs/assumptions were simply taken for granted that might be less so today?*
- *What did you think it meant to be successful?*
- *A good person?*
- *What qualities were presented in a somewhat negative light that might be more positively regarded today?*
- *What assumptions/predictions have you recently noticed may no longer be trustworthy predictors?*
- *What ideas or assumptions from that time in your life have you noticed continue to influence you today?*

Small Group Exercise (2-person groups/7 min)

In your 2-person group, each person should briefly share either their answers to the question above or thoughts about what kinds of things they noticed. ***You listen without comments or questions while your partner shares.*** After both people have shared, spend the rest of your time (approximately 5 minutes) talking about what you noticed. This is not a time to tell old stories -- this is a time to focus on (gently and kindly) learning about your automatic associations. Do you notice any patterns in your reflections? Are there old associations that no longer serve you?

Whole Group Processing (8 min)

Decisions Are Answers (Dona/20 min.)

When you think about the sorts of decisions we're concerned about in a decision-making seminar, what occurs to you? What are some examples of the decisions we're talking about?

BIG decisions are answers to the ultimate legal questions in cases, which vary based on the kind of case. Two examples of ultimate questions are (1) is there probable cause to believe that a particular person committed a particular crime, or (2) whether a plaintiff in a small claims case has established a right to recover the requested remedy by the greater weight of the evidence. What's another example?

Determining the answer to the ultimate question requires a judicial official to determine the answers to a number of underlying questions. The rules for knowing what these questions are and how they may be answered constitutes the basic analytical framework established by the law for making legal decisions. The specifics of that analysis differs from one proceeding to the next, but there are four broad steps that apply:

1. Identify the applicable law.
 2. Determine the relevant facts.
 3. Apply the law to the facts,
 4. Using the correct legal standard of proof.
-
-
-

Notice that the result of following this analysis will quite often yield a different result than that the parties might agree to if they settled their dispute, or that a mediator might urge the parties toward. The objective of a judicial official administering the law is not to reach an acceptable compromise of the parties' competing claims. In other words, law is (or at least aspires to be) like math.

Notice also that these underlying questions/answers are only the tip of the iceberg when it comes to the decisions a judicial official must make. There are 1000's of decisions underlying this analytical process, involving such diverse questions as whether a witness is credible, when to ask a follow-up question and how to phrase it if you do, what meaning to give to an ambiguous word in a statute, and so on. As you can easily see, each of these decisions can be broken down into even smaller questions.

Finally, notice that the same brain you're using to make those decisions is influenced by 1,000 factors we'll call "extra-judicial." Fatigue, how much protein you had for breakfast, bias, and political pressure all have potential power to affect what you decide.



Expertise in making decisions as a judicial official requires both mastery of the 4-step analytical approach and the ability to detect and manage the impact of extra-judicial influences. Most fundamentally, that expertise requires the ability to direct your attention in a (slow-thinking) deliberative, focused way to the analysis while recognizing and thus reducing the impact of other influences.

Mindful Moment #2 (Elizabeth/5 min.)

Ten-Minute Assignment To Do Before PM Session:

2 min. max!

1. Take this test. Do it as quickly as you can.
 - a. A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost? _____ cents
 - b. If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets? _____ minutes.
 - c. In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake? _____ days.

8 min. max!

2. Quickly skim Jim's article titled Implicit Bias, located in the **Appendix**. Mark any paragraph that catches your eye or draws your interest. Quickly note any thoughts or reactions below.

Session 2/Monday PM

Mindful Moment #3 (Elizabeth/5 min.)

About the Law (Dona/45 min.)

The law is vast.

The first step in making a legal decision is determining the applicable law.

One of the fundamental principles of the Rule of Law is that "applicable law" should be the same for everyone, and that the law should determine the result – rather than the result determine the law.

The primary sources of law in NC courtrooms are case law and statutes.

Case law consists of opinions handed down by appellate courts in appeals from trials conducted by district and superior court judges (mostly). In an appeal, the losing party submits a written argument that the trial result should be reversed due to some legal mistake(s) made by the presiding judicial official.

Statutes are rules enacted by the NC General Assembly. Unless the meaning of a statute is not clear or a statute is found unconstitutional, courts are obliged to enforce the plain language of the rule. It is improper for judicial officials, under the guise of judicial interpretation, to re-write, supplement, or otherwise modify a rule enacted by the legislature.

Tips for reading statutes:

Slowly. Read. Every. Word.

Always check for a definitions section.

Pay particular attention to these and similar words:

Subject to Including Notwithstanding Shall Must May

When you see a cross-reference, stop and check the cross-reference.

When a statute is unclear or incomplete, there are legal rules (called *principles of statutory construction*) about how a judicial official determines the meaning of the statute. [See **Appendix** for more.]

Small Group Exercise (4-person groups/5 min. solo/5 min. small group/5 min. processing)

We're going to work with a case (Thomas v. Williams, found in the **Appendix**) today and tomorrow. In Thomas, the Court had to determine what rules are established by the portion of the GS 50B statute related to dating relationships. We're going to take a close look at how they did that.

3 minute Break & 2-Minute Mindful Movement (5 min.)

Our Brain's Priorities May Not Be Our Priorities (Jim/45 min.)

Class Exercise with Jim: (5 min)

1. List a couple of situations or examples where anchoring might be present, and do the same for confirmation bias.
 - a. Anchoring examples:
 - i.
 - ii.
 - b. Confirmation bias examples:
 - i.
 - ii.
2. Stereotypes are common in our everyday life. One of the most powerful associations that affects our thinking is to be warm and fuzzy to people "like us". What categories would you say are people "like you?"
 - a.
 - b.
 - c.
 - d.
 - e.

Additional Notes (10 min)

Mindful Moment #4 (Elizabeth/5-10 min.)

Session 3/Tuesday AM

Mindful Moment #5 (Elizabeth/5 min.)

One word about how I'm feeling now: _____

Things I want to remember: _____

Noticing if anything has changed: _____

Revisiting Yesterday (Elizabeth & Dona/5 min.)

About the Facts (Dona/50 min.)

Distinguish **ultimate facts** from **evidentiary facts.**

The respondent is mentally ill.	The respondent has taken anti-psychotic medication for 3 years. _____ _____
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Remember that your task is not to find The Truth, but instead to determine the facts. But WHICH facts?

How do you know? _____

A fact is relevant if it might make a difference in the outcome of the proceeding. So, those are the facts you need.

And evidence is relevant if it makes such a fact more or less likely. So, this is the evidence you need.

Let's call that **Point A.**

Quite often, however, you don't have the luxury of beginning with a presentation of evidence. Instead, you have *data*, sometimes defined as "*the mass of disordered, raw material from which information (knowledge) is abstracted to provide evidence to support argument and conclusions.*" Let's call this **Point B.**

Here's the question: how do you get from **Point B** (the messy mass of data) to **Point A** (evidence)? The answer is that you elicit additional information by asking questions. Which means you need to know (1)

what information is missing, and (2) how to ask questions worded in a way most likely to elicit trustworthy information.

Note that evidence doesn't have to be determinative, or even persuasive. It might alter the likelihood of a fact only to a small degree (and it's important to notice how much). Your job is to identify and evaluate relevant evidence so as to make a decision about the facts in a proceeding. Among other things, you'll consider the *relevance*, *trustworthiness*, and *significance* of the offered information.

Example: Imagine, in an IVC proceeding in which the petitioner is a landlord concerned about a tenant's odd behavior, you hear: "I've heard from some of the other tenants that he's been in and out of the mental hospital for years now."

Relevant? _____

Significant if true? _____

Trustworthy? _____

The formal Rules of Evidence have only limited – if any -- applicability in most proceedings before a magistrate. You are likely to make better decisions if you evaluate information in light of the underlying objectives of the Rules rather than attempt to apply them in a mechanical manner. In the above example, the statement is hearsay, which raises issues of trustworthiness that are important to consider. What if the statement were "His mom told me that he's been in and out of the mental hospital for years now," however? It's still hearsay, but arguably more trustworthy.

Evidence may be misleading for all the following reasons and more: it can be incomplete, based on stale observation, suggestive of more than one possibility, out-of-context, based on limited opportunity to observe, the result of faulty memory, etc. Remember that witnesses too have Human Brains, which often do not like to "not know" and thus sometimes fill in the blanks or see what they expect to see.



Be alert for inferences presented as facts: "You could tell the puppy wasn't feeling well." "He was driving as though he was in a big hurry."

Include one you've heard: _____

Remember that your best tools are questions like:

How could you tell?

What made you think that?

What did you notice?

How do you know?

What did you observe?

One of the most challenging aspects of evaluating evidence involves assessing the credibility of a witness. Remember that direct conflicts in testimony (aka, “*he said/she said*”) doesn’t mean you throw up your hands and say “who knows?” Instead, it means that it’s time to focus on performing one of the most significant responsibilities judicial officials are entrusted with: closely scrutinizing such conflicts in an analytical manner so as to determine which version is more likely true. Sometimes you won’t be able to make that determination, and the party with the burden of proof will lose. But it is up to you to try.

[See the **Appendix** for an article providing more information about assessing credibility.]

Small Group Exercise (Dona/4-person groups/8 min./8 min.)

Recall the Court of Appeal’s exploration of the law about a “dating relationship” in Thomas v. Williams, revisited here in a different context. As you know, whether the parties are involved in a dating relationship is relevant not only to protective orders, but also to whether the 48-hour hold rule applies in some criminal cases. The existence of that relationship is an “ultimate fact,” which must be supported by evidentiary facts. Your mission for this exercise is to evaluate the following items of evidence related to that determination in terms of (1) its relevance, (2) its significance, if true, and (3) its trustworthiness? (*Jane* is the alleged victim.)

Scale: 1-5, with 1 indicating *none* and 5 indicating *high*. Circle your answer.

D tells you that he used to be engaged to Jane but they haven’t spoken since early in the lockdown.

Relevance 1 2 3 4 5

Significance 1 2 3 4 5

Trustworthiness 1 2 3 4 5

The arresting officer tells you that D and Jane work together and that she told the officer that they’ve “gone out a few times.”

Relevance 1 2 3 4 5

Significance 1 2 3 4 5

Trustworthiness 1 2 3 4 5

The officer tells you that D and Jane both rent rooms and share common areas in a large home along with 6 other young adults.

Relevance 1 2 3 4 5

Significance 1 2 3 4 5

Trustworthiness 1 2 3 4 5

D tells you that Jane has been harassing him and telling others that they're involved, but he's not interested.

Relevance 1 2 3 4 5

Significance 1 2 3 4 5

Trustworthiness 1 2 3 4 5

D tells you that he had a one-night stand with Jane but otherwise hasn't socialized with her.

Relevance 1 2 3 4 5

Significance 1 2 3 4 5

Trustworthiness 1 2 3 4 5

3 minute Break & 2-Minute Mindful Movement (5 min.)

Mindfulness Primer and Practices (Elizabeth, 45 min.)

Why people practice mindfulness: _____

How might this help me: _____

My reservations (if any): _____

Techniques: _____

Highlights/Reflections from the day:

Session 4/Tuesday PM

Mindful Moment #6 (Elizabeth/5 min.)

Rules vs. Standards:

[illegible]

Small Group Exercise (Dona/5-person groups/10 min./5 min. processing)

Break & 2-Minute Mindful Movement (5 min.)

What Can We Do: Strategies for Better Decisions (Jim/50 min.)

Small Group If/Then Exercise (Jim/15 min.)

Mindful Listening (Elizabeth/20 min.)

Homework Assignments

You may recall that we deliberately designed this course with an “open day” to allow time for you to process the material from the first two days and to prepare for our last day together. Here’s the preparation-for-tomorrow-part – 3 assignments. Completing this work before we reconvene tomorrow will significantly enhance your experience in those sessions, so be sure to make Your Homework a priority!

Assignment #1: Take the assessment found at <https://www.careinnovations.org/wp-content/uploads/3-Burnout-Compassion-Fatigue-and-Vicariou-Trauma-Assessment.pdf> and reprinted in the **Appendix**.

Assignment #2: Complete the Self-Assessment found in the **Appendix**.

Assignment #3: Take the Implicit Association Test. Read on for instructions!

One of the questions we have been asking is “what is in your boxes? We’re asking you to explore that by taking the Implicit Association Test (aka the *IAT*), which may be found at <https://implicit.harvard.edu/implicit/takeatest.html>. Many of you are likely to have taken it previously, but we want you to take it again. Pay attention both to the results of your test(s) and to the experience of taking the Test. In the Appendix we’ve included an article with important information about the *IAT*. Read both that article and the information below before you begin.

1. You may not like the results you get. That is not unusual. For example, the race test reveals a widespread preference for European American faces over African American faces.
2. The purpose of the test is to examine the unconscious associations your life experience has created for you. It does not mean that is your conscious preference or desire. It does not mean that when you are acting consciously that this preference is controlling. It does suggest that when your “fast thinking” brain is engaged, the associations you carry around may impact your decisions.
3. There are several categories of tests. It will be helpful if you take a few of the tests.

After you take the test, record your questions and comments below:

Session 5/Thursday AM

Mindful Moment #8 (Elizabeth/5 min.)

Vicarious Trauma, Secondary Trauma, & Burnout (Tonia/100 min.)

[illegible]

Self-Care (Elizabeth/45 min.)

[illegible]

Mindful Moment #9 (Elizabeth/5 min.)

Appendix

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What Magistrates Need to Know About Statutes

Statutes are rules enacted by the NC General Assembly. Unless the meaning of a statute is not clear or a statute is found unconstitutional, courts are obliged to enforce the plain language of the rule. It is improper for judicial officials, under the guise of judicial interpretation, to re-write, supplement, or otherwise modify a rule enacted by the legislature.

Tips for reading statutes:

Slowly. Read. Every. Word.

Always check for a definitions section.

Pay particular attention to these and similar words:

Subject to *Including* *Notwithstanding* *Shall* *Must*
May

When you see a cross-reference, stop and check the cross-reference.

When a statute is unclear or incomplete, there are legal rules (called *principles of statutory construction*) about how a judicial official determines the meaning of the statute. Here are some of the most important:

- ✓ Read the statute as a whole, construing words and phrases in context to be consistent with the clear intent and purpose of the statute. “Statutes are not read as a collection of isolated phrases.”
- ✓ Assume that the legislature carefully selected each word of a statute, and so read every part in a way that gives significance and effect to that part.
- ✓ A statute must be interpreted to give meaning to all its provisions.
- ✓ Use of similar-but-different words in a statute is presumed to be deliberate, with each word having a different meaning.
- ✓ The legislature is presumed to act with full knowledge of existing law – both statutory and case law.
- ✓ When a statute has been interpreted by a court and the legislature does not amend the statute, the court assumes the interpretation has been approved by the legislature.

- ✓ When a legislature deletes words from a statute, it is presumed that the intent was that the deleted portions are no longer the law.
- ✓ When a legislature includes particular language in one section of the law but not in a different section of the same statute, the differential inclusion/exclusion is presumed to be intentional and purposeful.
- ✓ Matters necessarily implied by statutory language are to be given effect just as if they were explicitly stated.
- ✓ When one interpretation of a statute is inconsistent with long-established common law principles, the courts will prefer an interpretation consistent with common law principles absent a clear contrary intention or purpose expressed by the legislature.
- ✓ When one term in a statute is ambiguous, the court will look to surrounding terms for clarification.
- ✓ The scope of a penal statute may not be extended by implication to include offenses not clearly identified in the statute.
- ✓ When construing a statute, we presume that the legislature acted with reason and common sense and did not intend an absurd result.

[GS 12-3](#), titled *Rules for Construction of Statutes*, contains useful definitions for a variety of common terms. For example, Sec. (6) provides that the word “person” in a statute includes “bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary.”

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-37

Filed: 7 July 2015

Mecklenburg County, No. 14 CVD 10124

CAROLINE ANNE THOMAS, Plaintiff,

v.

KEVIN S. WILLIAMS, Defendant.

Appeal by Defendant from order entered 4 August 2014 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 1 June 2015.

No brief filed for Plaintiff-Appellee.

The Law Office of Richard B. Johnson, PA, by Richard B. Johnson, for Defendant-Appellant.

McGEE, Chief Judge.

Kevin S. Williams (“Defendant”) appeals from a domestic violence protective order (“DVPO”) entered 4 August 2014. Defendant contends that the trial court erred by concluding (1) that Defendant and Caroline Anne Thomas (“Plaintiff”) had a “dating relationship” and (2) that Defendant had committed acts of domestic violence against Plaintiff by repeatedly contacting Plaintiff after she ended their relationship, thereby placing Plaintiff in fear of continued harassment. We disagree.

I. Background

Plaintiff and Defendant met in early April 2014 on a greenway in Charlotte where Defendant regularly volunteered with the Charlotte-Mecklenburg Park and Recreation Department. Plaintiff and Defendant dated for less than three weeks. Plaintiff attempted to end her relationship with Defendant on 1 May 2014 and asked Defendant to stop contacting her. However, Defendant continued to contact Plaintiff via phone calls, voicemails, and text messages. In response, Plaintiff filed a police report with the Charlotte-Mecklenburg Police Department on 17 May 2014. Detective Melissa Wright (“Detective Wright”) spoke to Defendant on 23 May 2014 and directed Defendant to stop contacting Plaintiff. Defendant, however, continued to contact Plaintiff.

Plaintiff filed a verified complaint and motion for a domestic violence protective order on 30 May 2014 (“Plaintiff’s verified complaint”). Defendant was served with notice of a hearing on Plaintiff’s verified complaint on 2 June 2014. Plaintiff’s verified complaint recounted Defendant’s repeated attempts to contact her and stated, in part, that Plaintiff ended their relationship because Defendant “said and did controlling things” and that Plaintiff was “afraid” of him. Detective Wright also obtained a warrant to arrest Defendant for stalking on or around 5 June 2014 and arrested Defendant. After Defendant was released from jail, he again contacted Plaintiff and, in a voicemail, reportedly stated: “[Y]ou put me through hell. Now it’s your turn.”

A hearing on Plaintiff's verified complaint was held on 4 August 2014. Plaintiff testified she ended her relationship with Defendant because she was "very afraid" of him and that Defendant had called her twelve times, left six voicemail messages, and texted her ten times between 1 May 2014 and the day of the hearing, with most of those contacts occurring in May 2014. Plaintiff further testified that Defendant's continued contacts had "severely affected [her] new job that [she had] just [taken] when all this started happening. [She] had to leave work several times. It[] [has] caused [her] a lot of emotional distress. [She has had] trouble sleeping. It [gave her] an upset stomach. [She also] purposely avoid[ed] the Greenway [now.]"

In a DVPO entered 4 August 2014, the trial court concluded that Plaintiff and Defendant had been in a "dating relationship" and found that, after Plaintiff tried to end the relationship, Defendant "continued to initiate contact by telephone and [text] message for no legitimate purpose except to torment Plaintiff." The trial court further found that Defendant's conduct had caused Plaintiff to "suffer[] substantial emotional distress in that she suffers [from] anxiety, sleeplessness[,] and has altered her daily living activities." The trial court concluded that Defendant had "committed acts of domestic violence against" Plaintiff in that he "placed [Plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." Defendant was ordered, *inter alia*, to have no contact with Plaintiff and to surrender his firearms for one year. Defendant appeals.

II. Standard of Review

When the trial court sits without a jury regarding a DVPO,

the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Hensey v. Hennessy, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (citation omitted). “Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.” *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (citation omitted).

III. “Dating Relationship”

Defendant challenges the applicability of North Carolina’s Domestic Violence Act (“the Act”) to the facts in the present case. *See generally* N.C. Gen. Stat. § 50B-1 *et seq.* (2013). Specifically, Defendant contends the trial court erred by concluding that he and Plaintiff were in a “dating relationship” for the purposes of the Act, primarily because their relationship lasted for less than three weeks. We disagree.

N.C.G.S. § 50B-1 limits the definition of “domestic violence[.]” in relevant part, to the commission of certain acts “by a person with whom the aggrieved party has or has had a personal relationship[.]”

For purposes of this section, the term “personal relationship” means a relationship wherein the parties involved:

...

- (6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.

N.C.G.S. § 50B-1(b). N.C.G.S. § 50B-1(b)(6) has rarely been interpreted by our appellate Courts. However, “[i]n interpreting a statute, we first look to the plain meaning of the statute. Where the language of a statute is clear, the courts must give the statute its plain meaning[.]” *Frye Reg’l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). “In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute.” *In re N.T.*, 214 N.C. App. 136, 141, 715 S.E.2d 183, 186 (2011) (citations and quotation marks omitted).

We first begin by examining what a “dating relationship” is not. Specifically, under N.C.G.S. § 50B-1(b)(6), a “casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.” The term “acquaintance” means “a relationship less intimate than friendship.” Webster’s II New College Dictionary 10 (3d ed. 2005). The term “fraternize” means to “associate with others in a congenial or brotherly way.” *Id.* at 453. Read together – and in conjunction with the modifiers “*casual* acquaintance” and “*ordinary*

fraternization” – this language appears to expressly exclude only the least intimate of personal relationships from the definition of “dating relationship” in N.C.G.S. § 50B-1(b)(6). (emphasis added).

However, N.C.G.S. § 50B-1(b)(6) also provides that a “dating relationship” is one in which the parties are “*romantically involved over time and on a continuous basis during the course of the relationship.*” (emphasis added). Provided that a relationship is not a “casual acquaintance” or results merely from “ordinary fraternization[,]” and provided that this relationship is “romantic” in nature “on a continuous basis” and for a sufficient period of time, then it would appear to constitute a “dating relationship” under N.C.G.S. § 50B-1(b)(6). The primary question this Court must resolve is how long a “continuous” “romantic” relationship must exist in order for it to exist “over time[.]”

As a preliminary matter, we do not believe that the term “over time” is unambiguous. Indeed, this Court has used “over time” to describe everything from the span of minutes or hours, *see State v. Dahlquist*, __ N.C. App. __, __, 752 S.E.2d 665, 668 (2013), *disc. review denied*, 367 N.C. 331, 755 S.E.2d 614 (2014), to months or years, *see In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 395 (2005). “[W]here the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent.” *Frye Reg’l Med. Ctr.*, 350 N.C. at 45, 510 S.E.2d at 163. If the statute also is “remedial” in nature, the “statute must be

construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained,” *O & M Indus. v. Smith Eng’r Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (emphasis added) (citation and quotation marks omitted), as well as to “bring[] within it all cases fairly falling within its intended scope.” *Burgess v. Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979).

“A remedial statute . . . is for the purpose of adjusting the rights of the parties as between themselves in respect to the wrong alleged.” *Martin & Loftis Clearing & Grading, Inc. v. Saieed Constr. Sys. Corp.*, 168 N.C. App. 542, 546, 608 S.E.2d 124, 127 (2005) (citation and quotation marks omitted). N.C. Gen. Stat. § 50B-3 (2013) defines the kinds of relief available to aggrieved parties under the Act. This section provides that “[i]f the [trial] court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence” and it authorizes a litany of enumerated forms of relief in order to effectuate that end. *See id.* In essence, N.C.G.S. § 50B-3 “requires the state to engage in prompt *remedial* action adverse to an individual[’s] [property or liberty] interest[s]” in order to further “the legitimate state interest in immediately and effectively protecting victims of domestic violence[.]” *Cf. State v. Poole*, __ N.C. App. __, __, 745 S.E.2d 26, 37, *disc. review denied*, 367 N.C. 255, 749 S.E.2d 885 (2013) (emphasis added) (citation and quotation marks omitted) (discussing *ex parte*

protective orders under N.C. Gen. Stat. §§ 50B-2(c) and 50B-3.1 (2013)). Moreover, the term “over time” in N.C.G.S. § 50B-1(b)(6) is used to define the General Assembly’s “intended scope[,]” *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251, of who may obtain relief under N.C.G.S. § 50B-3. Therefore, to the extent that the term “over time” in N.C.G.S. § 50B-1(b)(6) is ambiguous, it will be “construed broadly” by this Court. *See O & M Indus.*, 360 N.C. at 268, 624 S.E.2d at 348; *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251.

As an additional matter of statutory construction, we also note that “the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute.” *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251. Given that the last sentence in N.C.G.S. § 50B-1(b)(6), regarding “casual acquaintance[s]” and “ordinary fraternization[,]” appears to expressly exclude from the definition of “dating relationship” only the least intimate of personal relationships, we do not believe that the term “over time” – construed broadly – categorically precludes a short-term romantic relationship, such as the one in the present case, from *ever* being considered a “dating relationship” for the purpose of N.C.G.S. § 50B-1(b)(6). Instead, we agree with courts in other jurisdictions that the question of what constitutes the “minimum conduct to establish a dating relationship . . . is necessarily fact sensitive and thus warrants a ‘factor approach’ rather than a

‘definitional approach[.]’ ”¹ *Andrews v. Rutherford*, 832 A.2d 379, 382–84, 387 (Ch. Div. 2003) (noting that Vermont, Massachusetts, and Washington also use a factor approach); accord *Brand v. State*, 960 So. 2d 748, 750–52 (Ala. Crim. App. 2006) (adopting the factor approach used in *Andrews*).

The court in *Andrews* provided six non-exhaustive factors that courts should consider when determining if a “dating relationship” existed – factors we believe are informative in the present case:

1. Was there a minimal social interpersonal bonding of the parties over and above [that of] mere casual [acquaintances or ordinary] fraternization?
2. How long did the alleged dating activities continue prior to the acts of domestic violence alleged?
3. What were the nature and frequency of the parties' interactions?
4. What were the parties' ongoing expectations with respect to the relationship, either individually or jointly?
5. Did the parties demonstrate an affirmation of their relationship before others by statement or conduct?
6. Are there any other reasons unique to the case that support or detract from a finding that a “dating relationship” exists?

Andrews, 832 A.2d at 383–84.

¹ For similar reasons, to the extent that there may be ambiguities in determining whether a relationship was sufficiently “romantic” in nature or “continuous” for the purposes of N.C.G.S § 50B-1(b)(6), we believe these ambiguities are also appropriately addressed through a factor approach.

In the present case, under the first factor in *Andrews*, the uncontested evidence shows that Plaintiff and Defendant dated each other for less than three weeks, which appears to exceed the “minimal social interpersonal bonding” of casual acquaintances or of contacts through ordinary fraternization. Under the second factor, Plaintiff testified that she ended her relationship with Defendant after less than three weeks because she was “very afraid” of Defendant and instructed Defendant to never contact her again, at which point Defendant began contacting Plaintiff repeatedly and over a prolonged period of time. There is little evidence in the record regarding the third, fourth, and fifth factors, but we do not believe that this is necessarily dispositive. As for the sixth factor, we find it notable that Defendant felt strongly enough about his relationship with Plaintiff to extend their two-to-three-week-long relationship into essentially a two-to-three-month-long breakup by continuing to contact Plaintiff in direct contravention of Plaintiff’s and Detective Wright’s demands that he cease.² After reviewing these factors, we believe there was sufficient competent evidence to establish that the relationship between Plaintiff and Defendant fit within the General Assembly’s intended definition of “dating relationship” and we find no error by the trial court.

² Defendant even suggests in his brief before this Court that these repeated, unwelcome attempts to contact Plaintiff were done “with the hopes of continuing the [parties] ‘relationship.’”

IV. Fear of Continued Harassment

Defendant contends there was insufficient evidence for the trial court to find that Defendant “placed [Plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress.” *See* N.C. Gen. Stat. § 50B-1(a)(2) (2013). Specifically, Defendant argues that, “[e]xcept for one voicemail that Defendant left after he was arrested, Plaintiff failed to present evidence as to the nature of [Defendant’s] voicemails or texts, thereby failing to show Defendant’s intent was to harass Plaintiff.”

As a preliminary matter, “[t]he plain language of [N.C.G.S. §] 50B-1(a)(2) imposes only a subjective test, rather than an objective reasonableness test, to determine whether an act of domestic violence has occurred.” *Brandon v. Brandon*, 132 N.C. App. 646, 654, 513 S.E.2d 589, 595 (1999). Therefore, N.C.G.S. § 50B-1 does not require Plaintiff to establish that Defendant “intended” to do anything. Instead,

[d]omestic violence means the commission of one or more of the following acts upon an aggrieved party . . . by a person with whom the aggrieved party has or has had a personal relationship . . . :

. . .

- (2) Placing the aggrieved party . . . in fear of . . . continued harassment, *as defined in G.S. 14-277.3A*, that rises to such a level as to inflict substantial emotional distress[.]

N.C.G.S. § 50B-1(a) (emphasis added). N.C. Gen. Stat. § 14-277.3A (2013) provides that “harassment” is

[k]nowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

The evidence presented at the hearing tended to show that (1) Plaintiff and Defendant entered into a romantic relationship; (2) within several weeks, Plaintiff ended the relationship, reportedly because she was “very afraid” of Defendant, and she expressly instructed Defendant to not contact her again; (3) Defendant nevertheless proceeded to contact Plaintiff repeatedly and over a prolonged period of time, even after Plaintiff filed a domestic violence complaint against him and Detective Wright directed him to stop contacting Plaintiff; (4) after Defendant was arrested for continuing to contact Plaintiff, he left a voicemail on Plaintiff’s phone and stated: “[Y]ou put me through hell. Now it’s your turn[;]” and (5) Plaintiff consequently suffered from anxiety and sleeplessness and altered her daily living activities. Although Plaintiff testified only about the specific contents of one voicemail during the hearing – which Defendant acknowledges was “hostile” in nature – when combined with the facts described above, there was sufficient competent evidence for the trial court to find that Defendant placed Plaintiff in fear of continued harassment and caused her substantial emotional distress, and this finding supports the trial court’s ultimate conclusion that Defendant committed acts

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of domestic violence against Plaintiff. *See* N.C.G.S. § 50B-1(a)(2). Defendant's argument is without merit.

AFFIRMED.

Judges GEER and TYSON concur.

IMPLICIT BIAS



It seems so simple. Treat everyone fairly and only consider things that are relevant in handling cases. Avoid any effects of race, gender, national origin, religion, appearance, sexual orientation, gender identity, cultural biases, etc. If only that were true.

The desire for a “fair” justice system is nearly universal. In my teaching over the past forty years, I’ve asked hundreds of new court officials what value is the most important for the system. Well over 90% say “fairness”—over efficiency or promptness or anything else. It’s a value that we learn from our earliest days, especially if we had siblings who sometimes got more stuff than we did. It’s a primal need. And when the state is about to impose its will on a defendant to imprison or fine or permanently mark a person as a criminal, the desire for fairness (although some defendants prefer mercy) is very strong. That desire is simply made stronger by the reality that many of the decisions (charging, sentencing, bail) that lead to the state’s action are discretionary and frequently unreviewable.

Yet if you want to scatter people at a cocktail party, tell them that you want to talk to them about their biases. Or watch when they are told that they are about to hear a presentation on “implicit” biases. It is natural to think that any conversation about bias must be talking about other people and not about you or me. Wrong.

Enter the brain. Everyone has one. And everyone’s works basically the same way. It is a marvelous organ in our heads that performs miracles of perception and awareness and decision-making every day. Unfortunately, it is not designed with fairness as the preeminent value. Job #1 is survival. And survival, in today’s world, is not about avoiding tigers and lions and snakes, as it may have been for our ancestors. It is about detecting danger and difference and reacting accordingly. The

brain does so much more than that, but only after it takes care of survival first.

In a very helpful and important book, *Thinking, Fast and Slow*, Nobel Laureate Daniel Kahneman describes two systems: System 1 (Fast) and System 2 (Slow). System 1 is the workhorse of our existence. It is virtually effortless, quick and automatic. It works without our knowing it. It is also sometimes wrong. It puts survival first. Well over 90% of the decisions we make are automatic System 1 decisions—the underwater part of the iceberg. Mostly it’s done without thinking (as we typically think about what it means to think—taking a hand off a hot stove, or recoiling from a snake, etc.). Ever driven somewhere and don’t remember anything about how you got there? System One was driving.

System 2 is slow and cumbersome. It is the opposite of unconscious and automatic. Unlike System 1, it has a very limited bandwidth and can only do one thing at the time. Try to remember a number longer than seven digits. You probably can’t. Look at this number, 837402118. Now put aside the newsletter, wait 30 seconds and write the number down.

Despite System 2’s extremely limited capacity, It is the system we can (and should) use when we have something important to decide. It’s the decision-making capacity that separates us as a species.

Here are some examples of System 1 decisions:

- Detect that one object is more distant than another.
- Orient to the source of a sudden sound.
- Complete the phrase “bread and . . .”
- Make a “disgust face” when shown a horrible picture.
- Detect hostility in a voice.
- Answer to 2 + 2.

- Read words on large billboards.
- Drive a car on an empty, familiar road.
- Find a strong move in chess (if you are a chess master).

These are System 2 decisions:

- Brace for the starter gun in a race.
- Focus attention on the clowns in the circus.
- Focus on the voice of a particular person in a crowded and noisy room.
- Look for a woman with white hair.
- Maintain a faster walking speed than is natural for you.
- Monitor the appropriateness of your behavior in a social situation.
- Count the occurrences of the letter a in a page of text.
- Tell someone your phone number.
- Park in a narrow space (for most people except garage attendants) or drive in a congested, unfamiliar city.
- Compare two washing machines for overall value.
- Fill out a tax form.

One way to “feel” the interplay between these two ways of

thinking is to take a Stroop Test. First created in 1935, and used in a variety of settings by psychologists, this test requires word and color recognition of letters. Read the words: **Red, Blue, Green, Yellow**. System One reads words, automatically; it’s easy. Then you must recognize colors: **Red, Green, Blue**. It not so easy to do it quickly because you have to override System’s One’s automatic reading of letters that make words. System Two has to be used to recognize colors when they are in the form of letters. The conflict between the two will become obvious if you try the exercise.

What does that have to do with implicit bias? The answer lies in the way the same two systems in the brain store and use data, particularly data about other people.

The amount of data that a brain processes in a single day is huge. System One’s efficiency kicks in and it classifies data into categories. Social scientists tell us that within a second upon meeting a person, we have categorized the person into various categories; male/female, black/white/other, old/young, etc. Each category has various traits or tendencies assigned to it, based on one’s experiences. The brain has stored all the previous interactions. For some, the traits for a particular group are positive; that is often the case if the person shares traits with us. Using extensive research including Functional Magnetic Resonance Imaging (fMRI), Social Scientist believe that the part of the brain processing information about people like us is the

same part of the brain that processes information about ourselves. But for people who are different, parts of the brain associated with fear and danger may initially interpret the interaction. If we are not careful, where we start may determine where we end up in evaluating a situation.

Khaneman puts it this way:

The normal state of your mind is that you have intuitive feelings and opinions about almost everything that comes your way. You like or dislike people long before you know much about them; you trust or distrust strangers without knowing why.

Khaneman, *Thinking, Fast and Slow*, p. 97

That intuition is framed by the categories you have already put

the new person into and the traits that are associated with the categories. They become stereotypes. Stereotypes are formed by the brain’s storage of massive amounts of data about the category. Family, personal experience, TV, movies, social media, cultural norms—all of these sources are updating our stereotypical understandings of various categories of people. They may be positive or negative.

Stereotypes are effortless and require little energy. They are powerful because they are often right. They are never always right. And figuring that out in a particular situation may take time. But that is what fairness demands—not relying on first impressions.

“Ask citizens what they want from a court system and an immediate answer is likely to be ‘fairness.’ A system is fair when cases are decided based on the law as applied to the relevant facts. Bias arising from characteristics such as wealth, social class, ethnicity, race, religion, gender, and political affiliation have no place in a fair decision.”

North Carolina Commission on the Administration of Law and Justice, Final Report, pp 15-16. Available at: https://nccali.org/wp-content/uploads/2017/pdf/nccali_final_report.pdf

In other words, the brain is an “us” vs. “them”, as well as a categorizing machine. Stereotypes leave a powerful first impression. As an evolutionary matter, “them” were initially perceived as dangerous. That might not always be the case, but it was the safest thing to think. False negatives don’t get you killed. False positives might.

These initial evaluations are not conscious. They cannot be turned off. But that is not the end of the story. System Two kicks in eventually. And that is where intentionality can play a positive role. Human decision-making and the interplay between System One and System Two is a complex topic (e.g., Stroop Test) and one that is the subject of many books and research studies. But it is pretty clear that Systems One’s stereotypes are never completely turned off.

As the Greek maxim puts it, “Know Thyself”. Knowing the traits your automatic System One brain has stored is a key to doing that. And being fair, among other things, requires you to follow the maxim to minimize any biases that might be triggered by your personal stereotypes.

How can you know yourself? One way is to take the Implicit Association Test, found online at <https://implicit.harvard.edu/implicit/takeatest.html>. The test can help us to understand what kinds of associations—negative or positive—are stored in the brain. How much more it can do—can it predict behaviors, for example—is the subject of much debate and study. But it is pretty easy to feel in one’s fingers using the keyboard in taking the test when it is harder to associate good traits with a particular category of people. There are tests keyed to race, or gender/work, or religious groups, or sexual orientation, among others. It is a good way to begin to unpack what kinds of associations are stored in your head.

If, for example, you associate negative concepts with a particular race or gender or religion or sexual orientation, what does that mean? Here’s what it doesn’t mean—that, at your best, you act in a discriminatory way. It does mean that your particular history of family, and experience, cultural norms, and media exposure has filled your stereotype buckets with a peculiar mix of data points. Yours will be different from everyone else’s. That’s been done automatically. It’s not something you can opt out of. And quite likely, some groups of people are stereotypically viewed more negatively than others.

Your first impressions happen beyond your control. When you intuitively feel some one is dangerous, or when you feel that someone is not worthy of trust, it’s often a “feeling” that can’t be described any better than that. A feeling. That’s System One at work. What we do next, after the “feeling”, is not important in many contexts. In the context of a justice system where many of the most important decisions are unreviewable and

discretionary, it is critical.

It is important to remember that having these unconscious associations (or as it is often described, implicit biases) is not a character flaw. It is part of the universal human condition. The question is not whether you have them. The question is what you do about this part of the human condition. If you want to minimize the impact of your particular set of associations, what can you do?

- Recognize that differences matter. Consciously consider the impact of differences.
- Reverse the parties in your mind.
- Develop a structured way to make important decisions; use checklists to help keep focus on the relevant aspects of a decision.
- Check your decisions with colleagues; the process of articulating a rationale can be very helpful.
- If you are fortunate enough to work in a diverse workplace, learn from your colleagues; seek out opportunities to interact with people of different backgrounds as the opportunity arises.
- If it is available, look at data about your discretionary decisions. Patterns can be a clue to creeping stereotypical decisions.
- Do not make any important decisions when you are angry, tired, stressed or in a hurry. That is when System One’s stereotypes are at their most powerful.

Fairness requires more than judging how dangerous or worthy of taking a risk a person is by the group they belong to. Unfortunately, there is no pill, vaccine, or surgery that can do that. It is a daily chore. Some have reduced it to three simple ideas.

- Intention (a commitment to fairness).
- Attention (a commitment to avoiding the easy, automatic decision prompted by stereotypical thinking).
- Taking your time, particularly for important discretionary decisions.

The justice system is not perfect. To paraphrase Judge Jerome Frank in his important book, *The Mind of the Law*, though, we come closer to perfection when we realize that we are not perfect and have the humility to seek out and work on our imperfections. 

NOTES ON SOURCES AND REFERENCES

For more information about the concepts discussed in this article, these sources will be helpful.

Web based resources:

Implicit Bias, A Primer for Courts, Jerry Kang, National Center for State Courts (2009) available at <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx>.

Project Implicit®, Web site: <http://projectimplicit.net/>.

Kirwin Institute on Race and Ethnicity, Ohio State University, <http://kirwaninstitute.osu.edu/> (Website contains extensive materials on ongoing research studies dealing with implicit bias, along with other resources, such as webinars and other educational materials. Updated frequently).

A Meta-Analysis of Procedures to Change Implicit Measures, Forscher, Lai, Axt, Ebersole, Herman, Devine, Nosek. A continuing effort by multiple scholars to monitor studies in the area, last updated in August, 2018. Detailed analysis of methodology of studies and of difficulty in measuring changes in behavior. Pre-print available at <https://psyarxiv.com/dv8tu>.

Hidden Injustice: The Prosecutor's Paradox, ABA Legal News Network, <https://vimeo.com/176681786/5a69f94cf3> (12 minute video).

Helping Courts Address Implicit Bias: Resources for Education, National Center for State Courts (website) <https://www.ncsc.org/ibeducation>.

Books:

Thinking, Fast and Slow, Khaneman; Farrar, Straus, and Giroux (2011).

Blind Spot, Hidden Biases of Good People, Banaji and Greenwald; Delacorte Press (2013).

ASSESSING CREDIBILITY

People only correctly judge whether someone is lying 50 per cent of the time. Why is it so hard to tell if someone is telling the truth? And how can tribunals improve their rate of detecting deceit? HAZEL GENN explains.

The assessment of credibility is an essential and difficult aspect of fact-finding in judicial decision-making. Deep within our legal culture, with its emphasis on orality, is the presumption that the seeing and hearing of witnesses is not merely useful but crucial to accurate and fair judicial decisions. Despite the importance and difficulty of this aspect of the judicial role, we spend little time in judicial training discussing how assessments of credibility are and should be made. Why is this so? Perhaps it is because we feel that assessing credibility is something instinctive and personal to the individual judge – not amenable to the kind of guidance given for decisions on points of law and procedure. But precisely because the subject is hard, and because on appeal such assessments are difficult to reconsider or dislodge, it is important to discuss how credibility is evaluated and what are helpful, legitimate and appropriate factors to weigh in reaching those assessments.

What is ‘credibility’?

At its most basic, credibility involves the issue of whether the witness appears to be telling the truth as he now believes it to be¹. Involved in that assessment may be judgments about whether the witness can generally be considered to be a truthful or untruthful person and whether, although generally truthful, he may be telling less than the truth on this occasion. In order to make these assessments, Eggleston² suggests a number of tests including:

- Consistency of the witness’s evidence with what is agreed or clearly shown by other evidence to have occurred.
- The internal consistency of the witness’s evidence.

- Consistency with what the witness has said or deposed on other occasions.
- The credit of the witness in relation to matters not germane to the litigation.
- The demeanour of the witness.

In many tribunals, and some other proceedings, the judicial decision-maker often has little more to go on than a party’s oral evidence about his or her situation and the circumstances leading to the claim being decided. There may be scant supporting documentary evidence and an absence of other witnesses to corroborate the story being told. In these situations, decisions about credibility or truth-telling may be crucial to the outcome of the case and the demeanour of the appellant or witness may be central in reaching a judgment about credibility.

Why is it that we think demeanour helps us in assessments of credibility? It is because, as social beings as well as professionals concerned with truth-telling, we believe that liars give themselves away not simply in the words they use but through their non-spoken behaviour. Lord Bingham describes demeanour as the sum of a witness’s ‘conduct, manner, bearing, behaviour, delivery, inflexion’. In short, ‘anything which characterises his mode of giving evidence but does not appear in a transcript of what he actually said’.³ So demeanour is about the language of the body rather than words – emotion about lying that is translated into visible or audible signs. Although Lord Bingham and some other distinguished judges have cautioned against too great a dependence on demeanour in reaching assessments of credibility, most judicial decision-makers accept that it is an important element in the finding of facts and,

of course, part of the point of having witnesses giving evidence orally.

However, assessing credibility on the basis of demeanour presents two potential types of error:

- 1 Mistakenly believing someone who is lying.
- 2 Mistakenly disbelieving someone who is telling the truth.

The complexities of detecting lies

In seeking to improve our ability to assess credibility, we must search for insights within the literature of social psychology rather than law⁴. Social psychologists recognise that lying is a central characteristic of life and that understanding the phenomenon is relevant to almost all human affairs – not simply to the tribunal or court context.

For the purposes of better understanding the process of lying, psychologists distinguish two types of lying and several types of emotion about lying that serve to complicate matters for those charged with the job of detecting lies.

Two types of lying

There are two primary ways to lie:

- 1 To conceal – withholding information without actually saying anything that is untrue.
- 2 To falsify – presenting false information as if it were true.

Often it is necessary to combine concealing information with falsifying information, but sometimes it is possible simply to conceal information. When there is a choice about how to lie, psychological research suggests that liars generally prefer to conceal information than to falsify information, principally because concealing is generally easier than falsifying information. If you don't have to make anything up you don't have to remember your story. It is also possible

that witnesses consider concealing information to be less reprehensible than falsifying information and are therefore less likely to reveal signs of discomfort about concealment and less fear of detection.

Emotions about lying

A key problem in assessing credibility from the *demeanour* of the witness is the possibility of confusing two types of emotion that might be expressed by a person giving evidence or being questioned:

- 1 The innocent witness's fear of being disbelieved.
- 2 The guilty witness's apprehension about being detected.

Many of the signs that people commonly use as indicators of untruthfulness are simply the physical signs of raised emotion that can occur for many different reasons. Hearts beat faster, faces may redden and bodies sweat whenever emotion is aroused, so that these signs in themselves cannot reliably be taken as a guide for deceit.

Moreover, experiments show marked individual differences within the population in our ability to conceal emotions. Some people are naturally vulnerable to detection apprehension while others successfully lie with ease. The ability to perpetrate a lie apparently cuts across the type of lie being told, so that a good liar will be good at all lies – no matter how big or small. Indeed, there may actually be genes for lying.

*To the judge,
resolution of
factual issues
is (I think)
frequently more
difficult and
more exacting
than the deciding
of pure points
of law... He is
dependent, for
better or worse, on
his own unaided
judgment*

Lord Bingham
'The Business of
Judging'

Natural liars know about their ability to deceive and will have been getting away with things throughout their lives. They feel no detection apprehension because they are confident in their ability to deceive. This quality is useful among certain professions, for example actors, salesmen, negotiators and spies.⁵

On the other hand, some people are unusually vulnerable

to a *fear of being disbelieved*. This may occur when people have a deep sense of guilt about some unresolved issue in their life, and their feelings of guilt are aroused whenever they realise that they are suspected of wrongdoing. They may appear uncomfortable or even distressed while giving evidence, but this relates to anxiety about being disbelieved, rather than evidence of lying.

So it seems that although the causes will be different, both the liar and the truthful person may display signs of emotion prompted by the suspicions or questions of the tribunal probing their evidence.

Emotions around lying and truthfulness are therefore difficult to read, but liars may sometimes give themselves away by two further emotions described as ‘deception guilt’ and ‘duping delight’. A successful liar may eventually send out an emotional signal because he misjudges the guilt or shame he will feel at having lied. Alternatively, a successful liar may become excited at the prospect of success and fail to conceal that emotion.

*The absence of
a sign of deceit
is not evidence
of truth*

The mistakes we make in judging who is lying

Experimental research by psychologists has established that few people do better than chance in judging whether someone is lying or truthful. The research also consistently shows that most people *think* they are making accurate judgments when they are not.

Studies suggest that people are about 45 to 60 per cent accurate in spotting lies – in fact, very close to chance, which would be 50 per cent. One study comparing the ability of different professional groups to detect lies found that the police were no better than ordinary people in identifying who was lying, although they were confident that their judgments were better. In another US study involving secret service agents, psychiatrists, judges, robbery investigators, FBI polygraphers and college students, the only group to score significantly above chance in detecting lies were the secret service agents. In all groups, the subjects’ self-assessment of their skill at lie detection bore no relation to their actual score.

This all suggests that although we are not very good at detecting deceit, we *think* that we are.

There are two types of error made in assessing the truthfulness or untruthfulness of a witness: *disbelieving the truth* and *believing a lie*. Our failure to take into account how people differ in their expressive behaviour leads to both types of mistake in detecting deceit. We may believe a lie because the person telling their story gives no clue that they are deceiving us. She may be a natural liar or someone who has simply come to believe her own lies. The absence of a sign of deceit is not evidence of truth.

But on the other hand, if we detect what we believe to be a sign of deceit we may misbelieve the truth. Many

people have odd behavioural quirks.

Some may be naturally hesitant and speak with pauses between words and this is a particular problem when the judgment is being made relatively quickly and on the evidence of a first meeting. On a first meeting what is the basis for comparison?

Are the quirks part of normal behaviour or is the person behaving differently on this occasion?

Many people may show signs of fear, anger or distress that are unrelated to lying but to the situation in which they are being questioned. Disbelieving the truth may occur when the decision-maker fails to appreciate that a truthful person who is under stress may appear to be lying. For most people, presence in a tribunal or court is a unique experience and one that is likely to arouse strong emotions. There is a danger here that a truthful person under stress may appear to be lying.

Poor guides to whether or not someone is lying are signs such as breathing, blinking or sweating. These are all physical manifestations of emotion but they are non-specific. Similarly, blushing may be a reflection of embarrassment, of shame, of anger or of guilt, and blanching may reflect either fear or anger.

In trying to assess whether someone is lying, we often pay attention to words and to facial expressions, which

research suggests are relatively unreliable sources of information. Liars will be very careful about their choice of words and are also generally careful about controlling their facial expressions. On the other hand, they may be somewhat less conscious of their body and voice and therefore less able to control 'leakage' of emotion through movement and voice inflexion and pitch.

Ekman argues that it is hardest to detect a lie in the following circumstances:

- *When the liar and the recipient have never met before.* It is harder for the recipient to avoid making mistakes about individual quirks of behaviour.
- *When the liar can anticipate when he has to lie.* In these situations the lies can be prepared and rehearsed so that the liar presents a seamless and internally consistent story. Repeated preparation of evidence increases confidence and decreases fear of being detected.
- *When the lie only involves concealment.* This is generally harder to detect than falsification because nothing has to be said and emotion about concealment may be less.
- *When the liar and the recipient come from different cultures or backgrounds.* The recipient will make more errors in judging clues to deceit.
- *When the recipient is impersonal or anonymous.* This decreases the deception guilt felt by the liar who will therefore display fewer signs of emotion around the lie.
- *When the liar and recipient do not share the same values.* The liar will feel less guilt about lying and therefore reduced emotion surrounding the lie.
- *When there is no severe punishment for being caught lying.* Apprehension detection will be low, although there is the possibility of carelessness.

How to improve our detection ability

Success in distinguishing between when a person is telling the truth or is lying is likely to be highest when:

- The lie is being told for the first time.
- The liar cannot exactly anticipate the questions that are going to be asked and when she is going to have to lie.
- There is a threat of severe punishment for lying.

- The questioner is truly open-minded and does not jump to conclusions quickly.
- The questioner knows how to encourage the witness to tell his story.
 - Experiments suggest that the more words spoken the better the chance of distinguishing lies from truthfulness.
 - Training in interview techniques can improve the ability of questioners to detect deceit.
- The questioner and witness come from the same cultural background and speak the same language.
- The questioner is aware of the difficulties of identifying the truthful, innocent person who is under suspicion.
 - A courteous and humane approach in tribunal proceedings is good practice and will reduce the truthful appellant's fear of being misbelieved and may increase the guilt felt by the liar.

Paradoxically, it seems that the tribunal is a relatively poor environment in which to make judgments about deceit from demeanour. Punishment for lying is rare, time may be limited for sensitive and protracted interrogation and, with an increasingly diverse population, the tribunal and appellant frequently come from different backgrounds, cultures and languages. Bearing in mind the difficulty of detecting deceit, tribunals should guard against too much weight being placed on demeanour as a guide to truth as compared with other forms of evidence. On the other hand, refining tribunals' interviewing techniques and exploring how, when and why truthfulness might be judged from demeanour may help to increase the accuracy of assessments of credibility.

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¹ *Onassis v Vergottis* [1968] 2 Lloyd's Reports, referred to by Lord Bingham at p 5.

² Eggleston *Evidence Proof and Probability* (1978) 155.

³ Op cit p 8.

⁴ See Professor Paul Ekman, *Telling Lies* (2001), and Daniel McNeill, *The Face* (1998).

⁵ Ekman, op cit, p 57.



MAKING SENSE OF YOUR IAT RESULTS

COMMON REACTIONS TO THE IMPLICIT ASSOCIATION TEST

THE KIRWAN INSTITUTE FOR THE STUDY OF RACE & ETHNICITY

For some people, receiving the results of an Implicit Association Test (IAT) can bring forth a level of relief or self-reinforcement. This is particularly true when one's implicit preferences align with one's explicit beliefs. However, for many people there is disconnection between espoused beliefs and the results of the IAT. If this is your experience, you may be left wondering how to make sense of your IAT results.

This document provides a research-based typology of some common reactions to the IAT.¹ Regardless of what reaction(s) you may have, it is important to know that your feelings are normal and you are not alone in feeling this way. While we all have biases that may or may not align with our deeply held explicit beliefs of justice and equity, what speaks to the content of our character is how we choose to act in the face of learning about the implicit biases that we possess.

Common Reactions to the IAT

- **Disbelief**
 - It is common for people whose results conflict with their worldview to experience a level of disbelief and defensiveness about their results.
 - *What to do if you're experiencing disbelief:* If you are experiencing these feelings, remind yourself that our implicit biases are often different from our explicit beliefs. Therefore, regardless of your results, it is important to remember that our implicit biases are not measures of whether or not we are good people, but rather what messages and experiences we have internalized over a lifetime. Moreover, research suggests we have the capacity to alter our unwanted implicit associations.
 - **Disregard**
 - Perhaps you're questioning whether or not your score would be different if you're right or left-handed? Or maybe you're thinking that it may be possible to somehow outsmart the test? If so, rest assured that you are not the first person to have these thoughts.
 - *What to do if you're experiencing disregard:* Check the evidence—more than a decade of research exists analyzing various components of the IAT and its functioning. Although debates persist in the academic community, by and large the IAT has been found to be a reliable and valid measure of one's automatic associations.² Researchers have even assessed whether or not people are able to “fake out” the IAT.³ Remind yourself that while it is sometimes easier to disregard a challenging result, learning comes from embracing and moving through discomfort in order to engage in self-reflection.
-

- **Acceptance**
 - For some, it is relatively easy to come to a place of acceptance of their results.
 - *What to do if you're experiencing acceptance:* If you're able to quickly come to a place of understanding of your results and why you possess the associations that you do, the next step is to move toward action. This can be finding ways to change associations that don't align with your explicit beliefs and/or finding ways to ensure that your unwanted biases are not unintentionally yielding unwanted effects.
- **Discomfort**
 - Some individuals feeling discomfort may accept the accuracy of their IAT results, but are upset or uncomfortable with their results. Uneasiness with one's results can lead to reflection, questioning, and/or uncertainty.
 - *What to do if you're experiencing discomfort:* If you are made uncomfortable by your results, you're likely accepting the validity of the IAT. This is a major step in beginning to correct your biases. Take the time to look into what your biases indicate and realize that society shapes our biases. Also, discomfort can foster the inclination to take action.
- **Distress**
 - Feelings of distress come with elevated concern with one's results, sparking reflection on personal responsibility. This can sometimes manifest through embarrassment, guilt, shame, and/or a desire for action.
 - *What to do if you're experiencing distress:* If you are feeling distress, think of how taking action to combat these biases may change your role in harboring potentially harmful biases. Taking steps to change your biases and championing bias mitigation in your environment may also help.

Reflection Questions

- What feelings or reactions did you have upon learning your IAT results?
- Reflect on your life experiences that may have influenced your results. Consider your childhood and family upbringing; the neighborhoods in which you've lived; elements of your career path; media messages; your family and peer networks; etc. How might these experiences have shaped your biases, with or without your conscious awareness?
- How might knowing your IAT results affect your future actions and decisions, both in your role at your workplace and in other aspects of your life?

Citations

1. Clark, P., & Zygmont, E. (2014). A Close Encounter with Personal Bias: Pedagogical Implications for Teacher Education. *The Journal of Negro Education*, 83(2), 147-161.
2. Greenwald, A. G., & Nosek, B. A. (2001). Health of the Implicit Association Test at Age 3. *Zeitschrift für Experimentelle Psychologie*, 48(2), 85-93.
3. Steffens, M. C. (2004). Is the Implicit Association Test Immune to Faking? *Experimental Psychology*, 51(3), 165-179.

Self-Assessment

Rate the following areas according to how well you think you are doing:

3 = I do this well (e.g., frequently)

2 = I do this OK (e.g., occasionally)

1 = I barely or rarely do this

0 = I never do this

? = This never occurred to me

Physical

___ Eat regularly (e.g. breakfast, lunch, and dinner)

___ Eat foods that make me feel good

___ Exercise

___ Get regular medical care for prevention

___ Get medical care when needed

___ Take time off when sick

___ Get massages

___ Dance, swim, walk, run, play sports, sing, or do some other fun physical activity

___ Get enough sleep

___ Wear clothes I like

___ Take vacations

___ Make time away from technology

___ Other:

Psychological

___ Take day trips or mini-vacations

___ Make time for self-reflection

___ Seek therapy as needed

___ Notice my inner experience - listen to my thoughts, beliefs, attitudes, feelings

___ Write in a journal

___ Read literature that is unrelated to work

___ Do something at which I am not expert or in charge

___ Attend to minimizing stress in my life

___ Engage my intelligence in a new area, e.g., go to an art show, sports event, theatre

___ Be curious

___ Make time away from telephones, email, and the Internet

___ Say no to extra responsibilities sometimes

___ Other:

Emotional

- _____ Spend time with others whose company I enjoy
- _____ Stay in contact with important people in my life
- _____ I am aware of my thoughts, without judgment
- _____ Give myself affirmations, praise myself
- _____ Re-read favorite books, re-view favorite movies
- _____ Identify comforting activities, objects, people, places and seek them out
- _____ Allow myself to cry
- _____ Find things that make me laugh
- _____ I am aware of my feelings without judgement
- _____ Play with children
- _____ Other:

Spiritual

- _____ Make time for reflection
- _____ Spend time in nature
- _____ Find a spiritual connection or community
- _____ Be open to inspiration
- _____ Cherish my optimism and hope
- _____ Be aware of non-material aspects of life
- _____ Try at times not to be in charge or the expert
- _____ Be open to not knowing
- _____ Identify what is meaningful to me and notice its place in my life
- _____ Meditate
- _____ Pray
- _____ Sing
- _____ Have experiences of awe
- _____ Contribute to causes in which I believe
- _____ Read inspirational literature or listen to inspirational talks, music
- _____ Other:

Relationship

- _____ Schedule regular dates with my partner or spouse
- _____ Schedule regular activities with my children
- _____ Make time to see friends
- _____ Call, check on, or see my relatives
- _____ Spend time with my companion animals
- _____ Stay in contact with faraway friends
- _____ Make time to reply to personal emails and letters; send holiday cards
- _____ Allow others to do things for me
- _____ Enlarge my social circle
- _____ Ask for help when I need it
- _____ Share a fear, hope, or secret with someone I trust
- _____ Other:

Work/Professional

- _____ Take a break during the workday (e.g., lunch)
- _____ Take time to chat with co-workers
- _____ Make quiet time to complete tasks
- _____ Identify projects or tasks that are exciting and rewarding
- _____ Set limits with clients and colleagues
- _____ Balance my caseload so that no one day or part of a day is “too much”
- _____ Arrange work space so it is comfortable and comforting
- _____ Get regular consultation or collaboration where possible
- _____ Negotiate for my needs (benefits, pay raise)
- _____ Have a peer support group
- _____ Strive for equanimity within my work-life and work day
- _____ Unplug/Have some work-free spaces in my life

Other Areas that are Relevant to You

- _____
- _____
- _____

16 Warning Signs of Trauma Exposure

(Paraphrases and quotes from Trauma Stewardship, Edition 2009, by Van Dernoot Lipsky & Burk)

1. Feeling helpless and hopeless

It may be hard to see any progress when on a daily basis I see and experience the enormity of the challenges. I know in my gut that there is only so much I can do, but I still feel responsible.

2. Sense that one can never do enough

I may have the belief that I'm not enough and should be doing more.

3. Hyper-vigilance

I may be wholly focused on the job, at the sacrifice of not being present for other things in my life. It may be difficult to get away from work to relax and be present in my life.

4. Diminished creativity

I may experience decreased joy and decreased innovation in my work.

5. Inability to embrace complexity

I may feel an urgent need to choose sides or that I am becoming dogmatic and opinionated.

6. Minimizing

I may experience a decrease in feelings of compassion and ability to empathize.

7. Chronic exhaustion/physical ailments

I may feel exhausted. I may feel completely overwhelmed by the urgency of the tasks at hand.

8. Inability to listen/deliberate avoidance

I may avoid calls and e-mails. I may hope for meetings to be cancelled, or for no-shows in a case.

9. Dissociative moments

I may cut myself off from my internal experience in order to guard against sensations and emotions that could be overwhelming to my system.

10. Sense of persecution

I may become convinced that others are responsible for my well-being and that I lack the personal agency to transform my circumstances.

11. Guilt

I may get caught up in discomfort about the disparity between my life and my families' lives.

12. Fear

I may experience fears of intense feelings, personal vulnerability, or potential victimization.
I may not know how to process my fears.

13. Anger and cynicism

I may be unaware of my own anger, even when all of my loved ones, colleagues, and others have to tiptoe around me. I may use "gallows" humor or cynical humor to manage my anger.

14. Inability to empathize/numbing

I may feel numb or emotionally "asleep." I may numb my feelings so that I don't feel out of control.

15. Addictions

I may find myself using drugs, alcohol, and other potentially destructive distractions to cope.

16. Grandiosity

I may allow work to become the center of my identity. I may begin to think, "Who else will do it if I'm not here?" or "I can't possibly leave, they're relying on me."

Behavioral Warning Signs

- **Avoiding meetings**
- **Avoiding phone calls and other interactions** with colleagues and/or specific types of cases
- **Avoiding difficult topics on the job**
- **Excessive use of sick or vacation leave**
- **Chronic reports of fatigue/exhaustion**
- **Being a “workaholic”** (i.e., has no life outside of work)
- **Significant anger and irritability** toward colleagues and/or individuals involved with cases
- **Significant change in health**
(e.g., chronic headaches, migraines, weight gain/loss, getting sick often)
- **Increase in drug and/or alcohol use**
- **Other addictions** (e.g., shopping, compulsive eating, over-exercising, etc.)
- **Change in decision-making skills** (e.g., indecision, lack of sound judgment, etc.)
- **Forgetfulness**
- **Decreased effectiveness in their work**
- **Silencing cases and/or colleagues** by changing the subject, minimizing the trauma, not listening, etc. *(may indicate an inability to hear more stories of trauma)*
- **Lack of empathy for others**
- **Cynicism** (e.g., “This person isn’t going to change,” “We don’t make a difference,” etc.)
- **Hypervigilance or irrational fears**



(Mathieu, 2012)

My Warning Signs

Fill in the blanks below to explore your personal indicators for unmanageable levels of work-related stress.

I know indirect exposure to trauma at work is beginning to affect **me** when

_____, and _____.

I know that the stress of work is beginning to affect **my relationships with loved ones** when

_____, _____, and

_____.

I know my indirect exposure to trauma is beginning to affect **my work** when

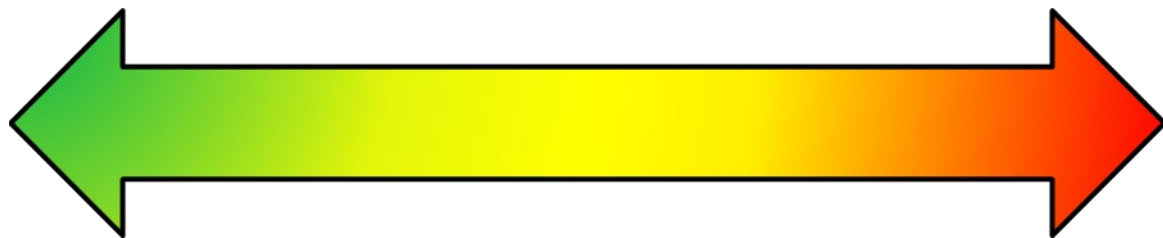
_____, _____, and

_____.

Other people in my life can tell I am stressed out when I look _____

and _____.

(Adapted from Volk, et al., 2008)



Key Resilience Skills

Skill 1: Manage Emotions

- Be aware of what is happening in our bodies when we are calm
- Notice what happens in our bodies when we are stressed
- Bring our body back into balance and experience well-being, self-regulation

Skill 2: Positive Relationships and Supports

We all need people who care about us. People we can:

- Turn to in times of need or celebration, give us advice, and call on for help

Different people can provide different kinds of support:

- Emotional, Informational, Spiritual, and Instrumental

Questions to Consider:

- Do you have friends or family you can call for advice or just to talk?
- Do you belong to any groups or organizations?
- How often do you see the people that matter to you?
- What kind of social support do you need?
- If it is challenging to make friends, what makes it hard for you?
- What helps you feel connected?
- Can you turn to your supports for help in times of need (transportation, childcare, etc.)?
- Are you willing and able to accept help from others?

Skill 3: Self-Care

Good self-care focuses on these four areas:

- **Physical** self-care is about diet and nutrition, exercise, and getting enough sleep and rest.
- **Social** self-care is about maintaining relationships with people important to you.
- **Emotional** self-care is about caring for yourself and seeking support or services when you need them.
- **Spiritual** self-care is about the beliefs that keep us balanced and hopeful.

Skill 4: Ask for Help and Find Services

- Asking for help is one step toward building resilience
- Learning new skills increases our confidence
- If we've experienced trauma, services can help us heal

Questions to Consider:

- Are you able to identify, find and receive services to meet your needs?
- What do you need to face challenges in your life?
- What have you done to handle the problem so far? Has this worked?
- Are you willing to use services that can help?
- Are there services that you have used in the past? What was your experience with them?