



## **IMPLICIT BIAS IN THE LEGAL PROFESSION**

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### **Introduction**

Implicit bias refers to the unconscious attitudes or stereotypes that affect our understanding, actions, and decisions. These biases—which can encompass both favorable and unfavorable assessments—manifest involuntarily without an individual's awareness or intentional control. Though shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Unconscious biases in the workplace can hinder diversity, recruiting, and retention efforts and can shape an organization's culture in detrimental ways. Unconscious bias can skew talent and performance reviews. They can affect whom an organization hires, promotes, and develops—which unintentionally reinforces barriers to opportunity.

The focus of this whitepaper is to describe how implicit bias affects the legal profession and to offer recommendations on addressing implicit bias.

### **(I) What is Implicit Bias?**

The term "implicit bias" is believed to have been coined by University of Washington Professor Tony Greenwald and Yale University Professor Mahzarin Banaji in a 1995 paper

titled, “Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes.” Greenwald and Banaji<sup>1</sup> defined implicit bias as follows:

Social behavior is ordinarily treated as being under conscious (if not always thoughtful) control. However, considerable evidence now supports the view that social behavior often operates in an implicit or unconscious fashion. The identifying feature of implicit cognition is that past experience influences judgment in a fashion not introspectively known by the actor. The present conclusion—that attitudes, self-esteem, and stereotypes have important implicit modes of operation—extends both the construct validity and predictive usefulness of these major theoretical constructs of social psychology. Methodologically, this review calls for increased use of indirect measures—which are imperative in studies of implicit cognition. The theorized ordinariness of implicit stereotyping is consistent with recent findings of discrimination by people who explicitly disavow prejudice. The finding that implicit cognitive effects are often reduced by focusing judges’ attention on their judgment task provides a basis for evaluating applications (such as affirmative action) aimed at reducing such unintended discrimination.

“Implicit bias” is synonymous with “unconscious bias,” while explicit bias involves recognition of one’s biases. Implicit biases are disconnected from awareness, through a process called “dissociation.” As researcher Hayley Roberts wrote, “More than 85 percent of all Americans consider themselves to be unprejudiced. Yet researchers have concluded that the majority of people in the [U.S.] hold some degree of implicit racial bias.”<sup>2</sup> While implicit bias is generally associated with negative racial, ethnic, and gender stereotypes, even a positive implicit bias can have a negative impact on the integrity of decision-making.

Some researchers note that implicit bias is not about bigotry per se. Instead, it results from basic features of human psychology. Writing in the New York Times, New York University Graduate Student Daniel Yudkin and Associate Professor Jay Van Bavel said, “As new research from our laboratory suggests, implicit bias is grounded in a basic human tendency to divide the social world into groups. In other words, what may appear as an example of tacit racism may actually be a manifestation of a broader propensity to think in terms of “us versus them”—a prejudice that can apply, say, to fans of a different sports team. This doesn’t make the effects of implicit bias any less worrisome, but it does mean people should be less defensive about it.”<sup>3</sup>

Psychologists estimate that our brains are capable of processing approximately 11 million bits of information every second. Given the tremendous amount of information that inundates this startlingly complex organ in any given moment, many researchers have sought to understand the nuances of our remarkable cognitive functioning. In his 2011 tome on cognition, “Thinking, Fast and Slow,” Daniel Kahneman articulated a widely

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<sup>1</sup> Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4-27 (1995), [https://faculty.washington.edu/agg/pdf/Greenwald\\_Banaji\\_PsychRev\\_1995.OCR.pdf](https://faculty.washington.edu/agg/pdf/Greenwald_Banaji_PsychRev_1995.OCR.pdf).

<sup>2</sup> Hayley Roberts, *Implicit Bias and Social Justice*, OPEN SOCIETY VOICES (Open Society Found., New York, N.Y.), Dec. 18, 2011, <https://www.opensocietyfoundations.org/voices/implicit-bias-and-social-justice>.

<sup>3</sup> Daniel A. Yudkin & Jay Van Bavel, *The Roots of Implicit Bias*, NY TIMES, Dec. 9, 2016, [https://www.nytimes.com/2016/12/09/opinion/sunday/the-roots-of-implicit-bias.html?\\_r=0](https://www.nytimes.com/2016/12/09/opinion/sunday/the-roots-of-implicit-bias.html?_r=0).

accepted framework for understanding human cognitive functioning by delineating our mental processing into two parts: System 1 and System 2.<sup>4</sup>

System 1 handles cognition that occurs outside of conscious awareness. This system operates automatically and extremely fast. For example, you stop your car at a red light. When the light turns green, you know to proceed through the intersection. Thanks to the speed and efficiency of System 1, experienced drivers automatically understand that green means go, and so this mental association requires no conscious or effortful thought.<sup>5</sup>

In contrast, System 2 is used for conscious processing. It is what we use for mental tasks that require concentration, such as completing a tax form. Rather than being automatic and fast, this undertaking requires effortful, deliberate concentration.<sup>6</sup>

Together, these two systems help us make sense of the world. What is fascinating, though, is how much our cognition relies on System 1. Of the millions of possible pieces of information we can process each second, most neuroscientists agree that the vast majority of our cognitive processing occurs outside of our conscious awareness. Besides its vastness, System 1 cognitive processing is also notable because it helps us understand that many of the mental associations that affect how we perceive and act are operating implicitly (i.e., unconsciously). As such, System 1 is responsible for the associations known as implicit biases.<sup>7</sup>

Because the implicit associations we hold arise outside of conscious awareness, implicit biases do not necessarily align with our explicit beliefs and stated intentions. This means that even individuals who profess egalitarian intentions and try to treat all individuals fairly can still unknowingly act in ways that reflect their implicit—rather than their explicit—biases. Thus, even well intentioned individuals can act in ways that produce inequitable outcomes for different groups.<sup>8</sup>

Moreover, because implicit biases are unconscious and involuntarily activated as part of System 1, we are not even aware that they exist, yet they can have a tremendous impact on decision making. A large body of social science evidence has shown that implicit biases can be activated by any number of various identities we perceive in others, such as race, ethnicity, gender, or age. Since these robust associations are a critical component of our System 1 processing, everyone has implicit biases, regardless of race, ethnicity, gender, or age. No one is immune.<sup>9</sup>

There are many different types of implicit bias including but not limited to confirmation bias, attribution bias, availability bias, and affinity bias.

Confirmation bias is a type of unconscious bias that causes people to pay more attention to information that confirms their existing belief system and disregard information that is

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<sup>4</sup> Cheryl Staats, *Understanding Implicit Bias: What Educators Should Know*, AMERICAN EDUCATOR, Winter 2015-2016, 29-30, <https://www.aft.org/ae/winter2015-2016/staats>.

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

contradictory.<sup>10</sup> Confirmation bias can skew evaluations of others' work and potentially disrupt their careers.<sup>11</sup> In 2014, Dr. Arin Reeves released results of a study she conducted to probe whether practicing attorneys make workplace decisions based on confirmation bias. This study tested whether attorneys unconsciously believe African Americans produce inferior written work and that Caucasians are better writers.<sup>12</sup> This study showed that reviewers rated the same legal memo a 3.2 out of 5.0 when reviewers believed an African American man wrote it versus a 4.1 out of 5.0 when reviewers believed a Caucasian man wrote it.

Another type of unconscious cognitive bias—*attribution bias*—causes people to make more favorable assessments of behaviors and circumstances for those in their “in groups” (by giving second chances and the benefit of the doubt) and to judge people in their “out groups” by less favorable group stereotypes.<sup>13</sup>

*Availability bias* interferes with good decision-making because it causes people to default to “top of mind” information. For instance, if you automatically picture a man when asked to think of a “leader” and a woman when prompted to think of a “support person,” you may be more uncomfortable when interacting with a female leader or a man in a support position, particularly at an unconscious level.<sup>14</sup>

The adverse effects of many of these cognitive biases can be compounded by *affinity bias*, which is the tendency to gravitate toward and develop relationships with people who are more like ourselves and share similar interests and backgrounds. This leads people to invest more energy and resources in those who are in their affinity group while unintentionally leaving others out. Due to the prevalence of affinity bias, the legal profession can best be described as a “*mirrortocracy*”—not a meritocracy.<sup>15</sup>

Every legal organization has hidden barriers that disproportionately affect and disrupt the career paths of many female, LGBTQ, racially/ethnically diverse, and disabled lawyers.<sup>16</sup>

## **(II) Tests for Implicit Bias**

In this section, we identify various tests designed to aid individuals in determining where their biases lie.

### Implicit Association Test (IAT)

One of the most well-known and extensively used tests to identify implicit biases is the Implicit Association Test or IAT. The IAT was created and introduced in 1998 by Anthony

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<sup>10</sup> Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 THE COLORADO LAWYER 45, 49 (May 2016), <https://ncwba.org/wp-content/uploads/2016/11/Strategies-for-Confronting-Unconscious-Bias-The-Colorado-Lawyer-May-2016.pdf>.

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

Greenwald, Debbie McGhee, and Jordan Schwartz.<sup>17</sup> The purpose of the IAT is to measure individual differences in implicit social cognition. Social cognition is a sub-topic of social psychology focusing on the study of mental processes involved in perceiving, attending to, remembering, thinking about, and making sense of the people in our social world.<sup>18</sup> The IAT is generally run through a nonprofit organization through their site, Project Implicit, founded by Anthony Greenwald, Mahzarin Banaji, and Brian Nosek, all involved with implicit bias research. Currently, Project Implicit provides IATs for various domains such as race, gender, ethnicity, weight, age, religion, disability, and sexual orientation.<sup>19</sup> According to Nosek, over 17 million individual test sessions have been completed on the website through 2015.<sup>20</sup>

### *Procedure*

The IAT is a computer based test that measures, through latency-based tasks, strengths of associations between target categories and attributes. An example would be two chosen categories such as African American and European American racial categories that appear on a screen. Subjects are then asked to rapidly classify them by pressing one of two keys. Likewise, exemplars of attribute categories, such as positive or negative words, are also sorted by using the same keys to correctly categorize them. One critical block includes categories and attributes classified by pressing the same set of keys. A second critical block includes a complementary pairing. The speed is recorded and the difference in overall speed between the two blocks is taken to indicate the direction and magnitude of association strengths among the categories and the attributes.<sup>21</sup>

### *Results*

Notably, the IAT relies on automatic, associative processes that are difficult to fake, and certainly harder to fake than explicit self-report measures.<sup>22</sup> The IAT is widely accepted in the psychology research community; however, some detractors, as well as the initial authors, argue that the test should not be used as a diagnostic tool, but more for educational purposes in order to develop awareness of implicit preferences and stereotypes.<sup>23</sup> An appropriate use of the test results can be using the IAT test and others like it to teach groups of people about the possibility of unintended biases.

Greenwald and Banaji have recently acknowledged, contrary to their earlier claims, that it would be “problematic to use [the IAT] to classify persons as likely to engage in discrimination.”<sup>24</sup> However, they argue that these problems decrease with increases in sample size. “Therefore, limited reliability and small-to-moderate effect sizes are not

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<sup>17</sup> Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464-80 (1998).

<sup>18</sup> Gordon B. Moskowitz, SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS 3 (2005).

<sup>19</sup> PROJECT IMPLICIT, <http://projectimplicit.net/customwebsites.html>.

<sup>20</sup> Saul Kassin et al., SOCIAL PSYCHOLOGY 163 (Cengage Learning, 10<sup>th</sup> ed. 2017).

<sup>21</sup> Greenwald et al., *supra* note 17, at 1464-80.

<sup>22</sup> Melanie C. Steffens, *Is the Implicit Association Test Immune to Faking?*, 51 EXPERIMENTAL PSYCH. 165-179 (2004).

<sup>23</sup> PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/ethics.html>.

<sup>24</sup> Andrea S. Kramer & Alton B. Harris, *Diversity Initiatives Need to Change in Light of Criticism*, LAW PRACTICE TODAY, July 17, 2017, <http://www.lawpracticetoday.org/article/diversity-initiatives-need-change-light-criticism/>.

problematic in diagnosing system-level discrimination, for which analyses often involve large samples.” The race IAT is, in fact, commonly used to generate estimates of the level of implicit bias in society, or among various groups.<sup>25</sup>

### Affect Misattribution Procedure (AMP)

AMP has been forwarded as one of the most promising alternatives to the Implicit Association Test. The AMP measures automatically activated responses based on the misattributions people make about the sources of their affect or cognition.<sup>26</sup>

#### *Procedure*

Through AMP, subjects are presented with a stimulus for either a brief visible period or subliminally, which is suspected to elicit a positive or negative attitude. Directly afterward, subjects are presented with a neutral stimulus that they are asked to rate as either more or less pleasing than an average stimulus. During the trials, the positive or negative affect in response to the priming image is misattributed or projected on to the neutral stimulus such that it is rated as more or less pleasing as would be expected from solitary presentation.<sup>27</sup> An example of an initial stimulus would be either a glass of beer or a glass of water, with various Chinese characters used as the neutral stimulus. Subjects that prefer beer were more likely to prefer the Chinese characters that followed a photograph of beer rather than water.<sup>28</sup>

#### *Results*

The result of the example used above appears to vindicate the position that individuals prefer patterns that follow the presentation of an object they like.<sup>29</sup> Two empirical studies by Betram Gawronski and Yang Ye looked at the criticism of AMP, such as whether attention response-eliciting features would influence results on an age or race AMP test. The findings showed support in the use of AMP as a valid and reliable measure of implicit attitudes.<sup>30</sup>

### Additional Tests

Further tests are being developed and refined to seek novel ways of assessing implicit biases such as the Implicit Relational Assessment Procedure (IRAP) and Relational Responding Task (RRT). These two tests specifically can include propositional information rather than associative information. Tests such as IAT are designed to capture associations between concepts, not necessarily the way in which those concepts are

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<sup>25</sup> Jesse Singal, *Measuring Racism Isn't Up to the Job*, NEW YORK MAGAZINE: SCIENCE OF US, Jan. 11, 2017, <http://nymag.com/scienceofus/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html>.

<sup>26</sup> Keith Payne & Kristjen Lundberg, *The Affect Misattribution Procedure: Ten Years of Evidence on Reliability, Validity, and Mechanisms*, 8 SOC. & PERSONALITY PSYCH. COMPASS 672-686 (2014).

<sup>27</sup> Keith Payne et al., *An Inkblot for Attitudes: Affect Misattribution as Implicit Measurement*, 89 J. PERSONALITY & SOC. PSYCH. 277-293 (2005).

<sup>28</sup> B. Keith Payne et al., *Automatic Attitudes and Alcohol: Does Implicit Liking Predict Drinking?*, 22 COGNITION & EMOTION 238-271 (2008).

<sup>29</sup> See *id.*

<sup>30</sup> CHERYL STAATS ET AL., STATE OF SCIENCE: IMPLICIT BIAS REVIEW 2016, at 54 (Kirwan Institute, 2016), <http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf>.

related. With IRAP and RRT, the subject responds in alignment with specific beliefs.<sup>31</sup> An example with IRAP is a subject responding to the relation between two stimuli presented on screen such as “pleasant” and “positive” using one of two response options, such as “similar” and “different.” Across pairs of blocks on the screen, the subject must respond using two contrasting response patterns, such as “pleasant-positive-similar” versus “pleasant-positive-different.”<sup>32</sup> The RRT requires the subject to categorize statements as true or not true. Further statements require a true or not true answer based on a rule set, such as respond as *if* they believed that Flemish people are more intelligent than immigrants (or vice versa).<sup>33</sup> The IRAP was published in 2006, and the RRT was introduced in 2015.

### (III) Implicit Bias in the Legal Profession

The U.S. legal profession as a whole is not representative of the broader population that it serves, and it continues to lag behind a number of other professions in terms of gender diversity, as well as racial and ethnic diversity.<sup>34</sup> Particularly in view of broader demographic shifts, it appears that ongoing efforts by legal diversity committees continue to struggle to make significant progress.<sup>35</sup>

While the 2010 census indicates that women are almost 51% of the U.S. population<sup>36</sup>, women constituted about 36% of the legal profession in 2016, barely moving the needle from 34.5% in 2015.<sup>37</sup> While better than professions such as software developers (17.9%) and civil engineers (12.6%), female representation in the legal profession is lower than that found among physicians (37.9%), accountants and auditors (59.7%), and the professional workforce as a whole (57.2%).<sup>38</sup> Further, despite women comprising close to 50% of current and recent law school graduates (and over 40% of law school graduates since the mid-1980’s)<sup>39</sup>, the percentage of women among firm partnership has barely budged (21.5% of all firm partners and 17.4% of firm equity partners).<sup>40</sup> Meanwhile, women’s representation among judges has plummeted from 56.7% in 2004 to 39% in 2015.

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<sup>31</sup> Jan De Houwer et al., *The Relational Responding Task: Toward a New Implicit Measure of Beliefs*, 6 FRONTIERS IN PSYCHOL. 7 (2015).

<sup>32</sup> Dermot Barnes-Holmes et al., *A Sketch of the Implicit Relational Assessment Procedure (IRAP) and the Relational Elaboration and Coherence (REC) Model*, 60 PSYCHOL. RECORD 530 (2010).

<sup>33</sup> De Houwer et al., *supra* note 31, at 2.

<sup>34</sup> Elizabeth Chambliss, *The Demographics of the Profession*, 2017 IILP REVIEW 2017: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 13.

<sup>35</sup> Jacqueline Bell, *Why Law is the Least Diverse Profession*, LAW360, May 17, 2016, <https://www.law360.com/articles/795764>.

<sup>36</sup> UNITED STATES CENSUS BUREAU, AGE AND SEX COMPOSITION IN THE UNITED STATES: 2010, Table 1: Population, [https://www2.census.gov/programs-surveys/demo/tables/age-and-sex/2010/age-sex-composition/2010gender\\_table1.xls](https://www2.census.gov/programs-surveys/demo/tables/age-and-sex/2010/age-sex-composition/2010gender_table1.xls).

<sup>37</sup> Chambliss, *supra* note 34, at 13.

<sup>38</sup> *See id.*

<sup>39</sup> Liane Jackson, *Minority Women Are Disappearing from BigLaw—and Here’s Why*, ABA JOURNAL, Mar. 1, 2016, [http://www.abajournal.com/magazine/article/minority\\_women\\_are\\_disappearing\\_from\\_biglaw\\_and\\_heres\\_why](http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why).

<sup>40</sup> Chambliss, *supra* note 34, at 13.

In a 2016 survey of the Florida Bar's Young Lawyers Division, 43% of its women members reported experiencing gender bias related to such issues as salary discrepancies in comparison to male counterparts, insensitive comments by partners and clients, lack of advancement opportunities, and family leave policies.<sup>41</sup> Moreover, other studies indicate that women attorneys are held to a higher ethical standard than their male counterparts and are therefore punished more often and more harshly for the same offenses.<sup>42</sup> Women had a 35% chance of being disbarred in any given case, for example, while men had a 17% chance.<sup>43</sup> Such statistics suggest that even positive stereotypes (i.e., women attorneys are more ethical than male attorneys) nevertheless have implications that are harmful to the group being stereotyped.<sup>44</sup>

Racial and ethnic minority groups made up 14.5% of attorneys in 2015,<sup>45</sup> while accounting for almost 30% of the population.<sup>46</sup> In comparison to other professions, racial and ethnic minority groups made up 44.2% of software developers, 31.2% of physicians, and 27.3% of the overall labor force.<sup>47</sup> As a percentage of law firm partners, minority groups made up 7.5% of all partners and 5.6% of equity partners<sup>48</sup> despite making up more than 20% of law school graduates (and between 30-40% at elite law schools) since 2002.<sup>49</sup> In 2015, it was reported that 23.5% of judges were minorities, noting that 36.8% of President Barack Obama's appointees to date had racial and ethnic minority backgrounds.<sup>50</sup>

Experts suggest that the lack of progress is attributable at least in part to implicit bias.<sup>51</sup> And, such implicit bias—which may be unconsciously exerted at various stages of a legal career—present structural and cultural barriers to advancement of underrepresented groups within the legal profession.<sup>52</sup> Moreover, as one expert points out, “organizations that view themselves as highly meritocratic tend to have members with more bias than organizations that do not. People who believe the firm is meritocratic tend to perceive themselves as unbiased and fair, which causes them to succumb more easily to unconscious biases.”<sup>53</sup>

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<sup>41</sup> Carolina Bolado, *12 Ways to Eliminate Gender Inequality for Lawyers*, LAW360, June 5, 2017, <https://www.law360.com/articles/931195/12-ways-to-eliminate-gender-inequality-for-lawyers>.

<sup>42</sup> Shankar Vedantam, *Women Held to Higher Ethical Standard than Men, Study Shows*, NPR: HIDDEN BRAIN, June 2, 2016, <http://www.npr.org/2016/06/02/480487259/women-held-to-higher-ethical-standard-than-men-study-shows>.

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> Chambliss, *supra* note 34, at 13.

<sup>46</sup> News Release, U.S. Census Bureau, 2010 Census Shows America's Diversity (Mar. 24, 2011), [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb11-cn125.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn125.html).

<sup>47</sup> Chambliss, *supra* note 34, at 13.

<sup>48</sup> *See id.*

<sup>49</sup> Jacqueline Bell, *US Law Firms Fail to Move Needle on Racial Diversity*, LAW360, May 15, 2016, <https://www.law360.com/articles/794900/us-law-firms-fail-to-move-needle-on-racial-diversity>.

<sup>50</sup> Chambliss, *supra* note 34, at 13.

<sup>51</sup> Bell, *supra* note 35.

<sup>52</sup> *See id.*

<sup>53</sup> Renwei Chung, *Unconscious Bias Remains Silent But Deadly for Legal Diversity*, ABOVE THE LAW, Mar. 10, 2017, <http://abovethelaw.com/2017/03/unconscious-bias-remains-silent-but-deadly-for-legal-diversity/>.

In the technology field—which is similarly notorious for viewing itself as purely meritocratic—85% report having witnessed or observed bias in the workplace, and 78% of employees report having experienced bias personally.<sup>54</sup> Overall, individuals were twice as likely to leave an organization due to unfair treatment as to have been recruited away.<sup>55</sup> Specifically, unfair treatment was the most frequently cited reason (37%) for having left employment in the tech field, and nearly half of the remaining respondents (43%) cited unfair treatment as a contributing factor.<sup>56</sup> And while unfair treatment is an egregious manifestation of bias, some of the other reasons cited for leaving an organization—dissatisfaction with the work environment and dissatisfaction with job duties—may also be symptomatic of implicit bias.<sup>57</sup> Though not specific to the legal profession, such data indicates how bias can manifest in different ways and be experienced differently by the different affected groups driven to leave a “meritocratic” organization.<sup>58</sup> A survey of in-house attorneys who are women of color similarly revealed that many admit to having experienced some form of discrimination, spanning harassment, missing out on desirable assignments, lack of access to network opportunities, unfair performance evaluations, denial of promotion, different treatment, and lack of information and access.<sup>59</sup>

### Pipeline into the Legal Profession (Law School)

Current enrollment at U.S. law schools has dropped to historical lows for the last 42 years.<sup>60</sup> At the same time, the proportion of women has also dropped to 47%, from a high of about 49% in the early 2000s.<sup>61</sup> And while African-American and Hispanic-American law student enrollment has ticked up respectively to 1% and 2%, law schools have seen a concurrent 1.2% decrease in Asian American enrollment in that timeframe.<sup>62</sup> It appears, however, that such numbers may reflect disproportionate changes specific to schools with low median LSAT scores, which are seen as less prestigious and of lower quality.<sup>63</sup>

One study notes that the gender gap is “more significant than it initially appears because for some time now women have earned 53% of the bachelor’s degrees in the U.S.” and “women within the law school applicant population—as is true generally—earn higher undergraduate grade-point averages (UGPAs) than men.”<sup>64</sup> Nonetheless, women are less likely than men with the same grades to be admitted to American Bar Association (ABA)-accredited law schools.<sup>65</sup> In particular, such disparity may be tied to treatment of an

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<sup>54</sup> Allison Scott, et al., *TECH LEAVERS STUDY 12* (Kapor Center, 2017).

<sup>55</sup> *See id.* at 10.

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.* at 4.

<sup>59</sup> ABA COMM’N ON WOMEN IN THE PROFESSION, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN FORTUNE 500 LEGAL DEPARTMENTS 11* (2012), [https://www.americanbar.org/content/dam/aba/marketing/women/visible\\_invisibility\\_fortune500\\_executive\\_summary.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/marketing/women/visible_invisibility_fortune500_executive_summary.authcheckdam.pdf).

<sup>60</sup> Tyler Roberts, *Why Flat Enrollment Is Great News for Law Schools*, PRELAW, Jan. 13, 2017, <http://www.nationaljurist.com/prelaw/why-flat-enrollment-great-news-law-schools>.

<sup>61</sup> Chambliss, *supra* note 34, at 13.

<sup>62</sup> *See id.*

<sup>63</sup> Aaron N. Taylor, *Diversity as a Law School Survival Strategy*, 59 ST. LOUIS UNIV. L. J. 321, 331 (2015).

<sup>64</sup> William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 5 (2000).

<sup>65</sup> *See id.*

applicant's score on the Law School Admissions Test (LSAT) as "the single most significant element of an applicant's file."<sup>66</sup>

In particular, women's LSAT scores lag behind men's by an average of one-tenth of a standard deviation and women need to have grades a quarter-point higher than men to reach the same admission rates.<sup>67</sup> One study finds nearly 2000 additional women (approximately 8.5%) would have been admitted to an ABA-accredited law school on an annual basis if women were admitted at the same proportion as men with the same grades.<sup>68</sup> The study further finds that racial and ethnic minority admission rates would increase by 41% if admission were based on GPA alone rather than a combination of GPA and LSAT score, including twice as many African-Americans applicants and 13% more Asian American applicants.<sup>69</sup> "Conversely, white students are the only group that is advantaged by a LSAT/UGPA model."<sup>70</sup> The negative consequences of a lower LSAT score are the most exacerbated precisely where competition is the fiercest—not only for admission to elite law schools but also for some judicial clerkships, law firm jobs, and law school scholarships.<sup>71</sup>

For example, narrative bias—the "sometimes subtle, sometimes blatant, often pervasive bias of stories, manners, sensitivities, and paradigms"—may manifest in purportedly neutral questions that dredge up personal conflicts and cognitive dissonance for women (e.g., logical reasoning questions requiring acceptance of the premise that allowing women in the workforce is detrimental to children) and racial and ethnic minorities (e.g., questions premised on the legality of slavery or the deleterious effects of affirmative action).<sup>72</sup>

Other types of biases pertaining to the content of the LSAT include subject matter selection (how choices about content influence score differences between subgroups) and item bias (where certain questions impose extra burdens on test-takers of certain backgrounds).<sup>73</sup> While efforts have been made to make LSAT questions more inclusive, such efforts require transparency and ongoing evaluation to ensure progress in uprooting not only explicitly biased questions but also those that are implicitly biased.

Another type of bias—stereotype bias—is caused by self-awareness of the possibility that one's own test performance could reflect negatively on one's group and has been shown to be sufficient to adversely affect performance on standardized tests.<sup>74</sup> On the one hand, the Law School Admissions Council (LSAC) claims: "The LSAT permits the direct comparison of the abilities of persons from diverse educational backgrounds. . . . The primary advantage is that [LSAT scores] provide a standard measure and are administered to all applicants under standard conditions." On the other hand, stereotype threat research suggests that the LSAC's simplistic definition of standardized conditions obscures how a history of sexism, racism, and classism can facilitate so-called

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<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> Leslie Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121, 131-35 (1993).

<sup>73</sup> Kidder, *supra* note 64, at 5.

<sup>74</sup> See *id.*

standardized conditions that further privilege white and male and affluent (and therefore especially affluent white male) test-takers.<sup>75</sup>

Stereotype bias has been shown to have adverse effects on test performance by women, African-Americans, Latinos, and students of low socioeconomic backgrounds.<sup>76</sup> Such bias is rooted in societal stereotypes, which increases the difficulty of combatting the effects of such bias by mere efforts to alter the content of the test alone.

In addition to the difficulties in gaining admission to law school, there are also disparities in access to financial aid. A recent study found that nearly 80% of scholarships are not based on financial need, but on other factors including high LSAT scores.<sup>77</sup> As a result, more than two-thirds of white law students reported receiving a scholarship compared to less than half of African-American law students.<sup>78</sup> In the absence of such scholarships, law students may rely on a combination of parental assistance (which is less available to those of lower socioeconomic backgrounds), working (taking time away from studies and thereby affecting grades), and/or student loans (associated with mental and physical stress).<sup>79</sup>

First-generation law students—often more diverse in terms of racial and ethnic backgrounds, as well as from lower socioeconomic backgrounds<sup>80</sup>—are also less likely to be among recipients of such scholarships.<sup>81</sup> Further, first-generation law students may feel more isolated, find it difficult to fit in, lack the confidence to contribute to class discussions or to ask for help, and be unfamiliar about the etiquette, networking, and workplace norms that more affluent, connected students may take for granted.<sup>82</sup>

### The Law Firm Workplace

Entry-level hiring for law firms generally involves an on-campus screening interview and concurrent screening based on GPA/transcript, class standing, test scores, relevant work experience, and in some cases, a writing sample. As discussed herein, such purportedly objective criteria may nevertheless be colored by implicit bias and the lingering effects thereof. Following the screening interview, a subset of applicants may thereafter be asked to participate in a callback interview at the offices of the law firm in question during which a number of attorneys interview each applicant for about 20-30 minutes.

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<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> Scott Jaschik, *Study: Law School Aid Likely to Go to White Students*, INSIDE HIGHER ED, Feb. 9, 2017, <https://www.insidehighered.com/quicktakes/2017/02/09/study-law-school-aid-likely-go-white-students>.

<sup>78</sup> See *id.*

<sup>79</sup> Gillian B. White, *The Mental and Physical Toll of Student Loans*, THE ATLANTIC, Feb. 2, 2015, <https://www.theatlantic.com/business/archive/2015/02/the-mental-and-physical-toll-of-student-loans/385032/>.

<sup>80</sup> Laura Pappano, *First-Generation Students Unite*, NEW YORK TIMES, April 8, 2015, <https://www.nytimes.com/2015/04/12/education/edlife/first-generation-students-unite.html?mcubz=2>.

<sup>81</sup> Jaschik, *supra* note 77.

<sup>82</sup> Delece Smith-Barrow, *Law Schools Carve a Niche for First-Generation Students*, U.S. NEWS & WORLD RPT., Jan. 26, 2016, <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2016-01-26/find-a-niche-at-law-school-as-a-first-generation-professional>.

Studies have shown that implicit bias is inherent in interpretation of body language, facial expressions, and ambiguous actions, as well as how certain conditions are perceived.<sup>83</sup> Significantly, implicit biases are predictive of the rate of callback interviews.<sup>84</sup> Nonetheless, law firm hiring of women and racial and ethnic minority law students has generally tracked law school graduation rates in recent years,<sup>85</sup> as law firms struggle to find new ways to recruit diverse candidates.<sup>86</sup>

Although many firms pay all of their first-year associates the same starting salary and some firms operate in a lockstep model, the legal profession has one of the largest gender gaps in terms of compensation.<sup>87</sup> Median pay for full-time women attorneys is only 77.4% of the median pay for their full-time men counterparts.<sup>88</sup> That drops to about 69% when it comes to law firm partners,<sup>89</sup> although that is an improvement from 2010, when female partners made only 47% of the compensation of their male counterparts.<sup>90</sup> Other studies have found that even when controlling for billable hours, origination, tenure, and firm size, male partners still receive higher compensation than female partners.<sup>91</sup> Women of color (2.5% of partners in 2015) fare the worst across all firm sizes and most jurisdictions, receiving less compensation and fewer promotions than men and white women and seeing the highest rates of attrition (85% within 7 years).<sup>92</sup>

According to some sources, women attorneys bill an average of 24 minutes more each day than their male counterparts do, but are billed at much lower rates.<sup>93</sup> Such disparities result in women working more hours (and even having more experience) but earning less.<sup>94</sup> Some of the reason for the disparity may arise from distribution across different practice areas, as women are less represented in practices associated with higher prestige and higher salaries.<sup>95</sup>

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<sup>83</sup> David L. Douglass, *The Scientific Basis for the Ethical Obligation to Require Action to Eliminate Bias and Promote Diversity in the Legal Profession*, 2017 IILP REVIEW 2017: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 67-68.

<sup>84</sup> See *id.*

<sup>85</sup> Sharon E. Jones, *Diversity and Inclusion: Transformative Steps Toward a More Inclusive Profession*, 2017 IILP REVIEW 2017: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 87.

<sup>86</sup> Bonnie Marcus, *How One Law Firm Is Tackling Diversity*, FORBES, Oct. 24, 2016, <https://www.forbes.com/sites/bonniemarcus/2016/10/24/how-one-law-firm-is-tackling-diversity/#76901068758d> (discussing an initiative based on the NFL's "Rooney Rule" requiring that at least 20% of the candidate pool be diverse).

<sup>87</sup> Debra Cassens Weiss, *Full-Time Female Lawyers Earn 77% of Male Lawyer Pay*, ABA JOURNAL, Mar. 17, 2016, [http://www.abajournal.com/news/article/pay\\_gap\\_is\\_greatest\\_in\\_legal\\_occupations/](http://www.abajournal.com/news/article/pay_gap_is_greatest_in_legal_occupations/).

<sup>88</sup> See *id.*

<sup>89</sup> Elizabeth Olson, *A 44% Pay Divide for Female and Male Law Partners, Survey Says*, NEW YORK TIMES, Oct. 12, 2016, <https://www.nytimes.com/2016/10/13/business/dealbook/female-law-partners-earn-44-less-than-the-men-survey-shows.html?mcubz=2>.

<sup>90</sup> See *id.*

<sup>91</sup> LAUREN STILLER RIKLEEN, ABA PRESIDENTIAL TASK FORCE ON GENDER EQUITY AND THE COMM'N ON WOMEN IN THE PROFESSION, CLOSING THE GAP: A ROADMAP FOR ACHIEVING GENDER PAY EQUITY IN LAW FIRM PARTNER COMPENSATION 12 (2013), [https://www.americanbar.org/content/dam/aba/administrative/women/closing\\_the\\_gap.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap.authcheckdam.pdf) (citing a study by Keshet Consulting).

<sup>92</sup> Jackson, *supra* note 39.

<sup>93</sup> Alison Monahan, *Understanding the Gender Wage Gap in the Legal Profession*, THE BALANCE, Feb. 23, 2017, <https://www.thebalance.com/understanding-the-gender-wage-gap-in-the-legal-profession-4000621>.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

The ABA Commission on Women in the Profession found that minority women attorneys are denied equal access to significant work assignments, mentoring, and sponsorship opportunities.<sup>96</sup> Relationships in law firms—which are still predominantly white and male—are often built on common interests and backgrounds.<sup>97</sup> As noted above with respect to first-generation students, unfamiliarity with the norms of the predominant group leads to social isolation, difficulty fitting in, and lack of confidence.

Further, firm culture may make it difficult for those of different backgrounds to connect to partners responsible for allocating work assignments (i.e., opportunities to hone and demonstrate increasing skills).<sup>98</sup> Partners generally have discretion in distributing work assignments, as well as coordinating pitch teams and trial teams.<sup>99</sup> Partners also serve as mentors or sponsors, giving an associate feedback on how to improve and develop as an attorney, as well as making opportunities for leadership known.<sup>100</sup> Such relationships with partners are therefore crucial at virtually all stages of a law firm career, from work assignments to evaluation, compensation, promotion, and succession.<sup>101</sup> Lack of affinity and consequent difficulty in connecting in a meaningful way to partners may therefore disadvantage an associate’s career. As one Latina attorney noted, “The reality is, as a woman of color, I can’t necessarily count on inheriting a partner’s book of business. That’s not usually an option for people of color—and especially women.”<sup>102</sup>

In being prone to affinity bias, firm culture may allow for common types of workplace bias, which include pressure to hide one’s identity, lack of credibility (e.g., prone to interruption), inappropriate comments in the guise of jokes, indirect inappropriate comments (i.e., directed at others), exclusion from social and professional meetings, and unequal treatment of the same actions.<sup>103</sup> One study finds, for example, that a woman’s perceived competency drops by 35% when she is assertive or forceful, while men are judged less harshly.<sup>104</sup>

Even at the partnership level, the effects of implicit bias continue to be felt. The New York Times reported that the gender gap in pay at the partner level appears to be directly related to disparities in origination credit.<sup>105</sup> In particular, it was noted that the “old boys network”—the primarily male network of decision-makers within the law firm and within its client organizations—still has a disproportionate effect on who is credited with bringing in

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<sup>96</sup> Jackson, *supra* note 39.

<sup>97</sup> *See id.*

<sup>98</sup> *See id.*

<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> Vital Smarts, *Discrimination at Work: Prevalent yet Subtle Workplace Bias Erodes Productivity and Engagement*, CISION PR NEWSWIRE, Mar. 21, 2017, <http://www.prnewswire.com/news-releases/discrimination-at-work-prevalent-yet-subtle-workplace-bias-erodes-productivity-and-engagement-300426635.html>.

<sup>104</sup> Vital Smarts, *Gender Inequality: Women Judged More Harshly than Men When Speaking Up Assertively*, VITAL SMARTS: CRUCIAL CONVERSATIONS, [https://www.vital-smarts.com/resourcecenter/?fwp\\_resource\\_indie=diversity](https://www.vital-smarts.com/resourcecenter/?fwp_resource_indie=diversity) (last visited Aug. 15, 2017).

<sup>105</sup> Olson, *supra* note 89.

business.<sup>106</sup> Men receive more internal firm referrals for new work, as well as a higher percentage of origination credit from such referrals.<sup>107</sup>

These findings suggest that law firms do not compensate their lawyers based solely on merit and achievements. The race, ethnicity, and gender of high-achieving partners impacts compensation. A white male high-achieving partner is compensated more than his female and non-white colleagues who have the same levels of billable hours and origination.<sup>108</sup>

### The Corporate Law Department Workplace

In comparison to law firms, corporations have more readily accepted that diversity pays many dividends. Corporate legal departments, in turn, have adopted the enterprise commitment to diversity, which may be a big reason why diverse candidates have tended to fare better in large corporate legal departments than in law firms. The delta can be explained by two key differences: (1) enterprise culture; and (2) performance/reward criteria. Corporate America has seen the long-term benefits of diversity, while law firm leaders may have tended to take a short-term view (e.g., due to firm structure, including compensation parameters and other incentives).

In-house lawyers are particularly incentivized to identify, mentor, and promote young diverse talent.<sup>109</sup> According to the American Bar Association (ABA) report published January 2017 and entitled “A Current Glance at Women in the Law,” women occupy 24.8% of General Counsel positions in the Fortune 500 companies. This number falls to 19.8% for Fortune 501-1000 companies.<sup>110</sup>

Among minority lawyers, 47 companies on the 2012 Fortune 500 list employed minorities as general counsel, which is an increase of 4 since 2011 and an increase of 10 since 2008. Within the Association of Corporate Counsel (ACC), statistics show these diversification trends as well: in 2000, 68% of its self-disclosing members were male and 32% were female; by 2011, the figures had shifted to 58% and 42%, respectively.<sup>111</sup>

Female attorneys of color have made undeniable inroads into the leadership ranks of a number of Fortune 500 law departments. A small group of diverse female attorneys has even reached the upper echelons of corporate legal practice. In 2005, there were only five general counsels of such companies who were women of color. In 2010, there were seventeen (approximately 3.41% of all Fortune 500 general counsels and 18.1% of the

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<sup>106</sup> See *id.*

<sup>107</sup> RIKLEEN, *supra* note 91, at 12(citing a study by Keshet Consulting).

<sup>108</sup> See *id.*

<sup>109</sup> Mark A. Cohen, *Corporate Departments Are Taking the Lead in Creating a More Diverse Legal Industry*, FORBES (Mar. 27, 2017, 9:36 AM), <https://www.forbes.com/sites/markcohen/2017/03/27/corporate-departments-are-taking-the-lead-in-creating-a-more-diverse-legal-industry/2/#118933ee6657>.

<sup>110</sup> ABA COMM’N ON WOMEN IN THE PROFESSION, *A CURRENT GLANCE AT WOMEN IN THE LAW* (Jan. 2017), [https://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_january2017.auth\\_checkdam.pdf](https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.auth_checkdam.pdf).

<sup>111</sup> ASS’N OF CORPORATE COUNSEL, *LEADING PRACTICE IN LAW DEP’T DIVERSITY AND INCLUSION INITIATIVES: COMPANY BEST PRACTICES 8* (2013), [https://www.accmeetings.com/AM15/faculty/files/ACC\\_304\\_CE3B\\_601\\_Leading-Practices-in-Law-Department-Diversity-and-Inclusion-Initiatives-Company-Best-Practices.pdf](https://www.accmeetings.com/AM15/faculty/files/ACC_304_CE3B_601_Leading-Practices-in-Law-Department-Diversity-and-Inclusion-Initiatives-Company-Best-Practices.pdf).

total number of women holding such positions). However, female attorneys of color continue to face greater barriers than other groups that thwart their ability to achieve their full potential.<sup>112</sup>

Women of color surveyed in a 2012 ABA study noted some positive comparisons between their experiences in law firms and in corporate law departments, including the:

- “Opportunity offered by their corporate law departments to broaden their expertise beyond the law into the business side of their companies;
- Ability to develop more intimate, meaningful relationships with clients; and
- Opportunity to escape the pressures of stringent billable hours requirements and establish a better work-life balance.”<sup>113</sup>

However, that same study found that female attorneys of color were more likely than other groups to be experience obstacles that limited their opportunities for success early on in their careers.<sup>114</sup> For example, female attorneys of color:

- “Have the highest attrition rate of any group of attorneys;
- Are more likely than any other group to experience exclusion from other employees based on racial and gender stereotyping;
- Are most likely to feel the need to make adjustments to fit into the workplace; and
- Are more likely to cite dissatisfaction with current levels of work and access to high-profile client assignments relative to experience.”<sup>115</sup>

“Further, women of color in corporate law departments are the least likely of all groups to be hired at top executive or senior management levels and the most likely to be hired at junior levels. Commensurately, women of color are most likely to be hired at salary scales lower than their white female and all male counterparts, across almost all pay categories.”<sup>116</sup>

## Summary

Several, if not all, of the issues/problems described above contributing to low numbers of women and minorities in the legal profession can be at least partially attributed to implicit bias and/or discrimination. This is articulated in an article entitled “Implicit Bias and the Legal Profession’s ‘Diversity Crisis’: A Call for Self-Reflection” by Nicole E. Negowetti, which notes that social science studies demonstrate that the continued underrepresentation of women and minorities in the legal profession is not likely to be caused predominately by “explicit or ‘first generation bias,’ which involves ‘deliberate exclusion or subordination directed at identifiable members of disfavored groups.’ Rather, this bias has been supplanted by ‘second generation’ forms of bias, which are attributable to implicit bias.”<sup>117</sup>

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<sup>112</sup> ABA COMM’N ON WOMEN IN THE PROFESSION, *supra* note 59, at v *passim*.

<sup>113</sup> *See id.* at vii.

<sup>114</sup> *See id.* at v.

<sup>115</sup> *See id.*

<sup>116</sup> *See id.* at vii.

<sup>117</sup> Nicole E. Negowetti, *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection*, 15 NEV. L. J. 930, 932 (Spring 2015).

#### **(IV) Negative Impacts of Implicit Bias in the Legal Profession**

Implicit biases affect our judgment, influence our decision making, and have a real effect upon whom we befriend, employ, and promote in the workplace. In this section, we summarize the extensive research of the effects of implicit biases in a variety of situations in the legal profession.

##### Impacts in Attorney Hiring

###### *Bias in the Initial Screening of Minority Candidates*

Numerous studies have demonstrated that the hiring process is influenced by racial and gender stereotypes on the evaluation of candidates. One study looked at the issue of whether there was a preference for white candidates when faced with observably similar African-American and white applicants. Researchers submitted resumes in response to help-wanted ads in Chicago and Boston newspapers and measured call-backs for interviews for each resume sent. The researchers manipulated the perception of race by randomly assigning "typically white" names (e.g., Emily, Ashley) to half of the resumes and "typically black" names (e.g., Lakisha, Tamika) to the other half. Results showed that for two identical individuals engaging in identical job searches, resumes with "typically white" names received 50% more callbacks than those with "typically black" names, and average "typically white"-named candidates received more callbacks than highly skilled "typically black"-named candidates.<sup>118</sup>

Further, the study finds that discrimination levels are statistically uniform across all the occupation and industry categories covered in the experiment. Federal contractors, sometimes regarded as more severely constrained by affirmative action laws, do not discriminate less. Neither do larger employers, or employers who explicitly state that they are "Equal Opportunity Employer" in their ads.<sup>119</sup>

In a legal professional setting, researcher Dr. Arin Reeves examines whether race colors the way in which minority practitioners are evaluated by hiring committees in large law firms in her study "Colored by Race."<sup>120</sup> Dr. Reeves gathered data from confidential telephone interviews with 114 partners representing 83 large law firms throughout the US. All of the partners in this study were involved with the hiring process in their respective law firms for at least six months during their career as partners.<sup>121</sup> Some of the key findings in her study include:

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<sup>118</sup> Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

<sup>119</sup> David R. Francis, *Employers' Replies to Racial Names*, NAT'L BUREAU ECON. RESEARCH, <http://www.nber.org/digest/sep03/w9873.html> (last visited Aug. 16, 2017).

<sup>120</sup> Arin N. Reeves, *Colored by Race: Bias in the Evaluation of Candidates of Color by Law Firm Hiring Committees*, NAT'L EMPL. L. COUNCIL, 1, <http://www.nelc-law.org/docs/01-ColoredbyRace.pdf> (last visited Aug. 16, 2017).

<sup>121</sup> See *id.* at 5 n.2.

- One Candidate, Two Conversations—The majority of the responses by the white partners in the study illustrated that the focus on a minority candidate extended beyond the conversations in the hiring committee meetings. According to many of the white partners in the study, there were often two sets of conversations held about minority attorneys.

The first set of conversations involved the formal evaluative dialogues about candidates held in the hiring committee meetings. The second set of conversations occurred outside of the parameters of the formal committee meetings and took place usually without any minorities present, including the minority members of the hiring committees. In these discussions, partners involved in the hiring process express variations of the following themes: 1) the perception that if the minority candidates had been subjected to the same qualifying criteria as their non-minority counterparts, they would not be hired; 2) resentment regarding the client and social pressures for inclusiveness that are driving down the standards of hiring, especially as the standards relate to attorneys of color; and 3) concerns that the minority candidates would most probably never be successful at the firm.<sup>122</sup>

- The “Taint” of Affirmative Action Colors the Way Minority Attorneys and Aspirations Are Evaluated—A significant majority of the partners in the study, both minority and white, stressed the importance of their hiring programs not resembling affirmative action in any way. Affirmative action, as defined by the partners, implied that hiring standards were being lowered to hire minority candidates to increase the firm's diversity. As one partner in the study explains, “You've got the regular candidates in one pile, and you have the diversity candidates in another pile. We have different conversations about the diversity pile. We have different standards for the diversity pile. We have different expectations for the diversity pile.”<sup>123</sup>

## Impact in Attorney Performance Evaluation

### *Confirmation Bias of Gender Stereotypes*

The subjective nature of the attorney evaluation process is exacerbated by the influence of stereotypes and dominant ideologies. Research shows that when evaluating members of a group, individuals pay more attention to information that is consistent with a stereotype and less attention to stereotype-inconsistent information.<sup>124</sup> That is, people seek out and assign greater weight to information that is consistent with the stereotype while minimizing or ignoring information that conflicts with the stereotype. This is a phenomenon known as “confirmation bias,” which is the tendency for people to seek information that confirms preexisting beliefs or assumptions. When we make a judgment about another person, we subconsciously look for evidence to back up our own opinions of that person. We do this

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<sup>122</sup> See *id.* at 1-2.

<sup>123</sup> See *id.* at 2-3.

<sup>124</sup> Susan T. Fiske et al., *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 357, 367 (4th Ed., 1998).

because we want to believe we are right and that we have made the right assessment of a person.

Stereotypes linking women to the home and family have an effect on women's prospects for hiring and career advancement. One of the ways in which large law firms have sought to increase gender equity is through the introduction of part-time and flexible work structures. However, this arrangement may have unintended consequences. A supervising lawyer may assume, consciously or unconsciously, that an attorney working a reduced-hours schedule is not fully committed to her career, and the supervisor may be more likely to remember the times the attorney declined an assignment, left early, or failed to answer the phone (all of which confirm the partner's assumption) than the times the associate took on an extra project, stayed late, or responded promptly to emails.<sup>125</sup>

When a woman lawyer is not given a high-status assignment because her supervisors assume that family commitments will detract from the time she can commit to her work but is then denied partnership because she has not taken on enough challenging assignments, stereotypes with respect to women lawyers' family commitments and commitment to their work are reinforced.

We touched upon the concept of gender stereotypes in the previous section; however, these stereotypes have implications beyond the hiring of women in law firms, as these gendered qualifications are continually used, whether formally or informally, in evaluations of female lawyers. Women lawyers are therefore likely to be continually penalized for not possessing or successfully exhibiting these characteristics simply because they are women. For instance, individuals would often assume that women lawyers would be less assertive than male lawyers because assertiveness is considered to be a masculine characteristic. However, if a woman lawyer is assertive, a coworker or supervisor would either still not perceive her as assertive (due to the persistent nature of stereotypes) or would see assertiveness as a negative quality for a woman.<sup>126</sup>

### *Confirmation Bias in the Racialized Perceptions of Writing Skills*

A 2014 study, which is briefly discussed above, showed racial bias in evaluating legal writing and found that supervising lawyers were more likely to perceive African-American lawyers as having subpar writing skills in comparison to their Caucasian counterparts.<sup>127</sup> In its study, the researchers inserted 22 errors, including minor spelling or grammar errors, as well as factual errors and analysis errors, into a research memo written by a hypothetical third-year litigation associate "Thomas Meyer." The memo was sent to sixty diverse partners<sup>128</sup> who had agreed to participate in a writing analysis study.<sup>129</sup> The study

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<sup>125</sup> Lory Barsdate Easton & Stephen V. Armstrong, *How to Minimize Implicit Bias (and Maximize Your Team's Legal Talent)*, DRI FOR THE DEFENSE, Sept. 2016, at 80, 84.

<sup>126</sup> Anna Jaffe, et al., *White Paper: Retaining & Advancing Women in National Law Firms* (Stanford Law Sch. Women in L. Pol. Lab Practicum, White Paper, May 31, 2016), <https://law.stanford.edu/wp-content/uploads/2016/05/Women-in-Law-White-Paper-FINAL-May-31-2016.pdf>.

<sup>127</sup> Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills* (Nextions, Yellow Paper Series 2014-0404), <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf>.

<sup>128</sup> See *id.* (Of these partners, 23 were women, 37 were men, 21 were racial/ethnic minorities, and 39 were white.)

participants unconsciously found more of the errors in the “African-American” memo, because they expected to find more errors.<sup>130</sup> Implicit biases resulted in more discovered errors, which affected the final evaluation of the attorney’s work product and the ultimate evaluation of the attorney.<sup>131</sup>

This type of bias could have a very dramatic effect on associates, whose consideration for promotions and other rewards could rest on their performance reviews.<sup>132</sup> The findings of these studies is concerning, as career development is an even bigger issue than recruiting for big law firms when it comes to minority and women attorneys.<sup>133</sup>

In Dr. Arin Reeve’s study “Colored by Race,” she found that minority candidates are penalized for the high attrition of minority attorneys from law firms.<sup>134</sup> Research by the National Association of Law Placement and other notable organizations has consistently demonstrated that attorneys of color do indeed have dramatically higher rates of attrition than their white counterparts. However, research by the Minority Corporate Counsel Association, the American Bar Association, and other entities demonstrates that a large part of minority attorney attrition from law firms is due to the firms’ not fully integrating minority lawyers into their folds and the minority practitioners not being afforded full and equal opportunity to the work, the resources, and the relationships that they require in order to succeed.<sup>135</sup>

### *Gender Bias in Performance Reviews*

Performance reviews are partly, if not mostly, subjective—focused more on the reviewer’s perceptions of the employee’s performance than on objective metrics. Subjectivity opens the door to bias. Researcher Paola Cecchi-Dimeglio and author Kim Kleman found that gender bias taints performance reviews, with women often being shortchanged.<sup>136</sup> Their findings show that women are 1.4 times more likely to receive critical subjective feedback than men (as opposed to either positive feedback or critical objective feedback).<sup>137</sup> They also found that women’s performance was more likely to be attributed to characteristics such as luck or their ability to spend long hours in the office, perceived as real commitment to the firm, than their abilities and skills. As such, they often did not receive due credit for their work.<sup>138</sup>

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<sup>129</sup> See *id.*

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> Matthew Pearlman, *Implicit Bias Is Real and Needs to Be Addressed*, LAW360 (June 19, 2017, 6:56 PM), [https://www.law360.com/ip/articles/936093/implicit-bias-is-real-and-needs-to-be-addressed?nl\\_pk=6e6474d7-d523-48fa-8fc2-a2407b202bc0&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=ip](https://www.law360.com/ip/articles/936093/implicit-bias-is-real-and-needs-to-be-addressed?nl_pk=6e6474d7-d523-48fa-8fc2-a2407b202bc0&utm_source=newsletter&utm_medium=email&utm_campaign=ip).

<sup>133</sup> See *id.*

<sup>134</sup> Reeves, *supra* note 120, at 1.

<sup>135</sup> See *id.* at 3.

<sup>136</sup> Paola Cecchi-Dimeglio, *How Gender Bias Corrupts Performance Reviews, and What to Do About It*, HARVARD BUS. REV., Apr. 12, 2017, <https://hbr.org/2017/04/how-gender-bias-corrupts-performance-reviews-and-what-to-do-about-it%E2%80%AC>.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

A 2014 study by linguist Kieran Snyder found that roughly 59% of men got critical feedback in their reviews, compared to 88% of women. After analyzing 248 reviews from 28 companies, Snyder found that there is one word that is repeatedly used in reviews to describe women, but never for men—“abrasive.”<sup>139</sup>

The biases can lead to double standards, in that positive or a negative spin can be applied to behavior depending on the employee’s gender. For example, in a pair of reviews, the reviewer highlighted the woman’s “analysis paralysis,” while the same behavior in a male colleague was seen as careful thoughtfulness: “Simone seems paralyzed and confused when facing tight deadlines to make decisions,” while “Cameron seems hesitant in making decisions, yet he is able to work out multiple alternative solutions and determined the most suitable one.”<sup>140</sup> Double standards like these can affect women’s opportunities for advancement.<sup>141</sup>

These studies have identified many different reasons for this lack of improvement, but as discussed below they also make a compelling business case for law firms to embrace diversity in light of the changing demographics of attorneys across the country, and of their clients.

## Economic and Other Costs of Implicit Bias

### *Impact on Employees*

The practical effects of implicit/unconscious bias in hiring, retention rates, evaluations, promotions, and success in the legal profession are real.

Many of the impediments and biases we noted can lead to discrepancies between compensation for male and female equity partners. A study called “Compensation in Law Firms: Why Women Equity Partners Are Compensated Less for the Same Billable Hours and Business Origination as Male Equity Partners” surveyed over 1,700 lawyers, of whom 915 were male and 814 were female, 865 were equity partners, 342 were non-equity partners, and 463 were associates. Their research indicated, “compensation is gender-based, with male equity partners receiving more compensation than women equity partners do. This fact is true when women and male equity partners bill the same number of hours, generate the same levels of origination, have the same level of law firm tenure and work in the same size of law firms.”<sup>142</sup>

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<sup>139</sup> Yueqi Yang, *Studies: Performance Reviews Are Biased Against Women*, BIZPHILLY (Nov. 19, 2015, 10:19 AM), <http://www.phillymag.com/business/2015/11/19/performance-reviews-gender-bias/#tW05kyITvBxHWmL.99>.

<sup>140</sup> Cecchi-Dimeglio, *supra* note 136.

<sup>141</sup> *See id.*

<sup>142</sup> Sheryl L. Axelrod, *Challenging the Myths About Women and Minority Lawyers*, LAW PRACTICE TODAY, Mar. 13, 2005, <http://www.lawpracticetoday.org/article/women-and-minority-lawyers/>.

The fact that women in the profession are not being compensated at the same levels for the same work as men—and are not being equally credited for the business they generate—is not because they’re not putting in as many hours.<sup>143</sup>

A 2016 survey conducted by legal search firm Major Lindsey & Africa found that large firm female partners earned an average of \$659,000 annually compared with an average of \$949,000 for male partners.<sup>144</sup> Jeffrey A. Lowe, a Major, Lindsey & Africa leader, told the New York Times that partners pointed to “origination”—bringing new cases to the firm—as the top factor in their industry’s wage gap.<sup>145</sup> But this statement needs refining. The ability to generate business does not necessarily correlate to receiving the credit for the generation of that business. Business development credit is required for a successful practice, and research suggests that women are not receiving fair credit for the business they generate.<sup>146</sup> The study ties the origination credit issue tightly to the compensation gap:<sup>147</sup>

To achieve gender parity in compensation, law firms must provide a credit origination system that: ensures rainmaking opportunities and pitch teams are inclusive of women; fairly allocates credit among teams; offers a process for resolving credit disputes among partners; removes decisions about the “inheritance” of client credit from individual partners; and develops a system that systematically involves clients, firm leadership, and the partners who service the work in credit succession decisions.

In the past, clients have belonged to “the firm” as a whole and were served by the most qualified lawyers in each practice area as needed. Starting around the 1990s, there was a shift within firms; the power of the firm brand declined, and the power held by individual lawyers increased. ‘Clients were increasingly drawn by the reputations of individuals rather than those of the firms, and the individual rainmaker lawyer was accordingly rewarded based on “their” clients under the new model.<sup>148</sup> This shift has been accompanied by a legacy system for bequeathing of clients as older lawyers leave the firm. Most firm business comes from a core group of high-value clients—by some estimates, 80% of business comes from 20% of existing clients.<sup>149</sup> This means that the

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<sup>143</sup> See *id.*

<sup>144</sup> Christina Cauterucci, *Male Partners Make 44 Percent More than Female Ones*, SLATE: XXFACTOR (Oct. 24, 2016, 8:32 AM), [http://www.slate.com/blogs/xx\\_factor/2016/10/24/male\\_law\\_partners\\_make\\_44\\_percent\\_more\\_than\\_female\\_ones.html](http://www.slate.com/blogs/xx_factor/2016/10/24/male_law_partners_make_44_percent_more_than_female_ones.html).

<sup>145</sup> See *id.*

<sup>146</sup> LINDA BRAY CHANOW, NAT’L ASS’N OF WOMEN LAWYERS, ACTIONS FOR ADVANCING WOMEN INTO LAW FIRM LEADERSHIP 18-19 (Nat’l Leadership Summit, July 2008), <http://www.nawl.org/p/cm/ld/fid=82#reports>.

<sup>147</sup> LAUREN STILLER RIKLEEN, WOMEN LAWYERS CONTINUE TO LAG BEHIND MALE COLLEAGUES: REPORT OF THE 9<sup>TH</sup> ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3, 9-10 (October 2015).

<sup>148</sup> Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1876 (2008).

<sup>149</sup> Ellen Freedman, *Getting More Business from Existing Clients: Five Easy Strategies that Really Work*, PA. BAR NEWS, Apr. 7, 2003, <http://www.pabar.org/Public/LPM/Resources/R15/Articles/Getting%20More%20Business%20from%20Existing%20Clients~58~%20Five%20Easy%20Strategies%20That%20Really%20Work.pdf>.

vast majority of origination credits have already been allocated to and are held by certain firm partners. By exercising the power to bequeath their existing clients (and associated origination credit), such partners control who succeeds them in particular, as well as who succeeds at the firm generally. Women are often excluded from the mostly male internal networks in which attorneys assist and promote one another's efforts and where succession planning decisions are made.<sup>150</sup> When the client relationship partner chooses who succeeds him as originating partner after his departure, women who may not be in the "inner circle" are overlooked with respect to the opportunity to inherit that book of business.

The origination credit issue may be one of representation in initial wins of client business as well. Research suggests that the issue may be a lack of equal access to business development opportunities; for example, women spend time building pitch presentations, but are rarely afforded the opportunity to carry out the pitch with clients, where they gain real-world experience and the potential to win origination credits.<sup>151</sup>

### *Impact on Employers and Clients*

Besides hampering the recruiting process, unconscious bias also severely affects a firm's mentorship and culture, which have a direct impact on retention. The influence of implicit bias is confirmed by the observations of associates at New York City firm Cleary Gottlieb Steen & Hamilton LLP, which "actively recruited and hired more than thirty African-American associates from 1989 to 1996" but was unable to retain any of them.<sup>152</sup> When surveyed about their experiences, the associates mentioned "a subtle yet pervasive tendency by almost exclusively white partners to favor those who looked similar to themselves."<sup>153</sup>

A 2007 Corporate Leavers survey shows "9.5% of people of color indicated unfairness was the only reason for voluntary departure" and "24.6% of people of color would have stayed at their jobs if they had a more respectful work environment."<sup>154</sup> They argue that a firm's understanding of implicit bias can help protect it against attrition and reduce micro-inequities—"small events which are often ephemeral and hard-to-prove, often unintentional and unrecognized by the perpetrator."<sup>155</sup> This is a very real and costly exodus of talent for firms—when an attorney leaves a firm, the cost to the firm ranges from \$400,000 to more than \$800,000 (for experienced attorneys). Turnover costs the legal industry roughly \$9.1 billion annually in just the 400 largest firms in the U.S.<sup>156</sup> Other statistics relating to attrition include:<sup>157</sup>

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<sup>150</sup> RIKLEEN, *supra* note 91, at 15.

<sup>151</sup> CHANOW, *supra* note 146, at 18-19.

<sup>152</sup> Luis J. Diaz & Patrick C. Dunican Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 977 (2011).

<sup>153</sup> *See id.*

<sup>154</sup> Chung, *supra* note 53.

<sup>155</sup> *See id.*

<sup>156</sup> Desiree J. Nordstrom, *Law Firms: the Cost of Hiring and Attrition*, OVERFLOW LEGAL NETWORK BLOG (Dec. 15, 2014), <http://overflowlegallnetwork.com/law-firms-cost-hiring-attrition/>.

<sup>157</sup> *See id.*

- \$250,000 cost to recruit one 1st year associate
- \$400,000 cost to firm when associate leaves
- 17% annual attorney attrition rate for law firms
- 46% entry-level associates leave law firm within 3 years
- 81% entry-level associates leave law firm within 5 years
- 43% lateral hires lose money
- \$25 million annual cost

Research makes it increasingly clear that companies with more diverse workforces perform better financially.<sup>158</sup>



While correlation does not equal causation (greater gender and ethnic diversity in corporate leadership does not automatically translate into more profit), the correlation does indicate that when companies commit themselves to diverse leadership, they are more successful. Companies that are more diverse are better able to win top talent and improve their customer orientation, employee satisfaction, and decision making, and all that leads to a virtuous cycle of increasing returns.<sup>159</sup>

## (V) Recommendations for Reducing/Eliminating Biases

<sup>158</sup> Vivian Hunt, et al., *Why Diversity Matters*, MCKINSEY QTRLY., Jan. 2015, <http://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>.

<sup>159</sup> See *id.*

*“The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”*  
– Justice Sonia Sotomayor<sup>160</sup>

The very terms “implicit bias” or “unconscious bias” recognize that implicit bias is something people do unconsciously. Thus, addressing it presents challenges different from those encountered in addressing conscious bias. Challenges exist in pushing people to recognize the existence of their own unconscious biases, a necessary step to moving to change them. Given those challenges, figuring out where to start is difficult. However, “[w]e don’t have to—and we shouldn’t—throw up our hands and say that if the bias is ‘unconscious,’ it cannot be addressed. Studies have shown that people who pay attention to the assumptions they are making and challenge them can start to change those assumptions.”<sup>161</sup>

Mere awareness of unconscious bias is only the first step, however. Beyond awareness, the legal profession must work to move beyond its traditional framework as a blind meritocracy and implement deliberate strategies to allow women and minority groups to participate equally with heterosexual white men. The legal profession has a particular responsibility to combat unconscious bias because we contribute to the development of the law and counsel other employers.<sup>162</sup> Because the legal profession is based on judgment, “there is no one concept that has more application to what we do as lawyers than unconscious bias.”<sup>163</sup> “[T]he increasing disparity between the diversity of the legal profession and the population it serves will result in a crisis of confidence in our democracy, our businesses, our leadership, and our justice system. For us as lawyers, this should be the civil rights issue of our generation.”<sup>164</sup>

### Awareness

The crucial first step in addressing implicit bias is training lawyers to recognize its existence. As distinguished from conscious discrimination, “prejudice, once over, is now largely covert, indeed, so covert that possessors of the new prejudice are themselves unaware both of the contents of their own minds and of how these contents bias their judgments of protected-category groups.”<sup>165</sup>

Studies show that awareness of unconscious bias helps limit its effect on decision-making. For example, a 2007 study involving the NBA looked at games from 1991 through 2004 and showed that referees called more fouls against players that were of a different race

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<sup>160</sup> *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (Sotomayor, J., dissenting).

<sup>161</sup> Cynthia Mares, *Is Anybody Listening? Does Anybody Care? Lack of Diversity in the Legal Profession*, THE FEDERAL LAWYER 36, 37 (June 2015).

<sup>162</sup> Negowetti, *supra* note 117, at 953-58.

<sup>163</sup> James Cole & Jeffrey Adachi, Perspectives on Criminal Litigation Ethics, in 65 HASTINGS L.J. 1145, 1157 (May 2014).

<sup>164</sup> John Nussbaumer & Chris Johnson, *The Door to Law School*, 6 U. MASS. ROUNDTABLE SYMP. L.J. 1, 2 (2011).

<sup>165</sup> Joan Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 187, citing Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 Ohio St. L.J. 1023, 1023-24 (2006).

than the referee.<sup>166</sup> The release of the study results triggered extensive media coverage and criticism of the NBA.<sup>167</sup> Following the extensive media coverage, the researchers repeated the study and found no significant disparity in the number of fouls called based upon race.<sup>168</sup> The conclusion is that awareness of implicit bias helped to eliminate actions based upon it.<sup>169</sup>

How can we become more aware of our implicit biases? There are a number of strategies.

- *Implicit Association Test (IAT)*. Discussed above, these tests, from Project Implicit and sponsored by Harvard University, seek to measure implicit attitudes by measuring the strength of associations between concepts (e.g., gender, race, age, sexual orientation, religion, weight, mental health) and evaluations (e.g., good, bad) or stereotypes (e.g., nurturing, athletic).<sup>170</sup> Scoring is based upon how quickly or slowly concepts are associated with evaluations or stereotypes.<sup>171</sup> For example, if a person on average more quickly sorts the concept/stereotype of women being in the home than the concept/stereotype of women being leaders in the workplace, then that person would be said to have an implicit preference for women in the home.<sup>172</sup> Because these tests measure unconscious attitudes, the results can be surprising and uncomfortable.<sup>173</sup> However, they assist in awareness of personal implicit biases.
- *Learn from surprises*. Someone behaving in a way that surprises you can present an opportunity for examining your implicit biases.<sup>174</sup> For example, have you ever worked with someone for a period via email or phone and then been surprised upon meeting them to learn that their appearance (gender, race, etc.) was different from what you had imagined? Examining why you were surprised and what that says about your unconscious biases will help you become aware of those biases and how they may be influencing your decisions.

### Behavioral Changes

Awareness alone does not solve the problem. The next step is implementing personal behavioral changes to combat unconscious bias. “Implicit biases are malleable; therefore, the implicit associations that we have formed can be gradually unlearned and replace with new mental associations.”<sup>175</sup>

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<sup>166</sup> Nalty, *supra* note 10, at 45, citing Devin G. Pope et al., *Awareness Reduces Racial Bias*, ECONOMIC STUDIES AT BROOKINGS, ES WORKING PAPER SERIES (Feb. 2014), [www.brookings.edu/~media/research/files/papers/2014/02/awareness-reduces-racial-bias/awareness\\_reduces\\_racial\\_bias\\_wolfers.pdf](http://www.brookings.edu/~media/research/files/papers/2014/02/awareness-reduces-racial-bias/awareness_reduces_racial_bias_wolfers.pdf).

<sup>167</sup> *See id.*

<sup>168</sup> *See id.*

<sup>169</sup> *See id.*

<sup>170</sup> PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html>.

<sup>171</sup> *See id.*

<sup>172</sup> *See id.*

<sup>173</sup> PROJECT IMPLICIT, *supra* note 23.

<sup>174</sup> Nalty, *supra* note 10, at 45, 47 (providing the example of being surprised that a slow driver is young rather than old and using that as an opportunity to examine bias based upon age).

<sup>175</sup> Cheryl Staats et al., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2015, at 63 (Kirwan Institute, 2015), <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf>.

Strategies for interrupting your own implicit biases include:

- *Find motivation.* Motivation to reduce implicit bias aids a person's ability to do so.<sup>176</sup>
- *Be self-observant and self-critical.* Pay attention to your thinking and your decision-making. Be comfortable doubting your objectivity and critically examining the reasons for your decisions. Catch yourself applying stereotypes and actively redirect your thinking.
- *Remind yourself of your own unconscious biases.* People who believe that they are unbiased or color/gender/status blind are more biased than people who acknowledge the existence of their bias.<sup>177</sup> Several studies demonstrate this. For example, in one study, participants were taught about either multiculturalism or "color blindness" and then given a black/white IAT.<sup>178</sup> Those participants who had been taught about multiculturalism showed less implicit bias than those taught about color blindness.<sup>179</sup> Acknowledge differences and seek them out to improve your decision-making.<sup>180</sup>
- *Make yourself uncomfortable.* Seek out situations and relationships that require you to spend time with people who are different from you. Doing so will give you an opportunity to learn and grow. In fact, the more uncomfortable you are, the more you will learn.<sup>181</sup> Consider joining groups in which you are the minority. Be the male ally in a female group.
- *Expose yourself to counter-stereotypical situations.* If you have a bias toward thinking of leaders as men, read about successful female leaders. Simply viewing photographs of women leaders reduces implicit gender bias.<sup>182</sup> Even one of the founders of Project Implicit, Harvard professor Dr. Mahzarin Banaji, reports exposing herself to counter-stereotypical images such as female construction workers to reduce her own implicit gender bias.<sup>183</sup>

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<sup>176</sup> Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 143-44 (Fall 2010) (discussing research finding that white participants in an IAT demonstrate fewer implicit biases when the test is administered by a black experimenter), citing Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 247 (2002) (summarizing Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842 (2001)).

<sup>177</sup> Nalty, *supra* note 10, at 49, citing Eric Luis Uhlmann & Geoffrey L. Cohen, "I Think It, Therefore It's True": *Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 207 (2007) and Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. OF EXPERIMENTAL SOCIAL PSYCHOLOGY 417 (2004).

<sup>178</sup> Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCH. 417 (2004).

<sup>179</sup> *See id.*

<sup>180</sup> Nalty, *supra* note 10, at 49.

<sup>181</sup> *See id.*

<sup>182</sup> *See id.*, citing Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIFORNIA L. REV. 969, 969-96 (2006) and Irene V. Blair & Allison P. Lenton, *Imaging Stereotypes Away: The Moderation of Implicit Stereotypes through Mental Imagery*, 8 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 828 (May 2001).

<sup>183</sup> *See id.* (originally reported in The Boston Globe, available to subscribers at [archive.boston.com/news/science/articles/2008/10/20/she\\_explores\\_inner\\_workings\\_of\\_bias/](http://archive.boston.com/news/science/articles/2008/10/20/she_explores_inner_workings_of_bias/)).

## Structural Changes

While individual awareness and behavioral changes generate progress, true change requires structural changes in the legal profession. That means that firm leadership must buy in and corporate counsel must push for diversity on their teams.

Some structural changes to consider for addressing implicit bias include:

- *Commitment by management to diversity.* Diversity efforts are most likely to be successful when they are spread across the firm or company and have involvement of top management.<sup>184</sup>
- *Training.* The training needs to be high quality and consistent, given to law students and throughout a lawyer's career.<sup>185</sup> As discussed, *supra*, even short trainings have been proven to reduce implicit biases in IATs taken immediately after the training.<sup>186</sup> Some law firms are already committed to such training and seen success.<sup>187</sup> Training on implicit bias is particularly important for lawyers who serve on recruitment/hiring commitments or on evaluation/compensation committees.<sup>188</sup>
- *Commitment to women in counter-stereotypical roles.* As discussed above in strategies for creating individual change, exposure to counter-stereotypical images and situations reduces implicit bias.<sup>189</sup> Studies bear out that an organizational commitment to diversity results in lowered implicit bias. For example, one study had female students read biographies and view photos of counter-stereotypical women such as Supreme Court Justice Ruth Bader Ginsburg.<sup>190</sup> Administration of a stereotype/gender IAT afterward found that students who had learned about the counter-stereotypical women displayed less implicit bias than the control group.<sup>191</sup> In the same study, researchers also looked at women college students, comparing those in a women's college with those in a co-ed college, and found that those in the women's college, who had more female professors, demonstrated almost no implicit bias after a year.<sup>192</sup>
- *Mentoring.* Women and minority lawyers may be disadvantaged by the lack of meaningful relationships with powerful partners; thus, mentoring programs that seek to pair women and minority attorneys with partners who can provide them training and

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<sup>184</sup> Negowetti, *supra* note 117, at 953-58, citing Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1970 (2009).

<sup>185</sup> Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. OF GENDER LAW & POLICY 38 (2010).

<sup>186</sup> See *id.*, citing Richeson & Nussbaum, *supra* note 178, at 417, and Laurie A. Rudman et al., "Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001) (addressing a study in which participants were confronted with their own implicit bias and then administered an IAT that demonstrated reduced bias following such confrontation).

<sup>187</sup> Marcus, *supra* note 86 (discussing how Nixon Peabody has achieved some success in diversity).

<sup>188</sup> Negowetti, *supra* note 117, at 953-58.

<sup>189</sup> Steffens, *supra* note 22.

<sup>190</sup> Levinson & Young, *supra* note 185, at 38, citing Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 646-47 (2004).

<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

assistance help combat implicit bias.<sup>193</sup> For example, during the recession, one law firm noticed that 47 percent of its African American associates were laid off and found that the reason was that diversity associates lacked the relationships that majority associates developed.<sup>194</sup> That firm is attempting to rectify that with formal mentoring pairings and follow up to insure that diverse associates are getting the training and opportunities needed to succeed.<sup>195</sup>

## Conclusion

Implicit bias is “silently killing” diversity in the legal profession.<sup>196</sup> It should be deeply concerning to everyone that well-meaning people are doing more to foster inequities in the legal workplace—unintentionally and unknowingly—just by investing more in members of their affinity or “in groups” than the harm caused by outright bigotry.<sup>197</sup> This unfortunate dynamic will change only when we come to terms with the fact that we all have biases—conscious and unconscious—and begin to address those biases.<sup>198</sup> Good intentions are not enough; if you are not intentionally including everyone by interrupting bias, you are unintentionally excluding some.<sup>199</sup>

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<sup>193</sup> Negowetti, *supra* note 117, at 953-58.

<sup>194</sup> *See id.*, citing Julie Triedman, *Big Law Is Losing the Race*, AM. LAW. 46 (June 2014).

<sup>195</sup> *See id.*

<sup>196</sup> Chung, *supra* note 53.

<sup>197</sup> Nalty, *supra* note 10, at 49.

<sup>198</sup> *See id.*

<sup>199</sup> *See id.*