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The Kirwan Institute for the Study of Race and Ethnicity has become increasingly mindful of how implicit racial biases shape not only individuals’ cognition and attitudes, but also their behaviors. Indeed, a large body of compelling research has demonstrated how these unconscious, automatically activated, and pervasive mental processes can be manifested across a variety of contexts yielding significant impacts. Consider these striking examples:

In a video game that simulates what police officers experience, research subjects were instructed to “shoot” when an armed individual appeared on the screen and refrain from doing so when the target was instead holding an innocuous object such as a camera or wallet. Time constraints were built into the study so that participants were forced to make nearly instantaneous decisions, much like police officers often must do in real life. Findings indicated that participants tended to “shoot” armed targets more quickly when they were African American as opposed to White. When participants refrained from “shooting” an armed target, these characters in the simulation tended to be White rather than African American. Moreover, in circumstances where the target was “shot” in error (i.e., was “shot” even though they were wielding a harmless object), those targets were more likely to be African American than White. Research such as this highlights how implicit racial biases can influence decisions that have life or death consequences.

A 2012 study used identical case vignettes to examine how pediatricians’ implicit racial attitudes affect treatment recommendations for four common pediatric conditions. Results indicated that as pediatricians’ pro-White implicit biases increased, they were more likely to prescribe painkillers for vignette subjects who were White as opposed to Black patients. This is just one example of how understanding implicit racial biases may help explain differential health care treatment, even for youths.
Examining implicit bias research is important for all who work for racial justice because of the rich insights into human behavior that this work generates. Moreover, as convincing research evidence accumulates, it becomes difficult to understate the importance of considering the role of implicit racial biases when analyzing societal inequities. Implicit biases, explicit biases, and structural forces are often mutually reinforcing, thus multiple levels of analysis are necessary to untangle the nuances of these complex dynamics.

With this in mind, and as a testament to the Kirwan Institute’s belief in the importance of understanding implicit bias, we present to you this inaugural edition of our “State of the Science Review of Implicit Bias Learning.” As an annual publication, subsequent editions of this Review will highlight the latest research findings and underscore trends in the field. Our goal is to provide a comprehensive resource that communicates this research in a concise and accessible manner while stimulating further dialogue on implicit bias and its implications for the pursuit of social justice.
Introduction

“At the nexus of social psychology, cognitive psychology, and cognitive neuroscience has emerged a new body of science called “implicit social cognition” (ISC). This field focuses on mental processes that affect social judgments but operate without conscious awareness or conscious control.”

— Kang & Lane, 2010, p. 467 —

Although not yet a widely-known concept outside of the social science community, knowledge of implicit bias is gradually infiltrating the public domain. Attention from the media and other sources devoted to how implicit biases may have influenced voters’ decisions in the 2008 and 2012 presidential elections is permeating public consciousness (see, e.g., Greenwald, Smith, Sriram, Bar-Anan, & Nosek, 2009; McElroy, 2012; NPR, 2012; Payne, et al., 2010). The term was also emphasized in an April 2012 decision by an Iowa district court judge, in a class-action suit brought forth by African Americans who claimed that implicit racial biases influenced employment and promotion decisions for state jobs (“Iowa: Ruling for State in ‘Implicit Bias’ Suit,” 2012). As the body of literature on implicit bias expands and the scholarship gains traction outside of academic circles, one can reasonably anticipate that implicit bias will increasingly enter public discourse.

Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Among the key attributes of implicit biases are the following:

- **Implicit or Unconscious**: Much of the literature suggests that these biases are activated unconsciously, involuntarily, and/or without one’s awareness or intentional control (see, e.g., Dovidio, Kawakami, Smoak, & Gaertner, 2009; Greenwald & Krieger, 2006; Kang, et al., 2012; Nier, 2005; Rudman, 2004). The appropriateness of using terms such as ‘unconscious’ and ‘non-conscious’ with respect to the activation and application of implicit biases has been questioned by some (Fazio & Olson, 2003; Rudman, 2004). Implicit biases are defined as “attitudes and stereotypes that are not consciously accessible through introspection” (Kang, et al., 2012, p. 1132). This is in direct contrast
with explicit biases, meaning those that are held or endorsed on a conscious level. The distinction between implicit and explicit is further discussed in chapter 2 of this literature review.

• **Bias:** Bias “denotes a displacement of people’s responses along a continuum of possible judgments” (Greenwald & Krieger, 2006, p. 950). This bias may skew toward either a favorable or an unfavorable assessment (Greenwald & Krieger, 2006).

• **Automatically Activated / Involuntary:** Implicit biases can activate without intention and/or without being explicitly controlled (i.e., not deliberate) (Blair, 2002; Rudman, 2004).

• **Pervasiveness:** Substantial research has established that implicit attitudes and stereotypes are robust and pervasive (Greenwald, McGhee, & Schwartz, 1998; Kang, et al., 2012; Kang & Lane, 2010; Nosek, Smyth, et al., 2007).

**The Formation of Implicit Biases**

Regardless of whether implicit associations are positive or negative in nature, everyone is susceptible to implicit biases, including children (Nosek, Smyth, et al., 2007; Rutland, Cameron, Milne, & McGeorge, 2005). Implicit biases vary among individuals (see, e.g., D. M. Amodio, Harmon-Jones, & Devine, 2003).

The classic nature versus nurture debate is one way to approach the question of how our implicit associations are formed. A nature-based argument would assert that biases are hardwired. Research by Mahajan and colleagues broadly supports this argument, as they identified the existence of implicit ingroup preferences even among a nonhuman species, rhesus macaques (Mahajan, et al., 2011).

Renown implicit bias scholar Jerry Kang addresses the nature vs. nurture debate and sides with nurture, writing that “even if nature provides the broad cognitive canvas, nurture paints the detailed pictures – regarding who is inside and outside, what attributes they have, and who counts as friend or foe” (Kang, 2012, p. 134). Supporting
this declaration, he notes how entertainment media perpetuates stereotypes, citing one study that documented the subtle transmission of race biases through nonverbal behaviors seen on television. Exposure to nonverbal race bias on television can influence individuals’ race associations and attitudes, as “exposure to pro-white (versus pro-black) nonverbal bias increased viewers’ bias even though patterns of nonverbal behavior could not be consciously reported” (Weisbuch, Pauker, & Ambady, 2009, p. 1711). Kang also discusses how news programming, particularly the excessive portrayal of Blacks as criminal (see, e.g., Dixon & Linz, 2000; Oliver, 2003), helps foster the formation of implicit biases (Kang, 2012). He even recognizes how online virtual gaming worlds can contribute to implicit biases.

Rudman (2004) outlines five factors that influence the formation of implicit orientations more so than explicit ones. She asserts that early experiences may lay the foundation for our implicit attitudes while explicit attitudes are more affected by recent events (Rudman, 2004). Also on Rudman’s list are affective experiences (vs. self-reports), cultural biases (vs. explicit beliefs), and cognitive balance principles (Rudman, 2004). While these previous four principles were already established in the literature, Rudman adds a fifth for consideration: the self. She writes, “it may be difficult to possess implicit associations that are dissociated from the self, whereas controlled evaluations may allow for more objective responses. If the self proves to be a central cause of implicit orientations, it is likely because we do not view ourselves impartially, and this partisanship then shapes appraisals of other objects that are (or are not) connected to the self” (Rudman, 2004, p. 137).

The Importance of Implicit Bias to the Work of Social Justice Advocates

Understanding the nuances of implicit bias is critical for addressing the inequalities that are byproducts of structural forces. Indeed, Kang notes that implicit biases, explicit biases, and structural forces are not mutually exclusive but instead often reinforce one another (Kang, et al., 2012). Elsewhere he affirms this interrelation by writing that “the deepest understanding of any process such as racialization comes from multiple levels of analysis that can and should be integrated together” (Kang, 2010, p. 1147).
powell and Godsil emphasize that the human behavior insights gleaned from the study of implicit biases are key to achieving social justice goals (powell & Godsil, 2011). They declare that knowledge of how the brain functions, particularly how we understand our positioning with respect to our environment, is key for the creation of “a political space in which it is possible to first have a constructive dialogue about the continuing salience of race, then generate support for the policies necessary to address the role race continues to play, and finally, and as importantly, develop implementation measures that will allow these policies to achieve the sought-after outcomes” (powell & Godsil, 2011, p. 4).

Rudman unequivocally asserts the significance of understanding implicit biases with these cautionary words: “for a deep and lasting equality to evolve, implicit biases must be acknowledged and challenged; to do otherwise is to allow them to haunt our minds, our homes, and our society into the next millennium” (Rudman, 2004, p. 139).

About this Implicit Bias Review

Although a wide variety of characteristics (e.g., gender, age) can activate implicit biases, this literature review primarily focuses on implicit racial and ethnic biases. While this review is intended to be as complete as possible, it should not be regarded as comprehensive given the vast literature devoted to this topic.
STATE OF THE SCIENCE

Background on Implicit Bias
Background on Implicit Bias

**Key concepts**

A few fundamental definitions related to mental associations are important to understand before unpacking the nuances of implicit bias.

- **Schemas** are “templates of knowledge that help us to organize specific examples into broader categories” (Kang, 2008). These mental shortcuts allow us to quickly assign objects, processes, and people into categories (Kang, 2009). For example, people may be placed into categories based on traits such as age, race, gender, and the like. Once these categories have been assigned, any meanings that we carry associated with that category then become associated with the object, process, or person in question. The chronic accessibility of racial schemas allow them to shape social interactions (Kang, 2005).

- **Stereotypes** are beliefs that are mentally associated with a given category (Blair, 2002; Greenwald & Krieger, 2006). For example, Asians are often stereotyped as being good at math, and the elderly are often stereotyped as being frail. These associations – both positive and negative – are routinized enough that they generally are automatically accessed (Rudman, 2004). Stereotypes are not necessarily accurate and may even reflect associations that we would consciously reject (Reskin, 2005).

- **Attitudes** are evaluative feelings, such as having a positive or negative feeling towards something or someone (Greenwald & Krieger, 2006; Kang, 2009).

- **Ingroups and Outgroups** – As soon as we see someone, we automatically categorize him or her as either ‘one of us’, that is, a member of our ingroup, or different from ourselves, meaning a member of our outgroup. Making this simple ‘us vs. them’ distinction is an automatic process that happens within seconds of meeting someone (Reskin, 2005). Deservedly or not, ingroup bias leads to relative favoritism compared to outgroup members (Greenwald & Krieger, 2006). We extrapolate characteristics about ourselves to other ingroup members, assuming that they are like us compared to outgroup members (Reskin, 2005). By favoring ingroup members, we tend to grant them
a measure of our trust and regard them in a positive light (Reskin, 2005). This ingroup favoritism surfaces often on measures of implicit bias (see, e.g., Greenwald, et al., 1998). The strength of ingroup bias has been illustrated in various studies. For example, research has found that people tend to display ingroup bias even when group members are randomly assigned (Tajfel, Billig, Bundy, & Flament, 1971), and, even more incredibly, when groups are completely fictitious (Ashburn-Nardo, Voils, & Monteith, 2001).

Moreover, given the dynamics of race in our society, it is no surprise that extensive research has documented White Americans’ implicit ingroup bias and relative bias against African Americans (see, e.g., Dasgupta & Greenwald, 2001; Dasgupta, McGhee, Greenwald, & Banaji, 2000; Devine, 1989; Dovidio, Kawakami, & Gaertner, 2002; Dovidio, Kawakami, Johnson, Johnson, & Howard, 1997; Fazio, Jackson, Dunton, & Williams, 1995; Greenwald, et al., 1998; McConnell & Liebold, 2001; Nosek, Banaji, & Greenwald, 2002; Richeson & Ambady, 2003).

Select Seminal Works

Laying the foundation for implicit bias research was a 1983 seminal article by Gaertner and McLaughlin. Employing a lexical decision task, they found that research subjects, regardless of their personal prejudices, were reliably faster at pairing positive attitudes with Whites than with Blacks (in experiment 1) or with Negroes (in experiment 2) (Gaertner & McLaughlin, 1983). However, negative attributes were equally associated with Blacks and Whites. This article is regarded as the first piece to demonstrate implicit stereotyping.

In 1989, an article by Patricia G. Devine was the first to argue that “stereotypes and personal beliefs are conceptually distinct cognitive structures” (Devine, 1989, p. 5). Her dissociation model differentiated between automatic processes (i.e., those that “involve the unintentional or spontaneous activation of some well-learned set of associations or responses that have been developed through repeated activation in memory”) and controlled processes (i.e., those that are “intentional and require the active attention of the individual”) (Devine, 1989, p. 6). Devine tested the implications of this dissociation model with respect to prejudice and found that in-
Individuals can hold a “clear distinction between knowledge of a racial stereotype … and personal beliefs about the stereotyped group” (Devine, 1989, p. 15). In short, automatic and controlled processes can be dissociated such that an individual can rate as low-prejudiced while still holding knowledge of the existence of that given stereotype in his/her memory system.

Following this dissociation revelation, researchers who studied automatic associations generally regarded them as automatic and inflexible; that is, these associations were deemed spontaneously triggered and inescapable (Bargh, 1997, 1999; Devine, 1989; Dovidio & Fazio, 1992). This notion of these associations being automatic and unavoidable led to the conclusion that biases remained stable over time and, because they were so deep seated, were not open to manipulation. In a seminal work, Irene V. Blair upended this notion by establishing that automatic stereotypes and prejudice are, in fact, malleable (Blair, 2002). She found that automatic stereotypes and prejudices may be moderated by events such as contextual cues, the perceivers’ focus of attention, and the perceivers’ motivation to maintain a positive self-image, among others (Blair, 2002). Other researchers built on this scholarly foundation, suggesting that even if automatic, stereotype activation is not necessarily uncontrollable (Kawakami, Dovidio, Moll, Hermsen, & Russin, 2000).

These works opened up the door to a plethora of research that further examined the nature of associations, how implicit biases operate, and ways in which they may be countered. This body of work will be further discussed throughout the course of this literature review.

Understanding the Relationship Between Implicit and Explicit Bias

Implicit and explicit biases are generally regarded as related yet distinct concepts (Kang, 2009; Wilson, Lindsey, & Schooler, 2000). They are not mutually exclusive and may even reinforce each other (Kang, et al., 2012). “Neither should be viewed as the solely ‘accurate’ or ‘authentic’ measure of bias” (Kang, 2009, p. 3).

The main distinction between implicit and other types of bias centers on level of awareness (Petty, Fazio, & Briñol, 2009). Explicit biases “can be consciously detect-
ed and reported” (D. M. Amodio & Mendoza, 2010, p. 355). Processes that are not explicit are implicit, meaning that they occur without introspective awareness (D. M. Amodio & Mendoza, 2010; Greenwald & Banaji, 1995; Wilson, et al., 2000). Explicit attitudes tend to be associated with deliberate responses that individuals can control (Dovidio, et al., 1997; Nier, 2005). They are often measured by instruments such as feeling thermometers and semantic differentials, in addition to other forms of direct questioning.

Given that implicit associations arise outside of conscious awareness, these associations do not necessarily align with individuals’ openly-held beliefs or even reflect stances one would explicitly endorse (Graham & Lowery, 2004; Kang, et al., 2012; Reskin, 2005).

Following the 1989 debut of Devine’s dissociation model, further research has explored the idea of whether implicit and explicit biases are dissociated (see, e.g., Dasgupta & Greenwald, 2001; Dovidio, et al., 1997; Green, et al., 2007; Greenwald & Banaji, 1995; Nier, 2005). A vast body of empirical literature documents studies in which respondents’ implicit and explicit attitudes do not align (see, e.g., Cunningham, Preacher, & Banaji, 2001; Dasgupta, et al., 2000; Devine, 1989; Dunton & Fazio, 1997; Fazio, et al., 1995; Fazio & Olson, 2003; Greenwald, et al., 1998; Phelps, et al., 2000; von Hippel, Sekaquaptewa, & Vargas, 1997). That said, the literature is inconsistent and hardly conclusive, as other studies have found that implicit and explicit attitudes seem to align, thus calling into question this notion of dissociation (see, e.g., McConnell & Liebold, 2001; Wittenbrink, Judd, & Park, 1997).

To help get to the root of this debate about dissociation, Hofmann et al. performed a meta-analysis to examine the correlation between a measure of implicit bias (the Implicit Association Test, discussed in-depth in chapter 3) and explicit self-report measures. Analyzing this across 126 studies, they uncovered a mean effect size of 0.24, which is relatively small yet significant (Hofmann, Gawronski, Gschwendner, Le, & Schmitt, 2005). Thus, their meta-analysis concluded that this implicit measure and explicit self-reports are systemically related rather than dissociated. They also noted that variations in correlations between implicit and explicit measures can be attributed to how spontaneous the self-reports are and the degree of conceptual
correspondence between measures (Hofmann, et al., 2005).

In a search to explain these seemingly contradictory results between implicit and explicit measures, other factors have been identified as moderating variables (Rudman, 2004). These include individual motivation to report explicit attitudes that align with one’s implicit attitudes (Dunton & Fazio, 1997; Fazio, et al., 1995; Nier, 2005), the psychometric properties of the specific measurement techniques (Cunningham, et al., 2001; Greenwald, Nosek, & Banaji, 2003) and impression management or social desirability concerns, as discussed in the next section (Dunton & Fazio, 1997; Nier, 2005; Nosek & Banaji, 2002).

**Downfalls of self-reports and other explicit measures of bias**

Early researchers relied on explicit measurements of prejudice, such as the Bogardus Social Distance Scale (Bogardus, 1933). But as norms discouraging prejudice gained societal traction, straightforward approaches to measuring bias became less useful and increasingly suspect. Researchers were left to wonder whether stereotypes were fading, whether the content of stereotypes had changed, or whether people were simply suppressing their negative views of others (D. Amodio & Devine, 2009).

The downfalls of self-reports have been well-documented since at least the 1960s (Orne, 1962; Weber & Cook, 1972). Impression management can undermine the validity of self-report measures of bias, as the desire to be perceived positively can influence people to distort their self-reported beliefs and attitudes (D. Amodio & Devine, 2009; Dovidio, et al., 1997; Fazio, et al., 1995; Greenwald & Nosek, 2001; Greenwald, Poehlman, Uhlmann, & Banaji, 2009; Nier, 2005; Nosek, Greenwald, & Banaji, 2007). In 1971, Harold Sigall and colleagues famously exposed how social desirability can taint self-reports by employing a “bogus pipeline” machine that the researchers claimed would reveal participants’ true inner attitudes (Jones & Sigall, 1971; Sigall & Page, 1971). The portion of participants who were led to believe in the effectiveness of the machine reported attitudes that more closely reflected their true beliefs compared to those who did not believe they were being monitored and thus were free to distort their responses to whatever they deemed was socially appropriate (Sigall & Page, 1971). The underlying principles of the bogus pipeline’s mild
deception have become a classic technique that is still employed in current research on an array of topics (see, e.g., Myers & Zeigler-Hill, 2012; Nier, 2005).

This inclination for impression management that distorts the validity of self-reports is particularly likely when individuals are questioned about politically or socially sensitive topics such as interracial or intergroup behaviors (Dovidio, et al., 2009; Greenwald & Nosek, 2001; Greenwald, Poehlman, et al., 2009). As such, self-reports are generally regarded as being inadequate for capturing all aspects of individual prejudice (Tinkler, 2012), although other researchers have indicated that they may still be accurate when used in conjunction with implicit measures (Greenwald, Poehlman, et al., 2009) or when used on people who have low motivation to control their prejudiced reactions (Dunton & Fazio, 1997).

**On controlling responses**

The notion of what processes are automatic or controlled has received further examination following Devine’s 1989 seminal work.

It is important to note that implicit and automatic are not perfect synonyms, nor are explicit and controlled. Amodio and Mendoza conceptualize automatic processes as those that are unintentional while controlled processes are intentional and often goal-oriented (D. M. Amodio & Mendoza, 2010). Defining control, they write, “Control does not relate to content *per se*, such as an explicit belief, but rather to the deliberate adjudication of an endorsed response over a different, undesired response” (D. M. Amodio & Mendoza, 2010, p. 355). They note that while automaticity and implicitness may align, ultimately whether responses are automatic or controlled is distinct from the implicit or explicit nature of a response (D. M. Amodio & Mendoza, 2010).

Providing support for the value of automatic associations, Reskin writes of their “survival value,” noting that it is impossible for individuals to consciously process all of the stimuli around us, thus automatic associations release cognitive resources for other uses (Reskin, 2005, p. 34).
Racial attitude work by Fazio and colleagues led to the distinction of three types of individuals that differ due to what processes are automatically activated in them and how they then do or do not counter or control those evaluations (Fazio, et al., 1995). One group is comprised of individuals who are non-prejudiced; in Fazio’s work these are the folks who do not experience the activation of negative attitudes toward Black people. A second grouping captures those who are truly prejudiced, meaning those who experience a negative automatic association and do nothing to negate or control expression of that association. Finally, a third grouping involves those who may experience a negative automatic association but, like those in Devine 1989, are motivated to counter that sentiment.

Building on this work, researchers have identified several factors that influence individuals’ abilities to control responses or act in a manner that is consistent with one’s explicit position. These factors include:

**The role of motivation**

Individual motivation is a commonly cited factor in the controlling responses literature. For example, Dunton and Fazio studied the role of motivation on how people differ in the extent to which they seek to control expressions of prejudice. They found that motivation to control prejudiced reactions stemmed from two sources: one being a concern with acting prejudiced, and the other being a desire to avoid dispute or confrontation regarding one’s thoughts or positions (Dunton & Fazio, 1997). Dunton and Fazio also concluded that self-reports of racial attitudes can be reasonably accurate for individuals with low motivation to control prejudiced reactions (Dunton & Fazio, 1997).

Work by Devine et al. found that the implicit and explicit racial biases displayed by participants were a function of their internal and external motivation to respond in a non-prejudiced manner, with explicit biases moderated by internal motivation and implicit biases moderated by the interaction of both internal and external motivation (Devine, Plant, Amodio, Harmon-Jones, & Vance, 2002).
Relatedly, researchers have explored how motivation can lead to people “over-correcting” for their biases. Work such as that by Olson and Fazio found that some participants sought to control the racial attitudes they exhibited, and in so doing, over-corrected to display a exaggeratedly positive or negative response that concealed their true attitudes (Olson & Fazio, 2004). Earlier work by Dunton and Fazio concluded that prejudiced people who are highly motivated to control their prejudiced reactions may overcompensate for their automatically activated negativity (Dunton & Fazio, 1997). Regarding the extent of this overcorrection, they found that individuals’ “high motivation to control prejudiced reactions led to the expression of judgments that were more positive than the responses of individuals for whom positivity was activated” (Dunton & Fazio, 1997, p. 324). Additional research found this same trend toward motivation moderating bias overcorrection (Towles-Schwen, 2003). This phenomena of overcorrection aligns closely with Wegener and Petty’s Flexible Correction Model (see Wegener & Petty, 1995).

Also attesting to the significance of the role of motivation, multiple researchers have developed scales designed to measure the effect of motivation on controlling prejudiced reactions. Dunton and Fazio developed a Motivation to Control Prejudiced Reactions Scale that aimed to measure individual differences in motivation (Dunton & Fazio, 1997). Similarly, Plant and Devine developed two measures for assessing motivations to respond without prejudice, the Internal Motivation to Respond Without Prejudice Scale (IMS) and the External Motivation to Respond Without Prejudice Scale (EMS) (Plant & Devine, 1998).

The role of time

Another widely regarded factor that influences decision-making and whether individuals are able to control their reactions is time (Kruglanski & Freund, 1983; Payne, 2006; Sanbonmatsu & Fazio, 1990). Time pressures have been shown to be a condition in which implicit attitudes may appear (Bertrand,
Chugh, & Mullainathan, 2005), even despite explicit attempts at control.

The role of cognitive “busyness”

In the words of Reskin, “anything that taxes our attention – multiple demands, complex tasks, time pressures – increases the likelihood of our stereotyping” (Reskin, 2005, p. 34). Gilbert and Hixon studied how cognitive busyness can affect the activation and application of stereotypes. They found that cognitive busyness can decrease the likelihood of stereotype activation; however, should the stereotype be activated, cognitive busyness makes it more likely that that stereotype will be applied to the individual(s) in question (Gilbert & Hixon, 1991). Similarly, in an experimental design, Payne found that the group that was cognitively overloaded showed more bias, which he regards as a byproduct of individuals’ reduced level of control over their responses (Payne, 2006). Finally, Bertrand et al. cite three conditions that are conducive to the rise of implicit attitudes, including lack of attention being paid to a task, time constraints or cognitive load, and ambiguity (Bertrand, et al., 2005).

Monitoring verbal behaviors but not nonverbals (known as leakages)

While people can monitor their verbal behaviors pretty well, they do not monitor and control their nonverbal behaviors as effectively or as often; the prejudiced attitudes they are trying to conceal can “leak,” thereby revealing their true stances (Dovidio, et al., 1997; Fazio, et al., 1995; Olson & Fazio, 2007; Stone & Moskowitz, 2011).
Measuring Implicit Cognition

While implicit measures are less likely to be tainted by impression management tactics, measuring implicit biases remains a challenging task. Legal scholar Jerry Kang articulates the challenges of learning about people’s implicit biases as a two part (“willing and able”) problem (Kang, 2009, p. 2). As noted above, some people are unwilling to share their true feelings with researchers in order to maintain a sense of political correctness.

In terms of the “able” part of Kang’s assertion, the challenges of assessing implicit biases are compounded by the fact that some people may be unable to share their implicit biases. Broadly speaking, we are weak at introspection and therefore often unaware of our own biases (Greenwald, et al., 2002; Kang, 2005; Nisbett & Wilson, 1977; Nosek, Greenwald, et al., 2007; Nosek & Riskind, 2012; Wilson & Dunn, 2004). Explicit measures such as self-reports can only reflect what we believe to be true about ourselves, which may be an incomplete assessment (Rudman, 2004).

Similarly, Nosek and colleagues provide a three-part assessment of why implicit measures (in this case, the Implicit Association Test, discussed later in this chapter) and self-reports differ, including:

1. “the individual is unaware of the implicitly measured associations and uses introspection to generate a unique explicit response;
2. the individual is aware of the implicitly measured associations, but genuinely rejects them as not conforming to his or her belief system and so reports a distinct explicit response; or
3. the individual is aware of the implicit associations, but chooses to report an alternative explicit response due to social concern about the acceptability of such a response.” (Nosek, Greenwald, et al., 2007, p. 282)

As the credibility of bias self-reports were increasingly questioned, calls came for greater use of indirect measures and unobtrusive measures that accurately captured racial attitudes, as implicit measures are regarded as less susceptible to social desirability concerns (D. M. Amodio & Mendoza, 2010; Dunton & Fazio, 1997; Greenwald & Banaji, 1995; Jones & Sigall, 1971; Nosek & Banaji, 2002; Petty, et al., 2009; von Hippel, et al., 1997). Since that time, researchers have developed numer-
ous instruments and techniques designed to measure cognitions implicitly. Because implicit measures do not ask research subjects directly for a verbal report, in many cases the subjects may not even be aware of what constructs are being assessed and measured, thereby minimizing social desirability concerns (Fazio & Olson, 2003). This chapter provides a brief overview of several of these instruments.

**Physiological approaches**

Physiological instruments assess bodily and neurological reactions to stimuli. These instruments provide insights into implicit biases because they measure reactions that are not easily controlled, and the individuals involved may not even realize that they are reacting in any manner whatsoever.

In one study, Phelps et al. (2000) used functional Magnetic Resonance Imaging (fMRI) to examine unconscious evaluations of Blacks and Whites. The amygdala was of particular interest because of its known role in race-related mental processes (Hart, et al., 2000). It is also the part of the brain that reacts to fear and threat (Davis & Whalen, 2001; Pichon, Gelder, & Grèzes, 2009; Whalen, et al., 2001). Phelps and colleagues found that White subjects generally showed greater amygdala activation when exposed to unfamiliar Black faces compared to unfamiliar White faces; however, the fMRI data lacked any consistent patterns of amygdala activity when the subjects were viewing well-known Black and White faces (Phelps, et al., 2000). The researchers also examined the association between the strength of amygdala activation and other measures of race evaluation. They found that the amygdala activity for unfamiliar faces correlated with two different unconscious measures of race evaluation but not with explicit measures of racial bias. Overall, their research indicated that the amygdala response of White subjects to Black faces versus White faces is a byproduct of cultural evaluations that have been modified by individuals’ experiences (Phelps, et al., 2000).

Similarly, Cunningham et al. compared a measure of implicit racial bias to amygdala activity and found a significant correlation between the two (Cunningham, et al., 2004). In short, higher levels of anti-Black implicit bias were associated with greater amygdala activity, as measured by fMRI (Cunningham, et al., 2004).
These conclusions align with that of Lieberman et al. (2005) wherein researchers found that the amygdalas of both African American and Caucasian participants displayed greater levels of activity when viewing African American faces than Caucasian American faces (Lieberman, Hariri, Jarcho, Eisenberger, & Bookheimer, 2005). Lieberman et al. suggest that the amygdala activity recorded in this study reflect “culturally learned negative associations regarding African-American individuals” (Lieberman, et al., 2005, 722). Additional research expanded on Phelps et al. (2000) and Lieberman et al.’s (2005) studies by finding that beyond race, skin tone variations also affect amygdala activation, with darker skin tones provoking more amygdala activity than lighter tones (Ronquillo, et al., 2007).

Further research on the neural basis of implicit biases articulated a three-part model in which the amygdala is only one component. Stanley and colleagues’ model asserted that the anterior cingulate is involved in the detection of implicit attitudes, and the dorsolateral prefrontal cortices help regulate implicit biases (Stanley, Phelps, & Banaji, 2008). This conclusion aligns with earlier work by Cunningham et al. that suggested that the controlled processes that originate in the anterior cingulated and dorsolateral prefrontal cortex can override the automatic processing of Black and White faces that occurs in the amygdala (Cunningham, et al., 2004).

Vanman et al. (2004) explored another physiological approach to measuring implicit prejudices. They used facial electromyography (EMG) to examine the micro-movements of muscles used in smiling and frowning while exposing research participants to images of White and Black faces and ultimately concluded that facial EMG can be used as an implicit measure of racial prejudice related to discrimination (Vanman, Saltz, Nathan, & Warren, 2004).

Finally, work by Bascovich and colleagues employed cardiovascular and hemodynamic measures as a means to understanding how study participants responded to stigmatized individuals (in this case, individuals perceived to have port-wine birthmarks on their faces) (Blascovich, Mendes, Hunter, Lickel, & Kowai-Bell, 2001).
**Priming methods**

In psychological terms, priming is simply the act of being exposed to a stimulus that influences how an individual later responds to a different stimulus. Often used in experimental settings, priming methods typically feature a subliminal initial prime that influences or increases the sensitivity of the respondent’s later judgments or behaviors (Tinkler, 2012). Implicit racial bias research often uses a race-related term or image as the initial stimulus, followed by the measurement of a later stimulus that compares responses by participants who were shown a race-related prime versus those who were not. For example, Philip Goff and colleagues conducted a study in which they primed some participants with Black faces, White faces, or a non-facial control image. Participants were then presented degraded images of animals that gradually came into focus, making the animal incrementally easier to identify.

As hypothesized, the research team found that participants who were primed with Black male faces required fewer image frames to identify drawings of apes compared to those primed by White male faces or when not primed at all, yet participants remained unaware that they had ever been primed in any fashion (Goff, Eberhardt, Williams, & Jackson, 2008). These kinds of priming methods are thought to yield insights on associations that, despite their implicit nature, influence individuals’ perceptions.

**Response latency measures**

Response latency measures represent “the most widely used strategies to assess implicit prejudice” (Dovidio, et al., 2009, p. 170). These measures rely on reaction times to specific tasks to uncover individuals’ biases (Rudman, 2004). The quick speed of reply assumes that responses are uncontaminated and reflected “true” content of stereotypes (D. Amodio & Devine, 2009). The underlying premise of these reaction-time studies is that individuals are able to complete cognitively simple tasks relatively more quickly than those that are mentally challenging (Kang & Lane, 2010).

Thus, measuring the difference in response latency times can provide insights into how strongly two concepts are associated. While the premise may not sound particularly sophisticated, reaction-time instruments Kang and Lane assert that these are
the most reliable measures of implicit cognitions (Kang & Lane, 2010).

**Implicit Association Test**

One of the most popular, sophisticated, and recognizable response latency measures is the Implicit Association Test (IAT). Pioneered by Anthony Greenwald and colleagues, the IAT measures the relative strength of associations between pairs of concepts (Greenwald, et al., 1998; Greenwald & Nosek, 2001). These associations addressed by the IAT include “attitudes (concept-valence associations), stereotypes (group-trait associations), self-concepts or identities (self-trait or self-group associations), and self-esteem (self-valence associations)” (Greenwald, Poehlman, et al., 2009, p. 19). The IAT operates “on the assumption that if an attitude object evokes a particular evaluation (positive or negative), it will facilitate responses to other evaluatively congruent and co-occurring stimuli” (Dasgupta & Greenwald, 2001, p. 801). Stated another way, the IAT asks respondents to sort concepts and measures any time differences between schema-consistent pairs and schema-inconsistent pairs (Kang, et al., 2012). As a response latency measure, the IAT operates on the supposition that when the two concepts are highly associated, the sorting task will be easier and thus require less time than when the concepts are not as highly associated (Greenwald & Nosek, 2001; Reskin, 2005). This difference in mean response latency is known as the IAT effect (D. M. Amodio & Mendoza, 2010; Greenwald, et al., 1998). The time differentials of the IAT effect have been found to be statistically significant and not simply due to random chance (Kang, 2009). The IAT effect reveals the role of both automatic and controlled processing: the strength of an automatic association and the challenge associated with sorting a bias-inconsistent pair (D. M. Amodio & Mendoza, 2010). Some studies have found IAT results to be generally stable over time (Cunningham, et al., 2001; Egloff, Schwerdtfeger, & Schmukle, 2005).

One notable benefit to the IAT is that is relatively resistant to social desirability concerns (Greenwald, et al., 1998). Numerous studies have examined whether individuals can “fake out” the IAT by intentionally controlling their responses in such a way as to produce desired rather than authentic results. Outcomes and musings from these studies are varied (see, e.g., Cvencek, Greenwald, Brown, Gray, & Snowden,
That said, studies that compare individuals’ explicit responses with their implicit attitudes, as measured by the IAT, consistently find that the people’s implicit biases are actually higher than what they self-report (Nosek, et al., 2002; Sabin, Nosek, Greenwald, & Rivara, 2009). This finding aligns well with the social desirability/impression management literature discussed in the previous chapter.

Since its conception, researchers have subjected the IAT to numerous and rigorous tests of its reliability (see, e.g. Bosson, William B. Swann, & Pennebaker, 2000; Dasgupta & Greenwald, 2001; Greenwald & Farnham, 2000; Greenwald & Nosek, 2001; Kang & Lane, 2010; Nosek, Greenwald, et al., 2007). Similarly, the validity of the IAT has been examined extensively (for overviews and meta-analyses, see Greenwald; Greenwald, Poehlman, et al., 2009; Jost, et al., 2009). Studies designed to probe the IAT’s internal validity have been particularly extensive, with researchers examining potential confounds such as the familiarity of the stimuli (Dasgupta, Greenwald, & Banaji, 2003; Dasgupta, et al., 2000), the order of the tasks (Greenwald, et al., 1998; Nosek, Greenwald, & Banaji, 2005), previous experience with the IAT (Dasgupta, et al., 2000; Greenwald, et al., 2003), and various procedural nuances (Greenwald, et al., 1998; Greenwald & Nosek, 2001), among others.

Of particular interest to many researchers is the question of the IAT’s predictive validity (see, e.g., Blanton, et al., 2009; Egloff & Schmukle, 2002; Fazio & Olson, 2003; Greenwald & Krieger, 2006; Greenwald, Poehlman, et al., 2009; McConnell & Liebold, 2001). Is the IAT able to accurately predict attitudes and behaviors, and if so, can it do so better than explicit self-reports? Greenwald and colleagues’ 2009 meta-analysis addressed the predictive validity of the IAT in 122 research reports. Overall they found a predictive validity of $r = 0.274$ for the IAT, which is regarded as moderate (Greenwald, Poehlman, et al., 2009). Explicit measures were also effective predictors ($r = 0.361$); however, the predictive validity of these explicit self-report measures declined dramatically when the topic was socially sensitive. Thus, for topics such as interracial and intergroup behavior, the IAT held greater predictive validity than the self-reports did, which justifies the IAT’s use, particularly when in combination with self-report measures (Greenwald, Poehlman, et al., 2009).
As a whole, the IAT has performed extremely well to this scrutiny of reliability and validity, so much so that a 2010 article concluded, “After a decade of research, we believe that the IAT has demonstrated enough reliability and validity that total denial is implausible” (Kang & Lane, 2010, p. 477).

**IAT Findings on Race**

One of the most well-known versions of the IAT is the Black/White IAT, which examines the speed with which individuals categorize White and Black faces with positive and negative words. Faster reaction times when pairing White faces with positive words and Black faces with negative terms suggests the presence of implicit pro-White/anti-Black bias. Considerable research has indicated that most Americans, regardless of race, display a pro-White/anti-Black bias on this IAT (Dovidio, et al., 2002; Greenwald, et al., 1998; Greenwald, Poehlman, et al., 2009; McConnell & Liebold, 2001; Nosek, et al., 2002), even in children as young as six years old (A. S. Baron & Banaji, 2006).

The documented presence of pro-White bias even among nonwhites has intrigued researchers that study ingroup/outgroup dynamics. Dasgupta sheds light on the internal conflict that may help explain this unusual finding when she writes, “In the case of individuals who belong to disadvantaged or subordinate groups … the desire to protect self-esteem should lead to ingroup favoritism and outgroup bias, but the desire to maintain current social arrangements leads to predictions of outgroup favoritism” (Dasgupta, 2004, p. 148). This leads Dasgupta to question whether there are two separate sources of implicit attitudes – one that focuses on one’s group membership, and another that seeks to maintain current social hierarchies (Dasgupta, 2004). Several studies lean towards the latter explanation, citing the presence of implicit outgroup favoritism (or, in some cases, less ingroup favoritism) for a dominant outgroup over one’s own subordinated ingroup (Ashburn-Nardo, Knowles, & Monteith, 2003; Nosek, et al., 2002; Rudman, Feinberg, & Fairchild, 2002).

**Implicit Biases and the Effects on Behavior**

Regardless of how they are measured, researchers agree that implicit biases have
real-world effects on behavior (Dasgupta, 2004; Kang, et al., 2012; Rooth, 2007). These effects have been shown to manifest themselves in several different forms, including interpersonal interactions. For example, McConnell and Liebold found that as White participants’ IAT scores reflected relatively more positive attitudes towards Whites than Blacks; social interactions (measured by focusing on 13 specific behaviors) with a White experimenter were more positive than interactions with a Black experimenter. In this study, larger IAT effect scores “predicted greater speaking time, more smiling, more extemporaneous social comments, fewer speech errors, and few speech hesitations in interactions with the White (vs Black) experimenter” (McConnell & Liebold, 2001, p. 439). Another study by Dovidio et al. found that White individuals with higher levels of racial bias blinked more and maintained less visual contact with Black interviewers than White ones (Dovidio, et al., 1997).

Several studies look at interracial interactions and behaviors with a focus on friendliness to examine how implicit biases can affect behavior (Dasgupta, 2004; Dovidio, et al., 2002; Fazio, et al., 1995; Sekaquaptewa, Espinoza, Thompson, Vargas, & Hippel, 2003). Perceptions of friendliness are often but not necessarily entirely assessed through nonverbal body language, such as having an open vs. closed posture or degree of eye contact maintained. These behaviors are insightful because individuals are often relatively unaware of such actions and thereby unlikely to attempt to control or correct these behaviors (Dasgupta, 2004). In one study, Dovidio, Kawakami, and Gaertner established that the implicit biases of White participants significantly predicted the degree of nonverbal friendliness they displayed towards their Black partners in an experimental setting (Dovidio, et al., 2002). This result echoes earlier work by Fazio et al. that found that White students who possessed more negative attitudes towards Blacks were less friendly and less interested during their interactions with a Black experimenter (Fazio, et al., 1995).

Having established that implicit biases affect individuals’ behaviors, the next logical step is to consider the ramifications of those behaviors. Indeed, implicit biases have a tremendous impact on numerous social situations. In the words of Rudman, “biases that we do not acknowledge but that persist, unchallenged, in the recesses of our minds, undoubtedly shape our society” (Rudman, 2004, p. 130). The next three chapters examine how implicit racial biases affect three specific realms: education, criminal justice, and health/health care.
CHAPTER FIVE

Implicit Bias In Education
Implicit bias in Education

Implicit bias can permeate educational settings in several forms, all of which can yield disadvantageous consequences for students of color. Teacher expectations of student achievement, teacher perceptions of student behavior, and students’ self-perceptions are three key themes highlighted in the literature.

Teacher Expectations of Student Achievement

Teacher expectations related to student achievement is one area in which implicit biases can have detrimental effects. A 2010 study by van den Bergh et al. sought to determine whether teachers’ expectations for students and the ethnic achievement gaps found in their classrooms were related to the teachers’ prejudiced attitudes. Conducted in the Netherlands, researchers assessed the prejudiced attitudes of elementary school teachers using self-reports and results from Implicit Association Tests. Results indicated that “teachers generally hold differential expectations of students from different ethnic origins” and that implicit prejudiced attitudes were responsible for these differential expectations as well as the ethnic achievement gap in their classrooms (van den Bergh, Denessen, Hornstra, Voeten, & Holland, 2010).

van den Bergh et al. assert that teachers who hold negative prejudiced attitudes “appeared more predisposed to evaluate their ethnic minority students as being less intelligent and having less promising prospects for their school careers” (van den Bergh, et al., 2010, p. 518).

Indeed, many studies have shown that teacher expectations tend to vary based on the demographic characteristics of their students. Tenenbaum and Ruck (2007) performed a meta-analysis to determine whether teachers’ expectations, referrals (i.e., recommendations for special education, disciplinary action, or gifted programs), and speech patterns (i.e., positive, neutral, and negative speech) differ toward European American students as opposed to African American, Asian, or Latino/a students. They found statistically significant results that teachers hold lower expectations for African American and Latino/a children compared to European American children, and, per the Pygmalion Effect, these expectations may affect student academic performance (Rosenthal & Jacobson, 1968; Tenenbaum & Ruck, 2007). The results of this study align with previous meta-analyses (R. M. Baron, Tom, & Cooper, 1985; Dusek & Joseph, 1983).
McKown and Weinstein (2002) affirmed the role of teacher expectancy effects on the achievement of African American students. Using a sample of 561 elementary school children, the researchers examined whether students’ ethnicity played a role in their susceptibility to teacher expectancy effects. By conceptualizing teacher expectations as the degree to which teachers over- or under-estimated achievement compared to the students’ actual academic performance, McKown and Weinstein found that African American children are more likely than Caucasian children “to confirm teacher underestimates of ability and less likely to benefit from teacher overestimates of ability” (McKown & Weinstein, 2002, p. 176). Thus, implicit biases held by teachers, that affect the expectations they hold for students, have real consequences in the classroom for African Americans.

Students’ verbal nuances and vernacular dialects can also arouse implicit biases in teachers. Following an assertion by Christian (1997) that “people who hear a vernacular dialect make erroneous assumptions about the speaker’s intelligence, motivation, and even morality,” Cross et al. (2001) asked prospective teachers to blindly evaluate the personal characteristics of anonymous speakers reading a neutral and minimally difficult passage, judging the speakers’ intelligence, personality, social status, and ambition (Christian, 1997, p. 43; Cross, DeVaney, & Jones, 2001). The prospective teachers were found to draw conclusions about these traits based on perceptions of dialect, and ethnicity was one factor that influenced these judgments; White prospective teachers regarded White speakers as most favorable and Black speakers as least favorable (Cross, et al., 2001). With White women comprising the majority of our nation’s teachers (84% of public school teachers in 2011 were White), ostensibly trivial issues such as dialects can implicitly affect teachers’ preconceptions of students (Feistritzer, 2011). Cross et al. warns that biases stemming from verbal nuances can snowball, as “teachers’ preconceptions of students may be reflected in students’ grades and impact their self-perception, beginning a cycle of self-fulfilling prophecy that contributes to the eventual academic failure of speakers of nonstandard dialect” (Cross, et al., 2001, p. 223).

Finally, Ferguson notes that the oft-reported Black-White test score gap can influence teachers to develop stereotypical perceptions, expectations, and behaviors that most likely perpetuate this gap in test scores (R. F. Ferguson, 2003). For instance,
teachers may be less likely to help and support Black children than White children because they may underestimate Blacks’ intellectual potential. If Black students are taught by educators who do not believe in their full potential, these subtle biases can accumulate over time to create a substandard educational environment that fails to prepare at-risk students to become fully contributing members of society.

In short, teacher expectations of student achievement may be swayed by implicit biases, and the manifestations of these biases can have lasting effects on students and serve as self-fulfilling prophecies (for more on self-fulfilling prophecies, see Merton, 1957). Holding lower standards for nonwhite students is particularly disheartening in light of studies that find that holding students to higher standards benefits students and actually improves test scores (Betts & Grogger, 2003; Figlio & Lucas, 2004).

**Teacher Perceptions of Student Behavior**

Teachers’ perceptions of specific minority student behaviors can also energize implicit bias. For example, Neal et al. (2003) found that students who displayed a Black walking style (i.e., “deliberately swaggered or bent posture, with the head slightly tilted to the side, one foot dragging, and an exaggerated knee bend”) were perceived by teachers as lower in academic achievement, highly aggressive, and more likely to be in need of special education services (Neal, McCray, Webb-Johnson, & Bridgest, 2003).

Researchers also found that Whites with relatively high levels of implicit racial bias perceived Blacks to be more threatening than Whites. In one study, Hugenberg and Bodenhausen (2003) explored whether implicit biases affected how subjects perceived the facial emotions displayed by others. The subjects were shown a series of faces (one series of Black and one series of White) that progressed from a scowl to a smile and asked what face in the series indicated an offset/onset of anger. “Higher implicit … [bias] was associated with a greater readiness to perceive anger in Black faces, but neither explicit nor implicit prejudice predicted anger perceptions regarding similar White faces” (Hugenberg & Bodenhausen, 2003, p. 640). These findings suggest that White teachers may incorrectly perceive Black students as angry or ag-
gressive, which could deter them from reaching out to assist these students or cause them to mislabel Black students as deviant.

Teachers’ implicit biases may be further amplified by a cultural mismatch that exists between White teachers and their students of color, and this mismatch can lead to teachers misinterpreting student behavior (A. A. Ferguson, 2000). For example, Weinstein et al. (2004) recounts an anecdote wherein a European American teacher observed a lively debate occurring between African American males, and by interpreting the interaction as aggressive and contentious rather than simply verbal sparring common among African American teenagers, took the teens to the principal’s office for a reprimand (Weinstein, Tomlinson-Clarke, & Curran, 2004). Often these cultural mismatch scenarios, with implicit biases fueled by negative portrayals of Black youth in the media, result in unnecessary and unequal disciplinary interventions for students of color.¹ Similarly, in their book, *The Cool Pose: The Dilemmas of Black Manhood in America*, Majors and Mancini Billson explore how many Black males exhibit a distinct persona in an effort to assert their masculine identity. They write, “Cool pose is a ritualized form of masculinity that entails behaviors, scripts, physical posturing, impression management, and carefully crafted performances that deliver a single, critical message: pride, strength, and control” (Majors & Billson, 1992, p. 4). Teachers who are not knowledgeable about Black cultural cues may misread this portrayal of masculinity as confrontational or defiant.

**Students’ Self-Perceptions**

Stereotypes can also emerge implicitly and affect students through a subtle mechanism known as stereotype threat. Attributed to social psychologist Claude Steele, stereotype threat refers a fear of being viewed through the lens of a negative stereotype, or the fear of inadvertently confirming an existing negative stereotype of a group with which one self-identifies (Steele & Aronson, 1995). Studies have

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¹ March 2012 data released by the U.S. Department of Education reported that Black students, boys in particular, face harsher discipline in public schools. Black students were 3.5 times more likely to be suspended or expelled compared to white students in the 2009–2010 school year. (For more information, see Lewin, 2012.)
shown that these fears often manifest themselves in lower performance by the stereotyped group, even when the stereotyped group and non-stereotyped group being compared have been statistically matched in ability level (Steele & Aronson, 1995). For example, if a teacher tells students who are about to take a test that Asian students generally score higher than Whites on this test, then Whites tend to perform significantly worse than if they had not been primed to think of themselves as less capable than Asians. Moreover, stereotype threat has also been shown to impair test-taking efficiency, as individuals feeling stereotype threat complete fewer test problems and with a lower level of accuracy than those in a control group (Steele & Aronson, 1995). In short, the fear of reinforcing a negative stereotype can implicitly provoke a “disruptive apprehension” that interferes with performance (R. F. Ferguson, 2003; Steele, 1997).

Culturally Appropriate Curriculum

Implicitly biased teachers may also unknowingly use curriculum that is not culturally responsive to all members of their classroom community. This can be detrimental to students, as failing to modify curriculum in a manner that will facilitate the academic achievement of students from diverse racial, ethnic, and cultural groups creates an unequal pedagogy. Banks writes about how teachers’ cultural competency and willingness to develop their students’ cultural and linguistic strengths can increase academic achievement for students of color (Banks, 1995). Teachers with high levels of implicit bias may fail to make these adjustments because, as noted previously, they may subconsciously view minority cultures and linguistic styles as a sign of low academic ability and aggression rather than simply distinct cultures and linguistic styles that differ from their own. This not only reduces the academic potential of minority students but can also lead to the over-identification of students for special education and disciplinary action (for more information generally, see Arnold & Lassmann, 2003; Sherwin & Schmidt, 2003; Skiba, Michael, Nardo, & Peterson, 2000).
CHAPTER SIX
Implicit Bias In Criminal Justice
Implicit bias can surface in the criminal justice system in a variety of fashions, all of which may potentially taint the prospect of fair outcomes. Before delving into the different facets of the system in which researchers have identified implicit bias in action, it is important to note that even small implicit biases can accumulate over the course of legal proceedings, thereby amplifying the effect. In the words of Jerry Kang et al., “For a single defendant, these biases may surface for various decision makers repeatedly in policing, charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer persuasiveness, guilt determination, sentencing recommendations, sentencing itself, appeal, and so on. Even small biases at each stage may aggregate into a substantial effect” (Kang, et al., 2012, p. 1151).

Outside the Courtroom

Bias in Police Officers

Like all other populations, police officers are not immune to implicit bias. Eberhardt et al. studied police officers and found that when directly asked “who looks criminal?” they chose Black faces over White ones, particularly those that were more stereotypically Black (Eberhardt, Goff, Purdie, & Davies, 2004). Moreover, automatic implicit biases can cause officers to misinterpret Blacks’ behavior as suspicious or aggressive, even if the actions are neutral in nature (Richardson, 2011).

Graham and Lowery examined whether police officers’ unconscious racial stereotypes affected how they perceive and treat juvenile offenders. As predicted, the group of officers who were race-primed for the category Black judged the offenders
as more blameworthy and meriting harsher sanctions than the officers who were exposed to a neutral prime, and consciously held beliefs about race were not found to moderate the effects of the racial primes (Graham & Lowery, 2004). These findings have significant implications for juvenile offenders, as interactions with the criminal justice system at a youthful age can have lasting life effects.

On a more heartening note, while work by Plant and Peruche documented the existence of bias in police officers, they also concluded that racial biases are not inevitable and may be overcome (Plant & Peruche, 2005). In another study, they found that police officers who have positive intergroup contact with Black people in their personal lives outside of the workplace held more positive attitudes towards Black people and more positive beliefs with respect to the criminality and violence of Black suspects (Peruche & Plant, 2006). These findings foreshadow a larger discussion on debiasing found in chapter 7 of this document.

**Shooter / Weapons Bias**

Shooter/weapons bias is a well-documented phenomenon. Shooter bias refers to the strong and pervasive implicit association that exists between Blackness (as opposed to European Americans) and weapons (vs. harmless items). Some studies in this realm rely on priming, such as B. Keith Payne’s work that showed that study participants identified guns more quickly than hand tools when primed with Black faces versus White faces, and they also misidentified tools as guns more frequently when a Black prime was employed (Payne, 2001). These insights are helpful for beginning to understand the shooter / weapons bias phenomenon.

One well-known study that examined implicit bias in this context was conducted by Joshua Correll and colleagues. For this four-part study, the research team constructed a videogame that allowed them to measure the effect of ethnicity on making the decision whether or not to shoot. Simulating what police officers experience, participants were instructed to “shoot” when armed individuals appeared on the screen and to “not shoot” unarmed targets. Images that then flashed on the screen displayed African American and White individuals shown in front of complex backgrounds, all of whom were holding some kind of object. In some cases the objects
were guns; however, in others they were innocuous objects such as a camera, a can, a cell phone, or a wallet. Participants were told to make the decision whether or not to shoot as quickly as possible. Correll et al. hypothesized that stereotypes that associate African Americans with violence may provoke participants to “respond with greater speed and accuracy to stereotype-consistent targets (armed African Americans and unarmed Whites) than to stereotype-inconsistent targets (armed Whites and unarmed African Americans)” (Correll, Park, Judd, & Wittenbrink, 2002, p. 1325). The first study supported this hypothesis, as participants “shot” at armed individuals more quickly when they were African American as opposed to White, and made the decision to refrain from shooting unarmed targets more quickly when they were White as opposed to African Americans. The second study required participants to make “shoot or not” decisions within even shorter time constraints, and this led to the finding that when participants neglected to shoot an armed target, the individual on the screen tended to be White rather than African American. And, in circumstances where the videogame character was displaying a harmless object, participants were more likely to mistakenly shoot African Americans versus Whites. Part three of the study considered the effects of prejudice and personal endorsement of the violent stereotype about African Americans; however, these did not predict shooter bias. In short, it seems that the shooter bias observed was a byproduct of knowledge of the cultural stereotype rather than personal endorsement thereof. Indeed, in study four, researchers found that African American and White participants displayed similar levels of bias.

Following up on this study five years later, Correll and colleagues compared actual police officers to community members to assess difference in the speed and accuracy of the “shoot or not” decisions described in their previous study. They found that officers’ response times were quicker than civilians, and that officers made fewer mistakes differentiating armed from unarmed individuals (Correll, et al., 2007). While all participants displayed some degree of racial bias, police officers displayed less bias in their final “to shoot or not” decisions (Correll, et al., 2007).

It is important to emphasize, however, that weapons bias is generally regarded as occurring independent of intent, meaning that even someone who is consciously and explicitly committed to being fair and unbiased may display this bias anyways
(Kang, et al., 2012; Payne, 2006). Shooter bias is largely driven by stereotypical associations rather than blatant racial hostility (Payne, 2006). “In the policing context, implicit stereotypes can cause an officer who harbors no conscious racial animosity and who rejects using race as a proxy for criminality to unintentionally treat individuals differently based solely upon their physical appearance” (Richardson, 2011, p. 2039).

The measurement of schema consistent and inconsistent pairings, such as on the IAT, is significant to note here, as police officers may only have fractions of a second in which to decide whether to shoot (Kang, et al., 2012; Payne, 2006). Thus, the implications of this bias can be literally mean life or death (Kang, et al., 2012; Plant & Peruche, 2005; Plant, Peruche, & Butz, 2005).

Within the Courtroom

Numerous dynamics and actors within the courtroom can activate or fall susceptible to implicit biases.

Judges

Even with an avowed commitment to impartiality, judges, like the rest of the general population, display implicit biases. In one study, researchers administered the race IAT to both Black and White judges. White judges displayed a strong White preference, as this implicit bias was revealed in 87.1% of the 85 White judges studied (Rachlinski, Johnson, Wistrich, & Guthrie, 2009). In contrast, Black judges generally displayed a no clear preference (Rachlinski, et al., 2009).

While many variables may factor into this finding, one common theme in the literature is the “illusion of objectivity,” which contributes to judges feeling overly confident in their ability to remain unbiased. Rachlinski et al. asked a group of judges to rank their own ability to “avoid racial prejudice in decision-making,” and a stunning 97% of them placed themselves in the top half, with 50% ranking themselves in the top quartile (Rachlinski, et al., 2009, p. 1125). These unusually high percentages, that are mathematical impossibilities, were not isolated to just one study. Anoth-
er study asked administrative law judges about their capacity for avoiding bias in judging, and the numbers were extraordinarily similar. Over 97% of the judges in this study placed themselves in the top half, with 50% ranking their ability to avoid biased judging within the top quartile (Guthrie, Rachlinski, & Wistrich, 2009). Other related studies have noted how “blind spot bias” causes people to see biases in other people more clearly than in themselves (Pronin, 2006; Pronin, Lin, & Ross, 2002). These findings highlight the extent to which the illusion of objectivity can affect how judges perceive themselves and their decision making.

The illusion of objectivity not only affects judges’ self-perception, it also colors their judgment. An experiment by Ulhmann and Cohen found that “when people feel that they are objective, rational actors, they act on their group-based biases more rather than less” (Uhlmann & Cohen, 2007, p. 221). Susceptible to the illusion of objectivity, judges may unintentionally act in ways that align with the implicit biases they hold. The irony that thinking of oneself as objective actually fosters more biased decisions should be a tremendous concern to judges everywhere. In the concise words of Kang et al., “believing oneself to be objective is a prime threat to objectivity” (Kang, et al., 2012, p. 1184).

**Jurors**

Generally speaking, research has indicated that jurors tend to show biases against defendants of a different race (Kang, et al., 2012). One meta-analysis of laboratory studies by Mitchell et al. found this ingroup bias affected both verdicts and sentencing, albeit with relatively small effect sizes (T. L. Mitchell, Haw, Pfeifer, & Meissner, 2005).

An empirical study by Levinson and Young explored how mock-jurors assess trial evidence. Introducing their Biased Evidence Hypothesis, the researchers built upon the literature on priming by asserting that the activation of racial stereotypes prompt jurors to “automatically and unintentionally evaluate ambiguous trial evidence in racially biased ways” (Levinson & Young, 2010, p. 309). Research participants were shown a slideshow of evidence from a fictitious armed robbery in which half of the participants viewed a dark-skinned perpetuator and the other half saw a light-
er-skinned perpetuator. Supporting the Biased Evidence Hypothesis, the results showed that, compared to the White-skinned perpetuator, participants who viewed the darker skinned perpetuator were more likely to consider the evidence as indicative of criminal guilt and more likely to assert that the defendant was in fact guilty of committing the armed robbery (Levinson & Young, 2010).

An empirical study by Levinson examined whether implicit racial bias affected how mock jurors recalled legal facts from fictional story involving a fistfight. While the story itself remained consistent throughout the study, in one condition, participants read about “William,” who was specifically noted to be Caucasian. Other participants experienced alternate conditions in which William was replaced by Tyronne (who was explicitly listed as African American) or Kawika, a Hawaiian. After a fifteen-minute distraction task, participants were asked to recall details of the confrontation scenario. Levinson found that the reported race of the fictional defendant affected participants’ recall of the story. Notably, participants were significantly more likely to remember facts about the aggressiveness of Tyronne compared to when William or Kawika were substituted in the same role (Levinson, 2007). This finding of racially biased memories did not relate to participants’ explicit racial preferences (Levinson, 2007). Levinson notes how this misremembering of facts due to implicit racial biases can have crucial consequences for the enactment of justice in a legal setting.

Further work by Levinson and his colleagues Cai and Young examined whether implicit biases affect jury decisions in ways that reflect racial bias. The researchers debuted a new IAT, the Guilty/Not Guilty IAT, which measures the implicit association between African Americans and criminal guilt (Levinson, Cai, & Young, 2010). Their study tested whether the Guilty/Not Guilty IAT predicted how mock jurors responded to unclear trial evidence and found a connection between the implicit associations they measured and jurors’ views of the evidence (Levinson, et al., 2010, p. 190). Studies such as this reiterate the role of implicit bias in jury deliberations and introduce skepticism to the ideal of “innocent until proven guilty.”

One very important nuance to this juror bias research must be highlighted: contrary to what may be the prevailing assumption, when a case is “racially charged,” jurors show less bias because they are more thoughtful about the role of race than they are
when race is not an explicit aspect of the case (Sommers & Ellsworth, 2000; Sommers & Ellsworth, 2001).

The racial composition of a jury also has a considerable impact on legal decisions (Arterton, 2008; Bowers, Sandys, & Brewer, 2004; Sommers, 2006). Sommers studied the group decision making processes and outcomes of mock juries of various racial compositions and found that compared to an all-White jury, diverse juries deliberated longer and discussed a wider range of information from the case (Sommers, 2006). Bowers looked at the jury racial composition data from 74 capital trials and concluded that juries dominated by White males was strongly associated with death penalty sentencing decisions (Bowers, et al., 2004). Supreme court Justice Sandra Day O'Connor's dissent in Georgia v. McCollum affirms this notion that jurors, their implicit racial biases, and jury composition shape trial proceedings: “[i]t is by now clear that conscious and unconscious racism can affect the way White jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence .... [M]inority representation on the jury may help to overcome such racial bias, for there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury” (“Georgia v. McCollum,” 1992, p. 68).

Together these studies show that the likelihood of a jury convicting a defendant involves not only the strength of the case and the credibility of its evidence, but also the everyday prejudices and implicit biases the jurors bring to the deliberations.

**Sentencing**

Given the courtroom dynamics discussed thus far, it is not surprising that implicit racial biases may taint the sentencing process. Considering that sentences often have profound and life-altering effects on the convicted, researchers have investigated and attempted to measure the effects of these biases. The results are startling.

Adding to research that found that people hold associations between stereotypically Black physical traits and perceived criminality (Eberhardt, et al., 2004), Blair, Judd, and Chapleau explored the connection between criminal sentencing and Af-
rocentric features bias. This form of bias refers to the generally negative judgments and beliefs that many people hold regarding individuals who possess particularly Afrocentric features, notably dark skin, a wide nose, and full lips. The presence of these features may activate associations that lead to stereotypical perceptions. Blair et al. studied young Black and White male inmates in the Florida Department of Corrections database and found that Black and White inmates with equivalent criminal records tended to receive similar sentences; however, within each race, individuals with more Afrocentric features received longer sentences than those with less Afrocentric features (Blair, Judd, & Chapleau, 2004). More specifically, being one standard deviation above the mean level of Afrocentric features for a given group equated to sentences that were seven to eight months longer than individuals one standard deviation below the group mean, even when criminal records are held constant (Blair, et al., 2004). Thus, the mere perception of an offender having more Afrocentric features, even if the offender is White, activates an implicit bias that leads to longer sentences. Pizzi, Blair, and Judd posited an explanation for this phenomenon, asserting, “it is our thesis that judges have learned to be more careful to impose similar sentences between racial groups, but they have not been similarly sensitized to the possibility of discrimination based on Afrocentric features within racial categories” (Pizzi, Blair, & Judd, 2005, p. 331).

Applying this concept to death penalty sentences, Eberhardt and colleagues studied whether the extent to which Black defendants possess stereotypically Black physical traits affects their likelihood of being sentenced to the death penalty in death-eligible cases. Using data from death-eligible cases from 1979-1999 in Philadelphia, researchers found that after controlling for numerous factors, when the victim was White, Black defendants whose appearance was more stereotypically Black were more likely to be sentenced to death than those whose faces displayed fewer stereotypically Black traits (Eberhardt, Davies, Purdie-Vaughns, & Johnson, 2006). In cases where the victim was Black, however, the perceived stereotypicality of Black defendants did not predict death sentencing.

Prosecutors

Prosecutors are as susceptible to implicit racial biases as anyone else, and the unique
nature of their job provides numerous opportunities for those biases to act within criminal justice proceedings.

A recent law review article by Smith and Levinson outlines three main areas in which prosecutors may unknowingly act upon their implicit racial biases: when making charging decisions, during pretrial strategy, and throughout trial strategy (Smith & Levinson, 2012). With respect to charging decisions, implicit biases color how offenders are perceived, thereby affecting whether a suspect should be charged, and if so, what severity of a crime should be charged. These choices can have tremendous impacts on suspects’ lives, particularly when prosecutors are deciding between trying someone in juvenile court vs. adult court, or determining whether to pursue the death penalty.

Then, as part of pretrial strategy, prosecutors are faced with making bail determinations. Smith and Levinson note that the assumption that suspects who have good jobs and connections in the community are generally regarded as less likely to flee; however, the stereotypes that plague African Americans as being lazier and less trustworthy may activate implicit biases that cause prosecutors to view their employment records with a greater degree of skepticism (Smith & Levinson, 2012). Also part of pretrial strategy are decisions related to whether to offer a plea bargain, and if so, what the reduced charge would be. Smith and Levinson state that implicit stereotypes can affect this process, as some people may be regarded more leniently as “troubled, but not a bad person,” which increases the likelihood of being offered a plea bargain compared to an individual of a different race who may be deemed unlawful or dangerous (Smith & Levinson, 2012, p. 817-818).

Finally, prosecutorial implicit biases can crop up during aspects of trial strategy, such as jury selection and closing arguments. During closing arguments, in particular, prosecutors may activate implicit biases by referring to the accused in terms that dehumanize them, such as using animal imagery. Upon accounting for empirical studies that showed how many people still mentally connect Black people with apes (Goff, et al., 2008), the use of animal imagery is all the more alarming. Goff and colleagues found that as the number of ape references made about a Black defendant increased, so too did the likelihood of that defendant being sentenced to death.
(Goff, et al., 2008). Thus, the language used by prosecutors can trigger implicit biases that dramatically affect trial outcomes.

**Defense Attorneys**

As with all of the other legal actors discussed so far, defense attorneys are not exempt from harboring implicit racial biases (Eisenberg & Johnson, 2004). Lyon recently identified two main areas where defense attorneys’ implicit biases can affect the judicial process: within the attorney-client relationship, and during the jury selection process (Lyon, 2012). She writes about how implicit biases can influence how attorneys perceive their clients, such as seeing an “angry Black man” rather than a Black man who became frustrated when unable to understand the choices and consequences his attorney was outlining. Lyons also mentions how defense lawyers can fall into the trap of relying on humor to defuse stress; however, there is a need for caution in doing this so that the client is not dehumanized in the process.

With respect to voir dire and jury selection, defense attorneys must caution against relying on stereotypes to make assumptions about how a prospective juror may respond to the attorney’s client and associated case. Lyons asserts that using stereotypes in juror selection may extend to implicit biases later in the judicial process. She warns, “If we are using this process of elimination based on stereotypes, jurors will know it. And then we cannot get angry if the jurors return the favor by making the assumption that our young male minority client is guilty, a gang member, or otherwise dangerous and not deserving of respect” (Lyon, 2012, p. 767).
CHAPTER SEVEN

Implicit Bias In Health/Health Care
Implicit bias in Health/Health Care

The presence and prevalence of racial disparities in health and health care across a wide array of ailments have been documented extensively (for example overviews, see Elster, Jarosik, VanGeest, & Fleming, 2003; Mead, et al., 2008; Smedley, Stith, & Nelson, 2003; Stevens & Shi, 2003). Various explanations for these disparities range from individuals’ lifestyle decisions, biomedical reasons, and social/environmental factors. The Kirwan Institute emphasizes this third category, noting that the social determinants of health such as where people are born, live, and work all affect health outcomes (for further information, see Daniels, Kennedy, & Kawachi, 1999; Social Determinants of Health,” 2012; World Health Organization, 2008).

As discussed in this chapter, studies have documented the presence of implicit bias in a variety of facets of the health / healthcare industry.

Physicians’ Implicit Biases

Like all other groups of people, health care professionals carry implicit biases that can influence their behaviors and judgments (Stone & Moskowitz, 2011). Some researchers have examined what role, if any, physicians’ implicit racial biases play in the formation and perpetuation of these disparities. For example, Sabin and colleagues measured the implicit and explicit racial biases of 2,535 medical doctors and accounted for the physicians’ own race and gender in their analysis. This research yielded three notable conclusions: 1) the doctors’ implicit and explicit attitudes about race align well with the patterns found in large heterogeneous samples of the general population, as most doctors implicitly preferred Whites to Blacks; 2) on average, African American doctors did not display any implicit racial preferences for Whites or Blacks; 3) physician gender matters, as female doctors tended to hold fewer implicit racial biases (Sabin, et al., 2009). Other researchers have examined this phenomenon at an earlier stage, finding an implicit preference for Whites among first-year medical students (Haider, et al., 2011).

Furthering this line of inquiry, Moskowitz et al. conducted two studies aimed at exploring whether unconscious stereotypes influence the thoughts and behaviors of physicians. They identified the stereotypes maladies that medical professionals associated with African American patients and, by utilizing a reaction time procedure
in which subject received implicit primes, found that doctors implicitly associated certain diseases with African Americans (Moskowitz, Stone, & Childs, 2012). The authors articulate two main dangers of this implicit stereotyping: “(1) inaccurate components of a stereotype may be used in diagnosis and treatment without conscious knowledge of this influence, [and] (2) even an accurate stereotype may unduly influence diagnosis and treatment” (Moskowitz, et al., 2012, p. 1000).

Finally, in the realm of psychotherapy, Abreu used an experimental design to determine that therapists who were unknowingly primed with terms and stereotypes about a fictional patient rated the patient more negatively than a control group who were primed with neutral words (Abreu, 1999). This is yet another example of how the biases medical professionals carry can affect their patients.

**Differential Treatment**

Alarmingly, implicit biases have been shown to affect the type(s) and quality of care that patients of various races receive.

Schulman et al. examined racial variations in medical treatment using videos of actors portraying patients reporting chest pain. The patients were similar across several characteristics (e.g., socioeconomic status, type of insurance plan); however, they varied by race and sex. Results indicated that women and Blacks were less likely to be referred for cardiac catheterization compared to their respective sex and race counterparts (Schulman, et al., 1999). Further analyses indicated that patients’ race and sex independently influenced the doctors’ recommendations, which provides insights into the differential treatment of cardiovascular disease (Schulman, et al., 1999).

A similar study by Weisse and colleagues explored whether the race and gender of patients influence doctors’ decisions for treating patients who are reporting pain due to a kidney stone or back problems. Researchers presented doctors with vignettes depicting patients with these ailments. While patient race and gender varied across vignettes, the description and severity of his/her symptoms remained consistent across all cases. Researchers did not find any differences by race or gender with respect to the doctors’ decision to administer treatment; however, they found that
treatments prescribed varied by patients’ race and gender. With respect to race, male physicians prescribed higher doses of pain medication to White patients compared to Black patients, yet female doctors gave higher doses to Blacks (Weisse, Sorum, Sanders, & Syat, 2001). In terms of gender, male physicians prescribed higher doses of pain medicine to men, and female doctors gave higher doses of pain medication to female patients compared to males (Weisse, et al., 2001). These findings suggest that acknowledging a physicians’ gender is key to understanding differential treatment of patients by race and gender (Weisse, et al., 2001).

The first study to provide compelling evidence of implicit bias among physicians using the IAT was conducted by Green et al. They sought to determine whether physicians held implicit racial biases, and if so, did the amount of implicit bias predict whether the doctors would prescribe thrombolysis for Black and White patients displaying acute coronary symptoms. In terms of the results, the physicians reported not having any explicit preferences for Black or White patients; however, implicit measures recorded a preference for White patients and a belief that Black patients were less likely to cooperate with medical procedures (Green, et al., 2007). Most notably, the researchers found that increases in physicians’ pro-White biases coincided with an increased likelihood of treating White patients with thrombolysis but not Black patients (Green, et al., 2007). Thus, the dissociation of implicit and explicit biases in a medical context can lead to differential treatment by race, which has obvious and important implications for patients’ well-being.

Taking the study by Green et al., 2007 to a different context, Sabin and Greenwald used three different IAT tests to examine pediatricians’ implicit attitudes and how they affect treatment recommendations for four pediatric conditions (pain, urinary tract infection, attention deficit hyperactivity disorder, and asthma). While there were not any significant associations between implicit attitudes and three of the diagnoses, researchers did uncover an association between unconscious biases related to patient race and prescribing narcotics for surgery-related pain (Sabin & Greenwald, 2012). Specifically, as pediatricians’ pro-White implicit bias increased, so too did their inclination to prescribe pain-killing narcotics for White rather than Black patients (Sabin & Greenwald, 2012). Thus, implicit biases have been shown to influence patient treatment decisions even for youths.
Doctor – Patient Interactions

Another area affected by implicit bias in the healthcare realm is doctor-patient communication. Indeed, a study by Penner et al. concluded that White physicians’ implicit racial biases led to less positive interactions with Black patients, particularly for doctors who displayed the combination of low explicit bias but high implicit bias (Penner, et al., 2010). Relatedly, a sample of physicians in another study found that “physicians were 23% more verbally dominant and engaged in 33% less patient-centered communication with African American patients than with White patients” (Johnson, Roter, Powe, & Cooper, 2004, p. 2084).

Looking at primary care clinicians, Cooper et al. examined how the implicit attitudes of primary care clinicians related to clinician-patient communication and patient ratings of care. Using an IAT that measured clinicians’ race bias, the researchers found that higher implicit race bias scores generally were associated with more verbal dominance and lower patient positive affect for Black patients (Cooper, et al., 2012). From the perspective of Black patients, clinicians with higher IAT race bias were linked to Black patients feeling like they received less respect from the clinician, having less confidence in the clinician, and being less likely to recommend the clinician to other people (Cooper, et al., 2012). Conversely, White patients who interacted with clinicians who held higher levels of race bias felt that they were respected and liked (Cooper, et al., 2012).

Fostering Cultural Competency

Stone and Moskowitz define cultural competency in a medical environment as “the ability of systems to provide care to patients with diverse values, beliefs and behaviors, including their tailoring of delivery to meet patients’ social, cultural and linguistic needs” (Stone & Moskowitz, 2011, p. 771). Contributing to the perpetuation of implicit biases in health care is the fact that medical professionals are not necessarily formally trained or well-versed in cultural competency (Carillo, Green, & Betancourt, 1999; White III, 2011).

Begun in 1997 and formally published in 2001, the Office of Minority Health in the
U.S. Department of Health and Human Services created the National Standards for Culturally and Linguistically Appropriate Services in Health Care (National Standards for Culturally and Linguistically Appropriate Services in Health Care, 2001). These standards “respond to the need to ensure that all people entering the health care system receive equitable and effective treatment in a culturally and linguistically appropriate manner” (National Standards for Culturally and Linguistically Appropriate Services in Health Care, 2001, p. 3). Stone and Moskowitz, however, point out that while these standards are a step in the right direction, they leave the way in which this material should be taught open to interpretation, thus medical professionals are left to “walk the thin line between the activation of cultural knowledge and the use of stereotypes” (Stone & Moskowitz, 2011, p. 772).

Several scholars have called for more cross-cultural/cultural competency curricula to educate medical professionals (Geiger, 2001; Stone & Moskowitz, 2011; White III, 2011). While these materials and teachings can be an important steps toward dismantling implicit biases, scholars also warn against stereotyping or oversimplifying a culture, as assuming that members of a given racial or ethnic group behave in a uniform and predictable manner is also problematic (Betancourt, 2004; Carillo, et al., 1999).

**Concluding Thoughts**

The impact of implicit biases in healthcare should not be understated. Moskowitz and colleagues capture the far-reaching effects, writing that implicit stereotypes can unintentionally affect medical professionals’ “diagnoses, treatment recommendations, expectations about whether a patient will follow a prescribed treatment, and both verbal and nonverbal behavior toward patients during professional interactions, despite their intention to avoid such biases in conduct” (Moskowitz, et al., 2012). Anderson takes these concerns a step further by asserting that, “Of the four principles of bioethics, three—autonomy, non-maleficence, and justice—are most directly impacted by implicit bias” (Anderson, 2012). He stresses the need for medical providers “to increase the depth of their own understanding and to identify and utilize readily available resources to decrease both the occurrence and impact of implicit bias” (Anderson, 2012).
CHAPTER EIGHT

Debiasing
Debiasing

The holy grail of implicit race bias research is to change the underlying associations that form the basis of implicit bias.


While implicit biases are deeply entrenched in the subconscious, researchers generally agree that biases are malleable and that implicit associations may be unlearned (see, e.g., Blair, 2002; Blair, Ma, & Lenton, 2001; Dasgupta & Greenwald, 2001; Devine, 1989; Kang, 2009; Kang & Lane, 2010). As discussed in this chapter, the debiasing process can take many different forms and yield varying results depending on factors such as individual motivation and context, as these influence what associations are brought to the foreground of one’s mind (Foroni & Mayr, 2005).

Debiasing is far from a simple task, as it involves the construction of new mental associations. Devine writes, “Inhibiting stereotype-congruent or prejudice-like responses and intentionally replacing them with non-prejudiced response can be likened to the breaking of a bad habit” (Devine, 1989, p. 15). She adds how “intention, attention, and time” are needed so that new responses are learned well enough to compete with the formerly automatically activated responses (Devine, 1989, p. 16). Given how strongly rooted implicit biases tend to be, debiasing efforts have to compete against stimuli that can, in effect, “re-bias” (Kang, et al., 2012, p. 1170).

The first inclination for many people who realize they hold implicit racial/ethnic biases may be to attempt to debias by repressing these biased thoughts; however, this notion generally has not been supported by the literature due to “rebound effects.” Suppressing automatic stereotypes does not reduce them and may even amplify them by making them hyper-accessible (Galinsky & Moskowitz, 2000, 2007; Macrae, Bodenhausen, Milne, & Jetten, 1994). Studies have shown that “instead of repressing one’s prejudices, if one openly acknowledges one’s biases, and directly challenges or refutes them, one can overcome them” (bstan-’dzin-rgya-mtsho & Cuttler, 2009, p. 70). Similarly, Blair and Banaji found that conscious efforts to counter stereotypes can inhibit the activation of automatic associations (Blair & Banaji, 1996).
Numerous researchers have used the IAT to demonstrate the malleability of implicit attitudes. For example, Kawakami and colleagues found that proximity, as examined through approach-avoidance orientations, affected implicit racial bias scores across a series of four studies (Kawakami, Phillips, Steele, & Dovidio, 2007). Ito and colleagues published another example of the IAT documenting the malleability of implicit racial attitudes that they achieved by manipulating participants’ emotional cues. Some participants were surreptitiously induced to smile by holding a pencil in their mouths while viewing photos of unfamiliar Black or White men; others were not instructed to perform any such somatic manipulation. IAT results showed that this manipulation influenced IAT outcomes, as individuals who surreptitiously smiled while viewing Black faces earlier displayed less racial bias against Blacks (Ito, Chiao, Devine, Lorig, & Cacioppo, 2006). Richeson and Ambady considered the role of situational power (i.e., whether one is regarded as superior or subordinate in an interracial dyad) was reflected by changes in implicit racial attitudes in interracial interactions but not in same-race interactions (Richeson & Ambady, 2003). These studies, among others, declare implicit biases to be malleable.

With this in mind, it is logical that subsequent attention has been devoted to using this malleability property to counter existing biases. The following sections examine various debiasing techniques.

**Interventions that may debias successfully**

*Counter-stereotypic training*

A significant portion of the debiasing research centers on interventions that counter stereotypes and train individuals to develop new associations. One such example, advanced by Wittenbrink, Judd, and Park (2001) focused on how modifying the situational context may influence racial attitudes. By juxtaposing ordinary people in counter-stereotypic situations, such as depicting young White and Black males in scenes that included a church and a graffiti-strewn street corner, researchers found that the context condition affected participants’ racial attitudes on a subsequent sequential priming task (Wittenbrink, Judd, & Park, 2001). The data from this counter-stereotypic training indicated that social category clues may affect individuals’
automatic responses and racial attitudes.

Taking the notion of countering stereotypes rather literally, Kawakami et al., 2000 studied the effects of training people to negate stereotypic associations, including racial associations. By instructing participants to verbally respond “no” when presented with a stereotypic trait that matched a category representation and “yes” when viewing non-stereotypic associations, they found that participants who received this stereotype negation training displayed diminished stereotype activation (Kawakami, et al., 2000).

Notably, this effect remained salient 24 hours after the training ended (Kawakami, et al., 2000). These findings emphasize the importance of not just counter-stereotypic instruction, but also the need for consistent repetition of this instruction. Kawakami and colleagues later extended this work to examine the effect of training on non-stereotypic traits of men and women in the context of hiring decisions and found similar results supporting the effectiveness of counter-stereotypic training (see Kawakami, Dovidio, & Kamp, 2005).

Finally, Blair and colleagues researched the strategy of using mental imagery as a way to moderate implicit stereotypes. Over the course of five experiments that used mental imagery to target gender stereotypes, they found compelling evidence that counter-stereotypical mental imagery yielded notably weaker implicit stereotypes as compared to the implicit stereotypes assessed in individuals who either engaged in other forms of mental imagining or no mental imagery whatsoever (Blair, et al., 2001).

Rather than only mental, imagery in other forms may be used to debias. For courtroom settings, Kang and colleagues suggest the use of posters, pamphlets, photographs, and similar materials that would provoke counter-typical associations in the minds of jurors and judges (Kang, et al., 2012). The effects of this would likely vary based on the amount of exposure, with the underlying intention that even momentarily activating a different association may help decrease the presence of implicit bias during legal processes.
Exposure to counter-stereotypic individuals

Another type of intervention focuses on exposing people to individuals who contradict widely-held stereotypes. One fascinating study by Dasgupta and Greenwald (2001) investigated whether exposure to counter-stereotypic exemplars could decrease automatic preferences, such as that for White over Black Americans. They found that exposure to pro-Black exemplars (e.g., Michael Jordan, Colin Powell, Martin Luther King, Jr.) as opposed to nonracial or pro-White exemplars (e.g., Tom Hanks, Jay Leno, John F. Kennedy) significantly decreased the automatic White preference effect, as measured by the IAT (Dasgupta & Greenwald, 2001). Similar to the findings of Kawakami et al., 2000, this effect had staying power, as the IAT effect of this pro-Black condition remained 24 hours after the exposure to images of admired Blacks and disliked Whites (e.g., Jeffrey Dahmer, Timothy McVeigh, Al Capone). Emphasizing the malleability of implicit biases, the authors suggest that “creating environments that highlight admired and disliked members of various groups … may, over time, render these exemplars chronically accessible so that they can consistently and automatically override preexisting biases” (Dasgupta & Greenwald, 2001, p. 807).

This scholarship aligns well with the concept of debiasing agents, which refers to individuals whose traits contrast with the stereotypes typically associated with that particular category (Kang & Banaji, 2006). The presence of debiasing agents decreases the implicit biases of those they encounter due to their unique positioning. Example debiasing agents would include male nurses, elderly athletes, and female scientists. In many cases, debiasing agents change individuals’ implicit stereotypes, not just their implicit attitudes (Kang & Banaji, 2006). However, to be effective, debiasing agents must be viewed as not merely an exception but rather connect that individual to relevant categories, regardless of any counter-stereotypical traits they may also possess (Kang & Banaji, 2006).

The success of the exposure to counter-stereotypic individuals intervention has been echoed by other studies that do not focus explicitly on race. For example, one study found that exposure to women in leadership positions at a women’s college led to students being less likely to express automatic gender stereotypes about women,
compared to students from a coeducational college (Dasgupta & Asgari, 2004).

Moreover, exposure to counter-stereotypic exemplars does not even need to occur through in-person interactions. Renowned implicit bias scholar Mahzarin Banaji works to offset her own implicit biases through viewing images of counter-stereotypical individuals on her computer screensaver (Lehrman, 2006). Photos and other wall décor can serve a similar purpose (Kang, et al., 2012; National Center for State Courts).

However, some researchers question this counter-stereotypic exemplar debiasing method. First, an extensive 2010 study by Schmidt and Nosek examined whether Barack Obama, as a high-status famous Black exemplar shifted implicit or explicit racial attitudes during his candidacy and early presidency. Results from a heterogeneous sample of nearly 480,000 individuals led to the conclusion that there was minimal evidence that implicit racial attitudes changed systematically due to Obama’s presence as a counter-stereotypic exemplar (Schmidt & Nosek, 2010).

The authors suggest that the mere presence of a high-status counter-stereotypic exemplar may be inadequate to shift implicit or explicit racial attitudes (Schmidt & Nosek, 2010). Building on this work, Lybarger and Monteith’s research concluded that President Obama’s saliency alone did not have a debiasing effect, as one individual may be inadequate to shift long-standing implicit racial associations (Lybarger & Monteith, 2011).

Second, Joy-Gaba and Nosek provide a word of caution regarding the perceived malleability of implicit biases through exposure to counter-stereotypic exemplars. Their efforts to replicate and expand upon the work of Dasgupta and Greenwald (2001) noted earlier in this subsection yielded conspicuously less convincing results. Notably, while the degree of malleability found by Dasgupta and Greenwald was quite high on both the initial measure (d = 0.82) and follow-up 24 hours later (d = 0.71), Joy-Gaba and Nosek found significantly weaker effect magnitudes (d = 0.17 and 0.14, respectively) (Joy-Gaba & Nosek, 2010). This discrepancy leads the authors to broadly conclude that the extent to which the literature declares implicit biases to be malleable may have been overstated (Joy-Gaba & Nosek, 2010).
Intergroup Contact

Championed by American psychologist Gordon W. Allport in 1954, intergroup contact theory asserts that four key conditions are the necessary for positive effects to emerge from intergroup contact (Allport, 1954). Allport stipulated that optimal intergroup contact involves individuals of equal status, which explains why some relationships, such as that of student and teacher, do not necessarily lead to reductions in bias. Other conditions that yield positive intergroup contact effects include sharing common goals, interacting in a cooperative rather than competitive setting, and being supported by authority figures, laws, or customs. Allport’s theory has been supported consistently in the literature, including through large-scale meta-analyses (see, e.g., Pettigrew & Tropp, 2006, 2011).

Beyond simply gaining familiarity with outgroups through intergroup contact, these interactions have been shown to reduce implicit bias. For example, Thomas Pettigrew’s multi-national study found that “the reduction in prejudice among those with diverse friends generalizes to more positive feelings about a wide variety of outgroups” (Pettigrew, 1997, p. 180-181). Moreover, ten years later in a meta-analytic test of intergroup contact theory, Pettigrew and Tropp examined 713 samples and concluded that ingroup contact generally reduces intergroup prejudice (Pettigrew & Tropp, 2006).

With respect to the realms of criminal justice and health care previously discussed, intergroup contact can play a debiasing role in specific contexts. Peruche and Plant studied police officers and noted that “high levels of negative contact with Black people at work were related to negative expectations regarding Black suspects and marginally more negative attitudes toward Black people generally;” however, intergroup contact with Blacks outside of the workplace counteracted these effects (Peruche & Plant, 2006, p. 197). Similarly, diverse clinical care teams are vital to health care, because in a diverse team where members are granted equal power, “a sense of camaraderie develops that prevents the further development of stereotypes based on race/ethnicity, gender, culture or class” (Betancourt, 2004, p. 108).
**Education about Implicit Bias**

Efforts aimed at raising awareness of the phenomenon of implicit bias can also debias. This education can take several forms. For example, U.S. district judge Mark W. Bennett educates potential jurors about implicit bias during his time with them during the juror selection process. Judge Bennett aims to explain implicit bias and make jurors skeptical of their own objectivity through a 25-minute lesson that concludes by asking each juror to sign a pledge against bias. The text of this pledge is prominently displayed in the jury room. Then, at the beginning of the trial, Judge Bennett reiterates how implicit bias can taint jurors’ judgment by giving a short speech\(^2\) before the lawyers’ opening statements. He believes in the positive outcomes studies have documented regarding individuals’ responses to awareness of their own implicit biases (Bennett, 2010).

A recent article by Anna Roberts strongly supports the idea of using the IAT to educate jurors about implicit bias while dismissing the notion that the IAT should be used to “screen” prospective jurors (Roberts, 2012). Much like Judge Mark Bennett, Roberts recommends that this educational component be integrated into juror orientation, preferably with jurors receiving hands-on experiential learning that includes taking the IAT, as this is more impactful than passively learning about the IAT and its findings (Roberts, 2012).

Judges can also benefit from implicit bias education, which in large part involves persuading them of the presence of this problem (Kang, et al., 2012; Saujani, 2003). Organizations such as the National Center for State Courts (NCSC) have begun creating resources\(^3\), such as films and assessments, designed to raise judicial awareness of implicit biases and their implications in a courtroom setting. Results from pilot sites showed promising preliminary results (Kang, et al., 2012). Research suggests that educating judges about implicit bias is most effective under three circumstances: 1) training should start early, such as during new judge orientation when

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2. See Appendix A for the text of this brief speech.

3. The National Center for State Courts have posted some of their educational films and materials here: [http://www.ncsconline.org/D_Research/ref/implicit.html](http://www.ncsconline.org/D_Research/ref/implicit.html)
people are most open to new ideas; 2) the training should be presented in such a way that judges do not feel defensive; it should not be accusatory in nature; and 3) judges should be encouraged to take the IAT, as the results often prompt action (Kang, et al., 2012).

An entire industry around diversity education and trainings has proliferated in recent years, offering participants promises of reduced prejudice and greater appreciation of various cultures. Studies have examined whether diversity education can counter implicit biases, though the results are mixed. One study found that Whites who volunteered for diversity education forums showed lower levels of implicit and explicit anti-Black prejudice, with the change in implicit orientations “predicted by emotion-based factors, including reduced fear of Blacks, and liking for the Black professor who taught the course” (Rudman, 2004, p. 136; Rudman, Ashmore, & Gary, 2001). Conversely, other research finds diversity training yield minimal effects, particularly from a long-term perspective (Rynes & Rosen, 1995).

**Accountability**

Having a sense of accountability, meaning “the implicit or explicit expectation that one may be called on to justify one’s beliefs, feelings, and actions to others,” can be another powerful measure to combat bias (Lerner & Tetlock, 1999, p. 255). Research finds that having a sense of accountability can decrease the influence of bias (Kang, et al., 2012; Reskin, 2005). When decision makers are not held accountable for their actions, they are less likely to self-check for how bias may affect their decision-making (National Center for State Courts). Jurors’ feelings of being held accountable by the judge to produce unbiased decisions can help jurors keep their implicit biases in check (Kang, et al., 2012).

**Fostering Egalitarian Motivations**

Considerable research has shown that fostering egalitarian motivations can counter the activation of automatic stereotypes (Dasgupta & Rivera, 2006; Moskowitz, Gollwitzer, Wasel, & Schaal, 1999). Stone and Moskowitz write, “When activated, egalitarian goals inhibit stereotypes by undermining and counteracting the implicit
nature of stereotype activation, thereby cutting stereotypes off before they are brought to mind” (Stone & Moskowitz, 2011, p. 773). For example, work by Dasgupta and Rivera found that automatic biases are not necessarily inevitable, as the relationship between automatic antigay prejudice and discrimination was moderated by individuals’ conscious holding of egalitarian beliefs (Dasgupta & Rivera, 2006).

**Taking the Perspective of Others**

Another debiasing strategy that has gained some traction is when individuals take the perspective of someone who is different from them. Across three experiments, Galinsky and Moskowitz found that perspective-taking was effective at debiasing, as it “tended to increase the expression of positive evaluations of the target, reduced the expression of stereotypic content, and prevented the hyperaccessibility of the stereotype construct” (Galinsky & Moskowitz, 2000, p. 720).

Benforado and Hanson support perspective-taking as a debiasing tool, noting that considering opposing perspectives and fostering recognition of multiple perspectives are good techniques for reducing automatic biases (Benforado & Hanson, 2008). They caution, however, that this approach may have limited effects if individuals believe they have taken the perspective of others when in fact they have not been as successful at this venture as they judge themselves to be.

Later empirical work by Todd et al. shed light on effects of perspective taking. The researchers employed five experiments designed to assess whether taking the perspective of others could counter automatic expressions of racial bias. Their findings found that this debiasing technique yielded “more favorable automatic interracial evaluations” (Todd, Bodenhausen, Richeson, & Galinsky, 2011, p. 1038).

Taking the perspective of others can also be used in debiasing exercises. When Stone and Moskowitz outlined the components of a cultural competency workshop for medical professionals that sought to educate them about implicit bias, the authors suggested that the medical professionals imagine themselves as a minority group patient and write a story about that person’s life (Stone & Moskowitz, 2011). Finally, it is worth noting that perspective taking has benefits that extend beyond
debiasing. For example, in the realm of healthcare, studies have shown that encouraging practitioners to take the perspective of others cultivates empathy, which leads to positive outcomes for patient satisfaction and treatment (see, e.g., Blatt, LaLacheur, Galinsky, Simmens, & Greenberg, 2010; Drwecki, Moore, Ward, & Prkachin, 2011).

**Deliberative Processing**

Another technique that can counter implicit biases is to “engage in effortful, deliberative processing” (Kang, et al., 2012, p. 1177). This is particularly important for individuals who may be operating under time constraints or a weighty cognitive load, such as doctors and judges, because spontaneous judgments can provoke reliance on stereotypes (Burgess, 2010; Kang, et al., 2012). To that end, Betancourt suggests that medical professionals constantly self-monitor their behaviors in an effort to offset implicit stereotyping (Betancourt, 2004).

In another manner of deliberative processing, Stone and Moskowitz encourage medical professionals to rethink the standard ways that patients are classified (e.g., race/ethnicity, gender, etc.) and instead focus on a common identity that they share with each patient (Stone & Moskowitz, 2011). By activating this shared identity, the patient’s other identities (e.g., race/ethnicity) are not as prevalent in the medical professional’s mind, thus helping to counter the enactment of the implicit biases and stereotypes associated with those identities (Stone & Moskowitz, 2011).

The significance of deliberative processing is reinforced by research that finds that even one’s emotional state can influence the activation and nature of implicit biases (Dasgupta, DeSteno, Williams, & Hunsinger, 2009). For example, DeSteno and colleagues examined how the creation of automatic outgroup prejudice can be affected by emotional states, such as anger or sadness. Using both an evaluative priming measure and the IAT, they found that an angry emotional state led to automatic prejudice against outgroups, which the researchers attributed to anger’s association with intergroup competition and conflict (DeSteno, Dasgupta, Bartlett, & Cajdric, 2004). Thus, deliberate processing, including self-awareness of one’s own emotional state, plays a role in individuals’ ability to counter implicit biases.
Other Interventions

As discussed in this final subsection, some researchers have developed specific interventions as a means of debiasing.

As an extension of work that relied on counter-stereotypic exemplars, Foroni & Mayr showed how short fictional scenarios designed to present a counter-stereotypic example (in this case, flowers were regarded noxious while insects were positively regarded) had an immediate and automatic modulation of the IAT effect (Foroni & Mayr, 2005). This same effect was not observed when subjects were simply asked to think of flowers as negative and insects as positive. “These results suggest that a newly acquired knowledge structure targeting the abstract, category level can produce behavioral effects typically associated with automatic categorization” (Foroni & Mayr, 2005, p. 139).

A recent publication by Devine et al. highlights an intervention that is founded on the premise that “implicit bias is like a habit that can be broken through a combination of awareness of implicit bias, concern about the effects of that bias, and the application of strategies to reduce bias” (Devine, Forscher, Austin, & Cox, 2012, p. 1267). The logic here is that “breaking the habit” of implicit bias requires awareness of the contexts that can activate bias and knowledge of how to replace biased reactions with ones that reflect a non-prejudiced mindset. Devine and colleagues sought to assess whether interventions could yield long-term reductions in implicit racial bias. They used a randomly controlled experimental design in which participants assigned to the intervention group engaged in a bias education and training program that taught participants five strategies they could apply to different situations in their lives as appropriate (stereotype replacement, counter-stereotypic imaging, individuation, perspective taking, and increasing opportunities for contact). Results showed that the participants who had received this training had lower IAT scores than the control group participants, and unprecedentedly, this reduction in implicit race bias endured for at least eight weeks following the intervention (Devine, et al., 2012). Devine et al. attribute this decline in implicit bias to the multifaceted nature of the intervention rather than any specific aspect of the intervention.
CHAPTER NINE

Conclusion
Conclusion

It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.


The aforementioned studies underscore the devastating impact of implicit racial biases with a focus on education, criminal justice, and health care. These topics provide a mere snapshot of the range of realms affected by implicit biases. Other researchers have documented the role of implicit bias in domains such as employment (see, e.g., Bertrand & Mullainathan, 2004; Rooth, 2007) and aspects of the legal landscape, just to name a few (see, e.g., Brown, 2012). Despite a plethora of scientific evidence, not all scholars are swayed by implicit bias research. This final chapter summarizes some of the critiques implicit bias research has faced and concludes by offering some concrete steps for addressing implicit biases.

Critiques of Implicit Bias Research

Like most fields, implicit bias has been subject to criticism. The following points capture a few of these critiques, many of which are summarized in Kang & Lane 2010:

- It’s “junk science” – Some critics question the scientific validity of implicit bias research, characterizing it as “motivated by junk scientists and their lawyer accomplices who manipulate data, misinterpret results, and exaggerate findings in order to snooker society into politically correct wealth transfers” (Kang & Lane, 2010, p. 504–505). Kang and Lane argue against this so-called “backlash scholarship,” asserting that perfect knowledge of a concept should not be required given that the same level of scrutiny is not often inflicted upon the status quo (Kang & Lane, 2010). Others question measures of implicit bias because they are indirect in nature, thus any concept being studied relies on participants’ performance in another assignment, such as the sorting procedure in the
IAT (Nosek & Riskind, 2012). Finally, other detractors remain unsatisfied with the results of scientific tests of validity (see, e.g., G. Mitchell & Tetlock, 2006), though a later meta-analysis by Greenwald and colleagues provided convincing evidence to counter many of these claims.

- Implicit biases are “hardwired” – This stance asserts that implicit biases are immutable; therefore, we are unable to change them in any way. As discussed in the previous chapter, the creation of new associations, while not easy, is generally now regarded as a feasible task (Blair, 2002; Dasgupta & Greenwald, 2001; Devine, 1989; Kang, 2009; Kang & Lane, 2010).

- Implicit biases are rational – Another objection to implicit bias research contends that because implicit biases reflect reality, it is rational to act on them accordingly (Kang & Lane, 2010). This argument hinges on the apparent accuracy of individuals’ perceptions of reality.

- Unclear and /or limited policy impacts – Implicit bias research has also been subject to criticism because its connection to social policy is not immediately evident. Policies generally aim at addressing behaviors rather than individuals’ thoughts, though one’s actions and mental processes are certainly interconnected (Nosek & Riskind, 2012). However, Nosek and Riskind assert that implicit and explicit biases should be accounted for when crafting and implementing policy, because often policies are formulated under the erroneous assumption that people’s behaviors are the result of completely conscious and intentional actions (Nosek & Riskind, 2012).

**Criticism of the Implicit Association Test (IAT)**

The Implicit Association Test, in particular, has been subject to a distinct set of criticisms. One argument asserts that the IAT is suspect because it is difficult to determine what exactly the IAT is measuring. While the standard explanation is that the race IAT measures the attitudes that individuals hold toward specific groups, others have contended that IAT results may actually reflect test takers’ familiarity with
one group over another (e.g., greater familiarity with White people as opposed to Blacks) (Kinoshita & Peek-O’Leary, 2005). This claim of familiarity tainting IAT results directly counters earlier work by Dasgupta and colleagues who documented the persistence of a pro-White bias on the race IAT even after accounting for familiarity in their study design (Dasgupta, et al., 2000).

A second measurement-based criticism that has been leveled against the IAT questions whether it is assessing individuals’ attitudes as purported, or whether it is actually measuring their cultural knowledge. Some question whether anti-Black sentiments uncovered by the IAT actually reflect negative feelings associated with African Americans’ history of oppression versus personal anti-Black sentiments (Tetlock & Mitchell, 2008). Other work by Nosek and Hansen counters this notion, as their findings across seven different studies yielded the conclusion that the association between implicit attitudes and cultural knowledge is weak and inconsistent (Nosek & Hansen, 2008).

Another critical line of questioning that the IAT has faced interrogates whether the IAT measures a stable attitude or if the context of the test instead yields “an experimentally induced momentary response to the mapping project subjects face” (Tinkler, 2012, p. 992). In other words, this criticism questions the extent to which results are a methodological artifact of the IAT itself (Fiedler, et al., 2006; Tetlock & Mitchell, 2008).

Beyond the realm of measurement, another lingering criticism of the IAT is its reliance on hypothetical situations. Some argue that the contrived scenarios of the IAT calls into question the test’s predictive validity in real life situations. Mitchell and Tetlock go so far as to list twelve specific validity ways in which implicit bias research laboratory settings contrasts with what happens in real-life workplace settings (see pgs. 1109-1110 in G. Mitchell & Tetlock, 2006). In light of this criticism, researchers have begun crafting experiments that take advantage of non-hypothetical situations to assess how implicit biases affect behavior, such as Stepanikova and colleagues’ recent assessment of monetary generosity in light of IAT-measured implicit bias
scores (Stepanikova, Triplett, & Simpson, 2011).

**Steps for Addressing Implicit Biases**

Rudman (2004) offers several suggestions for what to do about implicit biases. They are summarized as follows:

- Increase awareness of the existence of implicit biases, because such efforts “are critical to our ability to provide descriptions of social cognition that are faithful to human complexity, as well as to endeavors to combat automatic prejudice” (p. 138). Dovidio et al. echo this mandate and add to it by asserting that “as important first step is making people aware of discrepancies between their conscious ideals and automatic negative responses” (Dovidio, et al., 1997, p. 535).

- Invest energy into advocating for policies (e.g., affirmative action) that can counter the effects of implicit bias.

- Strive for an inclusive society, because “to the extent that societal evaluations color implicit biases, a more inclusive society should reduce them” (p. 138).

- Provide people with opportunities to engage with out-group members in contexts of mutual trust that allow for intergroup interactions to counter implicit biases.

- Recognize that we may not be able to wholly ‘re-wire’ people’s implicit biases, but “what we can do is become aware of the power of implicit partisanship” (p. 139).

**A Broader, Interdisciplinary Future**

In addition to permeating public discourse, as noted in the introduction, implicit bias research is also attracting increased interest from academic fields within and outside of psychology. Initiatives such as the Implicit Bias & Philosophy Inter-
national Research Project⁴ seek to uncover ways in which these two fields, that are not traditionally aligned, may inform one another. Efforts such as Project Implicit Mental Heath⁵ explore unconscious reactions to a range of mental health issues, including anxiety, depression, mental illness, and eating disorders. These interdisciplinary ventures are likely to help shape the field of implicit bias in the years to come.

⁴ For more information, please visit http://www.biasproject.org
⁵ For more information, please visit https://implicit.harvard.edu/implicit/user/pimh/index.jsp
Judge Mark Bennett is a U.S. district judge in the Northern District of Iowa. Before opening statements, he gives jurors the following instructions regarding implicit biases:

“Do not decide the case based on ‘implicit biases.’ As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, ‘implicit biases,’ that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.”


Appendix B: Glossary

Above Average Effect
The Above Average Effect is a psychological phenomenon wherein individuals rate their own capabilities more highly than they regard those of other individuals. This rating of oneself as consistently above average is also known as illusory superiority. In the context of implicit bias, one study asked a group of 36 judges whether they were in the top half of judges who could avoid prejudiced decision-making. Researchers cited the Above Average Effect when 97% of those judges placed themselves in the top half. The Above Average Effect makes us think that we are the ones who are immune from bias.

Activation
Activation refers to how different parts of the brain display more neural activity depending on the task a subject is performing. Activation can be seen during Func-
tional Magnetic Resonance Imaging (fMRIs) when sections of the brain “light up” due to increased blood flow.

**Afrocentric Features Bias**

This form of bias refers to the generally negative judgments and beliefs that many people hold regarding individuals who possess particularly Afrocentric features, notably dark skin, a wide nose, and full lips. The presence of these features may activate associations that lead to stereotypical perceptions. To illustrate, one study examined the Afrocentric features and sentences of convicted felons and found that when controlling for numerous factors (e.g., seriousness of the primary offense, number of prior offenses, number of additional concurrent offenses, etc.), individuals with the most prominent Afrocentric features received sentences of up to 56–64 months more prison time than their less Afrocentrically featured counterparts. Thus, even judges, whose careers center on objectivity and fair sentencing, have been shown to possess Afrocentric features bias.

**Amygdala**

Considered part of the limbic system, the amygdala is located within the medial temporal lobe. It plays a key role in how we process emotions, notably fear and pleasure. The amygdala is involved with the expression of implicit attitudes; it activates when someone perceives threat or anxiety, such as when another individual appears untrustworthy. In light of this, researchers have studied amygdala activation to better understand Implicit Association Test results.

**Association**

In psychology, the extent to which two concepts are connected in individuals’ minds is called an association. For example, many associations reflect cultural stereotypes, such as youthfulness being associated with positive terms. Associations are learned and developed over time; we are constantly absorbing and developing both positive and negative associations, even from a very young age. Notwithstanding our external commitments to equality, fairness, and similar principles, we can still hold associations that reflect our implicit biases.

**Attitude**
An attitude is an association between some concept (e.g., a social group) and the evaluation thereof, such as liking/disliking or favoring/disfavoring.

**Bias**
A bias is a prejudice that leads to a tendency to favor one entity over another, often unfairly. Biases can be explicit or implicit.

**Categorical Boundaries**
Categorical boundaries refer to the abstract and fluid “lines” we draw that separate one grouping from another, thereby creating categories. These “lines” are malleable; they move to fit situational context. For example, the categorical boundary that defines the distinction between fast and slow changes depending on whether a vehicle is traveling 45 mph in a school zone versus an interstate highway.

**Concealed Bias**
Concealed bias is explicit bias that one hides for purposes of impression management.

**Debiasing**
Debiasing is the process of reducing susceptibility to implicit biases or dismantling them. Starting with a conscious goal to be fair or simply being aware of implicit bias is not enough to remove, overcome, or dismantle its effects on decision-making. Instead, research studies highlight several techniques that have been shown to successfully dismantle bias, including:

1. **Social contact** – Meaningful intergroup interactions allow us to find connections or links to people who are different from us. This opportunity to relate to one another can help eliminate bias.
2. **Counter-stereotypic Training** – Explicitly stating “no” when facing a stereotype can have a debiasing effect if this technique is practiced repeatedly and reinforced over time.
3. **Cuing Positive Exemplars** – Exposing people to images of outstanding and admired individuals who belong to groups that typically are stereotyped negatively can reduce bias. In one study, researchers found that implicit biases
for Whites decreased when exposing individuals to both admired Black and disliked White individuals.

4. Counter-stereotypic Image Reinforcement – While it can be very hard to “unlearn” an association, teaching a new, different association can have positive effects. Being exposed to images that counter stereotypes (e.g., a female scientist) can contribute to debiasing.

**Dissociations**
Dissociations occur when an individual's implicit and explicit attitudes on the same topic/object differ. This suggests that implicit and explicit biases are related yet distinct mental constructs.

**Dual-Process Theory**
Dual-Process Theory explores how phenomena can occur as a result of individuals’ reasoning occurring through two distinct processes. One process is rapid, implicit, and occurs automatically; conversely, the second process is slower, controlled, and explicit. This theory asserts that these two reasoning processes compete for control within individuals and influence their responses.

**Explicit Attitudes and Beliefs**
The opposite of implicit, explicit attitudes and beliefs are the ones that individuals profess publicly or express directly. These attitudes and beliefs are conscious and acknowledged by the individual who holds them.

**Extinction**
Also known as reversal, extinction is the process of unlearning mental associations. Extinction conditions the brain to no longer respond in the same way to specific cues. It can be used to dismantle implicit biases and is particularly effective when paired with counter-stereotypic image reinforcement, which refers to the viewing of images that are concrete examples designed to counter stereotypes (e.g., a female construction worker).

**Functional Magnetic Resonance Imaging (fMRI)**
fMRI is a type of MRI that takes structural pictures of the brain. More specifically,
fMRIs measure and record brain activity by detecting blood flow, thus allowing scientists to understand the brain’s neural activity in a continuous and dynamic manner. In implicit bias studies involving fMRIs, researchers ask subjects to think specific thoughts or perform certain tasks and then examine which portions of the brain image “light up” or are activated, thus providing insights into the subject’s mind processes.

**Illusion of Objectivity**
Built on the idea of detached impartiality, the illusion of objectivity refers to the false impression that one may be free from biases, opinions, and other subjective influences. Under the illusion of objectivity, we think that we are the only people who are objective, whereas everyone else is biased. In short, the illusion of objectivity is a bias that makes us think we are not actually biased. Psychological research has shown that we all harbor implicit biases, regardless of how strong our desires are to be unbiased or neutral. In legal settings, judges should acknowledge the illusion of subjectivity lest they become overconfident in their ability to make impartial judgments.

**Implicit Association Text (IAT)**
The Implicit Association Test (IAT) is a computer-based test that measures the strength of associations individuals hold on an unconscious (or implicit) level. It measures associations and stereotypes that people often do not even realize they possess. In the IAT, participants pair two concepts (e.g., men and career vs. men and family) and the test measures the speed with which participants are able to classify words and images related to these concepts. The more closely associated the concepts are in the participants’ minds (e.g., women and family), the more rapidly they will be able to respond; conversely, concepts that are not as strongly associated (e.g., women and career) take longer to classify. The speed with which individuals make these classifications sheds light on the associations they hold and the strength of those associations. Researchers contend that association strengths are at the heart of individuals’ attitudes and stereotypes.

**Implicit Bias**
Also known as unconscious or hidden bias, implicit biases are negative associations that people unknowingly hold. They are expressed automatically without conscious
Many studies have indicated that implicit biases affect individuals’ attitudes and actions, thus creating real-world implications even though individuals may not even be aware that these biases exist within themselves. Notably, implicit biases have been shown to trump individuals’ stated commitments to equality and fairness, thereby producing behavior that diverges from the explicit attitudes that many people profess. The Implicit Association Test (IAT) is often used to measure implicit biases with regard to race, gender, sexual orientation, age, religion, and other topics.

**Ingroup**
An ingroup is a group with which one feels a sense of membership, solidarity, or shared interest. Ingroup membership may be established along numerous identities, such as race, religion, sexual orientation, etc.

**Ingroup Bias**
Ingroup bias refers to the positive attitudes that people tend to feel towards members of their ingroup. Feelings of safety and familiarity are often associated with ingroup members. Research has shown that people are inclined to forgive members of their ingroup more quickly than they are members of outgroups.

**Insula / Insular Cortex**
Located deep within the brain between the temporal lobe and the parietal lobe, the insula is involved in several processes, including risky decision-making, bodily awareness, and certain aspects of motor control. It is also the part of the brain that is involved in the experience of disgust with respect to both smells and sights, even if these cues are only imagined. As such, neuroscientists often look for activation in the insula when studying implicit biases that prompt strong feelings of disgust in research subjects.

**Outgroup**
In contrast to ingroups, outgroups are groups with which one does not belong or associate. As a byproduct of ingroup favoritism, some people feel a sense of dislike or contempt toward members of outgroups.
Positivity Bias
When we evaluate our abilities to be better than average, or better than they actually are, we are engaging in positivity bias. This form of bias involves making predominantly favorable judgments. More specifically, positivity bias can also refer to the attribution of individuals’ successes to internal factors while explaining their failures through citing external factors.

Schema
A schema is a mental shortcut we automatically use to organize and categorize the vast amounts of information we encounter in our daily lives. As mental “blueprints,” schemata streamline information processing by creating generalized categories and expectations for objects, events, places, people, and so on. These abstract representations are often but not necessarily always accurate. Schemata unfortunately can contribute to stereotyping and prejudice when they cause people to misinterpret situations or exclude information in order to conform to pre-existing schemata. This can perpetuate implicit biases.

Shooter Bias
Shooter bias is a term that emerged from research studies that examined subjects’ reactions to a series of images of Black or White men. In the images, the men were holding either a gun or a benign object such as a can of soda pop. On the computerized test, participants were instructed to “shoot” if the man was holding a gun, refrain if he was holding any other object, and make this decision as quickly as possible. Shooter bias reflects the finding that participants made faster decisions and were more likely to shoot when the image depicted a Black man, even when this was an erroneous decision and the Black man was not actually wielding a gun.

Stereotype
A stereotype is a standardized and simplified belief about the attributes of a social group. Although not always accurate, stereotypes are often widely held and can have both positive and negative impacts of individuals. The act of stereotyping involves both activation (making the cognitive association) and application (using that association to make a judgment about a person or group).
Appendix C: Works Cited


National Center for State Courts. Strategies to Reduce the Influence of Implicit Bias. Williamsburg, VA.


By KATHLEEN J. WU

As has been amply publicized, Ellen Pao lost her discrimination lawsuit against her former employer, the San Francisco venture capital firm Kleiner Perkins Caufield & Byers. But even if one believes the jury made the right call in Pao’s case, most women (and hopefully a growing number of men) will acknowledge that women are held to a different standard than men.

Unfortunately for Pao, the jury didn’t agree with her. And it’s no surprise. Subtle discrimination the likes of which Pao claimed to be subjected to is hard to prove and wildly open to interpretation. And although the male-dominated world of Silicon Valley VCs seems to uniquely nurture such a culture, there’s no question it exists in the legal profession as well.

Nationally, women working full-time earn 82.5 cents for every dollar a man earns, but women lawyers can only dream of making that much compared to their male colleagues. According to the U.S. Department of Labor, women lawyers make 56.7 cents for every dollar a man earns—the lowest ratio of all the industries included on their survey.

The reasons for that discrepancy are vast and complex. Certainly, the billable hours’ expectation drives from the profession anybody who isn’t able—or doesn’t want—to work extraordinarily long days. But subtle discrimination, in the form of everything from gender stereotypes to women being excluded
from the old boys’ network that accounts for much of rainmaking, plays a major role as well.

Gender stereotyping plays itself out in a number of ways, including women being assigned (or taking on) too much “office housework,” as Facebook COO and resident neck sticker-outer Sheryl Sandberg noted in a recent New York Times column. Office housework—planning the office party, training new employees, taking notes at meetings and other “team player” chores—can be particularly pernicious in the legal profession, where billable hours are carefully tracked and non-billable time is seen as, at best, a necessary evil.

Office housework even played a cameo in Pao’s lawsuit: she and a second female colleague were asked to take notes at partners’ meetings.

Incidents like that highlight the difficulty of Pao’s claims. Is being asked to take notes illegal or, on its face, discriminatory? Certainly not. But when women are consistently expected to take notes, pass out office supplies, make copies or do other chores, it sends a distinct message. And, as Sandberg points out, there are opportunity costs: “The person taking diligent notes in the meeting almost never makes the killer point.”

Pao also claimed to be penalized for behavior that was tolerated or rewarded when it was exhibited by male colleagues. She was criticized both for being too quiet and passive and for being too brash and competitive. Is there such a thing as too brash and competitive for a Silicon Valley venture capital firm?

As most women lawyers will attest, there is such a thing as being too brash and competitive in the legal profession. Well, too brash and competitive for a woman. And that line is right next to the one for being “too quiet and passive.” Finding that sweet spot is difficult, to say the least.

How do those in the profession change the culture to one that allows for the equal contributions of men and women and brings out the best of all of our unique talents? Simply put, there must be a commitment to diversity and an awareness of the need to combat gender stereotypes at all levels of the profession. And men—at least a few of the more important and visible men—need to be vocal in their support of women in the profession.

The work force is about to be taken over by millennial women, who outpace their male peers in earning college degrees and in participation in the labor force. It’s a safe bet that a fair number of those women will want to become lawyers. If we want the best and the brightest of them to stay in our profession, we must welcome those women into a culture that values their contributions equally.

And we can only do that if we don’t load them down with “office housework” and we don’t hold them to a double standard that’s impossible to overcome.

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Implicit Bias

Jo Handelsman and Natasha Sakraney
White House Office of Science and Technology Policy

WHAT IS IMPLICIT BIAS?

A lifetime of experience and cultural history shapes people and their judgments of others. Research demonstrates that most people hold unconscious, implicit assumptions that influence their judgments and perceptions of others. Implicit bias manifests in expectations or assumptions about physical or social characteristics dictated by stereotypes that are based on a person’s race, gender, age, or ethnicity. People who intend to be fair, and believe they are egalitarian, apply biases unintentionally. Some behaviors that result from implicit bias manifest in actions, and others are embodied in the absence of action; either can reduce the quality of the workforce and create an unfair and destructive environment.

EXPLICIT VS. IMPLICIT BIAS

Explicit bias involves consciously held, self-reported attitudes that shape how people evaluate or behave toward members of a particular group. Explicit bias is accessible – it can be measured with straightforward questions in surveys, such as “do you agree or disagree with the statement that boys are better than girls at math. It can also be combated with logic and discussion because it is acknowledged by the person expressing the bias. Implicit bias, in contrast, is activated automatically and unintentionally, functioning primarily outside of a person’s conscious awareness. Therefore, measuring implicit bias requires more subtle tools, and combating it is challenging.

IMPLICIT BIAS: INDIVIDUAL AND INSTITUTIONAL

Implicit bias is usually thought to affect individual behaviors, but it can also influence institutional practices and structures. For example, many institutions adhere to certain practices that disadvantage a subset of the institution’s members, such as holding faculty meetings at a time when parents are most likely to be picking up children at day care, which discriminates against parents of young children. Institutional bias is usually not deliberate – schedules, for example, were often established at a time when most faculty were men married to women who stayed home with children. Thus, it is important to consider how past biases and current lack of awareness might make an institution unfriendly to members of certain demographic groups.

MEASURING IMPLICIT BIAS

Two methods are used to assess implicit bias. The Implicit Association Test (IAT) is commonly used to measure implicit bias in individuals. The IAT measures the strength of associations between concepts (e.g., black people, old people, or gay people) and evaluations (e.g., good or bad) or characteristics (e.g., athletic, smart, or clumsy). The IAT is based on the observation that people place two words in the same category more quickly if the words are already associated in the brain. For example, the rate at which a person can link the words “black” or “white” with “good” or “bad” indicates their implicit bias. In this

way, the IAT measures attitudes and beliefs that people may be unwilling or unable to report.²

The second method of measuring implicit bias uses randomized experiments on populations of people. In these studies, each participant is asked to evaluate an item, which might be a resume, a photograph, or a job-performance description. One characteristic of that item is varied randomly. For instance, in one type of experiment all evaluators see the same résumé, which has been randomly assigned a woman’s or a man’s name. If the evaluators who have seen the résumé with the man’s name are more likely to hire the candidate, but they believe they have no a priori preference for a man or woman, then this is evidence that, on average, this group of evaluators is expressing implicit bias.

Experiments show that people are more likely to hire a male candidate for a science position,³ rate the athletic ability of a person higher if they believe the person is African-American rather than white, and rate the verbal skills of a person higher if they think the writer is a woman rather than a man.⁴ Some stereotypes are fictional, whereas some are real generalities about a demographic group, but either way, stereotypes can lead to flawed assessments of individuals. For example, when evaluators are asked to estimate heights of subjects standing in a doorway, the evaluators will typically underestimate the heights of the women and overestimate the heights of the men⁵. In this case, the bias is based on a true generalization — men are, on average, taller than women — but applying the bias that is derived from the generalization to assessments of individuals leads to erroneous estimates about them.

Institutional bias is often studied by comparing trends at institutions that have different policies, or by comparing outcomes within one institution before and after implementation of a policy. Many universities, for example, experienced an increase in the proportion of women faculty who received tenure after implementing a flexible tenure-clock policy. Although definitively establishing that the policy is responsible for the change is not possible, strong associations can suggest that certain institutional changes have positive outcomes on reducing institutional bias.⁶ More research is needed to analyze the impact of policies and practices on institutional bias against various groups within the STEM community.

**THE IMPACT OF IMPLICIT BIAS**

Biases are destructive for those who apply them as well as those being judged based on stereotypes. Various experiments suggest that those who judge others through a biased lens can miss the chance to hire superior employees or appreciate the true talents of others, including their own children. For instance, parents rate the math abilities of their daughters lower than parents of boys with identical math performance in school.⁷⁸ College faculty are less likely to respond to an email from a student inquiring about research opportunities if the email appears to come from a woman than if the identical email appears to come from a man.⁹ Science faculty are less likely to hire or mentor a student if they believe the student is a woman rather than a man.¹⁰ In all of these experiments, expressions of bias are the same as those who judge others.⁴

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² https://implicit.harvard.edu/
⁴ https://www.zotero.org/groups/wiseli_library/items/collectionKey/4JCXCFD2K
across faculty of different academic ranks, fields of study, and genders.

REDUCING THE IMPACT OF IMPLICIT BIAS

Bias Mitigation: Metrics of Success
The incidence of implicit bias has not changed over the last few decades, demonstrating the persistence of such bias across time and generations. Active interventions can sometimes reduce implicit bias, but the effects of such interventions are often temporary. For instance, images of people who do not fit stereotypes (or, “counter-stereotypes”) influence IAT scores for 24 hours, but then the effect fades. Instead of trying to eliminate implicit bias, a good goal is to reduce the impact of implicit bias on people’s behavior by making people aware of the existence of implicit bias and encourage them to consciously evaluate their judgments about others in order to mitigate bias effects.

The IAT is useful in bias training as a tool to raise people’s awareness about their own implicit biases, but it is not a perfect yardstick of bias mitigation. Even when outcomes indicate that the influence of bias on a person’s behavior has been reduced, IAT scores may remain constant. Therefore, it is important to use behavioral and attitudinal metrics to evaluate bias-mitigation success.

Bias Mitigation: Bias Training and Awareness
Open discussion of implicit bias can reduce the impact of such bias on behaviors of members of an organization or community, as evidenced by several studies:

- A diversity-training session reduced implicit bias of men, although not of women.
- An experiential learning device – playing a board game that generated discussion about bias – was more effective at reducing bias than reading factual information about bias, and the effect persisted when subjects were surveyed seven to eleven days later.
- Implementation of a bias workshop during a search and hiring process increased the odds of academic departments hiring women. These workshops used an active-learning approach to engage the participants in discussions about bias research and how it can affect hiring decisions.
- In a randomized controlled study, bias-workshop improved department climate and attitudes of faculty toward women measured three months after the workshop.

Studies have also documented the influence of bias-mitigation approaches on behavior and decision-making:

- Organizational leadership can create greater value for equitable behaviors.
- A multicultural approach to race reduces bias whereas attempts at "color blindness" can increase expressions of bias.

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- Multifaceted, repeated training seems more effective than uni-dimensional training.\textsuperscript{18}
- Bias in selection processes can be reduced by developing objective criteria before evaluating candidates, ensuring that reviewers adhere to the criteria, and discussing alignment of criteria with selections.\textsuperscript{19}
- Reviewers rely less on implicit biases when they focus their full attention on reviewing candidates than when they multitask or have cognitive distractions.\textsuperscript{20}

**Bias Mitigation: Images and Mass Media**

Repeated exposure to images and themes affects people's beliefs and behaviors. For this reason, mass-media campaigns have been used successfully to influence Americans' behaviors, including by increasing the use of designated drivers, reducing drug use, and encouraging parents and mentors to discuss pregnancy with teenaged girls. It is hence unsurprising that mass media and imagery have been shown to affect implicit bias. In an experiment in Rwanda, for example, a radio soap opera that included messages about increasing racial tolerance and reducing prejudice revealed that participants who heard the radio drama were more tolerant of intermarriage and open dissent, and exhibited more trust, empathy, and cooperation.\textsuperscript{21} Exposing subjects to counter-stereotypes (such as descriptions or pictures of black or women leaders, or asking subjects to think of their own examples of women leaders\textsuperscript{23,24}) and training subjects to use counter-stereotypes in their evaluation of candidates\textsuperscript{25,26} can reduce the application of implicit racial, gender, or other bias. One study showed that the impact of implicit bias toward the elderly was reduced after subjects engaged in an exercise that had them taking the perspective of an old person\textsuperscript{27} and a similar effect on national-origin bias was observed when subjects went through a mock process of adopting a baby from another country.\textsuperscript{28}

**Bias Mitigation: Institutional Policies and Practices**

Many institutional policies were developed when the workforce looked very different from the workforce of today, and small policy changes can have large effects on worker success. Promotion timelines that conflict with women's prime child-bearing years, certain interview practices, traditions that require attendance at institutional functions on religious holidays, lack of dedicated space for lactating women, or biased criteria for hiring or performance review can all create an institution that is unwelcoming to women, people of color, people of certain sexual orientations, parents, people who are physically challenged, or people of certain religions.\textsuperscript{29} Reviewing practices and policies with bias in mind can identify those that could disadvantage some members of the community on bases that have nothing to do with...
their ability to contribute to institution's mission.

Numerous resources have been developed to assist administrators and institutional leaders in designing optimal programs for fostering a diverse community. For example, the National Science Foundation's ADVANCE program produced a suite of empirically tested tools to generate discussion and understanding of implicit bias and the institutional policies that can persist because of unexamined bias.30

**BEYOND IMPLICIT BIAS**

Most people want to be fair, but are unaware of their own biased tendencies. Introducing implicit bias into the national dialogue will change awareness of and accountability for bias, making it possible to have civil conversations without people feeling accused or blamed for diversity challenges. By making implicit bias familiar and providing visibility to practices that minimize or mitigate its effects, the Nation can reduce an important barrier to achieving the best workforce in which people are evaluated based on their abilities and accomplishments rather than on stereotypes and assumptions. Achieving an excellent, fair, and equitable workforce should be a shared American goal.

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Personal Reflections

In 2003, on a spring afternoon, I took the train from Washington, D.C. to Manhattan to attend a friend’s wedding reception. It was before I had children, so I remember feeling like my attire was flawless—a lovely dress, matching shoes, perfect hair, jewelry, and make-up. No purse because I was carrying a change of clothes that I had worn on the train in a small black satchel. I arrived a few hours early to spend time with some law school friends at their brownstone in Brooklyn. They had just had their first son, and I was newly pregnant with mine. The two or three hours passed quickly. It is amazing how close we had become in the three years that turned us into lawyers. Common suffering, civil procedure, and cold winters in Boston can do that, I suppose.

An hour before the reception was scheduled to begin, I changed and called a car for the ride into the city. I remember feeling excited to be in New York, a feeling that I used to get in the back of my grandparents’ station wagon when we would cross into Manhattan from Queens to attend services at the Convent Avenue Baptist Church in Harlem. On this day, however, I was driving through Central Park to the Upper East Side to a museum housed in the Henry Clay Frick House on Fifth Avenue between 70th and 71st. It never occurred to me as I stepped out of a sleek Lincoln Town Car and walked up the flagstone path that I did not look every bit the part.

I remember crossing the terrace and seeing Sunny chatting with a security guard, as she waited for the first guests to arrive. Our eyes met, and I was flooded with warmth and the comfort that comes from knowing someone since the 4th grade. We began walking toward one another, both of us smiling ear to ear, but suddenly the moment ended. The guard stepped in front of my friend as if to protect her from some threat. “Can I help you?” she asked. “No,” I responded, not quite realizing what was happening, wondering why someone was protecting one of my best friends from me. But I was guilty, guilty of forgetting my blackness, not remembering that I am not experienced as me, but as a black1 person/woman/threat who does not belong.
“I’m sorry. The museum is closed for a private event.” I was speechless for a moment, but only a moment, because then I understood. Even this other black woman, in her capacity as a security guard, did not think that I belonged at The Frick Collection, and certainly not at a function of the magnitude of this reception.

“I’m here for the party,” I explained. “I didn’t know,” she said. “You’re carrying that bag.” I carried a small, black bag over my shoulder. Just big enough for a wallet, makeup bag, clothes for my ride home. I couldn’t even fit my paperback book inside. Was it really my small, black bag or my big black self? Sunny rushed around the guard and assured her that it was okay to let me in, her green eyes sparkling with excitement, gushing about the evening, and all of the old friends who were due to arrive at any moment. I would like to say that I brushed it off, or that it did not bother me, but that would be untrue. It made me angry; it made me feel powerless; it was a reminder not only of how other people felt about me as a black woman, but also of how other people had successfully made us feel about ourselves. [C.N.C.]

I had been out of law school for about a year. I spent most of my days in the local trial court and was just beginning to feel like a lawyer, albeit an inexperienced one, when I had my first professional encounter with bias.

I was sitting in a settlement conference and the judge hearing the case was attempting to broker a settlement between my client and the other party. Every time my opposing counsel addressed me, she referred to me as young lady. “Listen young lady,” “what do you mean young lady,” “now, young lady . . .” She was not saying it in the good-hearted, encouraging way older people sometimes refer to those who are younger. She was using it to make me aware of my status and it was working. “Why does she keep saying ‘young lady’?” I thought to myself, trying to keep my focus on the issues at hand. Finally, I could not stand it any longer. “Would you please stop referring to me as ‘young lady’?” I asked. The judge looked up and the other attorney calmly replied, “Okay, older lady, what about this proposal?” The judge did not say a word. I was fuming inside, but did not want to let the other lawyer know it. I ignored her comment and continued with the negotiation.

That same year, I was appearing before a different judge in a family law matter. The courtroom was packed. My co-counsel and I (one white and one Latina) were presenting arguments to the judge on a procedural issue. When we finished, the judge turned to the other attorney and asked for his response to our arguments. While arguing his point, the opposing attorney referred to us as “lovely young ladies.” The judge interrupted him in mid-sentence and ordered him to approach the bench. Although the judge tried to make her comments inaudible to the rest of the courtroom, everyone heard the admonishment. She fumed “while your opposing counsel may be lovely and may be young, you better not ever use that kind of inappropriate language again in my courtroom.”
In both situations, as soon as the attorneys uttered their comments, I felt unnerved. The comments seemed inappropriate, but, I thought to myself, maybe I was being too sensitive. Perhaps the attorneys did not mean anything by what they were saying. Yet, it seemed they were trying to use their status to intimidate and belittle me. As a white woman, I felt that this inappropriate behavior did not rise to the level of something as serious as racial bias, but it was problematic. The one thing that was clear to me was that my legal education had not prepared me to deal with these issues. [S.L.B.]

The initials C.N.C. and S.L.B. refer to the authors Carmia Caesar and Stacy Brustin. Later in the chapter, when we tell our own stories, we refer to ourselves by our first names.

Why Do We Have This Chapter Anyway?

This is the 21st Century. A black man has been elected to our nation’s highest office—twice! And there are not two, but three women on the Supreme Court, and one of them is a woman of color. Surely, we are in post-racial America in which those of us in the legal profession are aware of bias and have made corrections.

So, why do we have this chapter anyway? We believe this chapter is important because external progress does not erase bias within the profession. As discussed in Chapter 6, what we profess to believe and how we aspire to live and interact with our colleagues, clients, professors, and peers is no match for how we unconsciously process information, read situations, and initially react to people around us. Certain types of people scare some of us while some of us look at those same people and experience a sense of relief and familiarity. Certain types of cars, certain types of music make some of our hearts race with panic while some of us see the same cars or hear the same music and our hearts race with excitement and fond memories. MacArthur Award-winning psychologist, Jennifer Eberhardt, has been widely cited for her work, Seeing Black: Race, Crime, and Visual Processing, which examines how individuals process race and how those processes effect perceptions of other objects, particularly objects associated with crime.\(^1\)

We have this chapter because even if you are of a generation committed to diversity and inclusion, you will be supervised by lawyers, collaborate with police officers, represent clients, and appear before judges who may not share your perspective or be aware of
their own biases. This reality is reflected in a story posted by one of the author’s black, female colleagues in 2014:

I had a senior person interviewing for a job “working for me.” The letter inviting him to interview was over my signature. He’d been working with my secretary for details of flights and hotels and what not. The day of the interview, he called me [by] my secretary’s name, assuming that I had to be her, as he tried to blow past me into the room ahead of schedule to say hello to Dr. Jones.

We have this chapter because hiring, retention, and promotion are still influenced by structural bias embedded in the profession. Joe will get hired before Jose, even if they are the same guy. See http://www.huffingtonpost.com/2014/09/02/jose-joe-job-discrimination_n_5753880.html?ncid=fcbklinkushpmg00000047&ir=Black+Voices.

While the 2014 MTV study referenced in Chapter 6 found that millennials believe their generation is post-racial, race still plays a significant role in how each millennial experiences the world. For example, in responding to the statement “I am often asked about my ethnic background,” nineteen percent of white people answered affirmatively, while sixty percent of persons of color answered affirmatively. MTV Look Different, MTV Strategic Insights, 2014 http://cdn.lookdifferent.org/content/studies/000/000/001/DBR_MTV_Bias_Survey_Executive_Summary.pdf. We are writing this chapter in the wake of the tragic police shootings of unarmed African American men in Ferguson, Missouri, New York City, and Baltimore. These incidents are painful reminders that there is still work for those in the legal profession to do.

Fortunately, as this chapter discusses, there has been progress. States have adopted laws and ethical rules prohibiting explicitly biased and discriminatory conduct. Younger lawyers expect and clients are demanding diversity in the profession. These changes, however, have not eliminated the longstanding patterns of discrimination that continue to impact present day law practice and the administration of justice. In addition, as the narratives in the next section suggest, subtle, and sometimes not so subtle, forms of bias continue to pervade the legal profession.

At least 65 state and federal courts have published reports on bias. These reports have documented racial, ethnic, gender, disability, and sexual orientation bias in law practice throughout the United States. Studies conducted of law schools suggest that students perceive similar bias in the law school environment.

Concern about bias has caused many jurisdictions to adopt rules of professional conduct prohibiting judges and attorneys from engaging in biased behavior. These
rules vary in scope, but they are designed to hold lawyers and judges accountable for their behavior in and out of the courtroom. For example, ABA Model Rule 8.4(d) on Misconduct & Maintaining the Integrity of the Profession states that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” The comment to this rule clarifies that “... [a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice . . . .” These rules supplement existing state and federal laws that prohibit sexual harassment, employment discrimination, and tortious behavior.

Some behavior does not rise to the level of actionable discrimination or violation of a professional conduct rule, yet it is still inappropriate. How will you respond if, in a professional setting, someone makes an inappropriate comment to you based on your age, race, ethnicity, gender, disability, sexual orientation, socioeconomic status, or religion? What if the comment is directed toward a colleague? Will you have an ethical obligation to report the behavior? If not, will you make clear your disapproval, or will you let the comment slide?

The legal workforce increasingly reflects the diversity of the larger workforce. In practice, you will be supervised by or work alongside judges, attorneys, administrators, support staff, and clients whose race, gender, physical abilities, mental health, age, religion, sexual orientation, or socioeconomic class differ from yours. How will you develop solid professional relationships? How can you be certain that you are not inadvertently engaging in behavior or making decisions based upon negative stereotypes or internalized, biased assumptions?

What happens when you become a supervisor or managing attorney and you bear the responsibility for ensuring that neither you nor your institution tolerates discriminatory or biased behavior? Will you know how to protect your organization? Will you be able to supervise a diverse group of employees? Even if the law office or organization you manage is free of illegal, discriminatory practices, is that sufficient? How can you foster a positive, inclusive work environment in which all employees are productive and feel that they are part of the team?

This chapter encourages you to grapple with these issues during your externship—before you officially enter the legal profession. If you have not previously considered the issue of bias, then an externship provides an excellent opportunity to develop your awareness. For those of you who are all too familiar with the personal impact of biased
or discriminatory behavior, an externship offers an opportunity to explore and refine how you will address these issues, as lawyers, in a professional setting.

We have this chapter because in 2014, partners at large law firms uniformly critiqued the exact same memo more harshly when they were told that the authoring associate was not white.4

Experiences of Bias in the Legal Profession

The concept of bias in the legal profession and its subtleties are best understood in the context of real life stories. The following excerpts explore bias from the perspectives of lawyers who have directly experienced it. The first excerpt was written in 2000 but, as the rest of the narratives demonstrate, the reality that Thomas Williamson Jr., a partner at Covington and Burling in Washington D.C. and former president of the D.C. Bar, describes is not a thing of the past.

Thomas S. Williamson, Transcript of the Boston Bar Association Diversity Committee Conference: Recruiting, Hiring and Retaining Lawyers of Color, 44 B.B.J. 8, (May/June 2000.)

. . . Often there are no other blacks in your entering class of associates; there may not be others in the whole firm, or, at best, there will be a token scattering. Depending on which floor in the firm you’re on, you may not see any black professionals for weeks or months at a time. Many firms have no black partners, and those that do only have one or two. The people of color who work in these firms are concentrated in support positions, at secretarial desks, in the mail room, pushing the carts around with audio/visual equipment, or in janitorial services. The firm’s clientele rarely, if ever, include any black organizations or any black individuals.

It may be an overstatement to say that this is a culture shock, but it is a particularly stressful entry experience. New black lawyers who have gone to these predominantly white firms understand the unwritten law that says you must be an expert, an expert in making white people feel comfortable, and, from the first, you are expected to act delighted and pleased that you are in such a “great firm.” If you fail to follow that rule, fail to adhere to that law, there will be severe repercussions for your professional career. . . .
Partner critiques and supervision of black lawyers are awkward, at best. Partners are the authority figures in law firms. They hand out the assignments; do the evaluations; decide who will become a partner. Minority lawyers, especially black lawyers, understand that many white partners at the large law firms have low or skeptical expectations about the abilities of minority lawyers. Those low expectations inevitably affect the types of assignments and the types of evaluations black lawyers receive . . .

White partners are generally very uncomfortable critiquing black lawyers for fear that aggressive criticism will be interpreted as racial animus. Even when a black lawyer does well, white supervisors are reluctant to push the good black lawyer to excel further, fearing it might be viewed as some kind of racial bias. This, of course, is very important for one’s partnership prospects. Most firms expect their lawyers to be good, but the associates who want to make partner must show they can be excellent. Thus, black lawyers are shortchanged at the very time in their careers when they are most open to learning and most in need of advice and guidance . . .

. . . The success mantra at law firms today is that you have to learn how to find clients and serve the clients if you want to get ahead. Minority lawyers face special obstacles in making their mark developing client relationships. Although a firm might provide a positive and nurturing environment for black lawyers, there’s no assurance that the clients are eager to entrust their problems to people of color . . .

Partners, of course, have to be realistic and business oriented and make careful calculations about how to foster client confidence. Will a client think a white partner is giving his company’s problem top priority if the partner assigns an African-American lawyer to handle the matter? Some clients are reluctant to believe that black lawyers are smart enough to handle a difficult and sensitive problem. I have had personal experience with this “business sensitivity” in my own career, and my unpleasant experiences have not just been limited to my associate years.

I had been a partner for two or three years when a client telephoned another partner and said, “We’re going to have a very sensitive board meeting and I know Tom is supposed to be there. But there are a couple of white southerners on the board, and I don’t think he would be the right person to do this.” The partner made it clear to the client that if Covington & Burling was to continue representing his organization, I would be the lawyer at the meeting . . .
My examples of the special burdens and challenges of being an African-American lawyer in a large law firm are not intended to be comprehensive, but simply illustrative of the fact that racial integration in the law firm setting is not simply a matter of white people opening doors with good intentions . . . .


There are dozens of different reasons why someone would choose to go to law school and become an attorney. Some may want to go into politics or trial work. Others may want to work for social justice, a nonprofit or a cause they are passionate about, such as the environment. Some view it, like many others, as a stylish path to making money.

. . . For some, however, the motivation that drives them to become attorneys is a bit different, motivated by a sense of feeling they have experienced wrongs in their lives. For many Latinos, the decision to become a lawyer can be very personal.

This was the experience for Anna, who grew up the youngest daughter of Mexican immigrants who earned a meager living as farmworkers in Burley, Idaho. As Anna recalls the experiences that motivated her to go to law school, she notes they weren’t all pleasant. She hated that her parents weren’t treated fairly when they worked in the fields of sugar beets, beans or potatoes. She recounts the grueling, often illegal, conditions they endured in the fields. . . . Her dad was always especially cautious when it came to the ranchers or bosses because he had no power and no conception of having rights. And it was his experience—her family’s experience—that made her decide to go to law school.

Feeling wronged is also what drove Tony, a man now in his late 50s, to become a lawyer. His high school teachers suggested that he set his sights on becoming an auto mechanic. This made him so angry, he recalls, that he was determined it was the last thing he would become. Perhaps they thought that by guiding him into a trade, they were actually doing this young Latino a favor. And in a way they did.

. . . One of the main findings in my study is that Latino lawyers still face an astounding amount of racism and discrimination in their professions and in
their communities. This experience does not end once Latinos have become professionals.

In the survey, I asked Latino lawyers whether their ethnicity has caused them difficulties in their profession. Although 46 percent of the respondents answered yes, a significant number of those who answered no included comments that echoed the experiences of those who perceived race-based professional problems.

Many of the comments included strong statements reflecting negative experiences with stereotypes and discrimination. The following examples are representative of their written comments:

“Societal stereotypes are very common in the legal profession. Most people believe you are a clerk/bailiff or interpreter.”

“Having to overcome other people’s prejudice; feeling different due to different values.”

“Only to the extent that persons of color must be better than others to succeed. I truly believe this.”

“Difficult to do jury trials because majority of jurors are retired white people.”

“Not treated the same as my counterparts by courts, colleagues.” “Do not fit in with the big-firm culture.”

“Only initially with other lawyers. Anglo clients rarely contact me, but Latino clients constantly do.”

“Latinos are not well-regarded in this country and other professionals do not know how to interact (threatening?)”

“I was not considered a good ‘mix’ for certain firms; looked upon as unqualified or undesirable.”

“The primary difficulty being Latino/Hispanic has caused [me] has been in the interview process as I was seeking my first job.”

“People don’t take you seriously.”

“Presumption of incompetence.”
“Negative stereotypes: lazy, affirmative action.”

... But perhaps the most durable theme that emerged from the survey was the notion often cited by other minorities—that Latino lawyers needed to be “10 times better” as professionals than their non-Latino counterparts. This subtle, pervasive sense—that throughout the day, every day they are being held to a higher standard by their colleagues, clients, and even community members—is difficult to grasp in a personal sense, unless one has experienced it.


Like many in the gay, lesbian, bisexual and transgender community, Liza Barry-Kessler has never been sure of the reaction she’ll get when potential employers, supervisors, co-workers and clients learn she’s a lesbian. In the early 2000s, while working at a small lobbying firm in Washington, D.C., on issues of education, technology, and the Internet, many of Barry-Kessler’s colleagues knew she was gay. But the issue was never discussed, and she sensed it was best not to mention it to clients. ... “That wasn’t something anyone ever said—the people I worked with weren’t homophobic. But there was an additional level of hypersensitivity to the possibility that it would look somehow off-putting to the clients.”

In 2003 with new employer AOL, then based in Dulles, Va., Barry-Kessler got an entirely different reception when she returned from her honeymoon after a non-state-sanctioned wedding. “It blew my mind,” Barry-Kessler says. “My co-workers did whatever they’d have done for anybody else getting married. They decorated my cubicle, everybody contributed to a gift, and they had a cake for me. It was better than I’d hoped for. It was treated as normal.”

... GLBT lawyers have come a long way ... but many still make individual calculations about how much personal information they can safely reveal at work. “One of the most obvious places where issues arise concerning sexual orientation is at the recruiting stage,” [another lawyer] says. “It somewhat frequently arises when recruits have done work related to their GLBT status as a law student or been involved in a leadership role at their college GLBT organization, and the entity might provide a reference. That’s something you’d normally put on a resume, but frequently that’s a concern if they don’t know whether the firm is going to discriminate.”
These challenges are compounded by the fact that many firms simply don’t discuss GLBT issues, making it difficult for these attorneys to know whether the firm believes it’s honoring their privacy or it simply wants the issue to go away. “Firm management who may feel they’re being appropriately respectful of the privacy of gay lawyers by not asking them personal questions such as ‘Do you want to bring your domestic partner to this client dinner?’ are instead sending a signal that GLBT lawyers are supposed to be closeted, that the families [of heterosexual lawyers] have value, and the gay lawyers are supposed to just be lawyers,” says Kelly Dermody, a partner at Lieff Cabraser Heimann & Bernstein in San Francisco. “If the leadership never uses the terms gay, lesbian or GLBT, or if the firm is completely silent, there’s a certain message being sent.” . . . Whatever the reason for many firms’ palpable silence, the result is that gay, lesbian, bisexual, and transgender lawyers must use detective-like skills to root out whether potential employers are GLBT friendly.

. . . The T in GLBT represents transgender individuals, a minority within the minority facing a kind of discrimination and disrespect that few, even within the gay and lesbian community, have considered. M. Dru Levasseur faced challenges few other students encounter when he transitioned during law school. “People met me as female and under a different name,” says the 2006 graduate of Western New England College School of Law, “and there was no way for me to have a different way to come out.”

One of Levasseur’s biggest challenges was how to address his gender identity during the hiring process.

. . . “During an interview, one person asked, ‘Do you really think it’s a good idea to tell people you’re a transgender attorney?’ I said, ‘Yes, I do. In fact, I think it’s a strength that I’ve gone through the challenge of transitioning, and I’m still a great attorney and have achieved in spite of all the extra stress.’” He got a job offer there. Levasseur also faced outright discrimination. “I was on a second interview [at a Northeastern office of a national firm], and the partner asked, ‘What’s transgender?’” he recounts. “I started telling him, and he interrupted and said, ‘There are no gay people at the firm. If you wanted to start a gay group, you’d be the only one in it.’”

Amina Saeed, a co-founder and president of the Muslim Bar Association of Chicago and an estate planning attorney in suburban Lisle, says she started studying Islam independently with a group of other Muslim students in college. It was shortly after the first Gulf War in 1991, and for the first time, she was hearing ethnic slurs against Muslims on campus and elsewhere. At the same time, she learned that some Muslims were upset that she, a woman, had been elected president of her university’s Muslim students’ association.

... When Saeed announced her intention to study law, her parents were dismayed. That was hardly surprising, Saeed acknowledges, because in general, Muslim-Americans were slow to embrace the law as a profession. First-generation immigrants often were suspicious of the law and lawyers, who they viewed as functionaries of the government. “In the countries that they came from, anything associated with government was looked on with suspicion,” she says. ... But it took the traumatic events of Sept. 11, 2001, for the Muslim community to recognize the important role lawyers can play in American society. Suddenly, Muslims across the United States were facing intense scrutiny and suspicion from both law enforcement and the larger society. “What we were seeing was a real void in the community in terms of understanding their legal rights,” says Farhana Khera, the president and executive director of Muslim Advocates. “There was also a void in terms of an effective advocacy voice for the community.” ... But with few older lawyers to turn to, Muslim communities had no choice but to seek out some young, newly minted lawyers.

... Perhaps nothing more dramatically illustrates the conflicts that female Muslim lawyers are navigating than their choices about whether to wear a simple cloth garment: the hijab, or headscarf. The hijab is fraught with meaning in almost every society with a significant Muslim population, and those controversies play out in many different ways—often reflected in government policies or cultural expectations. ... 

Female Muslim lawyers in the United States who choose to wear the hijab say they are not immune from these conflicting reactions. But they add that wearing the hijab also can work to their advantage. “I wear it because I believe my faith prescribes it, and it’s part of being modest,” says [one lawyer]. “It’s a way of having people’s attention focus on my actions and accomplishments and not on my physical attributes.” But wearing the hijab also provides a means of engaging both Muslim and non-Muslim communities, [this lawyer] says. “It allows me to not only identify myself outwardly as a Muslim, but it enables me to challenge stereotypes
and misconceptions about Muslim women and Islam,” she says. She believes that if Muslims and non-Muslims encounter a well-educated American professional like herself whose hijab identifies her as a Muslim, it might challenge preconceived or traditional ideas about a “proper” Muslim woman’s roles and capabilities.

Saeed says she wore a hijab from the time she started practicing law in 1996. But as she walked into the court, people often mistook her for a translator—sometimes even after she identified herself. “It made it more nerve-wracking because I felt I had to perform better than anyone else just to be considered an equal,” she says. “But I honestly believe that that experience made me a better lawyer.” But the hijab also has made her the target of discrimination, Saeed says. Last February, when she flew to Dallas for a family weekend with her husband and three children, she was singled out for extra security checks on both the outgoing and return flights.

The final excerpt examines obstacles that those in the legal profession have to overcome and the challenges they continue to face on account of disability and gender.


I was born with a rare genetic syndrome affecting my joints and connective tissues and necessitating forty-some odd surgeries on my hips, knees, and feet, but I did not feel disabled until law school. My health declined around that time and, rather than walking everywhere, I began to use a scooter—not a mint vintage Vespa, as the cool kids might imagine, but one of those orthopedic scooters . . . . Even then, while I seemed more obviously disabled to the outside world, the reflections of other people’s attitudes toward my physical appearance—their quick summaries and sizing up of my abilities and weaknesses—always surprised me. When fellow students at Harvard Law waited patiently some fifty yards ahead of me to push the blue button on the automatic door, I wished they would slam the door in my face as they had done with other students. I wanted the same level of rudeness in order to feel as if I had received the same level of kindness. Equality meant no deviations from the norms of law school behavior.

These daily events, while having a cumulative effect, did not serve as my initiation into the profession as a woman with a disability as much as one professor’s reaction to my disability. Our class was originally slated to be held in a building on campus that did not offer an accessible door and, therefore, left me to cast aside my scooter in the elements of Cambridge in January. The ADA coordinator moved the class to
another building with an automated door, and during the first class, the professor went on for a few minutes about why the class had been relocated. He could not understand what happened because his “class was always in that other room,” and he suggested that the registrar may have made a mistake. I went up to him after class and explained my situation. The next day, he was waiting at the door to the classroom building to hold it open for me. Our paths had not crossed without some serious intervention on his part; he had obviously been waiting a long time to hold the door—minutes, an hour?

... [I]n the classroom, I was also a delicate object to praise and pat on the head. I would get the easy questions, and he would gush publicly about how well I had done. ... [On the last day of class] ... [the professor] provided the customary adieus, he deviated from norms of any kind when he began to talk about a “special person” in class who would go far, “serve on the Supreme Court,” and “has helped so many unfortunate handicapped people.” That person was me. And he had kept our class several minutes over to tell them how special I was and how proud they should be of me. Of course, everyone fled when discharged and said nothing to me. If I had not been the target of that speech, I would not have known what to say to a peer either.

I do not blame my peers for leaving me alone or even the professor for highlighting me as a heroine of sorts. I understand the incredible discomfort surrounding disability—people tripping over themselves to say the right thing, parents pulling their staring children back into the grocery line, classmates treating the “asexual” female classmate with a disability as more an object of study than a potential friend or partner. I sound disenchanted, but at that moment, it was resignation to being terribly alone in a way that I had never experienced in other mainstream settings. Granted, the social element was one detail of law school that may not work for many people, but being singled out in the classroom for being different and being treated as less than my peers—in being heralded as more than them—created this divide that had reduced my entire being to two words: disabled and woman.

... Only months earlier, I had done the on-campus recruiting process for summer jobs. Hiring partners reacted negatively to seeing me totter into the room with a cane and an unsteady (and at that time painful) gait. Unlike my peers, the questions that I received were about Casey Martin, the disabled golfer, and the comfort of my chair—“just fine, thanks.” Fifteen minutes were routinely wasted on asking me if I could “keep up with the work” and understood “what it entailed.” Yes, I know law firm work takes energy, stamina, intellect, perseverance, and a general ability to
put up with a caste system. When I smiled and reassured them that I was capable, they nodded and suggested that I go into disability law....

**Exercise 7.1:** Record your reactions to the above readings. Identify examples of explicit, implicit, and structural bias from the readings. What do you believe is motivating the biased behaviors? Why, in the 21st century, are such experiences still prevalent? Is the bias that these legal professionals describe different in any way from bias that occurs to non-lawyers or those not involved in the legal profession? Are the conflicts and frustrations that the law students and lawyers describe attributable, at least in part, to stresses intrinsic to the practice of law regardless of race, ethnicity, gender, religion, socioeconomic status, sexual orientation, or disability? Do any of these excerpts, though intended to illustrate bias, inadvertently perpetuate stereotypes as well? What is your reaction to some of the lawyers’ comments that experiencing bias fueled their drive and made them better lawyers?

**QUESTIONS TO CONSIDER**

As you read, did you identify with the subjects of the narratives, the individuals who have experienced bias? Alternatively, did you identify with the other people in the story, and wonder if you have unwittingly done something to offend someone in the classroom, at your externship? Consider the kinds of bias discussed in these excerpts, as well as the legal contexts in which bias occurred—the law school classroom or job interviews, courtrooms, conversations with associates or partners, client meetings, etc. As you work at your externship, keep alert for these contexts and evidence of bias transpiring. Have you seen or experienced bias in the legal environment(s) you encounter in your placement?

**Defining and Assessing Bias in the Legal Profession**

What is bias, and how does it impact the legal profession? There are many different definitions of bias found in statutes and rules prohibiting discrimination, reports studying bias, and scholarly articles. Bias generally can be defined as intolerance, prejudice, differential or disparaging treatment toward an individual based on stereotypes, or
perceptions of inferiority related to the individual’s race, ethnicity, gender, age, sexual orientation, socioeconomic status, religion, disability, or other cultural characteristic or trait. The Final Report of the Task Force on Gender Bias for the District of Columbia Courts gives examples of biased behavior in the gender context:5

- when people are denied rights or burdened with responsibilities on the basis of gender;

- when stereotypes about the proper behavior, relative worth and credibility of men and women are applied to people regardless of their individual situations;

- when men and women are treated differently in situations because of gender where gender should not make a difference; and

- when men or women are adversely affected by a legal rule, policy, or practice that affects members of the opposite sex to a lesser degree or not at all.

Although these examples are in the context of gender bias, the concepts apply to other forms of bias as well. Bias may be manifested in the behavior of individuals or may have become institutionalized in an organization’s policies and procedures.

Some forms of discrimination are obvious and illegal. Firing an employee when she becomes pregnant, for example, or refusing to promote an associate in a firm because he has a foreign accent are obvious forms of illegal employment discrimination. Bias also comes in more subtle or elusive forms. While one person might interpret an incident as clear-cut bias, another person viewing the same situation may not see it at all.

Research on bias in the legal profession, distinguishes among three types of bias—explicit, implicit, and structural.

Explicit biases are attitudes and stereotypes that are consciously accessible through introspection and endorsed as appropriate. If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection. If we find out that we have them, we may indeed reject them as inappropriate . . . . Besides explicit and implicit biases, another set of processes that produce unfairness in the courtroom can be called “structural.” Other names include “institutional” or “societal.” These processes can lock in past inequalities, reproduce them, and indeed exacerbate
them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong.6

Rather than relying on anecdotal tales of individual and institutional exclusion, bar associations, courts, trade organizations, and scholars have taken a more systematic look at the issue. These reports compile revealing statistics, capture perceptions of those who interface with the justice system, and measure the degree to which bias permeates the profession.

In 2014, the National Association of Women Lawyers (NAWL) issued a report measuring the progress of women in the country’s 200 largest firms. According to this report, women are significantly underrepresented in leadership positions in large law firms despite the steady stream of women graduating from law school. “Since the mid-1980’s, more than 40% of law school graduates have been women. Therefore, by now, one would expect law firms to be promoting women and men at nearly the same rate. Such parity has not been achieved, with the typical firm still counting less than 20% of its equity partners as women.”7 When broken down by race, women of color in big law firms fare far worse than white women in terms of leadership status and somewhat worse than men of color. In the top 100 firms, 2% of equity partners were women of color, whereas 6% of equity partners were men of color.8 The NAWL survey notes that “[v]arious reports over the past 10 years show that virtually no progress has been made by the nation’s largest firms in advancing minority partners and particularly minority women partners into the highest ranks of firms.”9 In terms of representation in the judiciary, women fared better but still lag significantly behind their male counterparts. As of 2012, women held 27% of all state court judgeships10 and as of 2014, 33% of federal district court judgeships.11

Studies have found that racial/ethnic minorities, regardless of gender, perceive bias in the legal system more frequently than those in majority groups. In 2003, the National Center for State Courts issued a report entitled Perceptions of the Courts in Your Community: The Influence of Experience, Race, and Ethnicity.12 This report released results of a national study, which found significant differences in perceptions of unequal treatment in courts. African American and Latino respondents were more likely to believe that unequal treatment occurs frequently in courts than white respondents. All groups agreed, however, that low-income individuals from all racial or ethnic groups receive the worst treatment in the courts.

The National Association for Legal Placement reported that the “overall percentage of openly gay, lesbian, bisexual and transgender (LGBT) lawyers reported in the NALP Directory of Legal Employers (NDLE) in 2012 increased to 2.07% compared with 1.88%
in 2011. . . . Over half (56%) of employers reported at least one LGBT lawyer.”¹³ However, senior lawyers were less likely to identify as LGBT (1.4% of partners compared to 2.4% of associates), and 60% of the openly LGBT lawyers live in one of four cities: New York, Washington D.C., Los Angeles, and San Francisco.¹⁴ Reports on the state of the courts and judiciary found that fourteen percent of all of the judicial employees and nearly half of LGBT workers heard derogatory remarks or jokes about a person in the office who was perceived to be a member of the LGBT community.¹⁵

The numbers of attorneys with disabilities reported in surveys such as the National Association of Law Placements survey is very low. According to NALP, “[o]f the approximately 110,000 lawyers for whom disability information was reported in the 2009—2010 NALP Directory of Legal Employers (NDLE), just 255, or 0.23%, were identified as having a disability . . . Only a handful of firms reported employing at least one summer associate with a disability. Out of more than 9,000 summer associates, only nine were reported as having a disability . . . The numbers reported are very low and percentages are about 0.25% overall.”¹⁶ Many law firms do not collect this data and many individuals, particularly those with disabilities that are not readily apparent, are reluctant to disclose. According to NALP, law graduates with disabilities experienced lower rates of employment than other law graduates. For the class of 2009, 80.7% of graduates with disabilities were employed, whereas 89.2% of non-minority graduates and 84.8% of minority graduates were employed.¹⁷

Scholars have conducted research using the Implicit Association Test (IAT), which is discussed in Chapter 6 on Navigating Cultural Difference, to measure whether and to what degree bias permeates the legal profession and justice system. One such study conducted in 2010 suggested that unconscious gender bias was widespread among law students. In tests measuring implicit attitudes a diverse group of female and male law students associated males as judges and associated women with home and family.¹⁸ Another study of jury-eligible individuals from Los Angeles measured participants’ explicit and implicit beliefs about the ideal lawyer. This study, discussed in more detail in Chapter 6, demonstrated that individuals who subconsciously held implicit stereotypes associating litigators as being Caucasian, as opposed to Asian, were more likely to rank white lawyers as more competent, likable, and deserving of being hired.¹⁹

Bar associations, courts, scholars, and policy makers have offered varying causes for these concerning statistics, perceptions, and findings. Some suggest that implicit biases and stereotypes lead to the continued subordination of traditionally marginalized groups in the legal profession.²⁰ These biases permeate the culture of legal institutions causing disparities in promotion to leadership positions and causing lawyers subject to biases to leave these legal settings. Others suggest that biased criteria and “in-group” bias
or preference for hiring or promoting someone of the same gender, race, or background explain the disparity.\textsuperscript{21} Still others argue that structural barriers such as poverty and lack of educational opportunities blocking access to college and legal education,\textsuperscript{22} lack of affordable child care, unreasonable work demands, lack of a critical mass of attorneys from one’s affinity group(s), historically rooted challenges generating clients and business, and lack of understanding about accommodations lead female, disabled and individuals from other traditionally marginalized groups to part-time, public sector, or non-legal work.

Some skeptics argue that bias is not at the root of these disparities and that the passage of time will remediate the differentials. Given historical trends regarding admission of traditionally marginalized groups to law schools, they suggest it will take time for these groups to reach the leadership ranks of the profession. Some simply attribute the disparity to individual choices regarding career paths and work/life balance. In our view, however, the lack of progress despite the significant increase in the admission of diverse law school students as well as the studies on implicit bias are compelling and raise serious questions as to whether time or choice are responsible for the disparities in the legal profession.

Courts, bar associations, and legal scholars have issued wide ranging recommendations for addressing the problems of explicit, implicit, and structural bias including:

- changing hiring and promotion policies to ensure equal opportunity;
- adopting institutional measures for strengthening diversity within law firms such as tying compensation to diversity initiatives;
- enhancing mentoring programs;
- conducting multicultural training for court personnel, attorneys, and judges;
- improving communication between workers and managers;
- increasing the number of employees who speak languages other than English;
- enhancing the data collection and research conducted on diversity within the legal profession;
- instituting flexible work schedule policies;
- ensuring diversity in law school admissions as well as in law faculty hiring and promotion;

- incorporating discussions of the history of exclusion in the legal profession into the law school curriculum; and

- improving disciplinary proceedings for attorneys and judges.

While court bias studies and reports have been lauded for recommending needed institutional changes, they have also generated criticism. Critics argue that some of the task force recommendations threaten judicial independence and free speech. Some believe, for example, that the desire to bring about racial or gender equality is being used as a justification for changing substantive outcomes in civil and criminal cases. There is also concern that the enactment of disciplinary rules prohibiting biased conduct may prevent lawyers from expressing their personal opinions outside of the courtroom or inhibit lawyers from zealously advocating on behalf of their clients inside the courtroom. Other critics suggest that outgrowths of these studies such as mandatory continuing legal education courses on diversity infringe upon lawyers’ free speech rights because the government cannot coerce individuals into speaking or listening to messages with which the individual disagrees and constitute thinly veiled attempts to fulfill an agenda of liberal political correctness.

Whatever your views of these reports and studies, you will likely observe and experience changes in court practice, personnel policies in the private and public sectors, judicial decision-making, and disciplinary rules brought about as a result of these initiatives.

**QUESTIONS TO CONSIDER**

How should the judicial system cope with the effects of bias that are prevalent in the culture at large? Should reforms be implemented based upon the perception of bias? How does one account for the differences in perceptions between minority groups and majority groups? Are there situations in which zealous advocacy on behalf of your client requires you to appeal to stereotypes or engage in biased behavior?
Things That I May Take for Granted That Some of My Law School Colleagues Cannot (Inspired by the Work of Peggy McIntosh):

1. I am not repeatedly asked for my ID or credentials to demonstrate that I am a law student.
2. My fellow students or externship colleagues do not assume that I am an administrative assistant rather than a law student.
3. No one assumes that any of my educational or professional accomplishments were bestowed upon me because of the color of my skin or my disability.
4. I am able to observe major religious holidays because the law school or externship where I work closes on these days.
5. If I make a mistake, no one projects my mistake onto the group(s) to which I belong.
6. No one asks to touch my hair, is surprised that I wear sunscreen, or asks personal questions about my physical abilities.
7. I am not told to smile more so that I appear “less intimidating” or told to act “more feminine” or “more masculine.”
8. I do not need to worry that my being honest will make people around me feel guilty and uncomfortable.
9. I do not receive harsher or more lenient feedback on my work on account of my race, ethnicity, or other affiliation.
10. If I invite my spouse or partner to a law school or office event, he or she feels welcomed.
11. No one at a law school or office social gathering mistakes me for a waiter and asks me for a cup of coffee or a glass of wine.
12. No one is surprised when I mention that my parents are professionals and my grandparents were professionals.
13. No one asks me, having been born and raised in the U.S., what country I am from.
14. No one is impressed by my command of the English language, “complimenting” me for being so articulate and well spoken.
15. Colleagues do not look to me for comment or reaction when an abhorrent act is committed by someone from my ethnic, racial, or religious group.

16. Others consider my race, gender, sexual orientation, or other affiliation neutral and thereby view my opinions or decisions as arrived at objectively.

**Strategies for Dealing With Bias**

During the course of your legal career you may witness or become the target of biased behavior. How do you respond? You may not be certain that what you are seeing or experiencing is bias, but you perceive that something is not quite right. A comment an associate at your firm makes bothers you. A reaction of a judge to lawyers or litigants takes you by surprise. A policy of the organization in which you are working seems to disproportionately hinder the progress of certain groups of attorneys.

In some circumstances, the bias or discrimination you experience may be so severe and blatant that you decide to resort immediately to formal channels of redress such as reporting an ethics violation to the court or bar, requesting that a judge impose sanctions, lodging a grievance with an employer, or filing a discrimination or harassment lawsuit against your employer. There are federal laws, state laws, and company policies designed to address egregious forms of discrimination or abuse. In many instances, however, the bias is more subtle, making it difficult to determine how to respond. It is important to develop strategies for addressing biased behavior whether you are on the receiving end, a witness, or a supervisor who becomes aware of a particular problem. This section discusses a variety of informal and formal ways to do so.

First, a few personal experiences:

*During my first year of practice, I was representing a client in a divorce and custody hearing in the local trial court. My client’s first language was Spanish and she was testifying with the assistance of a court-certified interpreter. At one point in the trial, a new interpreter came in to replace an interpreter who was about to take a break. The opposing counsel jumped up and asked for a sidebar with the judge. She told the judge that according to her information (which she did not specify), the interpreter, who was Hispanic, had been through a messy divorce from an African-American man and could not be trusted to interpret the proceedings accurately because our case also involved a Hispanic woman seeking a divorce from an African-American man. I was outraged. I objected strenuously...*
to the attorney’s comments. I suggested that she was simply trying to disrupt the proceedings and deflect the court’s attention from the substantive issues at hand. I waited patiently for the judge to chide the attorney for bringing such biased, unsubstantiated claims into the proceeding. Instead the judge asked personal and somewhat humiliating questions of the interpreter until he was assured that she was capable of interpreting in a neutral fashion.

Although the comment was not directed at my client or me, I felt that what had happened was wrong. I did not know exactly what to do; I did not want to react in a way that would anger the judge and potentially hurt my client’s case. The main target of my outrage was the judge. While I believed the opposing attorney acted in an inappropriate, offensive manner, I was particularly troubled that the judge condoned her behavior. I was not sure, however, that there were grounds to file a formal complaint.

I spoke with several colleagues and they advised me to try to find a less risky way of addressing the situation. I eventually decided to take an informal route. One of my colleagues had been asked to participate in an upcoming judicial training on cultural sensitivity. All trial court judges were required to attend. I described the incident and my colleague used it as a hypothetical during the training. The judge in question was sitting front and center. Other judges reacted with harsh criticism to the response of the “hypothetical” judge. [Stacy]

**QUESTIONS TO CONSIDER**

What do you think about the judge’s response? How should the judge have responded? Should Stacy have made a formal complaint? What do you think of Stacy’s decision to use the incident as a hypothetical case at the training session? What other options might she have considered? What were the risks in taking the action she did?

In 2010, I was working as a TeamChild attorney, providing educational and mental health advocacy to children in the juvenile justice system. My work supported the cases of juvenile public defenders, and I would often come to court at their request to provide status updates to the judges about legal interventions that had resulted in academic or behavioral progress.
One morning, I happened to be walking through the parking lot toward the front door of the juvenile courthouse at the same time as the executive director of my office. Like many juvenile courthouses, this one was small and informal, and the floor that I regularly visited had only one courtroom on the delinquency side, and one on the child protection side. I imagine that the design was intended to both separate the two sides, and provide access in a system that is not supposed to be as adversarial as the adult criminal courts. In spite of its location in a large northern city, the courthouse felt like it belonged in a small town—proceedings featured repeat players who passed the time in between hearings exchanging second tier small talk, sharing highlights of fishing trips, First Commumions, and karate tournaments.

After two years in this practice, I was familiar with all of them. Yet as my boss and I entered the lobby, we parted ways. She kept walking and talking, and I very deliberately, slowed to put my brief case on the x-ray conveyer belt and walk through the metal detector. She had made it through a couple of sentences before she realized that I had stopped, and when she turned to look for me, a look of annoyance came over her face. Annoyance, it seemed, that was directed at me. “You don’t have to do that,” she quipped. “You’re an attorney. You need to tell them.” “No,” I explained, “You don’t have to do that. They don’t stop you, but they stop me. Every week. Do you really think that I haven’t told them who I am?” “That’s ridiculous,” she countered. “You need to tell them who you are, so that you don’t have to stop.” I did not respond.

More than once I had been confronted by the guards when I made the mistake of acting like an attorney, and walking past security. In fact, even after I told them that I was an attorney, they routinely instructed me to place my briefcase or case files on the x-ray belt. In addition to appearing in court, I had a monthly meeting with the Juvenile PDs. I regularly conducted trainings for the probation officers. Yet two years into my practice with that project, the strongest projection of my identity was my race.

In other courthouses around the state, I was routinely told upon my arrival that I was standing in the attorney line, and needed to wait someplace else. Clerks asked my name when I entered courtrooms to locate me on the party list in a housing case, a parent in a delinquency proceeding. Occasionally, I was given the professional boost of being asked if I was the social worker, having to explain to every person who entered a negotiation room that I was an attorney.

I don’t consider this to be anything other than a first-world problem. I don’t equate this inconvenience with the use of deadly force by the police, or global suffering. I do, however, equate it with a lack of control.
I often wonder when I will own the indicators that communicate who I am. At what point can I wear a black suit to a reception and know that I will not be mistaken for the wait staff? Is it reasonable for someone to think that the only reason that I should be in certain places is as an employee? Is it a mistake, or is it an unconscious communication to me that I do not belong? Is it really that big of a deal to have to say, “I’m sorry, I don’t work here,” or “I’m an attorney?”

Part of my professional routine has been to breathe deeply and assume a modern incarnation of Butterfly McQueen, the lovable mammy who is happy with her station in life and never judges the foolishness of her mistress. The role still exists, but now she is played by Whoopi Goldberg and Queen Latifah. My reaction to these slights is to tactfully help the offenders feel unembarrassed by their ignorance and deflect the racism implicit in their statements. I presume the absence of malice. Like most people who are experienced as other, I am exhausted by the amount of energy I exert to make other people comfortable with their biases that emerge as a result of my blackness. [Carmia]

QUESTIONS TO CONSIDER

What did the Executive Director “not get” at the juvenile courthouse? Should Carmia have continued the conversation with her boss? Have you witnessed incidents when good, well-intentioned people seem to miss incidents of bias, either explicit or implicit? Is Carmia compounding the problem by “tactfully help[ing] the offenders feel unembarrassed by their ignorance and deflect[ing] the racism implicit in their statements?” What role should bystanders to this type of conduct play? Does how you experience yourself professionally collapse into how you are experienced by others in professional settings? For example, if you think of yourself as smart and capable, is that how you think others are seeing you as well?

As a law student, what can you do ahead of time to prepare for dealing with issues of bias that will arise during your legal career? The following exercises are designed to help you envision responses and develop individual techniques for coping with explicit and subtle forms of biased behavior.

Exercise 7.2  Reactions to Bias in a Legal Setting: Break into small groups. Generate a list of possible responses for how the target of bias in the following
scenarios might respond and how a bystander to the bias might respond. Identify the pros and cons of taking different courses of action and determine what you would be likely to do. Each group should pick one individual from the group to report back to the class on the lists generated.

1. Two recent law graduates, one a white male and one an Asian male, are clerking for a trial judge. They have become friends and during the course of their conversations, one of the clerks, the Asian male, discloses to the other clerk that he is gay, but he makes it clear that he has not discussed his sexual orientation with the other law clerks in the court, nor does he plan to do so. The two clerks are in the court cafeteria eating lunch with a few other law clerks. One of the clerks for another judge starts to tell a joke that disparages gay men. A few people laugh, some look embarrassed. No one says anything.

2. A female, thirty year old attorney appears before a middle-aged, male judge who comments on her physical appearance in open court, telling her he likes her blouse, immediately prior to the start of a hearing on her motion for summary judgment.

3. An attorney in a small law firm, who has been out of law school for about two years, is negotiating a settlement for a client. The opposing counsel is approximately twenty years older. Opposing counsel repeatedly refers to the junior attorney as “young man,” interrupts him, asks when he got out of law school, and continuously references his inexperience: “When you have tried as many cases as I have, you will understand . . . .”

4. A partner in a medium-sized law firm is currently helping one of the firm’s most important clients negotiate a commercial lease. The partner selected a talented associate in the firm to assist in the negotiations. When the client meets the associate and learns that she is blind, he calls the partner and expresses concern that the associate is “not right for the project” because she might be viewed as vulnerable rather than as a tough negotiator.

5. Six lawyers have been asked to participate on a bar association committee to plan an annual conference. Two of the lawyers are Latina women, two are white women, and two are white males. During the first committee meeting, one of the white women takes charge, proposing a number of workshops for the conference. One of the Latina lawyers suggests that they do a survey of bar members to gauge interest before planning the workshops for the conference. There is no response to her suggestion. A few minutes later, one of the white women suggests that the group distribute a questionnaire to bar members to obtain feedback before deciding which workshops to
offer. The other white lawyers nod in assent, one of them commenting that a questionnaire is an excellent idea.

Exercise 7.3 Using the same scenarios, record your responses to the following questions: Do you have an ethical obligation to respond to any of these actions? Even if you determine that there is no ethical imperative to respond, would you have a moral or personal responsibility to act?

Suppose you want to object to the judge’s comments in scenario #2, but are afraid that the judge will take it out on your client by ruling against you. Do you have an ethical obligation not to object?

You are the senior partner of the law firm where the associate from scenario #3 works. The associate has just complained to you about opposing counsel’s behavior. What do you suggest? Also assume that you the partner in scenario (4) How do you respond to the client?

As an observer to the acts of bias described in #1 and #5, how do you determine whether and how to intervene?

The race or ethnicity of the attorneys/judge in scenarios #2–4 is omitted. Would it affect your response if the subordinate lawyer in the scenario was a person of color? What if the more senior attorney or judge was a person of color?

Informal Strategies

There are many ways to address an incident involving blatant or subtle bias. How one responds will often depend upon the forum in which the conduct takes place and one’s role in the system. For example, in the courtroom an attorney can choose to confront the offending party directly—whether it be judge, attorney, or clerk; ignore the behavior; seek a sidebar with the judge and ask the judge to address the issue; or communicate with the offending party by letter following the hearing or trial, provided that as an attorney you do not engage in ex parte communications with the judge.

Much of the biased interpersonal conduct that takes place during the course of litigation or transactional matters occurs outside of the courtroom, in depositions or negotiations. One can address this conduct in a variety of ways. In a deposition, an attorney might decide initially to ignore offensive behavior or use humor in response
Bias may also take place among colleagues or peers in the office, in a law school classroom, or in the hallways of a court. One might choose to discuss the issue directly with the offending party or to seek out a supervisor, a professor, or a trusted colleague who can intervene. Others may try to use humor to alert the person to the offensive nature of his or her behavior. In some situations, one might simply ignore the conduct if it appears that a reaction is exactly what the offending party intended to elicit. Rather than directly confronting someone about the issue, one can adopt a more indirect approach, such as organizing or participating in an office training on multicultural competence and using real life examples that put the offending party on notice that certain behavior is unacceptable.

Another powerful way to address bias is to support a co-worker or colleague who has been treated inappropriately. Vernā A. Myers, an attorney who practiced corporate and real estate law before becoming a nationally recognized expert on diversity and inclusion in the legal profession, calls this “interrupting bias.” If, for example, you are a male and you witness a male co-worker making disparaging, sexist remarks to a female colleague, you may be able to influence your male co-worker’s future conduct by demonstrating your disapproval of his behavior. This is often not an easy thing to do. As Myers notes, “[s]ometimes, we are reluctant to stand up because we see how people in the target groups are treated, and we fear we will suffer ourselves if we intervene.” Nonetheless, interrupting bias is a necessary step toward strengthening the profession.

The goal of “interrupting bias” is not to teach or change the other person’s viewpoint. As Myers explains,

\[\ldots\text{[p]eople might be changed through the process, but that isn’t your focus at the moment you are interrupting. What you are trying to do is to stop the troubling behavior and get people to think, to pause. Maybe your interruption keeps an unfair policy from being passed, prevents someone’s promotion from being denied, or helps the offended party hang in there because he knows he is not alone.}\]

Myers offers some suggestions for successfully interrupting bias:
• Use a non-judgmental tone of voice orally and in written comments. This will decrease the likelihood that the person will respond with defensiveness. I’m not sure what you mean by that reference. Treat the individual you are interrupting with respect, do not adopt an attitude of moral superiority. I may be misunderstanding the proposal, but it seems that your plan will exclude associates who are parents since the trainings are scheduled to take place after 6:00 p.m.

• Engage in a conversation if possible and let the other person know you are listening. It seems that you were focusing on cost which is understandable since it is less expensive to rent the training space in the evening. However, this may have unintended consequences.

• Ask open-ended questions to gain a better understanding of what the person meant and give them a chance to clarify or correct an unintended gaffe. What is it about Gerry’s work that makes you concerned he is not ready to handle misdemeanor trials?

• Explain why you are concerned about the comment or conduct and make clear this is your opinion: you are not speaking for others. I’m troubled by the reference to Mimi as bossy when, in my view, she is exhibiting the same assertiveness that we have praised Roger and Dominic for displaying.

• Offer a counter example or another perspective. I’ve met several of the community leaders from that neighborhood, and I have found them to be open-minded and flexible.

• Practice intervening so that you can more easily react in these situations. Develop a ready set of comments or responses.

Opportunities to interrupt bias in a legal context can take many forms. There may be opportunities to let colleagues know that terminology they are using in their writing or oral advocacy is inappropriate or could be considered offensive. Most colleagues would rather hear this information firsthand, even if the exchange is a bit awkward, than risk harming their client’s case or tarnishing their own reputation.

The manner in which someone confronts offensive conduct and the timing of such response depends upon a number of factors. This includes your own personal style; do you feel comfortable using humor or do you prefer a more serious, straightforward approach? Your choice of approach also includes your analysis of whether raising the issue or failing to raise the issue will negatively impact your client, your credibility, or
your case. You may decide to wait and raise the issue in a more indirect way at a later date, as Stacy did in the example with the judge and the accusation about the interpreter.

It can be particularly difficult to confront bias in an externship. The power imbalance between the extern and attorneys or staff members at the organization can limit an extern’s options for interrupting bias, and law students may reasonably question whether taking the risk is worthwhile given their transient status at the organization. Many externs fear that that they have to ignore or go along with troubling behavior in order to receive a favorable recommendation or, possibly, a job offer. The following exercise encourages you to practice responding to and interrupting bias in the externship setting.

Exercise 7.4 Either in writing or in small groups, generate a list of possible responses to the following scenarios for the extern who is the target of bias and for the extern who is a bystander. Identify the pros and cons of taking different courses of action and determine what you would be likely to do.

1. Four law students are working as externs at a government agency. Two are white women, one is an African American male and one is an Asian male. The four law student colleagues are sitting together in the office cafeteria discussing their assignments when the African-American extern comments that it seems that he is receiving much less challenging work than the others. Indeed, everyone agrees that most of the projects he is receiving seem more administrative or secretarial than legal.

2. Two law students working as externs in a medium size law firm are invited to sit in on a deposition. One of the externs is a male of Indian heritage who was born and raised in New Jersey. He is an adherent to the Sikh religion and wears a turban. The other extern is a white woman. When they enter the conference room where the deposition is to take place, the deposing attorney (a partner at the firm) walks over and introduces himself. He turns to the Sikh student, asks where he is from and, smiling, asks whether wearing a turban makes it difficult for him to get through airport security.

There is no fool-proof recipe for responding to bias in these tricky situations. One option is to model positive behavior, using culturally appropriate language or references in the presence of the offending person to demonstrate a more competent response. At other times, you may decide to use one of the more direct techniques suggested above. Sometimes an immediate response is not feasible and you will need to discuss
the situation with your field placement supervisor or law school externship teacher to consider more formal courses of action.²⁹

**Formal Strategies**

There are circumstances in which the biased conduct is so egregious that informal responses are inadequate and more serious, formal action must be taken. Or it may be that informal mechanisms have failed to alleviate the problem. One avenue may be to register a complaint against a co-worker or supervisor with an internal or external grievance committee set up by the organization, agency, firm, or court in which you work.

If the conduct takes place during litigation, one can seek sanctions. State and federal rules of civil procedure authorize the imposition of sanctions against attorneys, law firms, or parties who engage in improper conduct designed to harass another party during the course of litigation. In a New York case, for example, the court granted an attorney’s motion requesting that the court supervise all further depositions because of opposing counsel’s inappropriate behavior. During the deposition, the plaintiff’s attorney made derogatory and insulting remarks about the deposing counsel’s gender, marital status, and competence.³⁰ In its decision, the court referenced an earlier decision in which the Court imposed sanctions against an attorney who, during a deposition, referred to opposing counsel as “little girl” and made other gender-biased, derogatory statements.³¹

Another option may be filing a complaint with the local board that licenses and regulates attorney conduct. Rule 8.4 of the ABA Model Rules of Professional Conduct prohibits lawyers from engaging in conduct that is “prejudicial to the administration of justice.”³² The comment to this rule clarifies the rule:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

All states have adopted a version of Model Rule 8.4. For example, according to Rule 8.4 of the Washington Rules of Professional Conduct,
It is professional misconduct for a lawyer to:

(g) Commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer’s professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, or marital status. This rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with RPC 1.15;

(h) In representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. This rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments.

State rules differ in scope. Some prohibit lawyers from engaging in biased behavior generally, while others proscribe employment discrimination or other biased conduct while the lawyer is engaged in professional activities or during the course of representation of a client.

Courts impose a variety of sanctions for violations of these rules ranging from warnings to disbarment. The Supreme Court of Indiana, for example, imposed a public reprimand of an attorney for making racially derogatory comments during a divorce hearing in violation of Indiana Professional Conduct Rule 8.4(g). The court noted

... [l]egitimate advocacy respecting race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors does not violate Prof. Cond. R. 8.4(g), but our decision here is based upon the parties’ agreement that race was not relevant in this case; there was no legitimate reason underlying the comments made by respondent. Respondent’s misconduct is a significant violation and cannot be taken lightly. Respondent’s comments only serve to fester wounds caused by past discrimination and encourage future intolerance.

The Supreme Court of Washington upheld an eighteen month suspension imposed on an attorney for, among other things, having sent two ex parte communications
to the trial judge which included disparaging remarks about the opposing party’s national origin.\textsuperscript{35}

In addition to specific rules prohibiting biased conduct, many jurisdictions have more general ethical rules requiring attorneys to conduct themselves in a professional manner and refrain from behavior designed to harass or interfere with the administration of justice. See Chapter 9 on Professionalism. The Minnesota Supreme Court, for example, upheld the Lawyer’s Professional Responsibility Board decision to impose an admonition against an attorney who filed motions seeking a new trial in a personal injury suit in which he argued that the first trial was prejudiced by the presence of the judge’s law clerk who was physically disabled.\textsuperscript{36} The South Carolina Supreme Court imposed a six month suspension for a lawyer who, among other things, asked improper and irrelevant questions regarding a witness’ sexual orientation and HIV status during a deposition.\textsuperscript{37}

During your legal career, you may decide, after reading the rules of your particular jurisdiction and consulting with colleagues or local bar counsel, that you have an obligation to report an attorney who has engaged in biased behavior. In other circumstances, you may believe you have a moral responsibility to do so even if you are not legally obligated to report.

If the problem you are having involves a judge, then you will need to refer to the standards of professional conduct imposed upon judges as well as to the rules of civil or criminal procedure and determine whether you have a basis for filing a complaint or seeking other remedial action. The American Bar Association adopted a Model Code of Judicial Conduct in 1990 which was revised in 2007 & 2010, that addresses bias. Canon 2, Rule 2.3(A) & (B) provide

(A) [a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.

The comment to this rule gives concrete, detailed examples of the types of conduct that constitutes bias, prejudice, and harassment. Under the Model Code, judges are prohibited from engaging in biased or prejudiced behavior, and they also are required
to ensure that lawyers refrain from such conduct when appearing in legal proceedings. According to Rule 2.3 (C),

A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

At least 47 states and the District of Columbia have adopted Model Code 2.3 or similar rules prohibiting judicial conduct based on bias or prejudice. In addition, many federal trial courts, bankruptcy courts, administrative tribunals, and local courts have promulgated rules prohibiting judges from engaging in biased conduct based on race, ethnicity, gender, sexual orientation, or other personal characteristics or background factors. For example, Rule 1000-1 of the Local Rules governing the United States Bankruptcy Court in Arizona and Rules of Practice of the U.S. District Court for the District of Arizona, LRCiv 83.5, state that

[l]itigation, inside and outside the courtroom, in the United States District Court for the District of Arizona, must be free from prejudice and bias in any form. Fair and equal treatment must be accorded all courtroom participants, whether judges, attorneys, witnesses, litigants, jurors, or court personnel. The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another on the basis of categories such as gender, race, ethnicity, religion, disability, age, or sexual orientation.38

Judges have been overruled, removed from cases, censured, or removed from the bench as a consequence of engaging in biased behavior. The Arkansas Supreme Court, for example, upheld a judge’s removal from office, in part, resulting from derogatory sexist, racist, and homophobic remarks the judge posted on an electronic forum.39 The South Dakota Supreme Court issued a six month suspension of a judge based, in part, on racist and sexist jokes the judge made to court employees.40 The New York Court of Appeals upheld a decision of the State Commission on Judicial Conduct to remove a judge from office based, in part, on the fact that the judge used derogatory racial epithets and ethnic slurs. The court noted that “. . . such language, whether provoked or in jest, manifested an impermissible bias that threatens public confidence in the judiciary.”41
Every jurisdiction has a board or committee that reviews the conduct of judges. Many courts and bar associations also routinely conduct surveys of the bar seeking information on judges currently sitting in local courts. These surveys provide opportunities to inform the bar and the judiciary about problems of bias in local courts. Similarly, whether judges are elected or appointed to the bench, individuals in the community often have an opportunity to comment on a particular individual’s fitness to serve as a judge. One can report incidents in which the judicial candidate has previously engaged in biased behavior.

In addition to rules that govern judicial behavior, there are codes regulating the conduct of mediators and arbitrators. While these codes, unless adopted by a court or other regulatory body, do not have the force of law, they may be used to demonstrate or establish a standard of care. For example, the Model Standards of Conduct for Mediators were developed and approved by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution. They require mediators to conduct mediations in an impartial manner. Standard II.B.1 specifies that “[a] mediator should not act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs . . .”

Depending on the offensive behavior, one also may choose to file a claim with the local Human Rights Commission, the Equal Employment Opportunity Commission, or file a discrimination lawsuit to remedy the situation. Filing an administrative claim is usually a prerequisite for filing lawsuits seeking remedies for an employer’s discriminatory conduct. Note that the individual whose conduct is at issue and the individual’s employer may be liable under discrimination statutes. In addition to civil rights statutes, tort law may provide a remedy if the behavior constitutes invasion of privacy, intentional infliction of emotional distress, assault, or battery.

The decision whether to utilize formal mechanisms to combat a situation of bias is a difficult decision to make. In many cases, you will not have an ethical obligation to report the conduct. Instead, you will have discretion about which course of action to take. If you are a new attorney, for example, you must weigh the likelihood of obtaining a favorable result through formal channels against the impact that taking formal action will have on your career. It is also important to think ahead to the time when you, as an attorney, may become an employer. As an employer, it is imperative that you establish policies and procedures for dealing with complaints about biased or discriminatory behavior in your firm or organization.
QUESTIONS TO CONSIDER

Reflect on the following questions in your journal or in class:

• Should lawyers, as officers of the judicial system, be held to a higher standard of conduct than other individuals when it comes to engaging in biased behavior?

• Can one readily distinguish when a lawyer is acting in his or her capacity as a lawyer as opposed to speaking or acting in an individual capacity?

• How would you counsel a friend who is considering formal action against a judge or another attorney? What are the pros and cons you would want your friend to consider?

• Some raise concerns that disciplinary rules prohibiting biased conduct prevent lawyers from expressing their personal opinions outside of the courtroom or inhibit lawyers from zealously advocating on behalf of their clients inside the courtroom. What is your view of these critiques?

• Are there any formal or informal office policies or grievance procedures in place at your externship organization to address concerns about bias and discriminatory behavior?

• Are there times when an attorney who has witnessed or been the victim of bias or even egregious actions by another attorney or judge may justifiably elect to do nothing?

Eliminating Bias and Creating Inclusion in the Legal Profession

The last section of this chapter focuses on steps that law students, lawyers, and legal institutions can take to eliminate bias—explicit, implicit, and structural—and to ensure inclusion in the legal profession. Building off of the research and strategies discussed in Chapter 6, we identify concrete techniques that law students can use in practice to counter internal bias and develop culturally competent communication and advocacy skills. We end by suggesting ways to create institutional change and foster inclusion in the profession.
Developing Effective Communication, Decision-Making, and Advocacy Skills: The Culturally Competent Lawyer

For law students and lawyers, eliminating implicit bias and developing the capacity to communicate effectively with individuals of varying backgrounds and abilities serves several important purposes. First, and most importantly, lawyers have the obligation to remedy injustice and ensure that laws are applied and enforced fairly. Lawyers who remain unaware of their own assumptions and internalized biases cannot effectively carry out their responsibilities. Failure to recognize these biases may translate into ineffective client interviewing or counseling, imprecise and inaccurate use of language in oral or written advocacy, incomplete legal analysis, offensive interpersonal communication, and faulty decision making. The American Bar Association recognized the importance of these skills when it adopted Rule 2.4 on Cultural Competence in the ABA Standards for the Provision of Civil Legal Aid, August 2006. For additional communication ideas and techniques, see Chapter 5 on Effective Communication and Professional Relationships.

Second, cultural competence makes business sense. As the United States evolves into an increasingly multicultural society, an ability to work effectively with individuals of differing backgrounds enables majority lawyers and law firms to attract clients, appeal to diverse juries, retain talented lawyers, and develop more creative, comprehensive solutions to complex legal problems. As one study demonstrated, clients who perceive their lawyers as culturally sensitive are more likely to view their lawyers as competent. Corporate and other organizational clients are increasingly seeking lawyers with a broad range of skills and experience. In addition, firms comprised of culturally competent lawyers are at less risk of incurring liability due to harassment or discrimination claims.

As discussed more fully in Chapter 6 on Navigating Cultural Difference, our view about people and the categories into which they fall are shaped by our parents, the media, teachers, peers, and a host of other external sources. From these experiences, we develop lenses through which our perceptions are filtered. The exercises in Chapter 6 encourage you to examine your own experiences, beliefs, and assumptions. Without conscious recognition that one’s own culture is a filter through which information is channeled, a lawyer may not be able to recognize that someone else has a valid, yet different interpretation or reaction to the same set of facts, law, or circumstances.
Common sense is not enough. As Professor Bill Ong Hing points out,

\[\ldots\] common sense, without training, is dangerously fashioned by our own class, race, ethnicity/culture, gender, and sexual background. What we think of as common sense may make little sense or even be offensive to someone of a different identification background. Thus, the opportunity to learn and discuss different approaches with the help of different perspectives from readings, the opinions of others, and self-critique is unique.47

**Exercise 7.5** Consider the following scenario and record your responses:
A woman calls your law office seeking legal assistance. She is a grandmother interested in custody of her grandchild because she believes her daughter, the nineteen-year-old mother of the child, is too young to make responsible decisions for the child. The grandmother understands that her daughter is legally considered an adult, but she worries that her daughter is not mature enough to raise a child. The mother works full time and the grandmother cares for the child during the day. The grandmother believes that the mother uses her paycheck to buy unnecessary, frivolous items rather than saving money for an emergency or for the child’s education. The grandmother is also very concerned that the mother is an atheist and does not plan to provide the child with a religious identity. You set up an appointment to determine whether you will take the case.

You are not familiar with the standards for custody or the rights of grandparents in your jurisdiction. If you decide to take the case, you will have to do more research on the legal issues.

What are your initial impressions of the factual situation? As you read the account, did an image come to mind of the grandmother and mother? In your mind’s eye, how old is the grandmother? What were the racial and socioeconomic backgrounds of the grandmother and mother as you imagined them? Sexual orientation? Physical abilities? What initial assumptions did you make about the educational background of the grandmother or the educational status of the mother? Have you begun to develop views or concerns about the custody issue based on the little information you have received? How do your own values concerning money, work, family, and religion influence your initial views? Would your initial impression have been any different if the parent in the scenario was male and the grandmother was seeking custody from her son rather than her daughter? What questions would you ask to identify the grandmother’s values and interests?
QUESTIONS TO CONSIDER

Is it appropriate to use your own cultural views or perspective when assessing a legal problem or fashioning legal advice? Do the ABA Model Rules or your state ethical rules give guidance on whether this is appropriate? How can you ensure that your own cultural values do not interfere with your ability to give sound legal advice—advice based on the potential client’s values or objectives?

A lawyer is more likely to consider cross cultural differences when representing a client or interacting with a colleague who was born in another country or who does not speak English as a first language. However, cultural competence skills come into play whenever a lawyer interacts with a client, colleague, opposing counsel, court clerk, or judge whose background differs from the lawyer’s in a significant way because of race, religion, education, socioeconomic status, gender, sexual orientation, disability, and/or age. As professors Lorraine Bannai & Anne Enquist point out,

[r]ealizing that words are the tools of their trade, [law students and lawyers] . . . need to be particularly attentive to their spoken and written language and examine it for imprecision, stereotyping, and any potential for unintended offense. Realizing that legal analysis and legal argument are the professional services they will offer, they need to probe for cultural bias that leads to faulty reasoning.48

As discussed in Chapter 6, it is important to recognize that a person is not wholly defined by one characteristic or trait and may be significantly influenced by a confluence of factors, such as race and gender. Similarly, there are tremendous differences within cultural groups. Individuals who identify themselves as Latino or Asian, for example, hail from a host of countries that have unique histories, languages/dialects, foods, religions, and customs. “A broad definition of culture recognizes that no two people can have exactly the same experiences and thus no two people will interpret or predict in precisely the same ways.”49

So, what concrete techniques can you use as a law student and legal extern to help ensure that you are communicating and making judgments in a culturally competent way? Like many other lawyering skills, the ability to interact and communicate with individuals from a variety of backgrounds takes practice and conscious effort. An externship offers opportunities to hone these skills. Building on the strategies developed
in Chapter 6, the following is a list of concrete methods to use with colleagues, clients, court personnel, or others you may interact with during your externship to uncover your own assumptions; determine whether an assumption is accurate; challenge negative judgments; identify others’ priorities, concerns and values; communicate clearly; and correct mistakes that you inadvertently make:

• Stay in information-gathering mode longer, listen carefully, ask questions rather than making statements or coming to conclusions prematurely.

• Try to identify or imagine circumstances under which an assumption or conclusion you are about to make is not true or does not hold up—if you can identify such circumstances, then do not make judgments until you have gathered more information.

• Before commenting or reacting, repeat back or summarize what you have understood the other person to say in order to ensure that you accurately received the intended message; make a concerted effort to capture the words and meaning of the speaker rather than putting your own spin on what was said.

• Be aware of your own cultural beliefs, values, customs, and biases.

• Question your own objectivity rather than assuming that you will assess a situation fairly simply because you have a desire to do so.

• Do not assume the normativity of your life. Do not measure a client’s reaction, a court employee’s comment, or a colleague’s decision using your own beliefs, customs, and values as a yardstick.

• Do not assume that all people from a particular cultural group are the same or share the same values and priorities. Ask questions. Listen. Reflect before reacting.

• Before making a negative judgment about someone, try to come up with at least three or four possible, well-intentioned explanations for the other person’s reaction or behavior.

• If you find yourself making negative assumptions about individuals from a particular cultural group, discipline yourself to identify examples of individuals from that group or situations that counter that bias or stereotype so that you can make better judgments.
Identify areas of commonality you have with those you determine to be different from yourself and use these similarities to build rapport.

Identify areas of difference and try to anticipate where areas of miscommunication might arise. Plan to ask more questions or gather more information.

Recognize when you are under pressure to make a quick or less than fully informed decision and find ways to give yourself more time to consider the issue so that you do not reflexively resort to biased decision making.

Be extremely careful with humor; ensure that jokes do not rely on inappropriate bias or prejudice. If you are not sure, do not tell the joke.

Consider your choice of language in face to face interactions and in writing—reflect on which titles and terminology you should use to address or describe individuals of varying ages, races, ethnicities, and gender. If you are not sure, check.

Clarify that your view or opinion is your individual view, specify using phrases such as “I think,” “I believe,” “My view is . . .” rather than making global statements suggesting that there is only one reasonable position or view on an issue.

Apologize if you make a mistake. If it is not appropriate or possible to apologize or correct the mistake immediately, then find the next available opportunity to do so.\(^5\)

**Creating Inclusive Environments Within the Legal Profession**

In order to ensure that the legal profession reflects a diversity of perspectives, talents, life experiences, and skills, the institutions which comprise the profession must be inclusive. This is not simply a numbers game in which a law firm, government agency or public interest organization hires lawyers from traditionally marginalized groups and expects that an environment of inclusivity will inevitably follow. Instead, an inclusive environment is one in which attorneys of all races, ethnicities and backgrounds are acknowledged and have the same opportunity to acquire skills, develop professionally, and lead the organization.

Law student leaders, supervising attorneys, managing partners, bar leaders, and judges can take concrete steps to counter the effects of explicit, implicit, and structural
bias and make the profession accessible and relevant to those who join its ranks. One of the difficulties is that many of the leaders of firms and legal organizations are well-intentioned managers who affirmatively eschew any type of bias and do not believe that bias has permeated the organizations that they lead. As Vernā A. Myers explains,

I know “racism” feels like a harsh charge; it is, especially for many of my clients [her clients are law firms] who believe deeply in equality and fairness. When I use the term here, I am not talking about intentional racism, or people behaving out of racial animus. I am really referring to a more modern form of racism—unconscious biases and assumptions rooted in notions of racial superiority and inferiority that affect the way people behave and are embedded in the way organizations operate. This type of contemporary racism, sometimes called “aversive racism” or “implicit bias,” is perpetuated by good, kind, well-meaning white people. [footnote excluded]

It is subtle and mostly unintentional, and yet it is as concerning as old-fashioned forms of intentional and conscious racism.51

Myers suggests that it is necessary to “biasproof” a legal organization’s policies and practices because “[o]ur organizations will never reflect our deeply held values of fairness and equality or experience the many benefits that inclusion can bring, unless we account and adjust for how the organizations’ practices can hinder black people and non-majority groups from getting into the flow of the party, the lifeblood of the business.” 52

The narratives at the beginning of this chapter illustrate policies and practices that negatively impact attorneys of color, LGBT attorneys, attorneys with disabilities and others who have been marginalized from the profession. These include (i) obstacles at the recruiting stage such as vague interview criteria that give broad discretion to hiring attorneys to determine who will be able to “handle” the demands of the job and “work well” with clients; (ii) obstacles at the newly hired stage including arbitrary systems for distributing work assignments and loose processes for evaluation that result in attorneys not receiving challenging assignments or constructive feedback; as well as (iii) obstacles at the retention and promotion stage including a lack of mentoring and professional development programs that lead attorneys to experience isolation and diminishes opportunities to learn to network, generate business, and achieve other hallmarks of success in the profession.

At the heart of many of these practices is what Myers and others refer to as an implicit “bias in favor of” rather than against a particular individual or group.
It is . . . important to remember that biases run in favor of as well as against people. Sometimes the problem is not that some white people have biases against black people; it is that they unknowingly favor white people. They don’t notice that they have a positive bias toward whites with whom they agree about so many principles and rules regarding appropriate performance, behavior, and ways of being. So when judging who the best person is for the opportunity, they unconsciously prefer candidates with whom they feel a greater level of comfort, a sense of familiarity.\textsuperscript{53}

There are a number of strategies for fostering inclusion.\textsuperscript{54} Research suggests that one initial way to counter the effects of implicit bias in legal settings, including in courts, is to diversify the pool of judges, attorneys, and staff working in these environments. Such diversity offers counterexamples to the negative images of members of racial, ethnic, and other minority groups that are perpetuated in the media and United States culture at large. Such exposure can counter the biased attitudes or stereotypes that members of the bench or bar unconsciously hold about litigants, colleagues, or others with whom they come into contact in their professional lives.

Given that efforts to diversify take time as well as financial and political resources, research also suggests that an additional, albeit less effective, method of countering implicit bias is through vicarious exposure. Using counterexamples in posters, videos, artwork, screen savers, or office trainings that project positive images of a diverse group of individuals may help mitigate the internalized bias that has seeped into the thinking of partners, managers, judges, attorneys, and other staff of an organization. These efforts also ensure a more inclusive environment in which individuals of various backgrounds and abilities feel welcomed rather than isolated.

Another way in which to mitigate bias is to improve the conditions under which important decisions are made. As the authors of the article, \textit{Implicit Bias in the Courtroom} (one of whom is a federal judge) have suggested, “. . . [t]he conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability.” Therefore, “. . . [e]ven if we cannot remove the bias, perhaps we can alter decision-making processes so that these biases are less likely to translate into behavior.”\textsuperscript{55} The authors refer to ways to mitigate bias in the courtroom, particularly among judges and jurors, but several of their recommendations as well as the recommendations of experts such as Vernā Myers are equally applicable to other legal settings. Methods for improving the conditions under which decisions are made include:

\begin{itemize}
  \item Training leaders and managers in an organization to question their objectivity and educating them about unconscious bias and negative messaging.
\end{itemize}
Research suggests that those who believe themselves to be objective tend to behave in ways that are more susceptible to bias, whereas those who learn about the subtle ways in which implicit bias works and question their ability to be objective can decrease their susceptibility to such bias;

- Reducing vagueness of criteria as well as unbridled discretion and clarifying standards for making significant decisions such as hiring and promotion;

- Creating mentoring as well as professional development programs, and ensuring quality feedback so that everyone has an understanding of how a particular organization or business works as well as an opportunity to shine;

- Reducing time pressure under which important decisions have to be made in order to minimize the extent to which automatic “bias in-favor of” or other forms of implicit bias influence one’s behavior; and

- Enhancing accountability so that supervising attorneys, managers, and others with leadership responsibility justify their decisions.

As a law student, it is not too early to identify and practice using strategies that will help create a more inclusive environment in the law school where you study, the externship where you work, and eventually, in the firm or institution where you practice, supervise, or manage other legal professionals. The following exercise encourages you to consider how to foster inclusivity.

Exercise 7.6: Record your answers to these discussion questions in your journal.

Take a critical look at the student organizations or law journals to which you belong or which you lead:

- Is there a diverse membership? Even if the organization is one designed to address issues of particular relevance to ethnic, racial, or other affinity groups (i.e. BALSA, LALSA, Women’s Law Caucus), is there a diverse membership?

- Is there a process in place by which leaders in the group ensure that they are receiving perspectives from different constituencies in the organization or community? If not, are there obstacles preventing certain groups from joining or sharing their views?
• Does the organization have a process for ensuring that the group is addressing issues, selecting articles, or prioritizing projects that are of interest to different groups of students? Is there a process in place for gauging whether members are feeling engaged or alienated?
• Is there a mentorship program?

At your externship,
• How would you describe the work environment at the office or organization where you are doing your externship? Are there educational programs or other approaches used by the organization to address the issue of multicultural sensitivity?
• Are there any initiatives to ensure diversity and cultural competence of staff and managers?
• Are there certain positions in your office that seem to correlate to race?
• Do members of different groups interact with one another outside of their professional roles?
• What, if anything, have you noticed about the policies or environment at your externship that promotes or discourages inclusion?

Conclusion

An interesting empirical study was done to assess whether gender bias within the legal profession might be responsible for the low numbers of women in law practice leadership positions despite the nearly equal numbers of men and women entering law schools. The researchers evaluated whether law students have integrated gender bias and, if so, whether this implicit bias affects their decision-making. The results were somewhat alarming and yet, at the same time, optimistic. The study demonstrated that unconscious gender bias was widespread—in tests measuring implicit attitudes, a diverse group of female and male law students associated males as judges and associated women with home and family. At the same time, the law students were able to counter their internalized biases and make gender neutral decisions. The law professor and psychology professor who teamed up to conduct this study concluded,

Taken together, the results of the study highlight two conflicting sides of the ongoing gender debate: first, that the power of implicit gender biases persists, even in the
next generation of lawyers; and second, that the emergence of a new generation of egalitarian law students may offer some hope for the future.\(^5\)

This study gives reason for optimism that those entering the legal profession are better equipped to counter internalized bias and make decisions in a more considered, egalitarian way. However, the evolution to a bias-free profession will take time and effort. We hope that the strategies and techniques suggested in this chapter will guide you as you experience or witness acts of bias and as you become responsible for managing and “bias-proofing” legal institutions.

An externship provides a unique opportunity to start developing these skills. Will you recognize bias when you are confronted with it? How will you respond? What steps can you take to develop cultural awareness and improve your cross-cultural communication skills? How will you deal with bias in a profession that does not always keep pace with society? How will you interact with colleagues and superiors who may have joined a bar and practiced in a community that looks very different from the newly minted lawyers of today? You will grapple with these difficult questions throughout your career. Let your externship be one vehicle through which you devise and practice strategies for countering individual and institutional bias in the legal profession.

FURTHER RESOURCES


Natalie Holder-Winfield, Exclusion: Strategies for Improving Diversity in Recruitment, Retention and Promotion (ABA, 2014).

Vernā A. Myers, Moving Diversity Forward: How to Go From Well-Meaning to Well-Doing (ABA Ctr. for Racial and Ethnic Diversity & General Practice, Solo & Small Firm Div., 2011 ed.).


Yassmin Abdel-Magied, Beat Your Bias, Question Your First Impression, (TEDxSouthBank filmed January 2015), https://www.youtube.com/watch?v=vbHkh_faQu8.


Human Rights Campaign, Lana Wachowski Receives the HRC Visibility Award, YouTube (Oct. 24, 2012), https://www.youtube.com/watch?v=crHHCz7T_c.

Stella Young: I’m Not Your Inspiration, Thank You Very Much, (TED Talk April 2014), https://www.ted.com/talks/stella_young_i_m_not_your_inspiration_thank_you_very_much.

ENDNOTES

1 In this chapter we have elected to capitalize neither black nor white since both are racial constructs rather than ethnic categories. You will notice that ethnic references including Latino, African-American, and Native American are written with capital letters.

2 Jennifer L. Eberhardt, et al., Seeing Black: Race, Crime and Visual Processing, 87 J. Personality and Soc. Psychol. 876–893 (2004). “Using police officers and undergraduates as participants, the authors investigated the influence of stereotypic associations on visual processing in 5 studies. Study 1 demonstrates that Black faces influence participants’ ability to spontaneously detect degraded images of crime-relevant objects. Conversely, Studies 2–4 demonstrate that activating abstract concepts (i.e., crime and basketball) induces attentional biases toward Black male faces. Moreover, these processing biases may be related to the degree to which a social group member is physically representative of the social group (Studies 4–5).” Id. at 876.

3 This chapter will largely focus on explicit and implicit bias. For a more thorough discussion of structural bias see Jerry Kang, et al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124, 1133 (2012) (citing Michelle Adams,


5 Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias, xiv–xv (January 1996).

6 Kang, supra note 3, at 1132–33.


8 Id. at 6.

9 Id. at 16.


14 Id.


20 Id.

21 Elizabeth H. Gorman, Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms, 70 Am. Soc. Rev. 702, 705–06 (2005).

22 The 2011 American Bar Association Disability Statistics Report notes that the scarcity of lawyers with disabilities in the profession is attributable, at least in part, to a pipeline problem. “ . . . [T]he Center reports that only 12.3% of
working-age persons with disabilities held a Bachelor’s degree or higher, compared to 30.6% of non-disabled persons, an 18.3 percentage point gap. This education disparity helps explain why so few persons with disabilities become lawyers, as many individuals with disabilities lack the educational background and academic prerequisites to apply to law school.” ABA Comm’n on Mental and Physical Disability Law, Disability Statistics Report (2011), http://www.americanbar.org/.../aba/.../20110314_aba_disability_statistics.


25 Vernā A. Myers, ABA Comm’n on Diversity, Diversity in the Legal Profession (2010) 26 Id. at 156.

27 Id. at 158.

28 Id. at 160–163.

29 The ideas and techniques discussed in this section are taken from a number of useful sources including: Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, et al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124 (2012); Vernā A. Myers, ABA CTR. FOR RACIAL AND ETHNIC DIVERSITY, MOVING DIVERSITY FORWARD: HOW TO GO FROM WELL-MEANING TO WELL-DOING (2011); Jonathan A. Rapping, Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999 (2013); L. Song Richardson & Phillip Atiba Goff, Implicit Racial Bias in Public Defender Triage, 122 Yale L.J. 2626 (2013).


33 In re Thomsen, 837 N.E.2d 1011 (Ind. 2005).

34 Id. at 1011.

35 In re Disciplinary Proceeding Against McGrath, 280 P.3d 1091 (Wash. 2012).

36 In re Charges of Unprof’l Conduct Contained in Panel Case No. 15976, 653 N.W.2d 452 (Minn. 2002).

37 In re Hammer, 718 S.E.2d 442 (S.C. 2011).


40 In re Formal Inquiry Concerning Judge A.P. Fuller, 798 N.W.2d 408, (S.D. 2011).

41 In re Mulroy, 731 N.E.2d 120, 121–22 (N.Y. 2000).


43 Standards for the Provision of Civil Legal Aid Rule 2.4 Cultural Competence (Am. Bar Ass’n 2006).

44 The term “majority lawyers” refers to lawyers who are members of one or more of the following groups in U.S. society: white, heterosexual, male, Christian, able-bodied, under seventy, and/or born in the United States.
LEARNING FROM PRACTICE


47 Bill Ong Hing, Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses, 45 Stan. L. Rev. 1807, 1810—11 (1993).


51 Myers, supra note 25, at 2.

52 Id. at 141.

53 Id. at 122.

54 Diversity in the Legal Profession: The Next Steps, supra note 24.

55 Kang, supra note 3, at 1142, 1172.

56 Levinson, supra note 18 at 3, 28—29.
Document (1)

1. **Decline in Female Associates Called a ‘Red Flag’**
   - **Client/Matter:** -None-
   - **Search Terms:** decline in female associates called a red flag sloan
   - **Search Type:** Natural Language
   - **Narrowed by:**
     - **Content Type:** Legal News
     - **Narrowed by:** -None-
Decline in Female Associates Called a ‘Red Flag’

The National Law Journal (Online)
December 11, 2013 Wednesday

Length: 499 words
Byline: Karen Sloan

Body

First the good news: The percentage of women and minority partners at law firms continued to inch up during 2013, according to the latest figures from the National Association for Law Placement.

Now the bad: The percentage of women associates at law firms fell for the fourth straight year, even as the percentage of minority associates continued to rise.

"Since the recession, we have seen the figures for women associates drop each of the four successive years," NALP executive director James Leipold said. "While minority associate numbers also dipped immediately after the recession, they quickly rebounded, while the numbers of women have not. This is a significant historical shift, and represents a divergence in the previously parallel stories of women and minorities in large law firms."

This year, women accounted for 44.79 percent of associates, down from 45.66 percent at their peak in 2009. By contrast, the percentage of minority associates rose from 8.36 percent in 2009 to 20.93 percent in 2013.

NALP hasn't researched why the ranks of women associates are thinning while those of minority associates are increasing, although Leipold said it could be because some women are deciding not to pursue law firm careers, given increased attention to how demanding those jobs are and because the path to partnership has narrowed.

"You only have to have women opting out in the margins to see the total percentage go down," he said. "We may see a plateau—a leveling out of what had been a consistently upward curve until 2009. That's one interpretation."

Enrollment in law school also could be a factor, as the percentage of women in law school has fallen slightly since 2009, according to the American Bar Association.

Meanwhile, this year's rise in minority associates has helped to make up ground lost in 2009 and 2010, when widespread law firm layoffs hurt overall associate diversity.

Among law firm partners, minorities accounted for 7.1 percent this year, up from 6.71 percent last year. Similarly, the percentage of women partners rose to 20.22, up from 19.91 last year. Minority women partners continue to be vastly underrepresented, at just 2.26 percent.

The total percentage of women at law firms grew slightly in 2013—the second consecutive year of gains following a two-year decline, but all of that growth was among partners. Minorities now comprise 13.36 percent of all law firm attorneys, according to NALP, up from 12.91 in 2012.

However, the percentage of women and minority summer associates from the most recent class both fell slightly this year compared to 2012, although their percentages were higher than in the years before 2012.
Decline in Female Associates Called a ‘Red Flag’

"While the percentage of women partners, small as it is, has continued to grow each year, sustained incremental growth in the future is at risk if the percentage of women associates continues to inch downwards," Leipold said. "This should be a red flag for everyone in legal education and the law firm world."

Contact Karen Sloan at ksloan@alm.com

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**Classifications**

**Language:** ENGLISH

**Publication-Type:** Newspaper

**Subject:** WOMEN (91%); LEGAL SERVICES (91%); LAWYERS (89%); SUMMER LAW ASSOCIATES (78%); LAW SCHOOLS (78%); STUDENT DEMOGRAPHICS (78%); ASSOCIATIONS & ORGANIZATIONS (77%); LAW FIRM ATTORNEY RECRUITMENT (73%); BUSINESS & PROFESSIONAL ASSOCIATIONS (72%); GRADUATE & PROFESSIONAL SCHOOLS (68%); LAYOFFS (62%)

**Organization:** NATIONAL ASSOCIATION FOR LAW PLACEMENT (84%)

**Industry:** LEGAL SERVICES (91%); LAWYERS (89%); LAW SCHOOLS (78%); LAW FIRM ATTORNEY RECRUITMENT (73%); GRADUATE & PROFESSIONAL SCHOOLS (68%)

**Load-Date:** December 12, 2013
Elimination of Bias in the Legal Profession: 2013

Presented By:
David Maggiore-Anet, Esq.
Corporate Legal Consultant

January 18, 2013

For Educational Purposes Only
David Maggiore-Anet, Esq.

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Mr. Maggiore-Anet received his B.A. in Political Science from the University of California, Santa Barbara and his J.D. from the University of San Diego.

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A secured loan transaction is one in which the lender, often a financial institution such as a bank, lends money to a business and the business grants the lender a security interest in its assets. A security interest is a legal claim to collateral pledged to the lender in exchange for receiving the loan. In the event the borrower defaults on the loan, the lender can seek restitution through the sale of the pledged collateral. The collateral generally consists of the business’s property, such as real property, equipment, accounts receivable or inventory. By taking a security interest in the business’s assets, the lender mitigates the risk that the borrower will fail to repay its debt.

In entering into a loan transaction, the borrower and its counsel must clearly understand what they wish to accomplish and be in a position to meet the demands made of them during the loan negotiations. The process includes (i) coordinating the loan with the borrower’s intended use of the proceeds or its underlying transaction (if the loan proceeds are being used to finance the purchase of property); (ii) obtaining the loan for the desired term and rate, with limits on the closing costs and time to finalize the loan, if possible; (iii) binding the lender to an agreement that will maintain the loan commitment and keep the loan in place as the borrower’s business evolves; and (iv) limiting any undue interference by the lender both with the conduct of the borrower’s business and the exercise of the business judgment of the borrower’s officers and directors.
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AGENDA FOR TODAY

- Bias in the legal profession
- Preventing bias in the legal profession
- Preventing bias by promoting diversity in the legal profession
- Best practices and model legal departments
BIAS IN THE LEGAL PROFESSION
Bias and the Practice of Law

• CA Rule of Professional Conduct 2-400
  – (B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:
    (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
    (2) accepting or terminating representation of any client.
History of Gender Bias

- 1875: Wisconsin Chief Justice says that “the natural law destines and qualifies the female sex for the bearing and nurture of children of our race and for the custody of the homes of the world…”
- 1879: First female admitted to practice before U.S. Supreme Court
- 1944: U.S Supreme Court accepts first female law clerk (for Justice Douglas)
- 1950: Harvard Law School accepts first female student
History of Gender Bias

- 1960: Only 3% of attorneys are female
- 1972: Washington and Lee is the last law school to accept female students
- 1981: Sandra Day O’Connor is first female Justice appointed to U.S. Supreme Court
- 1993: Janet Reno becomes first female U.S. Attorney General
- 1996: ABA elects first female president
Justice O’Connor

• Top graduate of Stanford Law School in 1952

• A large California firm offered her only a secretarial position

• She refused the job and instead took a job as a deputy county attorney
Justice Ginsburg

• Top graduate of Columbia Law School in 1959
• She did not receive a job offer from any New York law firm
• Some law firms said she should apply to work as a secretary
Justice Kagan

• In 1986 graduated first in class at Harvard Law School
• In 1988 became law clerk for Justice Marshall
• In 2003 named first female Dean of Harvard Law School
• In 2009 named first female Solicitor General
Gender Bias Study

- 73% of female attorneys reported gender bias in legal workplaces as a major or moderate problem
  - The two examples of gender bias women agreed occurred most:
    - 70% - comments are made about the physical appearance or apparel of female attorneys when no such comments are made about male attorneys
    - 69% - asked if they are attorneys when male attorneys are not
- 61% of women somewhat or strongly disagreed that they are able to advance as far as male attorneys in the legal profession
- 67% of female respondents perceived there was less gender bias against women today than over the preceding five years
Gender Bias Today

• Women comprise:
  – 54% of population
    • 47% of law students
    • 31% of all lawyers
  – 46% of law firm associates
    • 20% of law firm partners
    • 15% of equity law firm partners
  – 31% of corporate attorneys
    • 20% of Fortune 500 General Counsel
  – 27% of federal & state judgements
Women in Law Schools

1st Yr Enrollment - 1
- Women: 22,798 (46.8%)
- Men: 25,899 (53.2%)

Total J. D. Enrollmt - 1
- Women: 68,262 (46.7%)
- Men: 78,026 (53.3%)

J.D.'s Awarded - 2
- Women: 21,043 (47.3%)
- Men: 23,452 (52.7%)
Women in Corporations

Fortune 500 General Counsel

<table>
<thead>
<tr>
<th>Ethnicity</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caucasian</td>
<td>85.1%</td>
</tr>
<tr>
<td>African American</td>
<td>8.9%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>3%</td>
</tr>
<tr>
<td>Asian American/Pacific Islander</td>
<td>2%</td>
</tr>
<tr>
<td>Middle Eastern</td>
<td>1%</td>
</tr>
</tbody>
</table>
Weekly Salary Men vs. Women Lawyers

Women lawyers’ weekly salary as a percentage of male lawyers’ salary:

|       | 73.4% | 77.5% | 70.5% | 77.5% | 80.5% | 74.9% | 77.1% | 86.6% |
Gender Bias In G.E. Legal Department?

- In-house counsel Lorene Schaefer filed gender discrimination class action lawsuit
  - Worked in legal department for 13 years – including 8 years handling employment and labor issues
  - Promoted to GC of Transportation Division in 2005 (1 of 7 GCs at GE) until demoted in April 2007
  - Claimed that more than 1,000 female lawyers and executives have been subject to “systemic, companywide discriminatory treatment” – including lower pay and fewer promotions
  - Claimed that number of women in top two levels (officer & senior executive) has remained stagnant for the past 5 yrs
  - Named GC Brackett Denniston as individual defendant
  - Sought $500 million in damages for the class
  - Lawsuit settled in February 2009 / Schaefer no longer w/ GE
In-House vs. Law Firm

• Do women have more success in law departments than at law firms?
  – “A most-hours-wins system tends to disadvantage women because it favors law firm partners who have a specific family form that most male law firm partners, but few women law firm partners, have: the “two-person career.” A lawyer with a two-person career has the advantage of a spouse who takes care of most, or all, of the lawyer's nonwork responsibilities, from waiting for the cable repairman to picking up the dry cleaning to caring for children and elders.”
    – MCCA Report (June 2010)
Figure 1. Work-life balance in-house

<table>
<thead>
<tr>
<th>Had prior law firm experience</th>
<th>78%</th>
<th>14%</th>
<th>7%</th>
<th>1%</th>
</tr>
</thead>
<tbody>
<tr>
<td>No prior law firm experience</td>
<td>68%</td>
<td>11%</td>
<td>5%</td>
<td>16%</td>
</tr>
</tbody>
</table>

- I think I am better able to balance work and non-work responsibilities as in-house counsel
- I think my ability to balance work and non-work responsibilities as in-house counsel is about the same as attorneys at law firms
- I think I am less able to balance work and non-work responsibilities as in-house counsel as compared to attorneys at law firms
- Don't know

Had prior law firm experience N=296; No prior firm experience N=19
Figure 18. *Household division of labor by gender*

**Child Care**

- **Women**: 13% (mostly responsible) | 54% (shared equally) | 33% (mostly responsible for partner)  
N=140
- **Men**: 66% (mostly responsible) | 31% (shared equally) | 3% (mostly responsible for partner)  
N=70

**Housework**

- **Women**: 13% (mostly responsible) | 50% (shared equally) | 37% (mostly responsible for partner)  
N=185
- **Men**: 48% (mostly responsible) | 46% (shared equally) | 6% (mostly responsible for partner)  
N=87

**Elder care**

- **Women**: 21% (mostly responsible) | 31% (shared equally) | 49% (mostly responsible for partner)  
N=39
- **Men**: 50% (mostly responsible) | 33% (shared equally) | 17% (mostly responsible for partner)  
N=18

Legend:
- Green: My partner is mostly responsible for this task
- Orange: My partner and I share this task equally
- Blue: I am mostly responsible for this task
History of Racial Bias

• 1865: First African-American admitted to practice before U.S. Supreme Court
• 1868: Harvard Law School accepts first African-American student
• 1948: U.S. Supreme Court accepts first African-American law clerk (for Justice Frankfurter)
• 1961: Reynaldo Guerra Garza is first Hispanic-American to be appointed to the Federal Bench (Southern District of Texas)
• 1967: Thurgood Marshall is first African-American Justice appointed to U.S. Supreme Court
• 1971: Herbert Young Cho Choy is first Asian-American (Korean-American) to be appointed to the Federal Bench (9th Circuit)
• 1994: Billy Michael Burrage is first Native-American to be appointed to the Federal Bench (District of Oklahoma)
• 2002: ABA elects first African-American president
Justice Marshall

- He was the grandson of a slave
- Denied admission to the University of Maryland Law School because he was African-American
- Attended Howard University Law School and graduated first in his class in 1933
Justice Sotomayor

• In 1978, Firm of Shaw, Pittman, Potts & Trowbridge suggested during recruiting dinner she was at Yale only as a result of affirmative action
  – Formal complaint filed with law school
  – Firm’s apology in December of 1978 made news in the Washington Post

• In 1991, first Hispanic federal judge in New York / first Hispanic female judge in U.S.
Racial Bias Study

• 77% of minority attorneys reported racial bias in legal workplaces as a major or moderate problem
• 63% of minority attorneys believe current law school graduates of color do not have the same opportunity for employment in legal community as Caucasian graduates
• 31% of minority attorneys reported they have been denied employment, equal pay, benefits, promotion, or another employment related opportunity within the past five years
ABA Report: Minority Women

- Missing out on desirable assignments
  - 44% = minority women
  - 39% = Caucasian women
  - 25% = minority men
  - 2% = Caucasian men

- Would have liked more and/or better mentoring by senior attorneys or partners
  - 67% = minority women
  - 55% = Caucasian women
  - 52% = minority men
  - 32% = Caucasian men

- Limited access to client development and relationship opportunities
  - 55% = Caucasian women
  - 43% = minority women
  - 24% = minority men
  - 3% = Caucasian men
Racial Bias Today

• Minorities comprise:
  – 30% of population
    • 20% of law students
    • 10% of all lawyers
      – 4% African-American
      – 3.3% Hispanic
      – 2.3% Asian
      – .2% American Indian
  – 20% of law firm associates
    • 7% of law firm partners
  – 14% of corporate attorneys
    • 8% of Fortune 500 General Counsel
Minority General Counsel

- 2012 Fortune 500 Survey of Minority GCs:
  - 47 (9.4 percent) = minorities
    - Increase of 4
    - 28 = African American
    - 11 = Asian American
    - 6 = Hispanic American
    - 2 = Middle Eastern
<table>
<thead>
<tr>
<th>2012 RANK</th>
<th>FIRM</th>
<th>DIVERSITY SCORE</th>
<th>PERCENTAGE OF MINORITY ATTORNEYS</th>
<th>PERCENTAGE OF MINORITY PARTNERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Lewis Brisbois</td>
<td>54.9</td>
<td>27.9%</td>
<td>27.0%</td>
</tr>
<tr>
<td>2</td>
<td>Wilson Sonsini</td>
<td>46.1</td>
<td>26.2%</td>
<td>19.9%</td>
</tr>
<tr>
<td>3</td>
<td>Fragomen, Del Rey</td>
<td>45.3</td>
<td>26.5%</td>
<td>18.8%</td>
</tr>
<tr>
<td>4</td>
<td>Munger, Tolles</td>
<td>42.6</td>
<td>23.4%</td>
<td>19.2%</td>
</tr>
<tr>
<td>5</td>
<td>Curtis, Mallet-Prevost</td>
<td>40.9</td>
<td>22.9%</td>
<td>18.0%</td>
</tr>
<tr>
<td>6</td>
<td>White &amp; Case</td>
<td>39.8</td>
<td>23.1%</td>
<td>16.7%</td>
</tr>
<tr>
<td>7</td>
<td>Kenyon &amp; Kenyon</td>
<td>37.4</td>
<td>24.7%</td>
<td>12.7%</td>
</tr>
<tr>
<td>8</td>
<td>Bowman and Brooke</td>
<td>36.5</td>
<td>18.3%</td>
<td>18.2%</td>
</tr>
<tr>
<td>9</td>
<td>Morrison &amp; Foerster</td>
<td>36.3</td>
<td>24.6%</td>
<td>11.7%</td>
</tr>
<tr>
<td>10</td>
<td>Fenwick &amp; West</td>
<td>36.0</td>
<td>25.8%</td>
<td>10.2%</td>
</tr>
</tbody>
</table>
Sexual Orientation Bias

- 32% of GLBT attorneys agreed it was safe for GLBT attorneys to be open about their sexual orientation at work.
- 84% of GLBT attorneys reported bias in legal workplaces as a major or moderate problem.
- 70% of GLBT attorneys have hidden their sexual orientation or identified themselves as heterosexual because of concern that revealing their orientation might negatively impact their careers.
- 36% of GLBT attorneys believe they have the same chance of promotion as heterosexual attorneys.
Sexual Orientation Bias

• National LGBT Bar Association “Out & Proud Corporate Counsel Award”
  – Prudential
  – GlaxoSmithKline
  – Wells Fargo
  – Shell Oil
  – Microsoft
Sexual Orientation Bias: Law Firms

- Human Rights Campaign – Corporate Equality Index
  - 2006 = 12 law firms earned top rating of 100%
  - 2012 = 55 law firms earned top rating of 100%
  - Written non-discrimination policy covering sexual orientation & transgender
  - Offer inclusive health insurance, bereavement and family leave policies to employees with same-sex partners
  - Offer diversity training
  - Have LGBT employee groups
  - Engage in appropriate and respectful advertising to the LGBT community
  - Contribute to LGBT community organizations
  - Decline to engage in any activities that would undermine the goal of equal rights for lesbian, gay, bisexual, and transgender people
Age Bias In Philip Morris Legal Department?

- 2007 – D’Arcy Quinn filed age discrimination lawsuit
  - In 2000, joined the company as counsel for anticounterfeiting matters
  - In 2003, promoted to director of brand integrity unit for Europe
  - Described as an “exemplary” employee in performance reviews
  - In 2005, after turning 50, told by senior management that he should be “moving on” and that he no longer fit the “right profile”
  - In 2006, protested managers’ announcement that they would fire two nonlegal members of the brand integrity group who were in their late 50’s and replace them with individuals in their 30’s because they wanted “fresh young talent”
  - Soon after Quinn’s protest, management began to retaliate against him by downgrading his performance reviews
  - In 2007, company told Quinn that he was being fired for performance-related reasons
  - In 2008, Court rejected Philip Morris’ motions to dismiss
  - In 2012, parties settled lawsuit
Disability Bias Study

- 66% of disabled attorneys considered bias against attorneys with disabilities in legal workplaces to be a major or moderate problem
- 72% of disabled attorneys reported their employers have made reasonable accommodations
- 27% of disabled attorneys reported they have been denied employment, equal pay, benefits, promotion, or another employment-related opportunity within the past five years because of their disabilities
Disability Bias

• 2011 Report
  – 19% of Americans have a disability
  – 6% of attorneys reported having a disability
  – 3.4% of law students requested accommodation for a disability
  – 7.6% lower employment rate

• ABA Commission on Disability Law explains:
  – Disability is not viewed as an issue of diversity and is not promoted as aggressively as issues with women and minorities
  – Stigmas attached to being disabled may discourage attorneys from reporting their disabilities
Disability Bias: A Pledge for Change

- “As legal employers, chief legal officers, hiring partners, and hiring personnel, we hereby affirm our commitment to diversity, including diversity regarding individuals with mental, physical, and sensory disabilities in the legal profession.”
  – www.abanet.org/disability/pledge
PREVENTING BIAS IN THE LEGAL PROFESSION
Preventing Bias: Understand Barriers

- “Like me” syndrome
- Stereotypes
- Negative perception by those who feel threatened by EEO practices
- Ignorance of laws
- Outright prejudice
Preventing Bias: Commitment by Management

• Anti-bias policies
• Training & education
• Mentoring programs
• Work-life balance
Preventing Bias: Anti-bias Policies

• Create & enforce anti-bias policies
• Respond to complaints
• Encourage use of employee hotline
• Audit employment decisions
• Conduct investigations
• Take remedial actions
• Follow-up on remedial measures
Preventing Bias: Training & Education

• CA Law
  – After January 1, 2006, employer covered by this section shall provide sexual harassment training / education to each supervisory employee once every two years
  – Supervisory employees outside CA must be trained as long as they directly supervise CA employees
  – e-learning, both by webinars and by self-study methods, is permissible
Preventing Bias: Mentoring

- **Formal mentoring**
  - Appoint someone to provide oversight to a mentoring program
  - Provide written guidelines / training / support
  - Clearly spell out goals and expectations
  - Expose mentees to successful women and minority lawyers
  - Impact lawyers at the earliest possible entry
  - Uphold confidentiality
Preventing Bias: Mentoring

• Informal mentoring
  – Workplace socialization
    • Build a sense of connection to the organization
  – Skills building
    • Help develop competency to practice law
  – Confidence building
    • Serve as role model / emotional support
  – Career advancement
    • Advice on career options / advocacy for promotion
Preventing Bias: Mentoring

- **Obstacles to mentoring for women / minority lawyers**
  - Scarcity of women and minority lawyers in management and partnership positions
  - Economic pressures that permit little time or reward for mentoring
  - Male lawyers’ reluctance to enter mentoring relationships with women and minorities because certain false assumptions or negative stereotypes cloud their judgment
  - Exclusion of women and attorneys of color from informal workplace networks that are the springboards for mentoring opportunities
Preventing Bias: Mentoring

• **General Mills’ Co-Mentoring Pilot Program**
  - Pairs minority and female director-level and above employees with the top management of company
  - Designed to promote a cross-functional, two-way learning exchange and dialogue between the two partners, who serve as both mentor and mentee within the relationship
  - Generates a broader awareness of gender and racial issues at the most senior levels of the company
Preventing Bias: Mentoring

• **General Motors’ Mentoring Program**
  – Works with select law firms to identify promising women and minority associates
  – Matches associates with GM’s in-house attorney mentors
  – GM mentor works closely with firm to facilitate associate development so that the mentee work for GM fits into an overall firm development plan
  – Goal is to develop lead attorneys that reflect the diverse communities in which GM does business
  – Ensure that GM’s external business success translates to internal firm success
Preventing Bias: Work-Life Balance

- Lawyers have the highest rate of depression of any profession
- Between 20% and 25% of lawyers suffer from stress so severe it impairs their practice
- 75% of attorneys would not want their kids to follow in their footsteps
- 71% of graduates from the nation’s top five law schools reported experiencing serious conflict between their work and their personal lives
- 70% of lawyers in their 20s and 30s would be willing to take lower salaries in exchange for more free time
Preventing Bias: Work-Life Balance

• Impact on women
  – 81% of all women in America have children
  – 95% of American mothers work fewer than 50 hours per week year-round
  – 75% of women graduates from top ten law schools cited commitment to family and personal life as a key barrier to the advancement of women
  – 66% of women leave law firm within 5 years
Preventing Bias: Work-Life Balance

• Impact on minorities
  – Caring for elderly relatives
    • Asians = 42%
    • Hispanics = 34%
    • African Americans = 28%
    • Caucasians = 19%
  – Asians and Hispanics feel more guilt about the level of care they provide, although they provide more care than other groups.
Preventing Bias: Work-Life Balance

• Impact on “millennials” (born after 1980)
  – “Used to balancing many activities such as teams, friends, and philanthropic activities, millennials want flexibility in scheduling and a life away from work.”
  – “They expect constant stimulation at work, and they want constant feedback…and want to be able to give feedback as much as they want to receive feedback.”
  – “Millennials are the most connected generation in history and will network right out of their current workplace if these needs are not met.”
Still Better on Balance?

Work|Life Balance In-House

by

Joan C. Williams, Penelope M. Huang, and Manar S. Morales

The Project for Attorney Retention

March 2012

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Figure 13. Reasons for going in-house

I was drawn to the type of work I would get in house  59%
I wanted to get away from billable hours requirements  57%
I wanted to be more involved in business matters  56%
I wanted more control over my work hours  45%
I wanted to work fewer hours  26%
I wanted to have better client relationships  22%
I wanted more control over my workload  21%
I wanted fewer work "emergencies" or "surprises"  18%

N=321; Note: Respondents were asked to select up to 3 reasons.
Figure 4. Distribution of hours worked per week

- 2% for 25 or fewer
- 9% for 26-40
- 43% for 41-50
- 35% for 51-60
- 10% for 61-70
- 1% for 71+

N=348
Table 8. Average hours worked per week by gender

<table>
<thead>
<tr>
<th>Hours Worked Per Week</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>25 or fewer</td>
<td>1%</td>
<td>3%</td>
<td>2%</td>
</tr>
<tr>
<td>26-40</td>
<td>8%</td>
<td>10%</td>
<td>9%</td>
</tr>
<tr>
<td>41-50</td>
<td>29%</td>
<td>51%</td>
<td>45%</td>
</tr>
<tr>
<td>51-60</td>
<td>50%</td>
<td>28%</td>
<td>34%</td>
</tr>
<tr>
<td>61-70</td>
<td>11%</td>
<td>7%</td>
<td>8%</td>
</tr>
<tr>
<td>More than 70 hours per week</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
</tr>
</tbody>
</table>
### Table 1. Ability to take vacations

<table>
<thead>
<tr>
<th>Statement</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>My vacation plans are frequently cancelled due to work</td>
<td>8</td>
<td>2%</td>
</tr>
<tr>
<td>My vacation plans are occasionally cancelled due to work</td>
<td>24</td>
<td>7%</td>
</tr>
<tr>
<td>I can take a planned vacation, but I maintain regular contact</td>
<td>211</td>
<td>60%</td>
</tr>
<tr>
<td>I can take a planned vacation and I can be reached if needed</td>
<td>85</td>
<td>24%</td>
</tr>
<tr>
<td>I can take a planned vacation without worrying about having to check in</td>
<td>23</td>
<td>7%</td>
</tr>
</tbody>
</table>

Total: 351, 100%
<table>
<thead>
<tr>
<th>Answer Options</th>
<th>Response Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telecommuting – formal and/or ad hoc</td>
<td>64%</td>
</tr>
<tr>
<td>Flexible start-stop times</td>
<td>61%</td>
</tr>
<tr>
<td>Part-time work</td>
<td>12%</td>
</tr>
<tr>
<td>Gradual return from maternity leave</td>
<td>10%</td>
</tr>
<tr>
<td>Compressed workweek (e.g., 10 hours per day/4 days per week)</td>
<td>8%</td>
</tr>
<tr>
<td>Back-up care service</td>
<td>4%</td>
</tr>
<tr>
<td>Results-only work environment (ROWE)</td>
<td>3%</td>
</tr>
<tr>
<td>On-site care (for elders and/or children)</td>
<td>2%</td>
</tr>
<tr>
<td>Parent/caregiver groups</td>
<td>2%</td>
</tr>
<tr>
<td>Job sharing</td>
<td>1%</td>
</tr>
<tr>
<td>Subsidized care (for elders and/or children)</td>
<td>1%</td>
</tr>
<tr>
<td>Back-up nursing service</td>
<td>0%</td>
</tr>
<tr>
<td>I have never made use of any of my company's work-life policies</td>
<td>17%</td>
</tr>
</tbody>
</table>

N=214; Note: Respondents were asked to select all policies that they have used, so percentages will not add to 100.
### Table 9. Use of work-life policies by gender

<table>
<thead>
<tr>
<th>Policy</th>
<th>Men</th>
<th>Women</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flexible start-stop times</td>
<td>51%</td>
<td>66%</td>
<td>61%</td>
</tr>
<tr>
<td>Ad hoc telecommuting</td>
<td>49%</td>
<td>48%</td>
<td>48%</td>
</tr>
<tr>
<td>Formal telecommuting</td>
<td>12%</td>
<td>17%</td>
<td>16%</td>
</tr>
<tr>
<td>Part-time work</td>
<td>4%</td>
<td>16%</td>
<td>12%</td>
</tr>
<tr>
<td>Gradual return from maternity leave</td>
<td>2%</td>
<td>14%</td>
<td>10%</td>
</tr>
<tr>
<td>Compressed workweek</td>
<td>9%</td>
<td>8%</td>
<td>8%</td>
</tr>
<tr>
<td>Back-up care service</td>
<td>0%</td>
<td>5%</td>
<td>4%</td>
</tr>
<tr>
<td>Results-only work environment (ROWE)</td>
<td>9%</td>
<td>1%</td>
<td>3%</td>
</tr>
<tr>
<td>Parent/caregiver groups</td>
<td>0%</td>
<td>3%</td>
<td>2%</td>
</tr>
<tr>
<td>On-site care</td>
<td>2%</td>
<td>2%</td>
<td>2%</td>
</tr>
<tr>
<td>Job sharing</td>
<td>0%</td>
<td>2%</td>
<td>1%</td>
</tr>
<tr>
<td>Subsidized care</td>
<td>2%</td>
<td>1%</td>
<td>1%</td>
</tr>
<tr>
<td>Paid maternal disability leave for childbirth</td>
<td>0%</td>
<td>34%</td>
<td>25%</td>
</tr>
<tr>
<td>Paid volunteer days</td>
<td>25%</td>
<td>18%</td>
<td>20%</td>
</tr>
<tr>
<td>Paid parental leave</td>
<td>9%</td>
<td>14%</td>
<td>13%</td>
</tr>
<tr>
<td>Paid school visitation time</td>
<td>4%</td>
<td>5%</td>
<td>4%</td>
</tr>
<tr>
<td>Never made use of any of my company's policies</td>
<td>25%</td>
<td>15%</td>
<td>18%</td>
</tr>
</tbody>
</table>
Likelihood of Policy Use

Respondents who indicated that they did not have access to policies supporting work-life balance were asked to rate on a 4-point scale how likely they would be to use each listed policy if they were to have access to it (1=Very unlikely; 2=Somewhat unlikely; 3=Somewhat likely; 4=Very likely). The results are shown below.

![Likelihood of Policy Use](image)
The survey further inquired about the extent to which they perceived the use of each policy would compromise career advancement (1=Not at all compromising; 2=Only slightly; 3=Somewhat; 4=A great deal), whether or not they had used them. The figure below shows the average ratings of career compromise for each policy, in order of greatest to least career compromising.

**Figure 11: Career compromise associated with work-life policies**

<table>
<thead>
<tr>
<th>Policy</th>
<th>Average Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part-time work</td>
<td>3.44</td>
</tr>
<tr>
<td>Job sharing</td>
<td>3.36</td>
</tr>
<tr>
<td>Results-only work environment (ROWE)</td>
<td>3.31</td>
</tr>
<tr>
<td>Formal telecommuting</td>
<td>2.73</td>
</tr>
<tr>
<td>Compressed workweek</td>
<td>2.62</td>
</tr>
<tr>
<td>Paid school visitation time</td>
<td>2.19</td>
</tr>
<tr>
<td>Gradual return from maternity leave</td>
<td>2.16</td>
</tr>
<tr>
<td>Back-up nursing service</td>
<td>2.09</td>
</tr>
<tr>
<td>Back-up care service</td>
<td>2.07</td>
</tr>
<tr>
<td>Subsidized care (for elders and/or children)</td>
<td>2.05</td>
</tr>
<tr>
<td>Parent/caregiver groups</td>
<td>2.05</td>
</tr>
<tr>
<td>On-site care (for elders and/or children)</td>
<td>2.05</td>
</tr>
<tr>
<td>Ad hoc telecommuting</td>
<td>2.02</td>
</tr>
<tr>
<td>Paid parental leave</td>
<td>1.99</td>
</tr>
<tr>
<td>Flexible start/stop times</td>
<td>1.88</td>
</tr>
<tr>
<td>Paid maternal disability leave for childbirth</td>
<td>1.87</td>
</tr>
<tr>
<td>Paid volunteer days</td>
<td>1.85</td>
</tr>
</tbody>
</table>

N-336
**Example:** Allstate recognizes that flexibility needs vary from person to person and even for the same person, over time. As such, many different policies are offered that provide for a variety of options to support employees at various stages of life. Moreover, employees have the option to pursue more than one flex option at the same time. For example, an employee may work from home one day a week and work flex hours on the remaining days of the week. "When it comes to our flexible work options program here at Allstate, we define the word 'flexible' quite literally," said Allstate Executive Vice President and General Counsel, Michele Coleman Mayes. "We offer our law department employees an array of options because the more flexible the program, the more relevant it will be at various stages in our employees' lives. And being flexible can mean allowing an employee to pursue multiple options at the same time."
Example: One substantially sized legal department acknowledges the use of flexibility by simply providing an email each day that states who is out of the office. All attorneys who are not on site are listed as out of the office along with their location or reason. For example, it may state that an attorney is at an off-site meeting, in mediation, taking paid time off, or telecommuting. By acknowledging that telecommuting is used by many in the organization and is a legitimate reason for being out of the office, this procedure evens the playing field for all who utilize flexibility—men and women, parents and non-parents alike.
Example: One large international legal group has adopted a universal “hoteling” policy, in which no attorney has a specific office with their name on the door. Rather, office space is reserved on a weekly basis and all attorneys are required to spend 50% of their time in the office, and 50% of their time outside the office. The office “hotel” system works via an online system that tracks not only office reservations, but enables calendaring, instant messaging, and provides quick and easy access to information that business clients need about an attorney’s availability. Because this system is implemented company wide, flexible work scheduling is normalized, and face time is rendered irrelevant as an indicator of productivity.
Preventing Bias: Work-Life Balance

• **Flextime among criteria for Wal-Mart’s evaluation of law firms**
  
  “We've found that even those firms that have flexttime policies, they haven't communicated to attorneys in the firm that it's OK to use them without fear or shame.”

  – AGC Joe West
PREVENTING BIAS BY PROMOTING DIVERSITY IN THE LEGAL DEPARTMENT
Promoting Diversity

- Background on diversity
- Promoting diversity in the legal profession
- Promoting diversity in corporate legal departments
- Promoting diversity in law firms
Defining Diversity

• “In its broadest context, diversity is defined as recognizing, appreciating, valuing, and utilizing the unique talents and contributions of all individuals regardless of age, career experience, color, communication style, culture, disability, educational level or background, employee status, ethnicity, family status, function, gender, language, management style, marital status, national origin, organizational level, parental status, physical appearance, race, regional origin, religion, sexual orientation, thinking style, speed of learning and comprehension, etc.”
  • Society for Human Resource Management
Why Promote Diversity?

- **Good for business**
  - Diverse attorneys bring valuable attributes to their organizations

- **Bring in talent**
  - What makes a successful attorney is not immediately discernable from a resume, transcript or twenty-minute interview

- **Maintain talent**
  - Creating a diverse environment can help prevent turnover / reduce recruiting expenses

- **Reduce legal risk**
  - Failing in diversity can mean more workplace lawsuits

- **Enhance reputation**
  - Inclusive organization can mean greater reputation and, therefore, competitive edge
Promoting Diversity: In Legal Departments

• Do companies believe in diversity?
  – 30% reported having some type of diversity and inclusion program
    • 14% of departments with two to five attorneys reported having a diversity program
    • 87% of departments with more than 75 attorneys reported having a diversity program
Promoting Diversity: In Legal Departments

• **Who is responsible for diversity?**
  – General Counsel
  – Assistant General Counsel / Deputy General Counsel
  – Diversity Officer or Chair
  – Human Resources Director
  – Compliance Officer
Promoting Diversity: In Law Firms


  - As the Chief Legal Officers of the companies listed, we wish to express to the law firms which represent us our **strong commitment to the goal of diversity** in the workplace. Our companies conduct business throughout the United States and around the world, and we value highly the perspectives and varied experiences which are found only in a diverse workplace. Our companies recognize that diversity makes for a broader, richer environment which produces more creative thinking and solutions. Thus, we believe that promoting diversity is essential to the success of our respective businesses. **It is also the right thing to do.**

  - We expect the law firms which represent our companies to work actively to promote diversity within their workplace. In making our respective decisions concerning selection of outside counsel, we will give **significant weight** to a firm's commitment and progress in this area.
Promoting Diversity: In Law Firms

- **ACC: A Call To Action (2004)**
  
  “…we pledge that we will make decisions regarding which law firms represent our companies based in **significant part** on the diversity performance of the firms. We intend to look for opportunities for firms we regularly use which positively distinguish themselves in this area. We further **intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.**”
  
  – Roderick A. Palmore, Esq. – Founder, “Call to Action”

- Over 100 GCs of Fortune 500 companies have signed

- www.cloCallToAction.com
Promoting Diversity: In Law Firms

- **Leadership Council on Legal Diversity (2009)**
  - New organization of chief legal officers and law firm managing partners dedicated to improving diversity in the legal profession
  - “The members of the LCLD believe that having diverse talent is a critical element to having the best talent. We also recognize and respect the work of other like-minded organizations committed to achieving a more diverse profession, and we intend to work with them to make our goals a reality.”
  - [www.lcldnet.org](http://www.lcldnet.org)
Promoting Diversity: In Law Firms

• Results of corporate pressure
  – Large departments (75 or more) track billable hours
    • 53% for minority attorneys
    • 50% for women attorneys
    • 18% for LGBT attorneys
    • 11% for disabled attorneys
  – Change in relationship
    • 8% of all legal departments reported that they changed their relationship with a law firm based on the diversity metrics or efforts of the firm
Promoting Diversity: Strategies for Inclusion

“Diversity is inviting people to the dance. Inclusion is asking them to dance.”

-- Joe West, CEO of MCCA
BEST PRACTICES & MODEL LEGAL DEPTS
1. **General Counsel is committed to diversity**

- Demonstrates dedication through ongoing support and evaluation of internal and external diversity efforts
- “For legal departments, the commitment of the general counsel is essential. It is clear that the higher up in the organization the commitment to diversity, the more pervasive it becomes throughout the organization.”
10 Best Practices for Corporate Law Departments

2. **Interpret diversity very broadly**
   - Include not only race and gender, but also ethnicity/national origin, age group, sexual preference, veteran status, disabilities, parental status, lifestyle, and educational background
3. **Metrics to measure progress**
   - Plan is implemented by a diversity committee or task force comprised of members of the department.
   - “Majority of law departments interviewed have developed some form of written ‘diversity action plan’ that includes diversity initiatives, goals, and metrics in key areas, such as staffing and outside spending.”
   - “People who work in the legal field like structure and formality…They believe you are serious about it and more committed to it if you have it in writing. You also hold yourself more accountable if you have a written strategy and set written metrics.” (GC Gap, Inc.)
10 Best Practices for Corporate Law Departments

4. **Innovative recruiting techniques**
   - Announce all open positions – via Internet / on-campus
   - Require internal / external recruiters to present diverse candidates
   - Establish policies for handling applications and standardize the interview process
   - Ask women and minorities in the department to play active roles
10 Best Practices for Corporate Law Departments

5. Focused retention efforts to reduce attrition
   • Establish formal mentorship programs
   • Provide networks of communication through committees / periodic meetings
   • Create an environment in which people want to stay
     • Feel secure and accepted
     • Included as part of the team
     • Have others like them in leadership positions as role models
     • Have mentors who are interested in their success
6. **Key promotion and career development opportunities**

- Review / formalize promotion plan
- Effective evaluation and promotion processes
- Formal management training / development program
- Increase opportunities for career development through rotational job assignments
- Announce all promotional opportunities
- Include those involved with equal employment opportunities (EEO) in all promotional processes
10 Best Practices for Corporate Law Departments

7. Tie compensation to diversity objectives
   - Percentage of compensation tied directly to diversity objectives and measurable results
   - Microsoft pays bonuses for outside counsel diversity – to both the firms / senior in-house attorneys who work with them
8. **Influence diversity in outside law firms**
   - By requesting and measuring diverse counsel representation on legal matters
   - By developing preferred partner relationships based in part on diversity progress of outside firms
   - "Measuring diversity of outside law firms was one of the most notable changes found in the latest research. Many legal departments view their dollars spent with outside firms as a major way to increase legal work done by minorities and women."
10 Best Practices for Corporate Law Departments

9. **Sponsor / invest in “pipeline” programs**
   - Programs aimed at helping develop the career path for a greater number of diverse attorneys
   - Partner with selected law schools
   - Establish summer intern programs
   - Establish multicultural and achievement scholarships
   - Participate with local high schools (e.g., Career Day functions)
10 Best Practices for Corporate Law Departments

10. Network with other organizations that share the company’s diversity values

- Minority bar associations and diverse business groups
- Way to advance the diversity principles of the law department and cultivate a network of diverse lawyers for future internal hiring or outside counsel retention
- “Many of those interviewed encourage staff not to just join, but to also become active members. Many noted that specific staff held leadership roles in these organizations and help direct the diversity initiatives of the organizations.”
American Airlines
Legal Department

• “Employer of Choice” Award – MCCA
  – Out of 31 lawyers, 10 are women / 8 are minorities / 4 are openly gay
  – In the past 5 years, women and minority lawyers have won a majority of the department’s promotions

• Promotes diversity in outside counsel
  – Spent $2.3 million on legal services from minority/women-owned vendors – up from $1.2 million in prior years

• Runs mentoring program for minority law students in TX
  – Offers summer internships

“We’ve made it abundantly clear that we welcome all people...having a diverse legal staff sends the right message.”
(GC Gary Kennedy)
Sony Electronics
Legal Department

• “Employer of Choice” Award – MCCA
  – Significant percentage of managing attorneys / staff attorneys are women and minorities
  – More than half of lawyers at Tokyo HQ are women

• Starts at the top
  – Chairman of Sony Corporate focused on diversity
  – Corporate Director of Diversity coordinates company-wide diversity efforts
  – Legal Dept management works closely with the Corporate Director of Diversity - member of company’s umbrella diversity affinity group
  – Legal Dept conducts a bi-annual survey to promote firms that make diversity a priority

“Diversity was a priority from the moment I joined Sony. I inherited a legacy from former general counsel Frank Lesher that was very successful, and I built upon the great foundation he laid for diversity.” (Former GC Michael Williams)
Resources for Corporate Legal Departments

• Association of Corporate Counsel (ACC)
  – Corporate Legal Diversity Pipeline Program
  – www.acca.com

• Minority Corporate Counsel Association (MCCA)
  – In-House Resources
  – www.mcca.com

• American Bar Association (ABA)
  – Member Services
  – www.abanet.org
THANK YOU!

“The legal system can force open doors, and, sometimes, even knock down walls. But it cannot build bridges. That job belongs to you and me.”

-- Justice Thurgood Marshall
5. “Going for broke in battle over gay vows,” San Francisco Chronicle (January 23, 2006)
11. “In the Middle,” A report from AARP, July 2001
12. “And Miles To Go Before I Sleep: The Road to Gender Equity in the California Legal Profession,” University of San Francisco School of Law (Fall 1999)
13. “Corporate Clients Push Law Firms To Use More Minority Lawyers,” 1MDiversity.com
21. www.abanet.org
22. www.acca.com
23. www.mcca.com
24. www.mnsbar.com
25. www.diversityinc.com
26. www.generalmills.com
Evidence Of Racial, Gender Biases Found In Faculty Mentoring

Research found faculty in academic departments linked to more lucrative professions are more likely to discriminate against women and minorities than faculty in fields linked to less lucrative jobs.

STEVE INSKEEP, HOST:

Now, when preschoolers get to college, some will have professors who take sustained interest in guiding them. This often happens because a student reaches out for a mentor. Now let’s hear how that time-honored process suffers from bias.

Our colleague David Greene sat down with NPR’s Shankar Vedantam.

DAVID GREENE, HOST:

We should be clear of what we're talking about here. This is not professors who sort of help students acclimate to a university, give them directions. We're talking about professors who really invest in a student.

SHANKAR VEDANTAM, BYLINE: That's right, David. And perhaps the most
important thing is this is intellectual guidance. This is guidance to say: Here's how you should best use your skills.

GREENE: And what's the bias you found?

VEDANTAM: The bias has to do with how faculty seem to respond to these requests, David. Group of researchers ran this interesting field experiment. They emailed more than 6,500 professors at the top 250 schools pretending to be the students. And they wrote letters saying, I really admire your work. Would you have some time to meet? The letters to the faculty were all identical, but the names of the students were all different.

Let me read you some of the names and you can tell if you can pick up a pattern.

GREENE: Mm-hmm.


GREENE: It sounds like a diverse group. I mean these are names that come from different ethnic and racial backgrounds.

VEDANTAM: That's exactly what the researchers were trying to establish. And all they were measuring was how often professors wrote back agreeing to meet with the students. And what they found was there were very large disparities. Women and minorities systematically less likely to get responses from the professors and also less likely to get positive responses from the professors. Now remember, these are top faculty at the top schools in the United States and the letters were all impeccably written.

I spoke to Katherine Milkman at The Wharton School at the University of Pennsylvania. She conducted the study with Modupe Akinola and Dolly Chugh. And Milkman told me she was especially struck by the experience of Asian students. Here she is.
KATHERINE MILKMAN: We see tremendous bias against Asian students and that's not something we expected. So a lot of people think of Asians as a model minority group. We expect them to be treated quite well in academia, and at least in the study and in this context we see more discrimination against Indian and Chinese students that against other groups.

GREENE: I mean Shankar, I guess that disparity, specifically is surprising. But disparities at all seem surprising early in the 21st century. I mean schools have been trying hard to diversify and attract diverse pools of students for a long time now.

VEDANTAM: Yeah. And one of the ways they try to do it David, is by attracting diverse faculty. And Milkman and her colleagues looked to see whether having diverse faculty protected against this kind of bias. Here she is again.

MILKMAN: There's absolutely no benefit seen when women reach out to female faculty, nor do we see benefits from black students reaching out to black faculty or Hispanic students reaching out to Hispanic faculty.

GREENE: So any idea why all of these faculty members are discriminating between students?

VEDANTAM: Milkman found there were very large disparities between academic departments and between schools. Faculty at private schools were significantly more likely to discriminate against women and minorities than faculty at public schools. And faculty in fields that were very lucrative were also more likely to discriminate. So there was very little discrimination in the humanities. There was more discrimination among faculty at the natural sciences. And there was a lot of discrimination among the faculty at business schools. Here's Milkman again.

MILKMAN: The very worst in terms of bias is business academia. So in business academia, we see a 25 percentage point gap in the response rate to Caucasian males vs. women and minorities.

GREENE: You know, I think of business schools and business programs, you think about money. You think of private schools vs. public schools and you're thinking
private schools are generally wealthy. Is money playing a role here?

VEDANTAM: To be honest, it's not exactly clear what this means. Milkman told me there has been some research that suggests that wealth can make it harder for people to notice inequality. If you're very wealthy, for example, it's harder to notice the perspectives of people don't have very much. The truth is, we don't really know exactly what's driving this bias among the faculty of the different schools. More research is going to have to look into that.

GREENE: Shankar, thanks for coming in, as always.

VEDANTAM: Thank you, David.

INSKEEP: That's NPR's social science correspondent Shankar Vedantam, speaking with our own David Greene. And you can follow Shankar, of course, on Twitter @hiddenbrain. You can also follow this program as always, @nprinskeep and npgreene and @morningedition.

(SOUNDBITE OF MUSIC)

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Harvard Business School Dean Admits Unequal Treatment of Women

Published February 4, 2014
By Chris Hoenig

Harvard Business School has not been fair to women, and now its chief is admitting and apologizing for it.

Nitin Nohria, Dean of HBS since 2010, surprised a room full of alumni and guests at an HBS Association of Northern California event in San Francisco. Women at the school, both students and staff, felt “disrespected, left out and unloved by the school. I’m sorry on behalf of the business school,” he said. “The school owed you better, and I promise it will be better.”

To start “making it better,” Nohria committed to building a larger role for women in HBS’ signature case studies. Harvard Business School is responsible for about 80 percent of all graduate-level business-school case studies worldwide, but women only hold a protagonist role in about 9 percent of those. Over the next five years, that number will increase to 20 percent, according to Nohria.

But that benchmark wasn’t enough for the women in the audience, who let out an audible sigh at the announcement.

Other measures include a program to increase the number of women serving on corporate boards and a mentorship program for female students and alumni. “We want to make sure the school provides pathways for alumni to help each other,” Nohria said.

The dean’s comments come just after the school wrapped up the 50th anniversary of the first women being admitted to HBS—eight women enrolled at the school in 1963. Over the next 22 years, that number would grow to just 25 percent of the student body. This year, Nohria announced that there would be a record percentage of women at HBS: 41 percent of the new class.

Despite their mistreatment, women thrive at HBS—if they can get in. The top 5 percent of each year’s graduating class are recognized as Baker Scholars. A record 38 percent of those receiving the honor were women in the class of 2013.

Cathy Benko, Vice Chairman and Managing Principal at Deloitte (No. 11 in the DiversityInc Top 50), is an HBS alum. “My path was a rather circuitous one growing up in the middle of five daughters in a single-parent household. Higher education wasn’t a realistic or financially practical goal,” she told the Huffington Post. “My choice of Harvard Business School was pragmatic: It had a stellar reputation and didn’t accept GMATs.”

Other HBS alumni include former Chairman of the Joint Chiefs of Staff Admiral Mike Mullen, President George W. Bush, former Time Inc. CEO Ann Moore, General Electric Chairman and CEO Jeffrey Immelt, Grok CEO Donna Dubinsky, former General Motors Chairman and CEO Rick Wagoner, ex-jcpenney CEO Ron Johnson and self-help author Steven Covey.
INTRODUCTION
Fifty years after federal law prohibited discrimination based on gender and race and ten years after Roderick Palmore issued *A Call to Action: Diversity in the Legal Profession*, racial and gender disparities persist in the legal profession. A 2013 study commissioned by Microsoft revealed that the diversity gap in the U.S. legal profession has worsened over the past nine years, lagging be-

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* Associate Professor of Law, Valparaiso University Law School.
1 Roderick Palmore, *A Call to Action: Diversity in the Legal Profession*, ASS’N CORP. COUNS. (Oct. 2004), http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074. The Call to Action states: [W]e pledge that we will make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms. We intend to look for opportunities for firms we regularly use which positively distinguish themselves in this area. We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.

Id.
hind other professions. While the underrepresentation of minorities is a pervasive problem in the workplace, the legal profession may be the palest profession. In May 2014, The American Lawyer magazine announced that the legal profession is suffering a “Diversity Crisis.”

According to Professor Deborah Rhode,

One irony of this nation’s continuing struggle for diversity and gender equity in employment is that the profession leading the struggle has failed to set an example in its own workplaces. In principle, the bar is deeply committed to equal opportunity and social justice. In practice, it lags behind other occupations in leveling the playing field.

Many efforts have been undertaken in response to the Call to Action, such as recruitment at law schools of Historically Black Colleges and Universities and diversity scholarship programs, and many scholars have also proposed institutional reforms to address the law firm practices that disadvantage women and minorities. However, diversity has been elusive. As Brad Smith, General Counsel and Executive Vice President of Microsoft, stated in response to data from the diversity gap findings: “What is troubling is the lack of clarity about why this is happening. And until we know why, we are just guessing at the best ways to help build a more diverse legal profession.”

One reason the diversity efforts have been unsuccessful may be due to a lack of focus on a key reason for the persistent disparities—the “reforms are unlikely to stick until people understand how race actually operates in the brain.”


3 The most recent data from the Equal Employment Opportunity Commission indicate that although minorities make up 35 percent of the private sector work force, they account for only 12 percent of the executive or senior level positions. 2012 Job Patterns for Minorities and Women in Private Industry, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eoo1/2012/index.cfm (select “National Aggregate, All Industries” option; then click “Go” button) (last visited Mar. 3, 2015). A 2007 national study showed that each year more than two million professionals and managers voluntarily leave their jobs solely due to unfairness, and persons of color are more than three times more likely than heterosexual men to leave their jobs solely due to unfairness. Howard Ross, Exploring Unconscious Bias, CDO INSIGHTS, Aug. 2008, at 1, 14.

4 Julie Triedman, Big Law is Losing the Race, AM. LAW., June 2014, at 46, 46.


6 Deborah L. Rhode, From Platitudes to Priorities: Diversity and Gender Equity in Law Firms, 24 GEO. J. LEGAL ETHICS 1041, 1041 (2011).

7 Veronica Root, Retaining Color, 47 U. MICH. J.L. REFORM 575, 600 (2014).


The goal of this article is to apply social science insights to understand and address the diversity “crisis.” Emerging studies from social science demonstrate that implicit biases play a pivotal role in those “continuing inequities.” Researchers assert that disparate outcomes for different demographic groups not explained by education, experience, qualifications, or work effort are “the most rigorous evidence that substantial bias remains in the American labor market.” Social science studies demonstrate that the continued underrepresentation of women and minorities in the legal profession is unlikely due predominately to 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.

Although it is human nature to desire and believe that we act free of prejudices and biases, a complex system of unconscious judgments of people, places, and situations, of which we are unaware underlie our thinking. Lawyers, in particular, consider themselves to be “rational actors.” However, studies reveal that most white adults are more likely to associate African Americans than white Americans with violence, and most Americans are more likely to associate women with family life than with professional careers. Implicit biases affect our judgment, influence decision making, and have a real effect upon whom we befriend, employ, value, and promote.

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12 Marc Bendick, Jr. & Ana P. Nunes, Developing the Research Basis for Controlling Bias in Hiring, 68 J. SOC. ISSUES 238, 244 (2012); see Cynthia L. Estlund, Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace, 26 BERKELEY J. EMP. & LAB. L. 1, 6 (2005) (noting the “voluminous empirical evidence of the prevalence of unconscious biases against non-white minorities”). For example, “female physicians earn an average of 18 percent less than male physicians with matching credentials, medical specialties, years in practice, and work hours per week.” Bendick & Nunes, supra at 244.
13 Susan Sturm, Lawyers and the Practice of Workplace Equity, 2002 WIS. L. REV. 277, 280.
14 Id. at 280–81.
15 Andrea A. Curcio, Social Cognition Theory and the Development of Culturally Sensible Lawyers, 15 NEV. L.J. 537, 537 (2015). Professor Curcio’s studies of law students reveal a common belief among law students that lawyers are less susceptible than clients to the influence of bias. Id. at 540. The studies also suggest a belief that “legal training somehow immunizes lawyers from viewing legal problems and clients through their own cultural lenses, and from having cultural biases that affect their analyses and interactions.” Id. Professor Curcio’s article discusses how legal educators may use social cognition theory to raise awareness of how implicit biases can affect the lawyering process.
16 See Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1515 n.117 (2005).
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.” Lawyers not only contribute to the development of legal doctrine, but are also employers and counselors to other employers. Thus, in addition to incorporating the scientific knowledge of implicit bias into legal theory, as employers, lawyers have a significant role to play in reducing discrimination caused by implicit biases. The implications are significant—“the 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.”

Although the call for greater diversity in the legal profession is not new, this article highlights several new studies which demonstrate the influence of implicit bias in perpetuating the disparity. Understanding an important cause of the continued underrepresentation of women and minority groups should help individuals, law firms, governments, and organizations focus efforts on effective measures for reducing the influence of implicit bias in decision making which thwarts diversity efforts.

Section I discusses the recent statistics demonstrating that the legal profession is suffering from a “diversity crisis.” Section II provides a brief overview of the social cognition research regarding implicit biases. Section III analyzes the specific effects of implicit bias in the legal profession. Section IV summarizes some of the most compelling arguments justifying diversity efforts and highlights one reason supported by the social science research—diversity is not only a result of a less biased workplace, profession, and legal system, but it is also a means of deactivating and countering stereotypes and implicit biases. Recent survey results regarding the overwhelming lack of diversity in the legal profession highlights that our society has much work to do to achieve a system of equal opportunity for all. Fortunately, studies show that these biases are not


20  See, e.g., Wilkins & Gulati, supra note 8.

permanent, and that we can deactivate the stereotypes we hold. Section V proposes suggestions of strategies to mitigate the effects of implicit bias in the hiring and evaluation of attorneys.

I. THE LEGAL PROFESSION’S “DIVERSITY CRISIS”

The make-up of the legal profession should give us reason to question whether implicit bias has played a role in the hiring of lawyers and the appointment of judges. On the federal bench as of April 2015, two-thirds of judges are male and nearly three-quarters are white. Approximately one-third of active U.S. district court judges and 35 percent of federal courts of appeals judges are women. In state high courts, 87 percent of judges are white. In state trial courts, 86 percent of judges are white.

Recent studies reflect even more stark disparities in law practice. Although large numbers of persons of color are attending the top twenty-five law schools, a much smaller percentage join large law firms and an even smaller percentage are made partner. “From 2000 to 2013, the percentage of persons of color matriculating into the top twenty-five law schools was consistently over 23.53 percent of the student body and has recently topped 28 percent.” However, law firm demographics do not reflect these statistics. Recent studies of the legal profession revealed that the legal profession trails other professions in diversity. “Between 2003 and 2012, the percentage of African American and Hispanic attorneys inched up by a mere 0.8 percent, and they now account for just 8.4 percent of attorneys . . . .” Although the number of minorities increased in

22 Calculations are based on data from the Biographical Directory of Federal Judges, 1789–present, Fed. Jud. Center, http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx (last visited Apr. 21, 2015). Of the 816 active (non-terminated and non-retired) judges in federal courts, 546 (66.91 percent) are male and 604 (74.02 percent) are white. Id.
23 Id. (205 of 631 active district court judges and 60 of 171 active circuit court judges).
26 Root, supra note 7, at 587 (demonstrating that the lack of diversity in law firms “cannot be explained away by different employment preferences between white attorneys and black and Hispanic attorneys”).
27 Id.
29 Id.
other professions, at elite law firms, the presence of black lawyers and black partners has fallen.30 “Black lawyers accounted for 3 percent of lawyers at big firms [in 2013], a percentage that has declined in each of the last five years.”31 During the same period, “the proportion of black partners at such law firms remained stagnant at 1.9 percent.”32

Data also reveals significant gender inequalities.33

[W]omen constitute about a third of the lawyers [employed by major law firms] but under a fifth of the partners. Attrition rates are almost twice as high among female associates as among comparable male associates. Women are less likely to make partner even controlling for other factors, including law school grades and time spent out of the workforce or part-time schedules.34

The American Lawyer reported that among other causes such as increased pressures within law firms making partnership more difficult, “[r]ecent research has painted an alarming picture of the continuing presence of unconscious racial bias at firms.”35

II. BRIEF OVERVIEW OF IMPLICIT BIAS RESEARCH

Three decades of research demonstrates that once activated, implicit biases influence many of our behaviors and judgments in ways we cannot consciously access and often cannot control.36 Leading social science researchers have conducted hundreds of studies which establish “that people can possess attitudes, stereotypes, and prejudices in the absence of intention, awareness, deliberation, or effort.”37 Reasoning occurs via a “dual process” in which people employ two cognitive systems38: System 1, which is “rapid, intuitive, and error-prone,” and System 2, which is “more deliberative, calculative, slower, and often more likely to be error-free.”39 Many implicit mental processes function outside of one’s conscious focus and are rooted in System 1, including implicit memories, im-

30 Elizabeth Olson, Black Lawyers Lose Ground at Top Firms, DEALBOOK (May 29, 2014, 10:02 AM), http://dealbook.nytimes.com/2014/05/29/black-lawyers-lose-ground-at-top-firms/.
31 Id.
32 Id.
33 Rhode, supra note 6, at 1042.
34 Id. at 1042–43 (footnotes omitted).
35 Triedman, supra note 4, at 46–47.
36 This summary of implicit bias research is largely based on the discussion in Nicole E. Negowetti, Judicial Decisionmaking, Empathy, and the Limits of Perception, 47 AKRON L. REV. 693, 705–14 (2014).
38 See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (discussing System 1 and System 2).
licit perceptions, implicit attitudes, and implicit stereotypes.\textsuperscript{40} System 1 mental processes “affect social judgments but operate without conscious awareness or conscious control. These implicit thoughts and feelings leak into everyday behaviors such as whom we befriend, whose work we value, and whom we favor—notwithstanding our obliviousness to any such influence.”\textsuperscript{41}

Implicit bias can be “understood in light of existing analyses of System \textsuperscript{[1]} processes.”\textsuperscript{42} Implicit biases are unconscious mental processes based on implicit attitudes or implicit stereotypes that are formed by one’s life experiences and that lurk beneath the surface of the conscious.\textsuperscript{43} They are automatic; “the characteristic in question (skin color, age, sexual orientation) operates so quickly, in the relevant tests, that people have no time to deliberate.”\textsuperscript{44} It is for this reason that people are often surprised to find that they show implicit bias. “Indeed, many people say in good faith that they are fully committed to an antidiscrimination principle with respect to the very trait against which they show a bias.”\textsuperscript{45} Although “System 2 articulates judgments and makes choices, but it often endorses or rationalizes ideas and feelings that were generated by System 1.”\textsuperscript{46}

Implicit biases are rooted in the fundamental mechanics of the human thought process, where people learn at an early age to associate items that commonly go together and to logically expect them to inevitably co-exist in

\textsuperscript{40} Jolls & Sunstein, supra note 39, at 975.


\textsuperscript{42} Jolls & Sunstein, supra note 39, at 975.

\textsuperscript{43} Id.

\textsuperscript{44} Id.

\textsuperscript{45} Id;

In a post-civil rights era, in what some people exuberantly embrace as a post-racial era, many assume that we already live in a colorblind society. . . .

. . . [W]e have learned well from Martin Luther King, Jr. and now judge people only on the content of their character, not by their social categories. In other words, we see through colorblind lenses. . . .

This convenient story is, however, disputed. . . .

. . . We now have accumulated hard data, collected from scientific experiments, with all their mathematical precisions, objective measurements, and statistical dissections—for better and worse. The data force us to see through the facile assumptions of colorblindness.

Kang & Lane, supra note 41, at 519–20.

\textsuperscript{46} Kahneman, supra note 38, at 415 (explaining that “You may not know that you are optimistic about a project because something about its leader reminds you of your beloved sister, or that you dislike a person who looks vaguely like your dentist.”).
other settings: “thunder and rain, for instance, or gray hair and old age.” The tendency to associate related concepts with each other and the ability to answer questions such as “What is it?,” “How does it work?,” “Why is it here?,” and “What will it do?” is understood through categories and “cognitive structures” called schemas. These schemas are “mental blueprints” that allow an individual to understand new people, circumstances, objects, and their relationships to each other by using an existing framework of stored knowledge based on prior experiences. Schemas are cognitive shortcuts allowing us to comprehend new situations and ideas without having to draw inferences and to understand relationships for the first time. When we see or think of a concept, the schema is activated unconsciously. For example, if an individual is introduced as a judge, a “judge schema” may be activated and we might associate this person with wisdom or authority, or past encounters with judges.

People have schemas for everything, including schemas for ourselves (“self-schemas”), for other people (“person schemas”), roles people assume (“role schemas”), and event schemas, or scripts, which help us to understand how a process, or event, occurs. Self-schemas contain our knowledge and expectations about our own traits. Person schemas “represent knowledge structures about . . . characteristics, behaviors, and goals” of other individuals. We classify individuals based on their characteristics and the inferences we make based on those traits. “Role schemas help to organize our knowledge about ‘the set of behaviors expected of a person in a particular social position.’ . . . Like self and person schemas, role schemas help us to make sense of and predict people’s characteristics and behaviors.” When we encounter a person, we classify that person into numerous social categories, such as gender, (dis)ability, age, race, and role. For example, people develop racial schemas

50 Id.
51 Chen & Hanson, supra note 48.
52 Id. at 1137.
53 Id. at 1134.
54 Id. at 1135.
55 Id.
56 Id. at 1137 (footnote omitted) (quoting SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 119 (1991)).
57 Kang, supra note 16, at 1499.
which trigger implicit and explicit emotions, feelings, positive or negative evaluations, and thoughts or beliefs about the racial category, such as generalizations about their intelligence or criminality.\(^5\) Because our individual experiences create our schemas, each person’s script for a particular situation may be different. People consciously and unconsciously draw on their knowledge, creating different cognitive frames that produce “different information” about the same event.\(^5\) Scripts not only function as cognitive shortcuts that provide meaning to a set of events, but they also reinforce traditional cultural and societal values. When an individual’s cognitive mind unconsciously selects a script within which to interpret the situation, that individual’s judgments will be based on the assumptions derived from the social knowledge embedded in the script rather than on the unique characteristics of the particular situation.\(^6\)

For example, studies have proven perceptual differences of certain situations among racial groups and between men and women. One such study was conducted by the Heldrich Center for Workplace Development at Rutgers University, which interviewed three thousand employees on various workplace equality issues.\(^6\) “Half of the African American respondents said that ‘African Americans are treated unfairly in the workplace,’ while just 10 [percent] of white respondents agreed with that statement. Thirteen percent of nonblack people of color shared this perception.”\(^6\) There is also evidence from polls, while mixed, which generally suggests that men and women perceive discrimination differently. For example, a 2007 survey of attorneys and judges conducted by the New Jersey Supreme Court Committee on Women in the Courts found that 86 percent of male respondents felt attorneys were treated the same regardless of gender, while only 48 percent of the female respondents agreed.\(^6\)

When asked about the perception of racial bias, 84 percent of male respondents

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58 Id. at 1500.

59 See Russell K. Robinson, Perceptual Segregation, 108 COLUM. L. REV. 1093, 1118 (2008) (explaining how white and black observers would perceive differently a scenario in which an African American family is seated near the back of the restaurant and for ten minutes, the parents attempt to get the waiter’s attention to ask for menus and to order food). Professor Robinson predicts that white participants would likely state that they did not consider that the placement of the family’s table might have a racial correlation, while “black observers might fill in the informational gaps with the assistance of a schema, such as, ‘fancy restaurants in suburbs are likely to be a site of discrimination against black customers.’” Id. at 1118–19 (footnote omitted).


62 Id. at 1107.

felt that attorneys were treated the same regardless of race, while only 31 percent of respondents of color agreed.64

One type of bias is affected by our attitudes and stereotypes regarding social categories, such as genders, ethnicities, and races.65 An attitude is “an association between some concept, [such as] a social group,” and a positive or negative valence.66 Prejudice can be defined as an association between social objects developed from memory and positive or negative valence.67 Similarly, stereotypes are associations between concepts, such as social groups, and attributes.68 In each case, the associations are automatically accessed in the presence of objects.69 Stereotypes emerge early in life (as young as three) and are caused by a variety of sources such as early experiences, family, friends, community, and exposure to stereotypes from society and culture.70 Even absent a conscious bias against women or minorities, everyone perceives, processes, remembers, and synthesizes information about people through the lens of these stereotypes.

As with other schemas, stereotypes can facilitate the rapid categorization of people and allow us to “save cognitive resources.”71 However, researchers explain that “the price we pay for such efficiency is bias in our perceptions and judgments,”72 and intuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system. Professor Jerry Kang describes the potential problem:

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with [b]lack

64 Id. at 7 tbl.2.
65 Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124, 1128 (2012).
66 Id.
68 Kang et al., supra note 65; Rudman, supra note 67.
69 Rudman, supra note 67.
men, such that we see them as more likely to have started the fight than to have responded in self-defense.\(^73\)

The most widely regarded social cognition research on implicit racial bias comes from Mahzarin Banaji, Anthony Greenwald, and their colleagues, who began using the Implicit Association Test (“IAT”) in the 1990s.\(^74\) The IAT “pairs an attitude object (such as a racial group) with an evaluative dimension (good or bad) and tests how response accuracy and speed indicate implicit and automatic attitudes and stereotypes.”\(^75\) For example, in one task, participants are told to quickly pair together pictures of African American faces with positive words such as “good,” and “pleasant.”\(^76\) The strength of the attitude or stereotype is determined by the speed at which the participant pairs the words.\(^77\) The results from millions of IATs taken on the IAT project’s website reveal that most Americans implicitly associate black people with negative attitudes, such as “unpleasant,” and stereotypes, such as “aggressive” and “lazy.” Regarding gender, while women are associated with “family,” men are more associated with “career.”\(^78\)

Implicit bias is not merely “a cognitive glitch,”\(^79\) but a reflection of cultural issues that have a real-world impact. Regardless of conscious and explicit desires for unbiased decision making, implicit biases predict behavior and “[t]hose who are higher in implicit bias have been shown to display greater discrimination.”\(^80\) An experiment featuring doctors making patient assessments provides an example of discriminatory behavior predicted by implicit bias measures.\(^81\) Physicians with stronger implicit anti-black attitudes and stereo-


\(^74\) Anthony Greenwald et al., Measuring Individual Differences in Implicit Cognition: The Implicit Association Test, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998); see also Greenwald & Banaji, supra note 41.

\(^75\) Levinson, supra note 70, at 420.

\(^76\) Id.

\(^77\) Id.

\(^78\) Id.

\(^79\) Levinson, supra note 73, at 3. Evidence of the pervasiveness of implicit bias comes from Project Implicit, a research website operated by research scientists, technicians, and laboratories at Harvard University, Washington University, and the University of Virginia. About Us, PROJECT IMPPLICIT, http://projectimplicit.net/about.html (last visited Mar. 10, 2015).

\(^80\) Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POL’Y REV. 149, 153 (2010). Empirical evidence from other social science studies also shows that implicit bias is pervasive in our society. See, e.g., Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989).

\(^81\) Lane et al., supra note 41, at 430.
types were not as likely to prescribe a medical procedure for African Americans compared to white Americans with the same medical profiles.82

Other findings that implicit biases, as measured by the IAT, predict behavior in the real world83 are that implicit bias predicts the rate of callback interviews;84 implicit bias predicts awkward body language which could influence whether people feel that they are being treated fairly or courteously;85 implicit bias predicts how we read the friendliness of facial expressions;86 implicit bias predicts more negative evaluations of ambiguous actions by an African American;87 and implicit bias predicts more negative evaluations of agentic (i.e., confident, aggressive, ambitious) women in certain hiring conditions.88 These studies are instructive for analyzing how implicit biases operate to disadvantage minority attorneys in hiring and evaluations.

III. THE EFFECT OF IMPLICIT BIAS ON DIVERSITY IN THE LEGAL PROFESSION

It is becoming more widely acknowledged that implicit bias plays a role in the racial and gender disparities regarding wages and position of authority in the workforce. For example, a March 2013 report released by the U.S. Equal Employment Opportunity Commission listed “[u]nconscious biases and perceptions about African Americans” as the first of seven “obstacles to achieving equality for African Americans in the federal workforce,” declaring that the more subtle discrimination that exists in our current society “can often be directly attributable to unconscious bias.”89 As the above discussion proves, no one is immune from the influence of implicit bias.

Many studies conducted in the employment context demonstrate how unconscious biases impact business decisions. Translated to the law firm setting, these studies help explain how the legal profession’s diversity crisis can be attributed, at least in part, to the implicit biases of hiring partners and other deci-

82 KANG, PRIMER, supra note 73, at 4.
87 Laurie A. Rudman & Peter Glick, Prescriptive Gender Stereotypes and Backlash Toward Agentic Women, 57 J. SOC. ISSUES 743, 743 (2001).
sion makers. “Second-generation” implicit bias in law firms includes “structural bias,” such as subjective hiring and evaluation processes. These processes, which trigger reliance on implicit bias, affect entry into and promotion in the legal profession and make it more difficult to ensure a level playing field for diverse associates.

A. Implicit Bias in Attorney Hiring

Numerous social cognition studies have demonstrated that the hiring process is rife with implicit bias pitfalls. Several studies have shown the influence of racial and gender stereotypes on the evaluation of candidates in different industries. For example, in one study researchers manipulated perception of race by submitting resumes of job applicants with “white-sounding names” and applicants with “black-sounding names.” Results showed that “for two identical individuals engaging in an identical job search, the one with an African-American name would receive fewer interviews.” Another study found that a hiring manager’s race affects the hiring of new employees. The findings suggest that, when a black manager is replaced by a nonblack manager in a typical large retail store, the share of new hires that is black falls roughly from 21 percent to 17 percent and the share that is white rises from 60 percent to 64 percent. In a study of leading symphony orchestras, when auditions of musicians were conducted behind screens so that judges could not see the applicants, more women were hired than those conducting auditions in the open.

One reason to explain the studies demonstrating how minorities and women are disadvantaged in the hiring process is the persistence and pervasiveness of stereotypes. Studies have demonstrated that in evaluating members of a stereotyped group, individuals pay more attention to information that is consistent with a stereotype and less attention to stereotype-inconsistent information, that people seek out information that is consistent with the stereotype, and that people are better able to remember information that is consistent with the stereo-

90 Root, supra note 7, at 606.
92 Id. at 1006.
94 Id. at 590–91. Such findings are consistent with perceptions of bias reported by minorities. In one survey with a nationally representative sample, 81 percent of African Americans, 60 percent of Hispanics, and 53 percent of Asian respondents felt that they had a lower chance of promotion to a managerial position than an equally qualified white. See Bendick & Nunes, supra note 12, at 245.
type. Individuals also make memory errors consistent with stereotypes even when recalling objective facts such as test scores or grade point averages.

Stereotypes are resistant to change because our perceptions become impervious to new information. People interpret ambiguous information to confirm stereotypes and are unaffected by information that a stereotype is invalid. When we discover evidence that supports our desired conclusions, we readily accept it. “[b]ut when we come across comparable evidence that challenges our desired conclusions, we . . . work hard to refute it.”

Coupled with the stubbornness of stereotypes, the amorphous characteristics of a “good” lawyer and the nature of law practice make law firm hiring susceptible to implicit bias. Lawyering requires “good judgment,” the ability to be, among other things, “a good judge of character,” “a quick and accurate calculator of costs and benefits,” “an empathetic listener,” “a team player,” and “a salesperson.” Furthermore, individual lawyers will place different values on the required traits. Because these skills are developed “on the job,” and credentials such as law school grades are not strongly correlated with these skills, at the recruiting stage decision makers must “rely on predictors of future success as opposed to a record of demonstrated ability.”

In this context, stereotypes create expectations of what constitutes potential. For example, several studies have found that people inside and outside the legal profession share common stereotypes of lawyers as assertive, dominant, ambitious, competitive, and argumentative. Professor Kang and his co-authors explain that these stereotypes of lawyers are both gendered and racialized because the traits and behaviors of ideal litigators typically are used to describe white male professionals. The authors suggest that the impact of these stereotypes leads to discrimination against those who do not fit this mold, such as Asian Americans. In the employment context, a hiring partner who envisions an ideal litigator as white will be less likely to deem an Asian American litigator as competent and will therefore be more reluctant to hire an Asian American as a litigation associate.

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96 Fiske, supra note 71, at 371.
97 See id. (stating that memory structure and guessing favor congruency).
98 Nugent, supra note 72.
99 Bendick & Nunes, supra note 12, at 240.
101 Kang, supra note 16, at 1515.
102 Wilkins & Gulati, supra note 8, at 524–25.
103 Id. at 525–26.
105 Id.
106 Id. at 892.
107 Id.
Similarly, stereotypes linking women to the home and family have an effect on women’s prospects for hiring and career advancement.108

Ironically, when a decision maker “believes himself to be objective, such belief licenses him to act on his biases.”109 In one study, participants choose either a candidate, “Gary” or “Lisa,” for the job of factory manager. “Both candidate profiles, comparable on all traits, unambiguously showed strong organizational skills but weak interpersonal skills. Half the participants were primed to view themselves as objective. The other half were left alone as control.”110 This was done by asking participants to rate their own objectivity.111 More than 88 percent of the participants “rated themselves as above average on objectivity.”112 Those in the control condition gave the male and female candidates statistically indistinguishable hiring evaluations.113 However, those who were manipulated to think of themselves as objective evaluated the male candidates more highly.114 The result was not because of any difference in the candidates’ merit. Instead, the discrimination was a result of disparate evaluation, in which “Gary” was rated as more interpersonally skilled than “Lisa” by those primed to think of themselves as objective.115 The study demonstrates that if a hiring partner views himself as objective, his thinking will be more influenced by implicit biases.116

The interview process is particularly susceptible to the influence of implicit bias. Research has demonstrated that implicit bias can compel people to favor those who are most similar to themselves, thereby leading to a tendency for managers to hire those whose qualities align with their own.117 According to behavior expert Ori Brafman, “research shows that interviews are poor predictors of job performance because we tend to hire people we think are similar to us rather than those who are objectively going to do a good job.”118 Interview-

109 Kang et al., supra note 65, at 1173.
110 Id.
112 Id. at 209.
113 Id. at 210–11.
114 Id. at 211.
115 Id.
116 Kang et al., supra note 65, at 1173. People also view others as being more biased than themselves by the ideologies of their respective political in-groups. Emily Pronin, Perception and Misperception of Bias in Human Judgment, 11 TRENDS IN COGNITIVE SCI. 37, 38 (2007).
117 Bendick & Nunes, supra note 12, at 240.
ers frequently evaluate candidates based on a vague, intangible feeling or hunch about whether the applicant is a good “fit” in the firm.\footnote{Wilkins & Gulati, supra note 8, at 554.} These “hunches” will be based on implicit biases. The tendency to engage in “racial loyalty” may explain why an interviewer may feel an indefinable affinity for a member of his own race.\footnote{Id.} “[T]o avoid attributing negative characteristics to white people and himself,” the interviewer will unconsciously attribute positive stereotypes of white people (despite contradictory evidence) such as “superior, more qualified . . ., more intelligent, more deserving and more hard-working.”\footnote{Id.} To bolster his own self-image, the interviewer is inclined to prefer the white applicant over the black applicant.\footnote{Id.}

Significantly, implicit biases cause a person to make different judgments of identical actions or objective states depending on one’s group membership.\footnote{Id.} For example, people with higher implicit bias towards certain groups judged ambiguous actions and facial expressions by members of that group more negatively.\footnote{Id.} Empirical research also demonstrates that when whites evaluate blacks, and when males evaluate women, they frequently discount positive acts and achievements as products of luck or special circumstances.\footnote{See Rhode, supra note 6, at 1050–51.} In contrast, achievements of white men are more likely to be attributed to internal capabilities.\footnote{Id. at 1051.} The social science research thus explains how hiring decision makers may honestly perceive themselves as making unbiased decisions reflecting objective differences in applicants’ qualifications when, in fact, they are influenced by implicit biases.

**B. Implicit Bias and Lawyer Evaluations**

According to The American Lawyer’s “Diversity Crisis” report, the root of the legal profession’s firm diversity crisis can be traced to the first years of an associate’s career and structural bias that places women and minorities at a critical disadvantage. As David Wilkins and G. Mitu Gulati explain in their seminal article regarding the lack of diversity in elite corporate law firms,\footnote{Wilkins & Gulati, supra note 8, at 572.} the pyramid system of law firms ensures that the majority of associates leave without achieving partnership\footnote{Id. at 572.} and creates a “tournament”\footnote{Id. at 519.} for opportunities and...
promotion in which white male associates are more likely to be selected for training and work on the most important assignments. 130 This occurs because most law firms utilize an informal assignment process that lacks standardization or systematic checks to ensure that all similarly situated associates receive the same quality of work. At these firms, distribution of assignments is socially constructed because partners select associates to work on certain matters based on existing relationships. 131 A socially constructed assignment process is influenced by implicit bias because partners, who are predominantly white males, distribute assignments to those with whom they naturally felt an affinity—associates who were most like themselves. This process denies diverse associates equal opportunities to work on important projects and develop relationships with clients, which makes it difficult or impossible for them to demonstrate the potential required to make partner. 132 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. 133 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.” 134 Associates of color who responded to a study recently conducted by Twin Cities Diversity in Practice also identified the lack of opportunity to work on important matters and a “lack of relationships” as reasons for leaving their previous firms. 135 Likewise, a Deloitte & Touche study on firm assignments for women found that “fewer women were assigned high-profile, high-revenue assignments because male partners made certain negative assumptions about the type of work they wanted.” 136 “A similar study by the New York City Bar Association found that women attorneys perceived that they were more frequently assigned pro bono matters, resulting in reduced opportunities to network with potential clients.” 137

As studies have shown, stereotypes are activated, leading to biased employment decisions, when candidates are evaluated against ambiguous and subjective criteria. This is one of the pitfalls of the law firm evaluation process. As discussed in Section II, stereotypes provide structure and meaning and they shape perceptions most when information is subject to multiple interpretations. For example, subjective judgments of interpersonal skills and collegiality are

130 Id. at 499–500.
132 Id. at 976–77.
133 Id. at 977.
134 Id.
135 Root, supra note 7, at 595–96.
136 Diaz & Dunican, supra note 131, at 977.
137 Id.
vulnerable to implicit biases. The nature of lawyering predisposes lawyers to evaluate each other using a subjective system of evaluation. Legal work contains discretionary judgment, a product of external factors and “the lawyer’s own character, insight, and experience.” “[G]ood lawyering is a practice that ultimately cannot be reduced to principles or rules that can be taught in the classroom”; therefore, judgments about a lawyer’s quality is inherently subjective and arbitrary. Without specific metrics to objectively evaluate the quality of an associate’s work, stereotypes and implicit biases will influence one’s judgment.

Higher rates of bias tend to occur in employment evaluations where the characteristics that are stereotypical for the job contradict with the gender or race stereotype. Stereotypes are more salient and influential in occupations such as a law firm partner, which is culturally associated with a particular gender or ethnicity (white males) and where women or minorities are underrepresented. In such roles, traditional stereotypes are “magnified by the stereotypical association between leadership roles and masculinity (with respect to gender) and leadership roles and Caucasians (with respect to ethnicity).”

Women and minorities who work in white male-dominated domains, such as the legal profession, may experience a “backlash” for violating stereotype expectations. For women, in particular, this often results in a paradox or “double bind” because they are penalized in their performance evaluations both for being too masculine and for not fitting the masculine stereotype for the job. Studies show, for example, that when female leaders behave in a “directive, autocratic style,” they receive more negative evaluations. The conflicting expectations for female and male judges was aptly stated by Lynn Hecht Schafran: “A male judge who strictly controls his courtroom runs a tight ship. His female counterpart is a bitch.”

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139 Wilkins & Gulati, supra note 8, at 524.
140 Id.
143 Id. at 28.
144 Ridgeway, supra note 141, at 649.
146 KNOWLTON & REDDICK, supra note 142, at 28.
147 Lynn Hecht Schafran, Not from Central Casting: The Amazing Rise of Women in the American Judiciary, 36 U. TOL. L. REV. 953, 960 (2005); Justin Levinson and Danielle Young conducted an empirical study of law students at the University of Hawai‘i to test the
Similarly, because the job of a law firm partner is perceived to be stereotypically masculine, “that perception would activate assumptions that associate competence with masculinity, so that men are perceived to be more competent than women.”\textsuperscript{148} Regarding ethnicity, if individuals create an association between white attributes (for example, assertiveness, ambitiousness, competitiveness, masculinity, and physical appearance), then as a consequence, white male qualities become the lodestar of a successful attorney.

Implicit biases also influence attorney evaluations due to the tendency to notice and recall information that confirms prior assumptions rather than information that contradicts those assumptions.\textsuperscript{149} “For example, when employers assume that a working mother is unlikely to be fully committed to her career, they more easily remember the times when she left early than the times when she stayed late.”\textsuperscript{150} Studies also show that attorneys who assume that attorneys of color have achieved success due to preferential treatment, and not solely because of merit, will more readily recall their errors rather than their contributions to the firm.\textsuperscript{151}

One study demonstrated more directly how implicit bias remains pervasive because people seek out information that confirms their preconceptions. Nextions, a law firm diversity consultant and leadership coaching firm, found that supervising lawyers were more likely to perceive African American lawyers as having subpar writing skills in comparison to their Caucasian counterparts.\textsuperscript{152} In its study, Nextions inserted twenty-two 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.\textsuperscript{153} The memo was sent to sixty partners who had agreed to participate in a writing analysis study; half received a memo identifying the author as African American and the other half received a memo noting that the associate was white.\textsuperscript{154} The hypothetical black associate received a significantly lower score on average than the hypothesis that implicit gender bias drives the continued subordination of women in the legal profession. The study tested whether law students hold implicit gender biases related to women in the legal profession and whether these implicit biases predict discriminatory decision making. Levinson & Young, supra note 108, at 3. As the authors predicted, the study “found that a diverse group of both male and female law students implicitly associated judges with men, not women, and also associated women with the home and family.”\textsuperscript{1d}

\textsuperscript{148} Knowlton & Reddick, supra note 142, at 28.
\textsuperscript{149} Rhode, supra note 145.
\textsuperscript{150} Rhode, supra note 6, at 1052; see also Rhode, supra note 145, at 6.
\textsuperscript{151} Rhode, supra note 6, at 1052.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
hypothesized white one and partners, regardless of their race or gender, provided more positive feedback to the white associate, and found fewer mistakes on average in the paper.

The study concluded that “racially-based perceptions about writing ability . . . unconsciously impact [partners’] ability to objectively evaluate a lawyer’s writing.” The findings of the study thus illustrated confirmation bias—that, “[w]hen expecting to find fewer errors, we find fewer errors.” The study participants unconsciously found more of the errors in the “African American” memo, because they expected to find more errors. Implicit biases resulted in more discovered errors which affect the final evaluation of the attorney’s work product, and the ultimate evaluation of the attorney.

A minority law firm partner explained the impact of implicit biases on the evaluation of diverse associates:

I almost don’t want to recruit students of color here [into the firm] anymore. I bring these talented young people here, and I know that, behind the scenes, people are setting the stage for them to fail. No matter how qualified, no matter how much star quality these recruits have, they are going to be seen as people who will most likely not cut it. So, they are under the microscope from the first moment they walk in. And, every flaw is exaggerated. Every mistake is announced. And, it’s like, aha. As soon as a minority makes a mistake, they immediately say that that’s what they were expecting all along.

IV. REASON FOR CONCERN: THE IMPORTANCE OF DIVERSITY

The economic and ethical justifications for diversity in the legal profession are numerous and have been explored in detail by other scholars, courts, and organizations. In support of increased diversity across the legal profession, the Institute for Inclusion in the Legal Profession has stated, “[d]iversity and inclusion strengthens the profession and enhances its ability to serve clients, solve problems, resolve conflicts, and dispense justice. . . . It makes us better

155 Id. The same memo averaged a 3.2/5.0 rating under the hypothetical “African American” Thomas Meyer and a 4.1/5.0 rating under hypothetical “Caucasian” Thomas Meyer. Id.
156 Id. For example, an average of 2.9/7.0 spelling/grammar errors were found in “Caucasian” Thomas Meyer’s memo in comparison to 5.8/7.0 spelling/grammar errors found in “African American” Thomas Meyer’s memo. An average of 4.1/6.0 technical writing errors were found in “Caucasian” Thomas Meyer’s memo in comparison to 4.9/6.0 technical writing errors found in “African American” Thomas Meyer’s memo. Id.
157 Id.
158 Id.
159 Id.
161 See, e.g., Rhode, supra note 6, at 1060–64 (analyzing the economic rationales for diversity).
lawyers and judges.162 The ABA has identified four rationales to ensure a diverse bench and bar:163. The Democracy Rationale (“A diverse bar and bench create greater trust in the mechanisms of government and the rule of law.”);164 The Business Rationale (“[C]lients expect and sometimes demand lawyers who are culturally and linguistically proficient.”);165 The Leadership Rationale (“Individuals with law degrees often possess the communication and interpersonal skills and the social networks to rise into civic leadership positions, both in and out of politics.”);166 and The Demographic Rationale (“Our country is becoming diverse along many dimensions and we expect that the profile of LGBT lawyers and lawyers with disabilities will increase more rapidly. With respect to the nation’s racial/ethnic populations, the Census Bureau projects that by 2042 the United States will be a ‘majority minority’ country.”).167

A lack of diversity can affect the public’s perception of equal treatment and fairness by the legal system. Minority groups consistently report feeling that the courts treat them unfairly and worse than majority groups. A study commissioned by the National Center for State Courts found that more than two-thirds of African Americans thought that African Americans received worse treatment than others in court.168 A majority of all California respondents stated that African Americans and Latinos usually receive less favorable results in court than others.169 Approximately two-thirds believed that non-English speakers also receive less favorable results, and nearly 70 percent of African Americans thought that African Americans receive unequal treatment.170 “The driving force behind these actual and perceived disparities may be more than meets the eye.”171 As the National Center for State Courts has reported, persistent public perception of unfairness may be understood in light of implicit bias research.172 The implications of these perceptions are numerous and significant. For example:

164 Id.
165 Id.
166 Id.
167 Id.
169 Id. at 37.
170 Id. at 37–38.
172 CASEY ET AL., supra note 21, at 1. “Thus although courts may have made great strides in eliminating explicit or consciously endorsed racial bias, they, like all social institutions, may still be challenged by implicit biases that are much more difficult to identify and change.” Id. at 2.
Attitudes toward the courts can affect the way individuals perceive their role in the justice system: their willingness to comply with laws, report crimes, file legal suits, serve as jurors, and so on. In short, a positive public perception of the courts is critical to the maintenance and operation of the judicial system. Therefore, a “lack of trust severely impacts the criminal justice system’s ability to serve and protect society.” The lack of representation of minorities as employees and administrators of the justice system [also] leads to a perception of injustice.

Diversity in the legal profession enhances the scope and quality of legal representation for many individuals who are racial minorities. Given this country’s history of discrimination, it is crucial that a client have the ability to choose a lawyer with whom he or she feels comfortable. It is not simply that the availability of such lawyers affects the quality of representation that a minority client receives; it may determine whether that person seeks a “more accepting community, sensitive to racial and ethnic issues and the unrecognized biases of those in the majority.” Diversity thus enhances courts’ credibility among minorities who “would otherwise limit their horizons and aspirations.”

Implicit social cognition research indicates that implicit bias in decision makers can be reduced through exposure to individuals who are different from

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173 Elizabeth Neely, Racial and Ethnic Bias in the Courts: Impressions from Public Hearings, COURT REV., Winter 2004, at 26, 26 (footnote and internal quotation marks omitted).
174 Robert M.A. Johnson, Racial Bias in the Criminal Justice System and Why We Should Care, CRIM. JUST., Winter 2007, at 1, 31.
175 In 2002, the Nebraska Minority and Justice Task Force, an organization established by the Nebraska State Bar Association and the Nebraska Supreme Court, conducted a comprehensive study of racial and ethnic bias in Nebraska’s justice system by conducting eight public hearings in five cities across Nebraska between January and May of 2002. Neely, supra note 173, at 30. For example,

As one African-American woman who has worked in the court system for over thirty years explained: People’s perceptions are that when they go in to any system and they do not see anybody that looks like them, and that’s whether they are African American, Native American, Hispanic, Latino, Asian, when they come in that system, if they don’t see people that look like them administering those systems, working in those systems, then I think the perception automatically [is] that they’re not going to get fair treatment. But when people come in and they are talking to me or they come into the office and they see other people in that office that are people of color, I think it kind of gives them a different notion, . . . as opposed to where you come in or when you come into a courtroom and when you don’t see anybody else but whites in the system, and, I mean from the time you walk in the door to the clerk’s office to the bankruptcy court to . . . the judge’s office . . . for that person I think starts with their perception of am I getting a fair trial, am I getting a fair shake? And how can I possibly because, you know, the entire system’s already set up against me.

Id. at 30.
us. In other words, diversity is not only a result of a less biased workplace, profession, and legal system, but it is also a means of deactivating and countering stereotypes and implicit biases. The “Social Contact Hypothesis” postulates that stereotypes and prejudice can be reduced when people of different social categories have face-to-face interaction under certain conditions because the inter-group contact reduces the salience of race and sex. Inter-group contact reduces people’s anxiety about each other, promotes empathy, and encourages friendships, all of which result in more positive attitudes toward one another.

For example, in one study, white subjects were asked to “take the race IAT and report the number of their close outgroup friends: African-Americans in one experiment and Latinos in another . . . . The researchers found negative correlations between the number of interracial friendships and level of implicit bias.”

Exposure to members of minority groups in roles of authority has also been shown to counter stereotypes. For example, several studies have shown that when a test administrator is black, white participants tend to exhibit less automatic stereotype activation on implicit bias tests. Similarly, women students who attended women’s colleges where they had frequent contact with women faculty showed less implicit bias after one year than those who attended coeducational institutions and had less frequent contact with women leaders. Thus, a diverse workforce can destroy detrimental stereotypes and disprove the “myth that certain groups are inherently incapable of attaining certain accomplishments or performing certain jobs.” As Justice Sandra Day O’Connor noted in her majority opinion in *Grutter v. Bollinger*, racial diversity has the potential to destroy stereotypes about the intellectual capacity and viewpoints of both minority and majority members.

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179 Kang & Banaji, *supra* note 17, at 1102–03.


182 Kang & Banaji, *supra* note 17, at 1103 (citing Christopher L. Aberson et al., *Implicit Bias and Contact: The Role of Interethnic Friendships*, 144 J. SOC. PSYCHOL. 335, 340, 343 (2004)).


185 Chen, *supra* note 177.

V. MITIGATING THE INFLUENCE OF IMPLICIT BIAS

As the above section explained, a diverse and inclusive workforce is not only a goal of the profession, but also a means of reducing stereotypes and implicit biases. This section discusses several strategies for mitigating the influence of implicit bias in hiring and evaluation of lawyers in law firms. Fortunately, research shows that “[t]he path from implicit bias to negative behavior does not appear immutable.”\footnote{188} Experiments conducted by Irene Blair and Mahzarin Banaji revealed that while stereotype activation is an automatic process, people can control or eliminate the effect of stereotypes on their judgments if they have the intention to do so and their cognitive resources are not over-constrained.\footnote{189} Because interventions to increase diversity will be ineffective unless implicit biases are addressed, mitigating the effects of implicit bias on behavior must involve awareness of implicit biases and motivation to behave in a nonprejudiced manner.\footnote{190}

As Professor Godsil suggests, interventions to reduce the influence of implicit bias are “more likely to be successful if they are accompanied by information about how implicit bias and racial anxiety work.”\footnote{191} Without this information, most white lawyers will think they are immune from treating people differently based on race and if this issue is not addressed expressly, any changes proposed to address race are unlikely to be integrated into firm practice.\footnote{192} In fact, studies reveal that there is a lack of consensus among gender and racial groups regarding the necessity of interventions to increase diversity.

\footnote{187} This Article does not analyze whether disparity in the legal profession qualifies or should qualify as discrimination pursuant to Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex, race, religion, and national origin. 42 U.S.C. § 2000e (2012). Rather, it explores non-legal tools for addressing the effects of implicit bias in employment decisions. See Rhode, supra note 6, at 1065–69 (discussing the limits of discrimination law in addressing diversity issues). Studies have shown that coercion is ineffective and counterproductive in mitigating implicit bias. Bartlett, supra note 180, at 1936–41. “The motivation research . . . , however, suggests that law alone will not activate the responses need[ed] to combat subtle, discriminatory behaviors, and may even undermine them.” Id. at 1941.

Strong legal standards can deter provable instances of discrimination and compensate victims, and they define desirable norms. The law, however, cannot reach the more hidden and ambiguous forms of discrimination, no matter how forcefully it tries to prohibit them. Instead of relying entirely on threats and coercion, which may even make discrimination worse, nondiscrimination strategies must also take account of people’s need for a sense of autonomy, competence, and relatedness.

\footnote{188} Lane et al., supra note 41, at 437; see Irene V. Blair, The Malleability of Automatic Stereotypes and Prejudice, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 242 (2002).


\footnote{190} Id. at 1142, 1159; Natalie Bucciarelli Pedersen, A Legal Framework for Uncovering Implicit Bias, 79 U. CIN. L. REV. 97, 143 (2010).

\footnote{191} Godsil, supra note 10, at 26; see also Rudman et al., supra note 181, at 856.

\footnote{192} Godsil, supra note 10, at 26.
For example, in a survey by the ABA Commission on Women, “only 27 [percent] of white men felt strongly that it was important to increase diversity in law firms, compared with 87 [percent] of women of color and 61 [percent] of white women.”  

Another survey revealed that only 11 [percent] of white lawyers felt that diversity efforts were failing to address subtle racial bias, compared with almost half of women of color. Only 15 [percent] of white men felt that diversity efforts were failing to address subtle gender bias, compared with half of women of color and four out of ten white women.

This research suggests that law firm leaders underestimate the impact of unconscious bias and overestimate the effectiveness of current policies. Furthermore, this generation of new lawyers believes that our society has moved past racial bias.

[This generation has] learned about racism as an evil that occurs only when perpetrators with bad intent target their hatred against people of differing races, instead of as a systemic force that is both attitudinal and institutional. . . . Similarly, they have grown up believing that women have equal access to promising opportunities within the workplace.

Unfortunately, these beliefs are not supported by reality.

“In addition, changes recommended to address race can cause tension if they are not accompanied by a persuasive justification.” Partners may feel they are being subtly accused of being racist” and diverse associates “may feel self-conscious that their presence is triggering resentment or pity.” “Policies that focus on recruitment of underrepresented groups . . . are better accepted among both beneficiaries and potential opponents of policies” if the justifications are explained.

In contrast, policies justified only by underrepresentation provoke resistance from majority employees who believe protected groups are

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193 Rhode, supra note 6, at 1049.
194 Id. (footnote omitted).
195 See Deana Pollard Sacks, Implicit Bias-Inspired Torts, in IMPLICIT RACIAL BIAS ACROSS THE LAW, supra note 11, at 61, 79. (“Implicit bias poses a constant, pervasive threat to society and causes much silent suffering. People who are not subject to common stereotypes and do not feel the sting of unfair assumptions and bias-inspired injustice may not understand what all the fuss is about, which is precisely why implicit bias must be brought into the public spotlight.”).
196 Rhode, supra note 6, at 1049.
198 Godsil, supra note 10, at 26. For example, diverse talent brings many benefits – “not only in terms of academic abilities, but also in terms of providing new and different perspectives toward their practice and the work environment.” John Park, Setting the Right Tone at the Top When Promoting Law Firm Diversity, in BUILDING AND ENCOURAGING LAW FIRM DIVERSITY 39, 44 (2014).
199 Godsil, supra note 10, at 26.
200 Bartlett, supra note 180, at 1967–68.
being favored to their detriment.\textsuperscript{201} Furthermore, policies that are thoroughly explained will counter the implicit bias that minorities did not achieve their success through merit.\textsuperscript{202} “Once it is accepted that people can have egalitarian intentions but nonetheless fall victim to practices that have harmful outcomes, the need to change practices can be addressed without triggering a defensive reaction.”\textsuperscript{203} Educational programs for all attorneys that discuss cognitive science and the implications of implicit stereotype activation “may have the benefit both of engaging participants in a less threatening discussion of bias and . . . may help motivate participants to do more to correct for bias in their own judgments and behaviors.”\textsuperscript{204} For these reasons, education about the influence of implicit bias is an important first step in addressing the diversity crisis.\textsuperscript{205}

Law firms should create a framework to address how implicit biases of individual attorneys and in the form of organizational practices hinder the advancement by women and minorities. In general, diversity efforts should be led by key decision makers in the firm to ensure that attorneys cannot eschew responsibility for diversity efforts and implicit bias mitigation to a diversity committee. “[R]esearch concludes that responsibility for diversity should be spread across the institution rather than focused in a single individual or administrative office” and that “top management should be both diverse and committed to diversity.”\textsuperscript{206} For example, “[Vinson & Elkins] has replaced its former diversity committee with a three-person team that includes the chairman of the firm, the head of women’s initiatives and [the] chair of a new talent management committee.”\textsuperscript{207} The team meets regularly with a group of minority attorneys to discuss issues.\textsuperscript{208} “The seniority of the core team ensures that diversity efforts have top-level buy-in,” and “[d]iversity efforts are now a responsibility of each practice group, which includes a diversity leader and a ‘talent leader’ who participate in decisions about [distributing assignments] and who track the

\textsuperscript{201} Id. at 1968 (discussing how \textit{Ricci v. DeStefano}, 557 U.S. 557 (2009) revealed misunderstandings about affirmative action and about how the City of New Haven’s decision not to certify the results of a firefighters’ promotion exam, under which no black and only two Hispanic firefighters could have obtained promotions, generated negative public response).


\textsuperscript{203} Godsil, \textit{supra} note 10.

\textsuperscript{204} CASEY ET AL., \textit{supra} note 21, at 2.

\textsuperscript{205} Although awareness of implicit biases is necessary to mitigate their effects, diversity training has been shown to be (the) least effective way to enhance diversity. Professor Bartlett explains that this can be attributed to “telling people that they would discriminate if they were allowed to do so, or unless they were taught not to do so, undermines their senses of autonomy, competence, relatedness, and basic goodness.” Bartlett, \textit{supra} note 180, at 1961.

\textsuperscript{206} Id. at 1970.

\textsuperscript{207} Triedman, \textit{supra} note 4, at 53.

\textsuperscript{208} \textit{Id.}
client engagement of minority associates.” When key decision makers are involved in diversity efforts and track efforts across the law firm, other employees will feel more likely to buy in to the diversity efforts. “Accountability is widely praised as a way to reduce discrimination” because it “motivates people to become more self-critical and to make more accurate, individuating (that is, non-stereotyping) decisions.” When the expectations are clear and “people know that their judgments of another person will be checked against the assessments of others whom they respect, they will want to form more careful judgments, and they will alter their attitudes accordingly.”

A. Re-evaluating Hiring Practices

In light of the studies demonstrating the influence of implicit biases on the hiring and evaluation of lawyers, law firms should reconsider and revise their hiring and evaluation systems accordingly. At a minimum, all attorneys involved in hiring decisions should receive comprehensive training on implicit bias that will keep them attuned to the subtle and unconscious ways that race bias can negatively affect all aspects of employment.

Changes to the interview process in light of implicit bias research can have a significant effect on the evaluation of diverse candidates. For example, the law firm Schiff Hardin claims that changes to its associate interview process are “bringing in a more diverse and talented pool of lawyers.” Instead of interviews with only one attorney, candidates are evaluated by “a panel of trained interviewers, with each panel including a minority attorney and a female attorney, to meet each candidate and to ask a set of standardized questions, reducing the likelihood that the race of the interviewer would be a factor.” More specifically, hiring partners should be instructed that when they initially conclude that a candidate is not a good “fit” for the firm, they should identify the specific reasons for “a poor fit” and examine whether these reasons reflect biases. For example, a candidate may seem “a poor fit” because his/her communication style differs from that of most current employees. Ask whether this style necessarily hinders the candidate’s ability to do the job or might it simply be a different, but equally effective, style. “Failing to ask these questions can lead selection committee members to primarily hire candidates similar to

209 Id.
210 Bartlett, supra note 180, at 1963.
211 Id.
212 Triedman, supra note 4, at 52.
213 Id. at 53.
themselves." During the interview, “[a] writing exercise is also graded ‘blind’ to prevent implicit bias from [influencing] the evaluation.”

B. Reconsidering Attorney Evaluations

Law firms should also examine evaluation procedures to ensure that partners are evaluating work without the influence of implicit biases. Because implicit biases affect judgment in the absence of objective criteria, evaluation metrics should be developed that are applied fairly to all associates and communicated to all associates prior to any work assignments. An example of a writing metric “might note that under three typographical errors in a memorandum of [ten] pages or more is excellent, four to six is average, and over seven is poor.” Another benefit of metrics will also help ensure that partners are not withholding constructive criticism from diverse associates, which is critical to their professional development.

Anonymous evaluations could also reduce the influence of implicit biases.

In one law firm where . . . minority summer associates were consistently being evaluated more negatively than their majority counterparts, . . . [the consultant group Nextions] worked with the firm to create an Assignment Committee, comprised of [three] partners through whom certain assignments were distributed to the summer associates and through whom the summer associates submitted work back to the partners who needed the work done. When the work was evaluated, the partners evaluating the work did not know which associate had completed the work. . . . At the end of the summer, every associate had at least [two] assignments that had been graded blindly. The firm then examined how the blind evaluations compared with the rest of the associate’s evaluations and found that the blind evaluations were generally more positive for minorities and women and less positive for majority men.

As discussed above, minority lawyers are often disadvantaged because of a failure to develop meaningful relationships with rainmaking partners. When the assignment system is based on existing relationships, minorities then miss opportunities to work on significant assignments, which is likely to lead to a failure to achieve partnership status. When 47 percent of their African American associates were laid off during the recession, Sidley Austin appointed a task force to review layoffs and discovered that “diverse associates were not making connections with partners in the same way and to the same extent as . . . majori-

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215 Triedman, supra note 4, at 53.
216 Godsil, supra note 10, at 28.
217 Id.
218 Id.
219 Reeves, supra note 152.
ty associates were . . . . Therefore they were viewed as more expendable.”
Effective mentoring relationships are critical for training and promoting young lawyers. Without formal programs, the relationships are likely to continue to arise between those who are most alike in terms of gender, race, and background. Sidley Austin is now attempting to “formalize those connections [by] pairing minority associates with partners within their practice group, and the task force is tracking those associates to make sure they are receiving skills training, career coaching and client access.”

CONCLUSION

The recent studies revealing a troubling lack of diversity in the legal profession should prompt the ABA,224 law firms, and other legal employers to identify practices and policies that appear impartial but produce unequal outcomes for women and minorities. Although it remains to be seen whether the proposals discussed above will have a positive impact on the number of women and minority attorneys hired and promoted in law firms, they have all been implemented or suggested in light of the implicit bias research. This is an important first step. An appreciation of how racial, ethnic, and gender stereotypes affect employment decisions is a requirement if the legal profession is to achieve a “just and inclusive workplace.”

220 Triedman, supra note 4, at 52.
221 Diaz & Dunican, supra note 131, at 994.
222 Professor Root also suggests ways to incentivize “white men, at least for a time, to consider black and Hispanic attorneys within law firms to be part of their ‘ingroup,’ which will allow these attorneys of color to receive the benefit of favoritism.” Root, supra note 7, at 619.
223 Triedman, supra note 4, at 52.
224 E.g., PRESIDENTIAL DIVERSITY INITIATIVE, supra note 163.
225 Rhode, supra note 6, at 1049–50.
SELFIE: SELFIE: Tools for Improving Women’s Leadership Skills in a Non-Diverse Environment

NAPABA Convention
Women’s Leadership Network (WLN) Workshop
November 2, 2016
Objectives

1. Discuss leadership challenges for women.
2. Discuss the SELFIE tools.
3. Discuss the impact of implicit bias on SELFIE tools.

DISCUSSION
SELFIE Tools for Leadership

- hard and soft Skills
- Emotional intelligence
- active Listening
- Financial literacy
- Innovation and problem-solving
- Efficiency
Unconscious bias?

Biases that are automatically triggered by our brain making quick judgments about people and situations based on our background, cultural environment and our experiences
Facebook COO Sheryl Sandberg has decided she doesn't like the word "bossy."

Last month, she and other prominent women, like Condoleezza Rice and Beyonce, collaborated to launch Ban Bossy, a campaign that claims the word disproportionately describes young women, damaging their confidence and desire to pursue leadership positions.

"When a little boy asserts himself, he's called a 'leader.' Yet when a little girl does the same, she risks being branded 'bossy,'" the website states.

While Sandberg's endeavor brings up worthwhile points about sexism and the lack of powerful women in the world, it has its haters. Some question the necessity of eradicating a word and even the campaign's overall effect on feminism. Others wonder if people truly call women "bossy" more often than men. Recently, libertarian feminist Cathy Young, writing for RealClearPolitics, called the ban a "bad remedy for a fictional problem."

Young's critique addresses some noticeable holes in the #banbossy logic, such as dubious research. But she swings and misses in one area: the gendered use of "bossy." Citing Google's analytics, she lists examples in which the word "bossy" describes both men and women. Further analysis, however, supports Sandberg's claim that women are called "bossy" much more frequently than men.

On his blog, Nic Subtirelu, a third year Ph.D. student in applied linguistics at Georgia State University, expanded upon Young's tactics, searching Google for even more gendered phrases. He found that "bossy" refers to women about 1.5 times more frequently than men. The first chart below shows Young's search, and the second chart shows Subtirelu's.
These search methods are hardly an exact science though. Since different combinations of words could easily shift the findings, Subtirelu moved on to other techniques.
In further analyses, he searched Google's Ngram viewer, which shows the frequency of phrases in Google books. He also considered collocation, the idea that certain words have a higher probability of existing near other words. Both demonstrated, once again, that "bossy" describes women more often than men.

"Language isn't necessarily completely random. Certain words tend to co-occur with other words. So if we ask the corpus ... we're actually looking across this astronomical variability [in English]. And we're taking them all into consideration as opposed to picking certain ones [like Google searches]," he told Business Insider.

Still, these methods have their flaws. Google can only pick up on set phrases, not the context. For example, someone could say "you're being bossy" about a man or a woman. To remedy that, Subtirelu used the Corpus of Contemporary American English, a database of the entire English language, to determine all the instances of "bossy" as an adjective. He then read them for interpretation.

His initial search yielded about 400 results. And after removing outliers (like a man named Mike Bossy), 101 examples remained — an acceptable, albeit small, sample size. He found that "bossy" describes women and girls three times as often as men and boys, shown in the graph below. (You can read Subtirelu's full post here.)

On top of that, corpora actually tend to mention women less than men. For example, the Corpus of Contemporary American English lists "he" 3,304,537 times, while “she” only 1,703,886 times, according to
Subtirelu. In that case, three times as likely could even underestimate the rate that "bossy" refers to women.

Without much doubt, "bossy" is a gendered word. The data supports it. But in reality, that means little for the debate about banning its use.

"You could make an argument that any division in language that separates gender inherently reflects this ideology of sexism. Whether that's a problem or not is another question," Subtirelu said.
Document (1)

1. *The Law Trails Other Professions in Ethnic Diversity*

   **Client/Matter:** -None-
   
   **Search Terms:** the law trails other professions in ethnic diversity sloan
   
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The law is diversifying at a much slower rate than are other professions, according to a study commissioned by Microsoft Corp.

Between 2003 and 2012, the percentage of African American and Hispanic attorneys inched up by a mere 0.8 percent, and they now account for just 8.4 percent of attorneys in the country, according to the report, which Microsoft released on Tuesday. (Download the report here.)

That growth was outpaced by the increase in those same minority groups among auditors and accountants, physicians and surgeons, and financial managers.

"Unless the legal profession makes faster progress, it will miss the dynamism and creativity that diversity brings to other fields," Microsoft General Counsel Brad Smith wrote in a blog post about the study. "We risk failure in having a profession that is as diverse as the country we serve—a prerequisite for healthy legal service for a democracy."

The percentage of African American and Hispanic financial managers nationwide grew from 13.3 in 2003 to 18.9 in 2012-up by nearly six percent overall. Similarly, their percentage among physicians and surgeons rose by 2.5 to 12.3 nationwide. The ranks of African American and Hispanic auditors and accountants saw less growth, increasing by 1.2 percent, but those groups still account for 16.5 percent of all accountants and auditors.

Microsoft zeroed in on those three other professions because they have broad education or licensing requirements, similar to the juris doctor and the bar examination.

"We're really struggling with how to think about the pipeline, and we got quite interested in seeing how other professions are doing and what they might be doing that we could do ourselves," said Mary Snapp, deputy general counsel at Microsoft.

The study found that African Americans and Hispanics are underrepresented in all four professions as compared to the U.S. population as a whole, but that the gap between the law and the three others is actually worsening.

That's despite more than a decade of efforts throughout the legal profession to diversify, from pipeline projects and fellowships to leadership programs and diversity initiatives in law firms and legal departments.

The study points to a number of reasons for the lag, among them that licensing passage rates are higher in other professions, that loan forgiveness is more available, and that the law lacks national scholarships on the same scale as medicine and business. The most recent study by the Law School Admission Council of race and bar
passage rates found that minorities had a higher failure rate on the bar exam than their white counterparts, the Microsoft report notes.

Improving diversity in the law would require the involvement of every corner of the profession, from professors and administrators at undergraduate universities to law firm leaders, the study concluded. While Microsoft has plenty of long-term goals for improving diversity in the profession, it would like to focus on bar passage rates first, Snapp said.

"We would like to convene a group of law firms, law department and law deans to discuss bar passage, which is one way we think we can make a difference in the immediate future," she said.

Contact Karen Sloan at ksloan@alm.com. For more of The National Law Journal's law school coverage, visit: http://www.facebook.com/NLJLawSchools.

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