

IMPLICIT BIAS AND THE LEGAL PROFESSION'S "DIVERSITY CRISIS": A CALL FOR SELF-REFLECTION

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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*,¹ 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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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.² While the underrepresentation of minorities is a pervasive problem in the workplace,³ the legal profession may be the palest profession.⁴ In May 2014, *The American Lawyer* magazine announced that the legal profession is suffering a “Diversity Crisis.”⁵ 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.⁶

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,⁷ and many scholars have also proposed institutional reforms to address the law firm practices that disadvantage women and minorities.⁸ 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.”⁹ 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.”¹⁰

² Microsoft Corp., *Raising the Bar: An Analysis of African American and Hispanic/Latino Diversity in the Legal Profession*, http://www.americanbar.org/content/dam/aba/administrative/diversity/Microsoft_Raising_the_Bar_FINAL.ppt (last visited Mar. 3, 2015).

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-eeo1/2012/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.

⁵ See generally AM. LAW., June 2014, Special Report: The Diversity Crisis, at 46–67.

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).

⁸ David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 496 (1996).

⁹ Brad Smith, *Raising the Bar: Exploring the Diversity Gap Within the Legal Profession*, MICROSOFT ON THE ISSUES (Dec. 10, 2013), <http://blogs.microsoft.com/on-the-issues/2013/12/10/raising-the-bar-exploring-the-diversity-gap-within-the-legal-profession/>.

¹⁰ Rachel D. Godsil, *Answering the Diversity Mandate: Overcoming Implicit Bias and Racial Anxiety*, N.J. LAW. MAG., Feb. 2014, at 25, 28.

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.”¹¹ 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.”¹² Social science studies demonstrate that the continued underrepresentation of women and minorities in the legal profession is unlikely due predominantly to explicit or “first generation bias,” which involves “deliberate exclusion or subordination directed at identifiable members of disfavored groups.”¹³ Rather, this bias has been supplanted by “second generation” forms of bias, which are attributable to implicit bias.¹⁴

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.”¹⁵ However, studies reveal that most white adults are more likely to associate African Americans than white Americans with violence,¹⁶ and most Americans are more likely to associate women with family life than with professional careers.¹⁷ Implicit biases affect our judgment, influence decision making, and have a real effect upon whom we befriend, employ, value, and promote.

¹¹ Nancy Gertner & Melissa Hart, *Employment Law: Implicit Bias in Employment Litigation*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 80, 81 (Justin D. Levinson & Robert J. Smith eds., 2012).

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).

¹⁷ See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1072 (2006) (“[S]eventy-five percent of men and women do not associate female with career as easily as they associate female to family.”).

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.”¹⁸ 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.”¹⁹

Although the call for greater diversity in the legal profession is not new,²⁰ 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 organizations²¹ 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

¹⁸ Jeff Adachi, Pub. Defender, City & Cnty. of S.F., *Implicit Bias*, Address Before Mandatory Continuing Legal Education Conference on Criminal Litigation Ethics at U.C. Hastings College of the Law (Aug. 1, 2013), in 65 HASTINGS L.J. 1145, 1157 (2014).

¹⁹ John Nussbaumer & Chris Johnson, *The Door to Law School*, 6 U. MASS. ROUNDTABLE SYMP. L.J. 1, 2 (2011).

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

²¹ See PAMELA M. CASEY ET. AL., NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION 1–2 (2012), available at http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx (evaluating the programs implemented by three states to reduce the effect of implicit bias); *Gender and Racial Fairness: Resource Guide*, NAT’L CENTER FOR ST. CTS., <http://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/Resource-Guide.aspx> (last visited Mar. 3, 2015) (describing state efforts to eliminate bias in the courtroom through the creation of task forces); *Implicit Bias Initiative*, A.B.A. SEC. LITIG., <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html> (last visited Mar. 3, 2015) (educating lawyers and judges about the pervasive “implications and effects of implicit bias”).

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.²² Approximately one-third of active U.S. district court judges and 35 percent of federal courts of appeals judges are women.²³ In state high courts, 87 percent of judges are white.²⁴ In state trial courts, 86 percent of judges are white.²⁵

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.²⁶ "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."²⁷ 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.²⁸ "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 . . ."²⁹ 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).

²⁴ *National Database on Judicial Diversity in State Courts*, A.B.A. STANDING COMMITTEE ON JUD. INDEPENDENCE (last updated June 2010), <http://apps.americanbar.org/abanet/jd/display/national.cfm>; cf. Gina M. Messamer, Note, *Iowa's All-Male Supreme Court*, 98 IOWA L. REV. 421, 423 (2012) (criticizing Iowa's current merit selection system for perpetuating gender disparities). For a list and links to states' gender/equality task force reports and related material, see *Gender and Racial Fairness: State Links*, NAT'L CENTER FOR ST. CTS., <http://www.ncsc.org/Topics/Access-and-fairness/Gender-and-Racial-Fairness/State-links.aspx?cat=gender%20Fairness%20Task%20Forces%20and%20Reports> (last visited Mar. 3, 2015).

²⁵ *National Database on Judicial Diversity in State Courts*, *supra* note 24.

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.*

²⁸ Karen Sloan, *The Law Trails Other Professions in Ethnic Diversity*, NAT'L L.J., Dec. 16, 2013, at 4.

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 work force 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).

³⁷ John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt*, 29 RES. IN ORGANIZATIONAL BEHAV. 39, 42–43 (2009).

³⁸ See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011) (discussing System 1 and System 2).

³⁹ Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 974 (2006). For a more detailed description of System 1 and System 2, see KAHNEMAN, *supra* note 38, at 20–22.

PLICIT perceptions, implicit attitudes, and implicit stereotypes.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.”⁴¹

Implicit bias can be “understood in light of existing analyses of System [1] processes.”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.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.”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.”⁴⁵ Although “System 2 articulates judgments and makes choices, but it often endorses or rationalizes ideas and feelings that were generated by System 1.”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

⁴⁰ Jolls & Sunstein, *supra* note 39, at 975.

⁴¹ Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 467–68 (2010). Implicit social cognition is a field of psychology that examines the mental processes that affect social judgments but operate without conscious awareness or conscious control. *See generally* Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007). The term was first used and defined by Anthony Greenwald and Mahzarin Banaji. *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

⁴² Jolls & Sunstein, *supra* note 39, at 975.

⁴³ *Id.*

⁴⁴ *Id.*

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. . . .

. . . [We] 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.

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.”⁴⁷ 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.⁴⁸ 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.⁴⁹ 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.⁵⁰ 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”),⁵¹ and event schemas, or scripts, which help us to understand how a process, or event, occurs.⁵² Self-schemas contain our knowledge and expectations about our own traits.⁵³ Person schemas “represent knowledge structures about . . . characteristics, behaviors, and goals” of other individuals.⁵⁴ We classify individuals based on their characteristics and the inferences we make based on those traits.⁵⁵ “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.”⁵⁶ “When we encounter a person, we classify that person into numerous social categories, such as gender, (dis)ability, age, race, and role.”⁵⁷ For example, people develop racial schemas

⁴⁷ Mahzarin R. Banaji et al., *How (Un)Ethical Are You?*, HARV. BUS. REV., Dec. 2003, at 56, 58.

⁴⁸ Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1133 (2004).

⁴⁹ Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 700 (1994).

⁵⁰ *Id.*

⁵¹ Chen & Hanson, *supra* note 48.

⁵² *Id.* at 1137.

Scripts are in some ways like recipes—helping us interpret both the things we see and the things we do not see. If we observe a person paying a bill and leaving a restaurant, the familiar restaurant script triggers a knowledge of earlier events that have happened: the customer has ordered, been served, and eaten food.

Id. at 1139.

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.⁵⁸ 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.⁵⁹ 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.⁶⁰

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.⁶¹ "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."⁶² 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.⁶³ When asked about the perception of racial bias, 84 percent of male respondents

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).

⁶⁰ Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 299 (2009).

⁶¹ Robinson, *supra* note 59, at 1106 (citing K.A. DIXON, DUKE STOREN & CARL E. VAN HORN, JOHN J. HELDRICH CTR. FOR WORKPLACE DEV., RUTGERS UNIV., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 5 (2002)).

⁶² *Id.* at 1107.

⁶³ SUPREME COURT COMM. ON WOMEN IN THE COURTS, SUPREME COURT OF N.J., SURVEY ON PERCEPTIONS OF RACE AND GENDER IN THE COURTS 6 tbl.1 (2009), available at http://www.judiciary.state.nj.us/access/wic_report.pdf.

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.*

⁶⁷ Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUST. RES. 129, 133 (2004).

⁶⁸ Kang et al., *supra* note 65; Rudman, *supra* note 67.

⁶⁹ Rudman, *supra* note 67.

⁷⁰ Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 363 (2007).

⁷¹ Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 367 (Daniel T. Gilbert et al. eds., 4th ed. 1998); *see also* C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93, 96 (2000) (“In attempting to make sense of other people, we regularly construct and use categorical representations to simplify and streamline the person perception process.”).

⁷² Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 11 (1994).

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-

⁷³ JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS 2 (2009), available at http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf.

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 355 (footnote omitted).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ KANG, *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 IMPLICIT, <http://projectimplicit.net/about.html> (last visited Mar. 10, 2015).

⁷⁹ Levinson, *supra* note 70, at 420.

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 *Id.*

⁸³ KANG, PRIMER, *supra* note 73, at 4.

⁸⁴ Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LAB. ECON. 523, 527–28 (2010) (based on implicit stereotype in Sweden that Arabs are lazy).

⁸⁵ Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 438–39 (2001).

⁸⁶ Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 640 (2003).

⁸⁷ Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 133 (2002).

⁸⁸ Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 743 (2001).

⁸⁹ *EEOC African American Workgroup Report: Executive Summary*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/federal/reports/aawg.cfm> (last visited Mar. 3, 2015).

sion makers. “Second-generation” implicit bias in law firms includes “structural bias,”⁹⁰ 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.”⁹¹ Results showed that “for two identical individuals engaging in an identical job search, the one with an African-American name would receive fewer interviews.”⁹² Another study found that a hiring manager’s race affects the hiring of new employees.⁹³ 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.⁹⁴ 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.⁹⁵

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.

⁹¹ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

⁹² *Id.* at 1006.

⁹³ Laura Giuliano et al., *Manager Race and the Race of New Hires*, 27 J. LAB. ECON. 589, 589 (2009).

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.

⁹⁵ Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000).

type.⁹⁶ Individuals also make memory errors consistent with stereotypes even when recalling objective facts such as test scores or grade point averages.⁹⁷

Stereotypes are resistant to change because our perceptions become impervious to new information.⁹⁸ People interpret ambiguous information to confirm stereotypes and are unaffected by information that a stereotype is invalid.⁹⁹ 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.”¹⁰⁰ “[W]e see what we expect to see. Like well-accepted theories that guide our interpretation of data, schemas incline us to interpret data consistent with our biases.”¹⁰¹

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.”¹⁰² 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.”¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ The authors suggest that the impact of these stereotypes leads to discrimination against those who do not fit this mold, such as Asian Americans.¹⁰⁶ 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.¹⁰⁷

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.

¹⁰⁰ ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 230 (1999).

¹⁰¹ Kang, *supra* note 16, at 1515.

¹⁰² Wilkins & Gulati, *supra* note 8, at 524–25.

¹⁰³ *Id.* at 525–26.

¹⁰⁴ Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 891 (2010).

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-

¹⁰⁸ See Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 9 (2010); Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 615, 617, 621 (2007).

¹⁰⁹ Kang et al., *supra* note 65, at 1173.

¹¹⁰ *Id.*

¹¹¹ Eric Luis Uhlmann & Geoffrey L. Cohen, "I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210 (2007).

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.

¹¹⁸ Marci Alboher, *Overcoming the 'Sway' in Professional Life*, N.Y. TIMES (July 15, 2008), <http://www.nytimes.com/2008/07/15/jobs/15shift.html>.

ers frequently evaluate candidates based on a vague, intangible feeling or hunch about whether the applicant is a good “fit” in the firm.¹¹⁹ 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.¹²⁰ “[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.”¹²¹ To bolster his own self-image, the interviewer is inclined to prefer the white applicant over the black applicant.¹²²

Significantly, implicit biases cause a person to make different judgments of identical actions or objective states depending on one’s group membership.¹²³ For example, people with higher implicit bias towards certain groups judged ambiguous actions and facial expressions by members of that group more negatively.¹²⁴ 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.¹²⁵ In contrast, achievements of white men are more likely to be attributed to internal capabilities.¹²⁶ 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,¹²⁷ the pyramid system of law firms ensures that the majority of associates leave without achieving partnership¹²⁸ and creates a “tournament”¹²⁹ for opportunities and

¹¹⁹ Wilkins & Gulati, *supra* note 8, at 554.

¹²⁰ Catherine Smith, *Unconscious Bias and “Outsider” Interest Convergence*, 40 CONN. L. REV. 1077, 1086 (2008).

¹²¹ *Id.*

¹²² *Id.*

¹²³ Lane et al., *supra* note 41, at 436; see Rudman & Lee, *supra* note 87 (implicit bias predicts more negative evaluations of ambiguous actions by an African American).

¹²⁴ Lane et al., *supra* note 41, at 436.

¹²⁵ See Rhode, *supra* note 6, at 1050–51.

¹²⁶ *Id.* at 1051.

¹²⁷ Wilkins & Gulati, *supra* note 8.

¹²⁸ *Id.* at 572.

¹²⁹ *Id.* at 519.

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.

¹³¹ Luis J. Diaz & Patrick C. Dunican Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947, 976 (2011).

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.¹³⁸ 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.”¹³⁹ “[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.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² 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).”¹⁴³

Women and minorities who work in white male-dominated domains, such as the legal profession, may experience a “backlash” for violating stereotype expectations.¹⁴⁴ 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.¹⁴⁵ Studies show, for example, that when female leaders behave in a “directive, autocratic style,” they receive more negative evaluations.¹⁴⁶ 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.”¹⁴⁷

¹³⁸ Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOLOGIST, 1049, 1050 (1991).

¹³⁹ Wilkins & Gulati, *supra* note 8, at 524.

¹⁴⁰ *Id.*

¹⁴¹ Cecilia L. Ridgeway, *Gender, Status, and Leadership*, 57 J. SOC. ISSUES 637, 648–49 (2001).

¹⁴² NATALIE KNOWLTON & MALIA REDDICK, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., LEVELING THE PLAYING FIELD: GENDER, ETHNICITY, AND JUDICIAL PERFORMANCE EVALUATION 27 (2012), available at http://iaals.du.edu/images/wigwam/documents/publications/IAALS_Level_the_Playing_Field_FINAL.pdf.

¹⁴³ *Id.* at 28.

¹⁴⁴ Ridgeway, *supra* note 141, at 649.

¹⁴⁵ DEBORAH L. RHODE, A.B.A. COMM’N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 15 (2001), available at <http://womenlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf>.

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.”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.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.”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.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.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.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.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.” *Id.*

¹⁴⁸ KNOWLTON & REDDICK, *supra* note 142, at 28.

¹⁴⁹ RHODE, *supra* note 145.

¹⁵⁰ Rhode, *supra* note 6, at 1052; *see also* RHODE, *supra* note 145, at 6.

¹⁵¹ Rhode, *supra* note 6, at 1052.

¹⁵² ARIN N. REEVES, NEXTIONS, YELLOW PAPER SERIES 2014-0404, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS, NEXTIONS (2014), *available at* http://www.nextions.com/wp-content/files_mf/14151940752014040114WritteninBlackandWhiteYPS.pdf.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

hypothetical white one¹⁵⁵ 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.¹⁵⁶

The study concluded that “racially-based perceptions about writing ability . . . unconsciously impact [partners’] ability to objectively evaluate a lawyer’s writing.”¹⁵⁷ The findings of the study thus illustrated confirmation bias—that, “[w]hen expecting to find fewer errors, we find fewer errors.”¹⁵⁸ The study participants unconsciously found more of the errors in the “African American” memo, because they expected to find more errors.¹⁵⁹ 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.¹⁶⁰

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.¹⁶¹ 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.*

¹⁶⁰ Arin N. Reeves, *Colored By Race: Bias in the Evaluation of Candidates of Color By Law Firm Hiring Committees*, MINORITY CORP. COUNSEL ASS’N., http://www.nextions.com/wp-content/files_mf/1285031389ColoredbyRace.pdf (last visited Mar. 3, 2015) (alteration in original).

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 bar¹⁶³: 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:

¹⁶² *A Pledge to the Profession*, INST. FOR INCLUSION IN THE LEGAL PROFESSION, <http://www.theiilp.com/pledge> (last visited Mar. 10, 2015).

¹⁶³ PRESIDENTIAL DIVERSITY INITIATIVE, AM. BAR ASS’N, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 5* (Cie Armstead ed. 2010), available at http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ NAT’L CTR. FOR STATE COURTS, *HOW THE PUBLIC VIEWS THE STATE COURTS* 38 (1999), available at http://www.flcourts.org/core/fileparse.php/243/urlt/publicop_natl.pdf.

¹⁶⁹ *Id.* at 37.

¹⁷⁰ *Id.* at 37–38.

¹⁷¹ Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 40 (2014).

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.¹⁷³

Therefore, a “lack of trust severely impacts the criminal justice system’s ability to serve and protect society.”¹⁷⁴ “The lack of representation of minorities as employees and administrators of the justice system [also] leads to a perception of injustice.”¹⁷⁵

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.”¹⁷⁶ Diversity thus enhances courts’ credibility among minorities who “would otherwise limit their horizons and aspirations.”¹⁷⁷

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

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.

¹⁷⁶ *Id.* at 30.

¹⁷⁷ Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 10 ASIAN L.J. 127, 134 (2003).

us.¹⁷⁸ 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 conditions¹⁷⁹ because the inter-group contact reduces the salience of race and sex.¹⁸⁰ Intergroup contact reduces people’s anxiety about each other, promotes empathy, and encourages friendships, all of which result in more positive attitudes toward one another.¹⁸¹ 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 biases.”¹⁸²

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.¹⁸³ 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.¹⁸⁴ 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.”¹⁸⁵ 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.¹⁸⁶

¹⁷⁸ Jolls & Sunstein, *supra* note 39, at 981; Kang & Banaji, *supra* note 17, at 1101; *see also* Hyman, *supra* note 171, at 47; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1226–27 (2009).

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

¹⁸⁰ Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1955 (2009).

¹⁸¹ *Id.*; *see* Laurie A. Rudman et al., “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY AND SOC. PSYCH. 856, 866 (2001).

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

¹⁸³ Bartlett, *supra* note 180, at 1948.

¹⁸⁴ *Id.*; *see* Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 653–54 (2004).

¹⁸⁵ Chen, *supra* note 177.

¹⁸⁶ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

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 strategies¹⁸⁷ 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.”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.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.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.”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.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.

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.

Id. at 1956.

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).

¹⁸⁹ Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1142–43, 1159. (1996).

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

¹⁹¹ Godsil, *supra* note 10, at 26; see also Rudman et al., *supra* note 181, at 856.

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.”¹⁹³ 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.¹⁹⁴

This research suggests that law firm leaders underestimate the impact of unconscious bias¹⁹⁵ and overestimate the effectiveness of current policies.¹⁹⁶ 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.¹⁹⁷

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.”¹⁹⁸ “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.”¹⁹⁹ “Policies that focus on recruitment of underrepresented groups . . . are better accepted among both beneficiaries and potential opponents of policies” if the justifications are explained.²⁰⁰ In contrast, policies justified only by underrepresentation provoke resistance from majority employees who believe protected groups are

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.

¹⁹⁷ Angela Onwuachi-Willig, *Teaching Employment Discrimination*, 54 ST. LOUIS U. L.J. 755, 756 (2010).

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.²⁰¹ Furthermore, policies that are thoroughly explained will counter the implicit bias that minorities did not achieve their success through merit.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.”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.”²⁰⁴ For these reasons, education about the influence of implicit bias is an important first step in addressing the diversity crisis.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.”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.”²⁰⁷ The team meets regularly with a group of minority attorneys to discuss issues.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

²⁰¹ *Id.* at 1968 (discussing how *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).

²⁰² David A. Harrison et al., *Understanding Attitudes Toward Affirmative Action Programs in Employment: Summary and Meta-Analysis of 35 Years of Research*, 91 J. APPLIED PSYCHOL. 1013, 1030 (2006).

²⁰³ Godsil, *supra* note 10.

²⁰⁴ CASEY ET AL., *supra* note 21, at 2.

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, *supra* note 180, at 1961.

²⁰⁶ *Id.* at 1970.

²⁰⁷ Triedman, *supra* note 4, at 53.

²⁰⁸ *Id.*

client engagement of minority associates.”²⁰⁹ 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.”²¹⁰ 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.”²¹¹

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.”²¹² 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.”²¹³ 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 Friedman, *supra* note 4, at 52.

²¹³ *Id.* at 53.

themselves.”²¹⁴ During the interview, “[a] writing exercise is also graded ‘blind’ to prevent implicit bias from [influencing] the evaluation.”²¹⁵

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.²¹⁶ 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.”²¹⁷ 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.²¹⁸

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.²¹⁹

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-

²¹⁴ LECIA BARKER, NAT’L CTR. FOR WOMEN & INFO. TECH., AVOIDING GENDER BIAS IN RECRUITMENT/SELECTION PROCESSES (2010), available at <http://www.ncwit.org/sites/default/files/resources/avoidinggenderbiasrecruitmentsselectionprocess.pdf>.

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.”²²⁰ Effective mentoring relationships are critical for training and promoting young lawyers.²²¹ Without formal programs, the relationships are likely to continue to arise between those who are most alike in terms of gender, race, and background.²²² 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.”²²³

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.”²²⁵

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.