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Polden, Donald J.

Anderson, Jenna M.

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## LEADERSHIP TO ADDRESS IMPLICIT BIAS IN THE LEGAL PROFESSION

Donald J. Polden\* & Jenna M. Anderson\*\*

*This Article discusses the problem of implicit bias within the legal profession; why its persistence impedes the work that lawyers do; and the need for leaders to take steps to recognize, understand, and ameliorate it. Implicit biases, also referred to as unconscious biases, are prejudices that people have, but are unaware of their existence. These biases act as mental shortcuts based on known stereotypes and social norms that cause people to make decisions that favor one group to the detriment of another. Even though the United States has laws prohibiting discrimination on the basis of race, religion, gender, and disability, these laws are incapable of confronting the systemic racism perpetuated by implicit bias. A law will not prevent people from reacting to biases that they are unaware they hold. For this reason, leaders cannot lead equitably without first discovering what biases may be influencing their decisions at the sub-conscious level. This Article calls for leaders within the legal profession to educate themselves about implicit bias, discover what implicit biases they harbor on a personal level, take time to ensure that their decisions are not being influenced by such biases, take steps to de-bias, and lead their constituents to do the same.*

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\* Dean Emeritus and Professor of Law, Santa Clara University School of Law. He currently serves as Chair of the Section on Leadership of the Association of American Law Schools and has taught leadership for lawyers classes for more than a decade.

\*\* J.D., Santa Clara University School of Law, 2021. M.B.A., Santa Clara University Leavey School of Business, 2021. Editor-in-Chief, SANTA CLARA LAW REVIEW, Volume 61.

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## I. INTRODUCTION

The legal profession, like many other professions, has a diversity problem. It is overwhelmingly White and male in proportions dissimilar to the racial, gender, and ethnic composition of the United States (“U.S.”) population. As of 2020, there were approximately 1.3 million active lawyers (i.e., people practicing law, maintaining their licensure to practice, or who report their status as a lawyer) in a U.S. population of about 328 million.<sup>1</sup> In the United States, 49.2 percent of the population is male, yet sixty-three percent of lawyers are male.<sup>2</sup> Black people constitute 13.4 percent of the population but only five percent of lawyers.<sup>3</sup> White people account for sixty percent of the population, yet eighty-six percent of lawyers are White.<sup>4</sup> The work that lawyers perform in society—such as addressing discrimination, protecting human rights, and combating the prevalence of systemic racism—requires an intentional commitment to creating more inclusive workplaces, housing,

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1. AM. BAR ASS’N, PROFILE OF THE LEGAL PROFESSION 30 (2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> [hereinafter Profile 2020]; *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Jul. 6, 2021).

2. Profile 2020, *supra* note 1, at 32.

3. *Id.* at 33.

4. *Id.*

and education. It also requires a conscious commitment to combat all forms of racism. Lawyers are instrumental agents in efforts to address bias and racism in society because they are called to interpret the national policies promoting equality of opportunity for their clients. However, the legal profession itself remains largely non-diverse, reflecting the failure of lawyers—individually and collectively in their organizations—to make the commitment to end racism and its impacts on communities. An added complexity to the legal profession’s diversity problem is that lawyers, like other individuals, are not immune from making decisions that are affected by implicit bias. Many legal professionals do not believe their actions perpetuate systemic racism, but science informs us that bias affects decision-making at the subconscious level.<sup>5</sup> This is the problem of implicit bias, and it is perhaps the single greatest reason why lawyers are not leading the fight against systemic racism in the United States.

The problem of implicit bias in the legal profession persists notwithstanding efforts to implement implicit bias training and workplace initiatives.<sup>6</sup> Addressing the problem of implicit bias is essential in order for the legal profession, and its lawyers, to fight systemic racism. But systemic racism is not going to end simply because legal professionals attended an implicit bias training once—more is needed. This Article will argue that confronting implicit bias is a multi-step process and the first step is to acknowledge the existence of implicit bias at the individual and personal level. The sustained and inspired leadership that is necessary to overcome systemic racism is not possible without introspection. In his commencement speech at Howard University, Barack Obama, the first Black President of the United States, reminded us that even good people with the best of intentions “might have unconscious biases, as we all do,” but “change requires more than just speaking out—it requires listening, as well.”<sup>7</sup> We need to listen to people and understand them before we cast judgment.<sup>8</sup> “We can’t walk by a homeless man without asking why a society as wealthy as ours allows that state of affairs to occur. We can’t just lock up a low-level

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5. See *infra* Part III.

6. See, e.g., Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017); see generally Samuel R. Bagenstos, *Implicit Bias’s Failure*, 39 BERKELEY J. EMP. & LAB. L. 37 (2017) (presenting an example of a law firm that failed to diversify because implicit bias drove new hires away).

7. Barack Obama, U.S. President, Remarks at the Howard University Commencement Ceremony (May 7, 2016), in POLITICO (May 7, 2016, 4:52 PM), <https://www.politico.com/story/2016/05/obamas-howard-commencement-transcript-222931>.

8. See *id.*

dealer without asking why this boy, barely out of childhood, felt he had no other options.”<sup>9</sup> Therefore, it should also be the case that judges, juries, lawyers, law professors, and other legal professionals cannot make a thoughtful decision affecting individual rights and liberties without asking what biases might be influencing that decision.

This Article will discuss the problem of implicit bias, why its persistence impedes the work that lawyers do, and the importance of addressing systemic racism through effective leadership in the legal profession. The scope of this Article is focused on the causes and effects of implicit bias within the legal profession; it does not propose to address all significant and harmful consequences of bias, including discrimination in areas such as employment and housing, incarceration rates for some racial and ethnic group members, and other indicia of structural racism in America. Further, although many different groups suffer from the consequences of implicit bias, this Article focuses on the negative effects faced by the Black community.<sup>10</sup> Part II will define important terminology and explain how implicit bias relates to equitable leadership that furthers diversity and inclusion.<sup>11</sup> Part III details research on implicit bias with an emphasis on the impact it has on the legal profession.<sup>12</sup> Part IV describes the leadership steps that lawyers, especially those in leadership roles, must take to ameliorate implicit bias, both on a personal and organizational level.<sup>13</sup> The Article closes with a call for greater attention to the problem of implicit bias in the legal profession and for more responsive leadership to attack the effects of that bias.<sup>14</sup>

## II. THE NEED FOR LEADERSHIP TOWARD DIVERSITY, INCLUSION, AND EQUITY

There are many definitions of “leadership” but one that captures the essence of true and effective leadership provides that it is: “a process by which an individual or a group influences others to achieve positive and ethical change.”<sup>15</sup> Leadership is about change and effecting change

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9. *Id.*

10. The authors expressly acknowledge that the problem of racism in America is complex and affects far more people than this Article discusses. We hope to shed light on implicit bias because we believe it perpetuates systemic racism within the legal profession.

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See infra* Part V.

15. *See* Donald J. Polden, *Leadership Matters: Lawyers' Leadership Skills and Competencies*, 52 SANTA CLARA L. REV. 899, 902-03 (2012); *see also* Leah Witcher Jackson Teague, *Training Lawyers for Leadership: Vitally Important Mission for the Future Success*

requires leadership. Leaders must step up to the national call for change and lead by advocating for the improvement of how marginalized communities are treated. Leadership is required to remove the constraints on the opportunity to achieve the benefits of life in a constitutional democracy. This is the work of everyone in society, but the chief responsibility for achieving these goals belongs to its leaders. In the words of Dr. Martin Luther King, Jr., “[i]njustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”<sup>16</sup>

Leadership is especially important in the field of law because of the instrumental and overarching roles that law, lawyers, judges, and legal institutions play in our society. Lawyers are in a unique position to shape the minds of others and to influence actions at many levels of our society, whether it be in the courtroom, classroom, workplace, or the legislature. From the first to the 115th Congress, lawyers have averaged seventy-one percent of the seats in the Senate and sixty-two percent of the seats in the House of Representatives.<sup>17</sup> A political seat is just one example of the many powerful positions that lawyers hold. Lawyers make crucial decisions from the judicial bench, draft policy, lead organizations and law firms, author critical texts, and educate future generations of lawyers. Thus, it is imperative that legal professionals use their power to lead Americans toward a more just and equitable society.

#### *A. Equality vs. Equity—Understanding Terminology*

An effective and inclusive leader will act equitably and will seek to make her organization more equitable.<sup>18</sup> The terminology here is important. Advocating for equality is not the same as advocating for equity. “Equality generally refers to equal opportunity and the same levels of support for all segments of society. Equity goes a step further and refers to offering varying levels of support depending upon need to achieve greater fairness of outcomes.”<sup>19</sup> The distinction between the two

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(and Maybe Survival) of the Legal Profession and Our Democracy, 58 SANTA CLARA L. REV. 633, 647-48 (2018).

16. Martin Luther King, Jr., *Letter from the Birmingham Jail*, AFR. STUD. CTR. - U. PA. (Apr. 16, 1963), [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html).

17. Adam Bonica, *Why Are There So Many Lawyers in Congress?*, 45 LEGIS. STUD. Q. 253, 256 (2020).

18. See Donald J. Polden & Leah Jackson Teague, *More Diversity Requires More Inclusive Leaders Leading by Example in Law Organizations*, 48 HOFSTRA L. REV. 681, 683-85 (2020).

19. *Equality vs. Equity*, DIFFEN, <https://www.diffen.com/difference/Equality-vs-Equity> (last visited June 7, 2021).

concepts can be explained by a graphic that went viral in 2013, depicting two versions of three boys of staggering heights watching a baseball game from behind the outfield fence.<sup>20</sup> The first boy was tall and he could easily see over the fence, the second boy was a bit shorter than the fence, and the third boy was not even half the height of the fence.<sup>21</sup> The first version, illustrating the concept of equality, depicted each boy standing on a box, but the box was the same size for each boy. Thus, the tall boy towered over the fence, the second boy could comfortably see over the fence, and the smallest boy still had no chance to see the game.<sup>22</sup> The second version, illustrating the concept of equity, depicted the tallest boy standing on the ground, the second boy standing on one box, and the third boy standing on two boxes.<sup>23</sup> This equitable outcome allowed all three boys to comfortably watch the baseball game.<sup>24</sup>

People of Color account for a disproportionate amount of the low-income category in the United States.<sup>25</sup> “In 2013, working families headed by racial/ethnic minorities were twice as likely to be poor or low-income” than non-Hispanic White people were.<sup>26</sup> “While racial/ethnic minorities made up forty percent of all working families in the United States, they accounted for fifty-eight percent of low-income working families.”<sup>27</sup> The 2014 U.S. Census Bureau revealed that for every dollar of wealth that White households have, Black households only have six cents.<sup>28</sup> Well-intentioned people may argue that all schools

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20. See Craig Froehle, *The Evolution of an Accidental Meme*, MEDIUM (Apr. 14, 2016), <https://medium.com/@CRAIG/the-evolution-of-an-accidental-meme-ddc4e139e0e4#.tm1cbg2vn>.

21. See *id.*; see also *Equality vs. Equity*, *supra* note 19.

22. See Froehle, *supra* note 21; see also *Equality vs. Equity*, *supra* note 19.

23. See Froehle, *supra* note 21; see also *Equality vs. Equity*, *supra* note 19.

24. See Froehle, *supra* note 21; see also *Equality vs. Equity*, *supra* note 19.

25. See Deborah Povich, Brandon Roberts & Mark Mather, *Low-Income Working Families: The Racial/Ethnic Divide*, WORKING POOR FAMILIES PROJECT (2014-2015), [https://www.workingpoorfamilies.org/wp-content/uploads/2015/03/WFPF-2015-Report\\_Racial-Ethnic-Divide.pdf](https://www.workingpoorfamilies.org/wp-content/uploads/2015/03/WFPF-2015-Report_Racial-Ethnic-Divide.pdf); see also Margaret C. Simms, Karina Fortuny & Everett Henderson, *Racial and Ethnic Disparities Among Low-Income Families*, URB. INST. (Aug. 2009), <https://www.urban.org/sites/default/files/publication/32976/411936-racial-and-ethnic-disparities-among-low-income-families.pdf> (“The Urban Institute used the 2008 Current Population Survey (which provides income data for 2007) to assess the characteristics of low-income families by race and ethnicity. Over 13.4 million families with children in the United States fall into the low-income category. Most of these families are racial or ethnic minorities. Four million low-income families (or 30 percent of the total) are Hispanic, 2.9 million (22 percent) are black or African American, and about 800,000 (6 percent) are other nonwhites.”).

26. Povich, Roberts & Mather, *supra* note 25.

27. *Id.*

28. David R. Williams, Naomi Priest & Norman Anderson, *Understanding Associations between Race, Socioeconomic Status and Health: Patterns and Prospects*, 35 HEALTH

should receive the same resources per pupil and that race should be ignored in application processes, but these arguments fail to understand that equality is not enough to solve injustice. The equitable approach recognizes “that some schools—like those serving students in low-income Communities of Color—will actually need more resources (funding, experienced teachers, relevant curriculum, etc.) . . . to make a dent in the educational disparities that have come to be known as the ‘achievement gap.’”<sup>29</sup> The equitable approach also recognizes that without affirmative action or application processes that take opportunity into account, it will be far more difficult for a student from a low-income community to get into college than for a student from an affluent community.<sup>30</sup> This argument is not telling students from affluent communities that they did not work hard for their academic achievements, but rather, it recognizes that students from low-income communities would have a better chance of making the same achievements if it were not for the myriad of barriers and limitations that they may be facing. For example, some students are burdened by the responsibility of taking care of siblings or working to supplement their family’s income. Some students lack a quiet place to study, strong and positive role models, access to mental and physical health services, access to the funds required to pay for a tutor or expensive preparatory courses, a home where they can feel safe, access to healthy food, etc. These are just a few examples of the barriers and limitations that can make it difficult for people from low-income Communities of Color to succeed professionally. Leaders who strive for equality will not remove these barriers. Addressing systemic racism and removing these unjust barriers requires *equitable* leadership.

In order for leaders to lead equitably, they first need to be aware of how their beliefs, attitudes, biases, and decisions can perpetuate systemic racism. Systemic racism, also called structural or institutional racism, has been defined as systems, procedures, and policies that prevent or make “it more challenging for [P]eople of [C]olor to participate in society and in the economy.”<sup>31</sup> Systemic racism is intimately connected to the racial wealth gap, housing insecurity, education, policing, and the

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PSYCHOL. 407, 409 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4817358/pdf/nihms749730.pdf>.

29. Paul Kuttner, *The problem with that equity vs. equality graphic you’re using*, CULTURAL ORGANIZING (Nov. 1, 2016), <https://culturalorganizing.org/the-problem-with-that-equity-vs-equality-graphic/>.

30. *Id.*

31. N’dea Yancey-Bragg, *What is systemic racism? Here’s what it means and how you can help dismantle it*, USA TODAY (Jan. 29, 2021, 8:53 AM), <https://www.usatoday.com/story/news/nation/2020/06/15/systemic-racism-what-does-mean/5343549002/>.

criminal justice system.<sup>32</sup> Even though the U.S. has laws prohibiting discrimination on the basis of race, religion, gender, and disability, these laws are limited in their ability to address the systemic racism perpetuated by implicit bias. Simply, the anti-discrimination laws address explicit bias and resulting discrimination but are not designed to address implicit bias. Implicit biases, also referred to as unconscious biases, are prejudices that people have, but are unaware of their existence.<sup>33</sup> “They are mental shortcuts based on social norms and stereotypes,” that cause people to “make decisions in favor of one group to the detriment of others and naturally creep into the workplace.”<sup>34</sup> A law will not prevent people from reacting to biases that they are unaware they hold. For this reason, leaders cannot lead equitably without first discovering what biases may be influencing their decisions at the sub-conscious level.

### *B. Implicit Bias Affects Diversity and Inclusion Efforts*

Research has shown that diversity and inclusion efforts improve the bottom line of professional organizations.<sup>35</sup> Diverse and inclusive workforces are more innovative and creative, and employees find those places to be more desirable locations to work.<sup>36</sup> Diverse and inclusive groups are more capable of solving problems.<sup>37</sup> For example, a study of 4,100 employees revealed, “[t]eams with inclusive leaders are seventeen percent more likely to report that they are high performing, twenty percent more likely to say they make high-quality decisions, and twenty-nine percent more likely to report behaving collaboratively.”<sup>38</sup>

Many decision-makers are aware of the benefits related to diverse workforces, but even after implementing diversification efforts, they struggle to create an inclusive environment.<sup>39</sup> In order to truly reap the

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32. *See id.*

33. *See* HORACE MCCORMICK, THE REAL EFFECTS OF UNCONSCIOUS BIAS IN THE WORKPLACE 2 (2015).

34. *Id.*

35. *See* Anna Powers, *A Study Finds That Diverse Companies Produce 19% More Revenue*, FORBES (June 27, 2018, 10:15 PM), <https://www.forbes.com/sites/annapowers/2018/06/27/a-study-finds-that-diverse-companies-produce-19-more-revenue/?sh=249c199c506f>.

36. *See id.*; Polden & Teague, *supra* note 18, at 686-91.

37. Polden & Teague, *supra* note 18, at 686-91.

38. Juliet Bourke & Andrea Titus, *Why Inclusive Leaders Are Good for Organizations, and How to Become One*, HARV. BUS. REV. (Mar. 29, 2019), <https://hbr.org/2019/03/why-inclusive-leaders-are-good-for-organizations-and-how-to-become-one>.

39. *See* Janice Gassam Asare, *Diversity Without Inclusion Is Useless*, FORBES (Feb. 4, 2019, 7:14 AM), <https://www.forbes.com/sites/janicegassam/2019/02/04/diversity-without-inclusion-is-useless/?sh=25f99da75685>; *see also* Luis J. Diaz & Patrick C. Dunican, Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947, 977 (2011).

benefits of a diverse workforce, teams must not only recruit and retain more people from underrepresented communities, but also tap into their identity-related knowledge and experiences as a resource for learning how the team can perform its core work better.<sup>40</sup> “Organizations limit their capacity for innovation and continuous improvement unless all employees are full participants in the enterprise: fully seen, heard, developed, engaged—and rewarded accordingly.”<sup>41</sup>

There is a plethora of implicit biases that a leader can have that, if not addressed, can be detrimental to inclusion efforts.<sup>42</sup> For example, a leader with racial bias at the sub-conscious level will struggle to foster a sense of belonging among a racially diverse team if that leader is unaware that her bias is causing her to make racially motivated decisions. Therefore, leadership toward greater inclusivity, equity, and diversity requires leaders to confront the problem of implicit bias.

### III. THE PROBLEM OF IMPLICIT BIAS IN THE LEGAL PROFESSION

To understand the problem of implicit bias in the legal profession, it is necessary to know more about implicit bias and its effects. This part of the Article delves more deeply into the existence, measurement, and extent of implicit bias.

#### A. *What is Implicit Bias and How is it Measured?*

Human beings have a tendency to trust people who are similar to them, and thus are more likely to distrust members of an “out group.”<sup>43</sup> “If scientists could scan our brains when we see spiders or snakes, they would see that the area of our brains that focuses on fear, threat, anxiety

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40. Robin J. Ely & David A. Thomas, *Getting Serious About Diversity: Enough Already with the Business Case*, HARV. BUS. REV. (Nov. – Dec. 2020), <https://hbr.org/2020/11/getting-serious-about-diversity-enough-already-with-the-business-case>.

41. *Id.*

42. Bailey Reiners, *Unconscious Bias: What It Is & 16 Examples to Avoid*, BULTIN (Oct. 21, 2021), <https://bultin.com/diversity-inclusion/unconscious-bias-examples> (highlighting sixteen unconscious bias examples that are detrimental).

43. See Roderick M. Kramer, *Rethinking Trust*, HARV. BUS. REV. (June 2009), <https://hbr.org/2009/06/rethinking-trust>. Dr. Lisa DeBruine of the University of Glasgow developed a clever technique for creating an image of another person that could be morphed to look more and more (or less and less) like a study participant’s face. The greater the similarity, DeBruine found, the more the participant trusted the person in the image. This tendency to trust people who resemble us may be rooted in the possibility that such people might be related to us. Other studies have shown that we like and trust people who are members of our own social group more than we like outsiders or strangers. This in-group effect is so powerful that even random assignment into small groups is sufficient to create a sense of solidarity. *Id.*

and distrust is” activated.<sup>44</sup> Researchers have discovered that this same area of the brain is also activated more when people with unconscious biases towards Black people see pictures of Black faces than when they see pictures of White faces.<sup>45</sup> “What is truly remarkable is that many of the people who have this reaction state they have no conscious bias or prejudice towards others. They have no idea that these reactions are going on in their minds.”<sup>46</sup> This phenomenon has led social psychologists to distinguish between explicit and implicit attitudes. An explicit attitude is a person’s conscious views toward people, objects, or concepts; views that someone can deliberately think about and report.<sup>47</sup> An implicit attitude is a person’s unacknowledged evaluations that are external to the person’s awareness.<sup>48</sup> Implicit attitudes have measurable effects on people’s response times to stimuli.<sup>49</sup>

In order to uncover a deeper understanding of these “implicit” aspects of social cognition, researchers at several universities joined forces in 1998 to create the Implicit Association Test (IAT), which can be accessed online through a Harvard University website.<sup>50</sup> The IAT is used to measure the strength of associations between concepts (e.g., “Black people,” “White people,” “women,” “men,” “gay people,” “old people,” “young people,” etc.) and evaluations or stereotypes (e.g., “good,” “bad,” “dangerous,” “safe,” “career,” “family,” “athletic,” “clumsy,” “intelligent,” “successful,” etc.).<sup>51</sup> It is easier for a test taker to respond quickly when closely related items share the same response key.<sup>52</sup> For example, one IAT measures whether the test taker has an implicit association for “Black faces” and “weapons” relative to “White faces” and “weapons” based on if the test taker is faster to categorize

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44. Kimberly Papillon, *The Hard Science of Civil Rights: How Neuroscience Changes the Conversation*, EQUAL JUST. SOC’Y (2012), <https://equaljusticesociety.org/law/implicitbias/primer/> (“Studies have shown that specific areas of the brain called amygdalae—a pair of small subcortical nodes—activate when we feel fear, threat, anxiety and distrust. People with diagnosed phobias of spiders and snakes have significantly higher levels of amygdala activation when they view pictures of those fear triggers than when they view pictures of other predatory or ferocious creatures, such as tigers.”).

45. *Id.*

46. *Id.*

47. See *Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html#faq0> (last visited Feb. 21, 2021).

48. *Id.*

49. See *id.*

50. *About Us*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/aboutus.html> (last visited Feb. 21, 2021); *Take A Test*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Feb. 21, 2021).

51. See *About the IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html> (last visited Feb. 21, 2021).

52. *Id.*

images when “Black faces” and “weapons” share a response key relative to when “White faces” and “weapons” share a response key.<sup>53</sup> Across the United States, statistically significant samples show that seventy to eighty-seven percent of White Americans demonstrate bias against Black Americans on the Race IAT.<sup>54</sup>

The IAT is both praised as a trusted psychological study and criticized as inaccurate.<sup>55</sup> The results of IATs are not always a pleasant discovery, especially if test takers consider themselves to be open-minded and unbiased. For example, if a career-oriented female takes the Gender-Career IAT and displays an association for Women with Family and Men with Career, does that mean she believes that men are more qualified for careers and a woman’s role is domestic? The answer is: “no, it does not mean that.” But why does her IAT score report this? Authors of a study critiquing the IAT answer this question by posing this scenario: if an environmentalist, active in protection and prevention of degradation, takes an environment-focused IAT, she may associate the environment with negative words.<sup>56</sup> This does not mean that she is implicitly biased against the environment; instead, it is more likely that she is associating the environment with its current condition.<sup>57</sup> This person has a positive attitude about the environment’s potential, but not about the current state.<sup>58</sup> This scenario illustrates that the IAT may merely uncover knowledge of common stereotypical attitudes rather than personal attitudes.<sup>59</sup> This would explain the result of a career-oriented female associating Men with Career; the unwanted stereotype is ingrained in her brain, making it easier to associate Women with Family. Whether or not these associations are in line with personal values, they can still cause unconscious reactions. For example, research shows that women ask for promotions and raises far less than men.<sup>60</sup> This may largely stem from unconscious reactions to stereotypical

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53. See *Take A Test*, *supra* note 51.

54. Papillon, *supra* note 45.

55. See Scott Sleek, *The Bias Beneath: Two Decades of Measuring Implicit Associations*, OBSERVER, Feb. 2018, at 11, 12, [https://www.psychologicalscience.org/redesign/wp-content/uploads/2018/01/Observer-Feb\\_Interactive.pdf](https://www.psychologicalscience.org/redesign/wp-content/uploads/2018/01/Observer-Feb_Interactive.pdf).

56. See Klaus Fiedler, Claude Messner & Matthias Bluemke, *Unresolved Problems with the “I”, the “A”, and the “T”: A logical and Psychometric Critique of the Implicit Association Test (IAT)*, EUR. REV. SOC. PSYCHOL. 74, 84 (2006).

57. *Id.*

58. *Id.*

59. See *id.* at 82.

60. Kim Elsesser, *Research Stating ‘Women Ask For Pay Raises As Much As Men’ Is Misleading*, FORBES (Sept. 7, 2016, 4:16 PM), <https://www.forbes.com/sites/kimelsesser/2016/09/07/research-stating-women-ask-for-pay-raises-as-much-as-men-is-just-wrong/?sh=278a034d3983>.

attitudes about a woman's place in society. In this case, the attitude or stereotype effectively acts as an implicit bias by holding a woman back from requesting a promotion or raise.

Critics of the IAT also voice frustrations about receiving inconsistent results when the test is taken more than once.<sup>61</sup> However, researchers have countered that although the test cannot predict behavior of an individual who only took the test once, the test can show trends in the aggregate.<sup>62</sup> Project Implicit offers the largest archive of data on implicit social cognition.<sup>63</sup> Further,

As for reliability, across twenty studies, the average (and median) correlation between a person's IAT score at two different times was 0.50, which is a respectable psychometric measure. Because of the moderate reliability, nearly all scientists have discouraged using the IAT in high-stakes individual selection contexts, such as judicial nominations. But this level of reliability is perfectly adequate for the IAT's efficacy as a research tool because we can aggregate across people to discern general patterns between mental constructs and behavior.<sup>64</sup>

The immense data produced by the IAT has encouraged and shaped public discourse about race and discrimination.<sup>65</sup> In 2015, the U.S. Supreme Court referenced implicit bias when it held that disparate impact claims are recognizable under the Fair Housing Act.<sup>66</sup> In 2016, Hillary Clinton called attention to the issue of implicit bias in one of the presidential debates.<sup>67</sup> In 2016, the U.S. Department of Justice ("DOJ") committed to combatting implicit bias among prosecutors and law enforcement by adding implicit bias training into the standard training curricula for over 28,000 DOJ employees.<sup>68</sup> In 2017, the Kirwan Institute for the Study of Race and Ethnicity defined implicit bias as "the attitudes or stereotypes that affect our understanding, actions, and

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61. See German Lopez, *For years, this popular test measured anyone's racial bias. But it might not work after all*, VOX (Mar. 7, 2017, 7:30 AM), <https://www.vox.com/identities/2017/3/7/14637626/implicit-association-test-racism>.

62. *Id.*

63. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, UCLA L. REV. 465, 473 (2010).

64. *Id.* at 477-78.

65. See Sleek, *supra* note 56.

66. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2511, 2522 (2015).

67. See Sleek, *supra* note 56.

68. Press Release, U.S. Dep't of Justice, *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel* (June 27, 2016), <https://www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel>.

decisions in an unconscious manner.”<sup>69</sup> According to the Kirwan Institute’s Report, implicit biases have these key characteristics:

1. Unconscious and automatic: They are activated without an individuals’ intention or control.
2. Pervasive: Everyone possesses them, even those avowing commitments to impartiality.
3. Do not always align with explicit beliefs: Implicit and explicit biases are generally regarded as related but distinct mental constructs.
4. Have real-world effects on behavior: As discussed in this publication and other editions of the State of the Science: Implicit Bias Review, significant research has documented real-world effects of implicit bias across domains such as employment, education, and criminal justice, among others.
5. Are malleable: The biases and associations we have formed can be “unlearned” and replaced with new mental associations.<sup>70</sup>

These characteristics tell us three very important things. First, the legal community has not escaped the real-world effects of implicit bias. Everyone possesses implicit biases, including jurors, prosecutors, defenders, judges, law professors, and other lawyers. Like most other social communities and institutions, our legal systems—including criminal and civil courts, public and private institutions, and individuals—are rife with biases. But legal systems have a greater impact on freedom and liberty; thus, it is imperative to address these biases. Because everyone has biases that affect their judgment, it becomes everyone’s duty to address its consequences. Second, it is impossible for legal professionals to fulfill a commitment to impartiality if they are not even aware of the implicit biases they hold. Third, it is possible for new mental associations to replace previous biases. Thus, it is imperative for legal professionals to actively search for these implicit biases and practice de-biasing.

### *B. Guilty Until Proven Innocent*

“Innocent until proven guilty” is a freedom that many White Americans take for granted. The presumption of innocence is meant to be a basic right bestowed upon everyone in the United States,<sup>71</sup> but social

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69. Cheryl Staats, Kelly Capatosto, Lena Tenney & Sarah Mamo, *Race and Ethnicity: Views from Inside the Unconscious Mind*, ST. SCI., 2017, at 10, <http://kirwaninstitute.osu.edu/implicit-bias-training/resources/2017-implicit-bias-review.pdf>.

70. *Id.*

71. *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and

cognitive studies are proving otherwise.<sup>72</sup> For example, a study was conducted by researchers at the University of Hawaii to test if implicit biases affect jury guilty/not guilty verdicts in racially biased ways.<sup>73</sup> The researchers developed their own version of the IAT, which combined social cognition methods and legal hypotheses to predict the way mock jurors would evaluate ambiguous trial evidence.<sup>74</sup> The results of the study, as predicted, held that implicit bias is a strong predictor of evaluations on trial evidence, and the implicit bias of these jurors more strongly associated Black with Guilty in comparison to White with Guilty.<sup>75</sup> Reasonable doubt is imposed in a trial to save someone from conviction, but implicit bias limits the reasonable doubt that can help a Black defendant.<sup>76</sup> According to these studies, jurors, attorneys, and judges already have a preconceived idea that the Black person is more likely to be guilty, giving the Black person a weaker presumption of innocence from the start.<sup>77</sup> In the Guilty/Not Guilty IAT, even people who reported having warm feelings toward Black people were still more likely to show an implicit guilty bias against Black people.<sup>78</sup>

Just as implicit bias affects juries, well-meaning, egalitarian judges also have neurophysiologic reactions to victims, defendants, attorneys, and experts that perpetuate racially biased decisions.<sup>79</sup> Even though judges are committed to fairness and impartiality, and are prohibited from considering race as a factor in sentencing,<sup>80</sup> it is clear from a multitude of studies that as Afrocentric facial features increase, the sentence length increases.<sup>81</sup> This means that someone with stronger Afrocentric facial features, such as darker skin, a broader nose, curlier hair, and fuller lips, will be required to spend more time in jail than a similarly situated criminal with more Eurocentric facial features, such as lighter skin, a sharper nose, and thinner lips, simply because of

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elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

72. See Justin D. Levinson, Huajian Cai & Danielle M. Young, *Guilty By Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 200-01 (2010).

73. See generally *id.*

74. *Id.* at 189-90.

75. *Id.* at 204.

76. *Id.* at 200-01.

77. See *id.*

78. Levinson, Cai & Young, *supra* note 73, at 205.

79. See Kimberly Papillon, *The Court's Brain: Neuroscience and Judicial Decision Making in Criminal Sentencing*, 49 CT. REV. 48, 48 (2013).

80. *Id.* (“The Model Code of Judicial Conduct, caselaw, the Fourteenth Amendment, and the constitutions of every state prohibit judges from using race as a factor in sentencing.”); see MODEL CODE OF JUDICIAL CONDUCT § 2.3 (AM. BAR ASS’N 2007).

81. Papillon, *supra* note 80, at 54.

appearance.<sup>82</sup> One study found that the jail sentence of inmates who were one standard deviation above the norm for Afrocentric features was seven to eight months longer than inmates who were one standard deviation below the norm.<sup>83</sup> That study further revealed that White inmates with Afrocentric features were given longer sentences than White inmates with more Eurocentric features.<sup>84</sup> Another study discovered a similar sentencing disparity by comparing the sentences of Black inmates and White inmates who had committed the same crimes, had the same criminal history, and had the same aggravating and mitigating factors.<sup>85</sup> The Black inmates received five and a half more months in prison than did their White counterparts, even though their criminal conduct and history were comparable.<sup>86</sup> A Stanford University study revealed a correlation between the imposition of the death penalty and Afrocentric facial features.<sup>87</sup> The study showed that as the level of Afrocentric facial features rises, the likelihood of the death penalty increases.<sup>88</sup> There is a long list of studies that support this disturbing reality.<sup>89</sup>

If judges are truly trying to be egalitarian and impartial, why does the research indicate that race undoubtedly factors into sentencing decisions? In the criminal sentencing process, judges are required to engage in a rigorous analysis leading to the imposition of sentence. However, this analysis and sentencing process “may allow or even facilitate problematic neurophysiologic reactions in a judge’s brain and may result in disparate sentencing patterns.”<sup>90</sup> “Validated studies have

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82. *See id.*; *see also* Mary Beth Oliver, Ronald L. Jackson II, Ndidi N. Moses & Celnisha L. Dangerfield, *The Face of Crime: Viewers’ Memory of Race-Related Facial Features of Individuals Pictured in the News*, 54 J. COMM. 88, 88 (2004).

83. Papillon, *supra* note 80, at 54.

84. *Id.*

85. *Id.* at 53.

86. *Id.*

87. *Id.*

88. *Id.*

89. *See* Papillon, *supra* note 80, for descriptions of multiple studies that reveal disparities in criminal sentencing related to race. Papillon not only addresses the findings of each study, but provides detailed explanations of the neurophysiologic reactions that occur in the human brain that can cause these disparities. Based on the studies examined by Papillon, “[t]he additional time in prison for being African-American is equivalent to the additional time provided for a prior felony conviction. Thus, in this context, being African-American was equivalent to committing an additional crime.” *Id.* at 54.

90. *Id.* at 48 (noting that criminal sentencing requires an analysis of four principles: retribution, rehabilitation, deterrence, and incapacitation). Judges are “expected to remove inappropriate biases from their decision-making process so that the biases will not influence those decisions. However, it is precisely the inquiry required by the principles of sentencing that calls upon judges to activate the parts of their neuro-anatomy that use biases.” *Id.* at 49.

consistently shown that specific areas of the amygdalae, small subcortical nodes in the brain, activate when subjects feel fear, threat, anxiety, and distrust.<sup>91</sup> A study with White subjects revealed that when viewing faces with more pronounced Afrocentric facial features, subjects had increased amygdala activation and a higher level of fear than when viewing a face with more Eurocentric facial features.<sup>92</sup> The amygdala is not the only region of the brain that is activated when subjects see Black faces; studies also show that some subjects have activation in the insular cortex.<sup>93</sup> The insular cortex is “associated with aversion, revulsion, or disgust; for example, it is the part of the brain that activates when we smell rotting garbage.”<sup>94</sup> A defendant “whose crime is repulsive to a judge will be a prime candidate for removal from society, and for longer periods of time.”<sup>95</sup> The unfortunate result is that a judge may have a fear-based reaction or aversion to a defendant and think that it simply stems from the crime, when in fact, it is implicitly potentiated by race.<sup>96</sup>

Another hurdle judges must overcome is the fact that as an individual’s bias increases, the brain depletes resources in an attempt to support the heightened level of amygdala and insula reaction.<sup>97</sup> This resource depletion substantially impairs other cognitive skills such as memory, flexible thinking, and self-control.<sup>98</sup> In three studies, White individuals either engaged with someone of a different race or someone of the same race, then proceeded to complete an unrelated test.<sup>99</sup> White subjects who interacted with a Black person before taking the test were slower and less accurate than when they interacted with a White person before taking the test.<sup>100</sup> If cognitive skills are impaired when a judge is faced with a Black defendant, it will be more difficult for that judge to access the appropriate rules, and it will be easier for implicit

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Determining how to apply the four purposes for punishment is based in part on a judge’s conclusions about a convicted individual’s inherent dangerousness or proclivity for engaging in criminal behavior, the judge’s sympathetic response to the victim and the defendant, and the judge’s belief in the ability of the defendant to change his behavior. *Id.* at 50.

91. *Id.* at 50.

92. *Id.* at 51.

93. *Id.* at 52.

94. *Id.*

95. Papillon, *supra* note 80, at 52.

96. *Id.*

97. See Jennifer A. Richeson & Sophie Trawalter, *Why Do Interracial Interactions Impair Executive Function? A Resource Depletion Account*, 88 J. PERSONALITY & SOC. PSYCHOL. 934, 934 (2005).

98. *Id.*

99. *Id.*

100. *Id.*; see also Papillon, *supra* note 80, at 52.

associations, such as equating Black and Bad/Dangerous, to prevail.<sup>101</sup> “Aversion and disgust, when combined with fear, threat, distrust, and diminished executive functioning, create a formidable combination for the [Black] defendant to overcome.”<sup>102</sup>

Along with juries and judges, attorneys also make decisions that ultimately perpetuate systemic racism. The peremptory challenge gives attorneys the right to reject a certain number of potential jurors with no explanation.<sup>103</sup> The issue with having no obligation to explain the purpose of dismissing a juror is that it allows attorneys to make racially motivated decisions.<sup>104</sup> For example, prosecutors abuse this right by dismissing potential Black jurors in an effort to avoid their sympathy for a Black defendant.<sup>105</sup> In *Batson v. Kentucky*, the Supreme Court ruled that a prosecutor’s peremptory challenge could not be used to dismiss a juror for the sole reason of race.<sup>106</sup> Later, in *Hernandez v. New York*, the Supreme Court expanded upon *Batson* by defining a race-neutral explanation to be “an explanation based on something other than the race of the juror.”<sup>107</sup> The Court further explained that “unless a discriminatory intent is inherent in the [attorney’s] explanation, the reason offered will be deemed race neutral.”<sup>108</sup> This broad definition allows for race-neutral reasons that are “implausible,” “fantastic,” “silly,” or “superstitious,” and even allows for a person’s appearance to be considered race-neutral.<sup>109</sup> The Supreme Court was stepping in the right direction by making the *Batson* rule, but unsurprisingly, attorneys have found their way around this rule;<sup>110</sup> this aligns with the expectations that Justice Marshall noted in his concurrence, “[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts

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101. Papillon, *supra* note 80, at 52.

102. *Id.*

103. *See* *Batson v. Kentucky*, 476 U.S. 79, 83 (1986).

104. *See id.* at 85-90.

105. *See id.* at 83.

106. *See id.* at 96.

107. *Hernandez v. New York*, 500 U.S. 352, 360 (1991).

108. *Id.*

109. Antony Page, *Batson’s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 168-69 (2005) (citing *Purkett v. Elem*, 514 U.S. 765, 776 (1995) (Stevens, J., dissenting)); *see* *State v. Williams*, 97 S.W.3d 462, 471-72 (Mo. 2003) (rejecting the defendant’s argument “that striking the venire person based upon physical appearance was inherently race-based because both he and [the defendant were] African-American.”).

110. *See* *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring) (“[T]he use of race-and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before.”).

are ill equipped to second-guess those reasons.”<sup>111</sup> The peremptory challenge allows attorneys to either make explicitly race-based decisions while claiming that race played no part in their rationale, or to unintentionally rely on implicit bias while selecting a jury.<sup>112</sup> If a Black man is on trial, twelve White jurors will not constitute a jury of his “peers.”

The peremptory challenge is not the only way attorneys implicitly and explicitly perpetuate systemic racism; the relationship between prosecutors and police departments also plays a major role. Prosecutors interact with the police every day and rely on the officers to investigate and testify for their cases.<sup>113</sup> Dan Richman, a former federal prosecutor, told NPR that “prosecutors also can’t help but relate to officers on a personal level, especially because they’re often the ones sending the cops into harm’s way.”<sup>114</sup> Further, it is common for police unions and organizations to contribute funds to the political campaigns of prosecutors, which adds another layer to their relationship.<sup>115</sup> Despite the close relationship prosecutors have with the police, it is the prosecutor’s role to decide whether to indict a police officer for wrongdoing.<sup>116</sup> An investigation launched by The Guardian, “found that in 2015, district attorneys cleared their cop colleagues of wrongdoing in 217 cases of police killings,” which constituted eighty-five percent of all “justified” police killings in that year.<sup>117</sup> In 2016, The Guardian reported that prosecutors chose to indict police officers for killings roughly six to

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111. *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (criticizing the Court’s willingness to allow “easily generated” race-neutral explanations to sustain peremptory challenges).

112. See Page, *supra* note 110, at 261 (arguing that “the best solution is to completely eliminate the peremptory challenge. In the alternative, lawyers should be made aware of the possibility or likelihood, that they are unconsciously using race- and gender-based stereotypes, and should actively and vocally affirm their commitment to egalitarian non-discriminatory principles. Judges should explicitly note the problems of race- and gender-bias before the start of jury selection. Judges should also allow for the increased use of questionnaires, preferably those that are race- and gender-blind. In addition, judges should permit more time for jury selection, both for questioning potential jurors and for allowing lawyers adequate time to think and combat their biases. Finally, judges should be prepared to find less stigmatizing reasons for disallowing peremptory challenges than the dishonesty of the lawyer before them. While these measures clearly will not eradicate unconscious stereotyping and the resulting discrimination, they will reduce their impact and frequency.”).

113. Martin Kaste, *It’s A Complicated Relationship Between Prosecutors, Police*, NPR (Dec. 4, 2014, 4:07 PM), <https://www.npr.org/2014/12/04/368529402/its-a-complicated-relationship-between-prosecutors-police>.

114. *Id.*

115. Rahel Gebreyes, *The Close Relationship Between Prosecutors And Police Officers*, HUFFPOST (Jan. 12, 2016, 1:25 PM), [https://www.huffpost.com/entry/police-prosecutor-relationship\\_n\\_56951b56e4b09dbb4bac9218](https://www.huffpost.com/entry/police-prosecutor-relationship_n_56951b56e4b09dbb4bac9218).

116. Kaste, *supra* note 114.

117. Gebreyes, *supra* note 116.

eight percent of the time.<sup>118</sup> The statistics show that far more people are killed by police in the United States than are killed by police in other advanced industrial democracies.<sup>119</sup> Further, Black men and boys are the most likely to be killed by police in the United States.<sup>120</sup> When prosecutors refuse to hold police officers accountable, they are maintaining structural inequalities that harm Communities of Color.

### *C. Implicit Bias Beyond the Courtroom*

The negative effects of implicit bias are not limited to the courtroom or criminal context. A multitude of studies have revealed that implicit bias infiltrates the workplace, legal hiring process, and legal education as well. For example, one study found that a statistically identical resume was roughly fifty percent more likely to result in a callback interview when the resume had a stereotypically White name than when it had a stereotypically Black name.<sup>121</sup> Another study found, “[e]mails sent to faculty members at universities, asking to talk about research opportunities, were more likely to get a reply if a stereotypically [W]hite name was used.”<sup>122</sup> In another study, White state legislators, of both political parties, were found to be less likely to respond to constituents with stereotypically Black names than stereotypically White names.<sup>123</sup>

Americans do not compete in a color-blind, gender-blind, and social category blind market.<sup>124</sup> “Regardless of what might be the case on the explicit level, on the implicit level, we are not cognitively colorblind.”<sup>125</sup> Most individuals show evidence of implicit bias.<sup>126</sup> According to the data collected by Project Implicit:

Most participants demonstrated implicit attitudes in favor of one social group over another, away from the neutral position of no bias. Notwithstanding protestations to the contrary, people are generally not “color” blind to race, gender, religion, social class, or other

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118. *Id.*

119. Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of being killed by police use of force in the United States by age, race-ethnicity, and sex*, 116 PNAS 16793, 16793 (2019).

120. *See id.* at 16794.

121. Sendhil Mullainathan, *Racial Bias, Even When We Have Good Intentions*, N.Y. TIMES (Jan. 3, 2015), <https://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias.html>.

122. *Id.*

123. *Id.*

124. *See* Kang & Lane, *supra* note 64, at 474.

125. *Id.* at 477. “[W]hen people claim colorblindness, they cannot be claiming perceptual colorblindness; instead, they are likely claiming to be cognitively colorblind. In other words, they have no (meaningfully) different attitudes or stereotypes between any two racial categories (e.g., Black and White).” *Id.* at 469.

126. *Id.* at 473.

demographic characteristics. More important, participants systematically preferred socially privileged groups: YOUNG over OLD, WHITE over BLACK, LIGHT SKINNED over DARK SKINNED, OTHER PEOPLES over ARAB-MUSLIM, ABLED over DISABLED, THIN over OBESE, and STRAIGHT over GAY.<sup>127</sup>

Auditing studies show that identical candidates for a job receive disparate treatment based on their race.<sup>128</sup> When we encounter another individual, we instantaneously classify that person into a racial category based on cultural and contextual rules.<sup>129</sup> We then interact with that individual in a certain way based on how we subconsciously categorize her.<sup>130</sup> This categorization process negatively impacts people of color in many ways, including job interviews.<sup>131</sup> Making unbiased hiring decisions requires the hiring team to look inward and recognize how implicit bias may be causing them to categorize an applicant in a way that perpetuates systemic racism.

#### IV. LEADERSHIP TOWARD ADDRESSING AND AMELIORATING IMPLICIT BIAS

The first step lawyers (and indeed other leaders) must take to address and ameliorate implicit bias is introspection and leadership of self. Before a leader can successfully lead any number of people, that leader must accept the existence of personal unconscious biases, uncover what those biases are, and actively practice “de-biasing” within oneself. Without such introspection, a leader cannot successfully lead equitably, nor can she help her constituents reduce or eliminate attitudes and behaviors that result in discrimination.

Change requires effective leadership. Before a leader can lead others by modeling the values that will move the group forward, the leader must embrace and believe in those values. Therefore, leaders who seek to make their organization a better, more successful workplace must believe in the message of change and must clearly embrace those values.<sup>132</sup> If the desire is to create a more equitable and inclusive law firm or judicial chamber, the lawyer or judge must believe that change is needed and must align his or her personal values with those goals. If

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127. *Id.* at 474.

128. Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1141 (2010).

129. *Id.* at 1143.

130. *See id.*

131. *See id.* at 1141.

132. *See* JAMES M. KOUZES & BARRY Z. POSNER, *THE LEADERSHIP CHALLENGE: HOW TO MAKE EXTRAORDINARY THINGS HAPPEN IN ORGANIZATIONS* 52-65 (6th ed. 2017).

a leader does not believe in what she is seeking to lead, her constituents will not believe her or in the goals she advocates. Lawyers and judges must model appropriate behaviors and attitudes with a conscious effort to inspire others (i.e., jurors, court personnel, younger lawyers, and even the media) toward a more equitable legal system.

Multiple studies have revealed that exposure to positive exemplars from other social groups can reduce implicit bias toward members of those groups.<sup>133</sup> For example, President Obama is a counter-stereotypic and positive exemplar, and one study discovered a reduction in implicit racial prejudice after high levels of exposure to President Obama during his presidential campaign.<sup>134</sup> Another study found that positive feedback from a Black manager subsequently reduced implicit biases of the employee.<sup>135</sup> The above-mentioned studies show us that diversifying the legal profession will naturally reduce implicit bias in firms and legal institutions; but it is not enough to stop there.

Leaders must actively seek to reduce bias on a personal level before persuading and leading their constituents toward understanding and addressing their own biases. Leaders can discover implicit biases by educating themselves about the topic, asking themselves critical questions, and taking various IATs or other assessments online.<sup>136</sup> Reducing the effects of implicit bias in the administration of justice is a multistep process and successful navigation of those steps requires thoughtful action by group leaders; an inclusive workplace free of the effect of bias does not happen without that leadership.<sup>137</sup> Leaders facilitate progress toward eliminating systemic racism by candidly addressing implicit bias and inspiring others to join such efforts. By creating a vision for these challenging yet necessary changes and modeling a way for constituents to create a more inclusive workplace, they can forcefully address the adverse consequences of implicit bias.

The following are several steps that dedicated leaders can take to achieve the benefits of a more inclusive and equitable law organization and to move the legal profession in the same direction.

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133. Corey Columb & E. Ashby Plant, *Revisiting the Obama Effect: Exposure to Obama Reduces Implicit Prejudice*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 499, 499 (2011).

134. *Id.*

135. See Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. AND SOC. SCI. 427, 438 (2007).

136. See e.g., *Preliminary Information*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Nov. 1, 2011).

137. Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERSONALITY AND SOC. PSYCHOL. 835, 835 (2002).

*A. Find Internal Motivation to Reduce Bias*

Effective leaders realize that many of their followers will not independently move to reduce or eliminate their biases. Thus, these leaders must clearly explain the problem of implicit bias, articulate appropriate ways to challenge it, and inspire others to perform the work that needs to be done to eliminate it. Making people more aware of the common nature of implicit biases and how to address them is a hallmark of an inclusive leader. Further, the leader should draw a hard line on the effects of bias, like racial stereotyping or compensation differentials based on inappropriate factors such as gender or race.

Many people attempt to control their bias during IATs, but these attempts are not usually successful.<sup>138</sup> In one study, subjects viewed unfamiliar Black faces while researchers assessed brain activation and they found that subjects with stronger anti-Black bias exhibited more activation in brain regions associated with cognitive control, suggesting they were engaging in attempts to control automatic reactions to faces.<sup>139</sup> This tells us that most people do not want to possess bias, but overcoming years of learned stereotypes requires sustained motivation and education.

Self-determination theory posits, “the more internalized or self-determined a goal or value is, the more successful people are at responding consistently with the goal or value.”<sup>140</sup> People with a goal to respond without prejudice can be motivated by internal (personal) reasons or by external (normative) reasons.<sup>141</sup> The internal motivation arises from a set of beliefs and standards that the person has internalized and finds important to uphold on a personal level.<sup>142</sup> The external motivation arises from a standard set by others.<sup>143</sup> Externally motivated people are seeking approval; they want to respond without prejudice to avoid negative reactions from others.<sup>144</sup> A group of researchers conducted three studies to find out which participants were more effective at reducing implicit bias: internally motivated individuals, externally motivated individuals, or individuals with high levels of internal and external motivation.<sup>145</sup> In all three studies, participants who reported high levels of internal motivation and low levels of external

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138. See Lane, Kang & Banaji, *supra* note 136, at 437.

139. See *id.*

140. Devine et al., *supra* note 138, at 836.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 845.

motivation to reduce implicit bias, “responded with lower levels of implicit race bias than did all other participants.”<sup>146</sup> Therefore, the first step one must take to ameliorate implicit bias is to consciously recognize that it is morally wrong to respond with prejudice and to internalize anti-racist and anti-prejudicial beliefs and standards as part of your personal moral code.<sup>147</sup> It is essential for these standards and beliefs to be integrated into both the personal and professional self-concept.<sup>148</sup> In order to lead others toward more inclusive, equitable workplaces, leaders need to be self-aware of their own challenges with bias and must learn to control those biases.

How can someone find internal motivation to change something that happens at the subconscious level? Finding internal motivation requires an acknowledgement and personal acceptance of the problem. Rather than make excuses for the recognition that one has unconscious biases, he or she needs to acknowledge that implicit bias has negative real-world consequences for other people and accepting the unfortunate reality that we all suffer from implicit bias. Self-reflection and the ability to empathize with others are signature traits of effective leaders.<sup>149</sup> Thoughtful consideration of how your life would be affected if you were forced to stay in prison for an extra year because of your race, or if you were faced with the grim reality that your son has a higher likelihood of being killed by police because of his race or ethnicity is necessary.

### *B. Be a Visionary for Positive Ethical Change*

Ameliorating the effects of implicit bias requires leaders to confront bias rather than be complacent or avoid difficult situations. Strong personal convictions against racism and other forms of bias are needed for a lawyer to lead himself and others to a fair legal environment. For example, trial lawyers should be expected by their colleagues, judges, and clients to seek just outcomes that avoid stereotypes and inherent

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146. Devine et al., *supra* note 138, at 845.

147. *Id.* at 836 (“[I]nternal motivation to respond without prejudice arises from internalized, personally important nonprejudiced beliefs (i.e., the self sets the standard against which one’s prejudice-relevant responses are evaluated).”).

148. *See id.* (“[T]he more internalized or self-determined a goal or value is, the more successful people are at responding consistently with the goal or value.”). The authors of this Article believe that the legal professional must have goals to be bias free internalized on a both a personal and professional level. In accordance with self-determination theory, internalizing anti-bias values and goals is the best way for the legal professional to avoid making decisions motivated by implicit bias.

149. Prudy Gourguechon, *Empathy Is An Essential Leadership Skill—And There’s Nothing Soft About It*, FORBES (Dec. 26, 2017, 2:47 PM), <https://www.forbes.com/sites/prudygourguechon/2017/12/26/empathy-is-an-essential-leadership-skill-and-theres-nothing-soft-about-it/?sh=73447352b9da>.

biases. The jury should be encouraged to discuss the possibility that they might be placing more weight on certain evidence because they are more inclined to find a Black defendant guilty. Even if deliberations seem complete, it is their duty to go through the evidence piece by piece with a new lens in order to ensure that race did not lower the prosecution's burden of proof. Judges should look at their potential sentencing decisions and compare them to similarly situated criminals of different races. They should then ask themselves whether or not an unconscious bias could have affected their decision. The attorney should ask herself why she really thinks the Black juror is unfit to sit on the jury. If her reasoning for removing the juror feels strained or inappropriate, she should ask herself if she is being unduly influenced by her implicit biases or if she is disregarding the ethical and moral responsibilities as an attorney for the sole purpose of winning the case. Even though the primary goal of a lawyer is to succeed for the client, victory should never come at the cost of fair and unbiased results. Every member of the legal profession owes a duty to their clients and to society to advance the rule of law and seek just and appropriate outcomes.<sup>150</sup>

Another powerful way lawyers and judges can model the way is by committing to litigation or trial management strategies that reject capitalizing on stereotypes or fears rooted in bias. In one noteworthy example, a federal district judge directly confronted implicit bias by creating a jury instruction that explained the fact that while everyone has biases, not everyone needs to act on those biases, which is essential for jury deliberations and decisions.<sup>151</sup> This commitment to recognizing and addressing implicit bias should become commonplace through thoughtful efforts by lawyers and judges to understand racial (and other forms of) bias and seek appropriate ways to reduce bias in juror deliberations, courtroom demeanor, and “around the water cooler” at the

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150. The Preamble to Model Rules of Professional Conduct articulates several important responsibilities of lawyers in their conduct with clients, courts and third parties as well as the personal conduct of lawyers as public citizens. This would include the need to control or eliminate the deleterious effects of bias in the courts and other areas for the administration of justice, including the legal profession. *See* MODEL RULES OF PROF'L CONDUCT pmbl. 1-2, 5-6 (AM. BAR ASS'N 1983), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/).

151. *See* JENNIFER K. ELEK & PAULA HANNAFORD-AGOR, CAN EXPLICIT INSTRUCTIONS REDUCE EXPRESSIONS OF IMPLICIT BIAS? NEW QUESTIONS FOLLOWING A TEST OF A SPECIALIZED JURY INSTRUCTION app. C (2014), [https://www.ncsc-jurystudies.org/\\_data/assets/pdf\\_file/0024/9249/can-explicit-instructions-reduce-expressions-of-implicit-bias.pdf](https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0024/9249/can-explicit-instructions-reduce-expressions-of-implicit-bias.pdf) (reviewing juror instruction of Judge Mark W. Bennett, U.S.D.C. Northern District of Iowa).

law firm. All judges and lawyers should seek ways to positively encourage others to confront their biases.

### *C. Inspire and Motivate Constituents to Reduce Bias*

Once a leader has properly recognized personal biases and actively engaged in meaningful attempts to reduce or eliminate his own biases, he must pave the way for his constituents to promote a bias-free legal system. Sometimes, the small steps can have the greatest impact. A clear rejection of jokes, innuendos and other statements that diminish another person goes a long way to setting the proper tone and atmosphere in the courtroom, chambers, law firm, or organization. Leaders should seek opportunities to directly confront inappropriate conduct or speech that is hurtful and unproductive in the workplace. This demonstrates the leader's personal commitment to an inclusive workplace and gives her an opportunity to teach others that respect is reciprocated, which ultimately makes everyone feel better about the work they do and the people around them.

When explaining why collective efforts to address and ameliorate bias are important, the leader can reference the well-documented case of a national law firm that actively recruited and hired (all at great expense) more than thirty Black associates in an eight-year span in the 1990s, but was not able to retain any of them.<sup>152</sup> The law firm associates did not report instances of overt racist behavior, but rather the "subtle but pervasive tendency" of predominately White partners to favor those in the firm that looked like them; for those Black associates, that implicit bias was the reason why they left.<sup>153</sup> This example illustrates the point that efforts to create a diverse workforce will be in vain if efforts to promote inclusion and address implicit bias are not simultaneous.

Leaders must set the tone in the organization by demanding actions that eliminate or minimize bias. Indeed, the leader strengthens others by encouraging their efforts to value and support a more inclusive environment. The Center for Talent Innovation has identified six behaviors of inclusive leaders, including making sure that team members speak up and are heard by everyone, making it safe to propose novel ideas, empowering team members to make appropriate decisions without fear of retribution, taking advice and implementing feedback, giving feedback, and sharing credit for the successes of others on the team.<sup>154</sup> Adhering to a code of conduct that includes these six behaviors can help

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152. See Diaz & Dunican, *supra* note 40, at 977.

153. See *id.*

154. Laura Sherbin & Ripa Rashid, *Diversity Doesn't Stick Without Inclusion*, HARV. BUS. REV. (Feb. 1, 2017), <https://hbr.org/2017/02/diversity-doesnt-stick-without-inclusion>.

leaders reinforce and model appropriate standards as well as encourage constituents to ameliorate their biases.

*D. Set Bias Elimination Goals and Reward Positive Steps to Achieve Them*

Effective leaders are cognizant of and attentive to efforts that those in their organizations make toward essential goals. If client solicitations and billable hours rise to exceed goals, law firm leaders recognize and reward those who pursued the goals to success. It is no different when the firm or judicial office establishes goals to ameliorate implicit bias. These leaders recognize the contributions of group members by showing appreciation and celebrating their successes.<sup>155</sup>

Organizational leaders are often the critical difference between the success of the organization and poor performance. For example, one study reported that the behaviors of leaders, irrespective of where they are in the organization's hierarchy, can drive up to seventy percentage points of difference between the proportion of employees who feel highly included in the work of the group and the proportion of those who do not and, as a result, become less productive.<sup>156</sup> Clearly, leadership matters to organizations that wish to improve employee morale and reduce employee turnover, and creating a more inclusive workplace is critical to achieving those goals.

## V. CONCLUSION

This Article urges leaders in the legal profession to recognize and address their own implicit biases and then lead their constituents toward a more bias-free legal system. The stakes are high and failure to advance this goal threatens the fair administration of justice and the rule of law. Reducing implicit bias is a multistep process that does not occur overnight.<sup>157</sup> First, the individual must consciously recognize that it is inappropriate to respond with prejudice and, more importantly, that the prevalence of prejudice, bias, and distrust harms human beings.<sup>158</sup> Second, leaders must take the appropriate, non-biased beliefs and standards, and adopt them into their own everyday lives as well as those

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155. See KOUZES & POSNER, *supra* note 133, at 247-92 (noting that recognizing and celebrating others' achievements and contributions enhances the spirit of the community, strengthens the connections between the leader and followers, and provides social support for those in the community).

156. JANET FOUTTY ET AL., *SHIFT/FORWARD: REDEFINING LEADERSHIP 2* (2018), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-shift-forward-redefining-leadership.pdf>.

157. Devine et al., *supra* note 138, at 835.

158. *Id.*

of others in the organization.<sup>159</sup> Organizational efforts for greater workplace diversity and inclusion are the kind of approaches that will get results in reducing implicit and explicit bias. Third, it is essential that these standards be integrated into one's self-concept.<sup>160</sup> This self-determination theory in practice finds that if the reasons are autonomous and sincere it is easier to overcome bias.<sup>161</sup> Before a leader can fulfill her duties as a leader, she must recognize her biases and actively practice de-biasing. She can practice de-biasing by consistently reminding herself that unconscious biases may be infiltrating her decision-making process and always giving decisions a second look. Then, she is prepared to lead others through this process of self-assessment, recognizing, and addressing personal biases.

This Article also set forth measures and initiatives (at the most basic level) that leaders can take to move their organizations toward greater inclusion and acceptance. These steps taken by some of the most influential organizations—courts, law firms, and corporate legal departments—can help the United States address its history of racism and discrimination.

Before a lawyer can model the way for constituents and influence them to rid themselves of implicit bias, he must have a strong vision for what a bias-free (or substantially so) work environment looks like and how beneficial that would be for all the lawyers, staff, and others. Effective lawyers and judicial leaders will lead their organizations past the negative effects of bigotry and bias and toward more effective, respectful workplaces, courtrooms, and academic classrooms. The legal profession will benefit and, in turn, so will the administration of justice and advancement of the rule of law in America.

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159. *Id.*

160. *Id.*

161. *See id.* at 836.