THEODORE ROOSEVELT INN OF COURT
PRESENTS

The Consequences Of Implicit Bias: What Is Implicit Bias? How To Recognize It and Why Should We Care?

PRESENTERS
Mirna M. Santiago, Esq.
Hon. Andrea Phoenix
Hon. Marilyn Genoa
Jess Bunshaft, Esq.
Dana Grossblatt, Esq.
Marshall Shicthman, Esq.
Students:
Alexandra Woods
Paul A. Tsenesidis
Sandra M. Morrongiello

Nassau County Bar Association
Tuesday, November 21, 2017
5:30 pm

Agenda

Introduction and "trigger warning" disclosure	10 Minutes
Power Point Part I What is Implicit Bias?	10 Minutes
Hat Game	25 Minutes
Power Point Part II	30 Minutes
Skit ---Jury Deliberation	15 Minutes
Discussion/Q&A Regarding Implicit Bias -panel members and audience	10 Minutes

Mirna Martinez Santiago MirnaMSantiago@gmail.com
MirSantiago@AcaciaNetwork.org

Implicit Bias Reference List

Rhode, Deborah L, *Law is the Least Diverse Profession in the Nation and Lawyers Aren't Doing Enough to Change That,* May 27, 2015, ("Women constitute more than a third of the profession, but only about a fifth of law firm partners, general counsels of Fortune 500 corporations and law school deans. . . . Although blacks, Latinos, Asian Americans and Native Americans now constitute about a third of the population and a fifth of law school graduates, they make up fewer than 7 percent of law firm partners and 9 percent of general counsels of large corporations. In major law firms, only 3 percent of associates and less than 2 percent of partners are African Americans.")

Jackson, Liane, *Minority women are disappearing from BigLaw – and here's why*, March 1, 2016, available at http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why ("Studies and surveys by groups such as the ABA and the National Association of Women Lawyers show that law firms have made limited progress in promoting female lawyers over the course of decades, and women of color are at the bottom.")

Greene, Michael, *Minorities, Women Still Underrepresented in Law*, April 16, 2015, available at https://bol.bna.com/minorities-women-still-underrepresented-in-law/ ("Based on Department of Labor Statistics, the IILP [Institute for Inclusion in the Legal Profession] found that 'aggregate minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs.'")

National Association for Law Placement Press Release, *Women, Black/African-American Associates Lose Ground at Major U.S. Law Firms,* Nov. 19, 2015, available at http://www.nalp.org/uploads/PressReleases/2015NALPWomenandMinorityPressRelease.pdf (noting in particular that the percentage of African-American firm associates has declined each year since 2009)

American Bar Association, *Summary Report and Recommendations From 2009 ABA Study of the State of Diversity in the Legal Profession, examining Race and Ethnicity Gender Sexual Orientation Disabilities*, April 2010, (citing as a top disappointment that "[t]he legal profession is less racially diverse than most other professions, and racial diversity has slowed considerably since 1995.")

Lam, Bourree, *The Least Diverse Jobs in America,* June 29, 2015, available at http://www.theatlantic.com/business/archive/2015/06/diversity-jobs-professions-america/396632/ (citing data from the U.S. Census showing that 81% of lawyers are white, topping the list)

New York State Bar Association, *Judicial Diversity: A Work in Progress,* Sept. 17, 2014, available at http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html ("People of color and women remain significantly under-represented on the bench. This under-

representation most starkly manifests in our upstate judicial districts, but can also be observed in certain downstate districts with large minority populations"), at p. 8.

Strickler, Andrew, *How Minority Attorneys Encounter BigLaw Bias*, available at http://www.law360.com/articles/795806/how-minority-attys-encounter-biglaw-bias; Rhode, n. 1, *supra* ("Minorities still lack a presumption of competence granted to white male counterparts, as illustrated in a recent study by a consulting firm. It gave a legal memo to law firm partners for "writing analysis" and told half the partners that the author was African American. The other half were told that the writer was white. The partners gave the white man's memo a rating of 4.1 on a scale of 5, while the African American's memo got a 3.2.")

Negowetti, Nicole E., *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, University of Nevada Law Journal, Spring 2015, available at http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1600&context=nlj (examining, at pp. 945-949, the relationship between implicit bias and lawyering and the impact on associate experience and retention: "[t]he 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.' . . . Without specific metrics to objectively evaluate the quality of an associate's work, stereotypes and implicit biases will influence one's judgment.");

Reeves, A., *Diversity in Practice: What Does Your Brain See?,* Nov. 2012, available at http://www.nextions.com/wpcontent/files_mf/1352727388_magicfields__attach_1_1.pdf ("The research effectively disproves that any of us are 'color-blind' or 'gender-blind.' We 'see' race and gender even when those characteristics are undefined.").

"Actions Speak Too: Uncovering Possible Implicit and Explicit Discrimination in the Employment Interview Process," Therese Macan and Stephanie Merritt, International Review of Industrial and Organizational Psychology 2011, Volume 26 (2011).

Incarceration rates for men and women of color continue to be significantly higher than those of white prisoners. A 2013 U.S. Department of Justice report cited that non-Hispanic blacks (37%) comprised the largest portion of male inmates under state or federal jurisdiction as compared to non-Hispanic whites, while the imprisonment rate for black females was twice the rate of white females. http://www.bjs.gov/content/pub/pdf/p13.pdf

"Male partners make 44% more on average than female partners, survey finds," ABA Journal, October 13, 2016. http://www.abajournal.com/news/article/male_partners_make_44_percent_more_on_average_than_female_partners_survey_f/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email

http://abovethelaw.com/2016/03/high-minority-attrition-rates-continue-to-plague-large-law-firms/

Mirna Martinez Santiago MirnaMSantiago@gmail.com
MirSantiago@AcaciaNetwork.org

A recent report in the *ABA Journal* showed that 85% of female attorneys of color in the United States will quit large firms within seven years of starting their practice, with a number surveyed stating that they "feel they have no choice."

http://www.abajournal.com/mobile/mag_article/minority_women_are_disappearing_from_bigla w_and_heres_why

http://www.usnews.com/news/articles/2015/07/06/its-official-the-us-is-becoming-a-minority-majority-nation. See also https://www.census.gov/quickfacts/table/PST045215/00 (showing declining numbers of "white alone" individuals in the United States).

Ian Ayres, When Whites Get a Free Pass, THE NEW YORK TIMES (Feb. 24, 2015), at A23, available at https://www.nytimes.com/2015/02/24/opinion/research-shows-white-privilege-is-real.html

http://time.com/3666135/sheryl-sandberg-talking-while-female-manterruptions/

Jessica Bennett, How Not to Be 'Manterrupted' in Meetings, TIME.COM (Jan. 14, 2015)

Tonja Jacobi & Dylan Schweers, Female Supreme Court Justices Are Interrupted More by Male Justices and Advocates, HARV. BUS. REV. (Apr. 11, 2017), https://hbr.org/2017/04/femalesupreme-court-justices-are-interrupted-more-by-male-justices-and-advocates.

http://gap.hks.harvard.edu/orchestrating-impartiality-impact-%E2%80%9Cblind%E2%80%9D-auditions-female-musicians

http://www.npr.org/sections/ed/2016/09/28/495488716/bias-isnt-just-a-police-problem-its-a-preschool-problem

http://www.huffingtonpost.com/2014/09/02/jose-joe-job-discrimination_n_5753880.html

https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html?_r=0

https://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html

https://ncwba.org/wp-content/uploads/2016/11/Strategies-for-Confronting-Unconscious-Bias-The-Colorado-Lawyer-May-2016.pdf

http://nypost.com/2017/10/25/kelloggs-called-out-for-racist-cartoon-on-cereal-box/

The New York Times | https://nyti.ms/1xvf63F

Opinion | OP-ED COLUMNIST

Crime, Bias and Statistics

Charles M. Blow   SEPT. 7, 2014

Discussions of the relationship between blacks and the criminal justice system in this country too often grind to a halt as people slink down into their silos and arm themselves with their best rhetorical weapons — racial bias on one side and statistics in which minorities, particularly blacks, are overrepresented as criminals on the other.

What I find too often overlooked in this war of words is the intersection between the two positions, meaning the degree to which bias informs the statistics and vice versa.

The troubling association — in fact, overassociation — of blacks with criminality directly affects the way we think about both crime and blacks as a whole.

A damning report released by the Sentencing Project last week lays bare the bias and the interconnecting systemic structures that reinforce it and disproportionately affect African-Americans.

This is the kind of report that one really wants to publish in its totality, for its conclusion is such a powerful condemnation of the perversity of racial oppression. But alas, this being a newspaper column, that's not possible. Still, allow me to present many of their findings:

• "Whites are more punitive than blacks and Hispanics even though they experience less crime."

• "White Americans overestimate the proportion of crime committed by people of color and associate people of color with criminality. For example, white respondents in a 2010 survey overestimated the actual share of burglaries, illegal drug sales and juvenile crime committed by African-Americans by 20 percent to 30 percent."

• "White Americans who associate crime with blacks and Latinos are more likely to support punitive policies — including capital punishment and mandatory minimum sentencing — than whites with weaker racial associations of crime."

This association of crime with blacks has been noted by others. Lisa Bloom, in her book "Suspicion Nation," points out: "While whites can and do commit a great deal of minor and major crimes, the race as a whole is never tainted by those acts. But when blacks violate the law, all members of the race are considered suspect."

She further says: "The standard assumption that criminals are black and blacks are criminals is so prevalent that in one study, 60 percent of viewers who viewed a crime story with no picture of the perpetrator falsely recalled seeing one, and of those, 70 percent believed he was African-American. When we think about crime, we 'see black,' even when it's not present at all."

As the Sentencing Project report makes clear, the entire government and media machinery is complicit in the distortion.

According to the report:

• "Whether acting on their own implicit biases or bowing to political exigency, policy makers have fused crime and race in their policy initiatives and statements. They have crafted harsh sentencing laws that impact all Americans and disproportionately incarcerate people of color."

• "Many media outlets reinforce the public's racial misconceptions about crime by presenting African-Americans and Latinos differently than whites — both quantitatively and qualitatively. Television news programs and newspapers overrepresent racial minorities as crime suspects and whites as crime victims."

• "Disparities in police stops, in prosecutorial charging, and in bail and sentencing decisions reveal that implicit racial bias has penetrated all corners of the

criminal justice system."

The effects of these perceptions and policies have been absolutely devastating for society in general and black people in particular. According to the report:

• "By increasing support for punitive policies, racial perceptions of crime have made sentencing more severe for all Americans. The United States now has the world's highest imprisonment rate, with one in nine prisoners serving life sentences. Racial perceptions of crime, combined with other factors, have led to the disparate punishment of people of color. Although blacks and Latinos together comprise just 30 percent of the general population, they account for 58 percent of the prison population."

• "By increasing the scale of criminal sanctions and disproportionately directing penalties toward people of color, racial perceptions of crime have been counterproductive for public safety. Racial minorities' perceptions of unfairness in the criminal justice system have dampened cooperation with police work and impeded criminal trials. In 2013, over two-thirds of African-Americans saw the criminal justice system as biased against blacks, in contrast to one-quarter of whites. Crime policies that disproportionately target people of color can increase crime rates by concentrating the effects of criminal labeling and collateral consequences on racial minorities and by fostering a sense of legal immunity among whites."

There is no way in this country to discuss crime statistics without including in that discussion the myriad ways in which those statistics are informed and influenced by the systemic effects of racial distortion.

Individual behavior is not the only component of the numbers; bias is the other.

I invite you to join me on Facebook and follow me on Twitter, or e-mail me at chblow@nytimes.com.

A version of this op-ed appears in print on September 8, 2014, on Page A19 of the New York edition with the headline: Crime, Bias and Statistics.

- What is an attitude?
- What are implicit and explicit stereotypes?
- How does the IAT measure implicit attitudes and stereotypes?
- What does it mean that my IAT score is labeled 'slight', 'moderate', or 'strong'?
- What does it mean that my feedback says that there were too many errors to determine a result?
- What does it mean if I take the test more than once and get different results?
- Could the result be a function of the order in which I did the two parts?
- Could the result be a function of handedness or hand-eye coordination?
- Might my preference for one group over the other be due to differences in familiarity with the groups?
- Might my preference for one group over another be a simple ingroup preference?
- Do black participants show a preference for black over white on the race attitude IAT? Do gay participants show a preference for gay over straight? Do older participants show a preference for old over young?
- If my IAT shows that I have an implicit preference for one group over another, does that mean I am prejudiced?
- Where do implicit attitudes come from? Is it me or my culture?
- What can I do about an implicit preference that I don't want?
- How can I support the research done at Project Implicit?

What is an attitude?

An attitude is your evaluation of some concept (e.g., person, place, thing, or idea). An explicit attitude is the kind of attitude that you deliberately think about and report. For example, you could tell someone whether or not you like math. Implicit attitudes are positive and negative evaluations that are much less accessible to our conscious awareness and/or control. Even if you say that you like math (your explicit attitude), it is possible that you associate math with negativity without being actively aware of it. In this case, we would say that your implicit attitude toward math is negative.

What are implicit and explicit stereotypes?

Stereotypes are the belief that most members of a group have some characteristic. Some examples of stereotypes are the belief that women are nurturing or the belief that police officers like donuts. An explicit stereotype is the kind that you deliberately think about and report. An implicit stereotype is one that is relatively inaccessible to conscious awareness and/or control. Even if you say that men and women are equally good at math, it is possible that you associate math more strongly with men without being actively aware of it. In this case we would say that you have an implicit math + men stereotype.

How does the IAT measure implicit attitudes and stereotypes?

The Implicit Association Test (IAT) measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The main idea is that making a response is easier when closely related items share the same response key. We would say that one has an implicit preference for straight people relative to gay people if they are faster to complete the task when Straight People + Good / Gay People + Bad are paired together compared to when Gay People + Good / Straight People + Bad are paired together.

What does it mean that my IAT score is labeled 'slight', 'moderate', or 'strong'?

If you respond faster when Flowers + Good / Insects + Bad are paired together compared to when Insects + Good / Flowers + Bad are paired together, we would say that you have an implicit preference for flowers relative to insects. The labels slight, moderate and strong reflect the strength of the implicit preference – how much faster you respond to Flowers + Good / Insects + Bad versus Insects + Good / Flowers + Bad.

What does it mean that my feedback says that there were too many errors to determine a result?

The IAT requires a certain number of correct responses in order to get results. If you made too many errors while completing the test, then you will get the feedback that there were too many errors to determine a result. This is different from the result saying that you show little or no association between concepts.

What does it mean if I take the test more than once and get different results?

Although the IAT is a well-validated measure of implicit attitudes, no test is perfectly accurate and some variation is to be expected. We encourage you to take a test more than once. If you get similar feedback more than once, you can be more certain about the accuracy of your results. If you get somewhat dissimilar feedback two times you can simply average the results. It is somewhat unusual for someone to get very different feedback but, if you do, you can think of your test results as being inconclusive.

Could the result be a function of the order in which I did the two parts?

Yes, the order in which you take the test does have some influence on your overall results. However, the difference is small. So if you first pair Gay People + Bad / Straight People + Good and then pair Gay People + Good / Straight People + Bad, your results might be a tiny bit more negative than they would be if you had done the reverse pairing first. One way that we try to minimize this order effect is by giving more practice trials before the second pairing than we did before the first pairing. It is also important to know that each participant is randomly assigned to an order, so half of test-takers complete Gay People + Bad / Straight People + Good and then Gay People + Good / Straight People + Bad, and the other half of test-takers get the opposite order.

Could the result be a function of handedness or hand-eye coordination?

There is no evidence that handedness influences IAT scores. When thinking about the influence of hand-eye coordination or cognitive ability, keep in mind how the test works. In a gay-straight IAT we measure how long it takes people to categorize items when Gay People + Good / Strait people + Bad are paired together versus when Strait People + Good / Gay people + Bad are paired together. People who have better hand-eye coordination or higher cognitive ability might be generally faster to respond, but there is no reason to think that they would be faster in one category pairing versus the other. For this reason we do not think that hand-eye coordination will influence IAT scores.

Might my preference for one group over the other be due to differences in familiarity with the groups?

Research shows that IAT scores are not influenced by familiarity with the individual items to be categorized. Also, faces used in the IATs here should all be equally unfamiliar to everyone. That said, this is a tough question. Classic research in psychology shows that people tend to like things that they are familiar with. So, there may be a role for familiarity in liking of the categories. But also people avoid things that they don't like, so it is possible that implicit bias is what leads to unfamiliarity.

Might my preference for one group over another be a simple ingroup preference?

A simple preference for the ingroup might partially explain implicit bias for White respondents, the majority of whom show an implicit preference for White people. However, it is also more than that. For example, about a third of Black participants show an implicit preference for White people relative to Black people which can't be explained as an ingroup bias. In addition, there are plenty of tests on which people prefer one group or the other even when they do not belong to either group. For example, Asian participants tend to show an implicit preference for White people relative to Black people. In this sense the IAT might also reflect what is learned from a culture that does not regard Black people as highly as White people.

Do black participants show a preference for black over white on the race attitude IAT? Do gay participants show a preference for gay over straight? Do older participants show a preference for old over young?

Results from this website consistently show that members of stigmatized groups (Black people, gay people, older people) tend to have more positive implicit attitudes toward their groups than do people who are not in the group, but that there is still a moderate preference for the more socially valued group. So gay people tend to show an implicit preference for straight people relative to gay people, but it is not as strong as the implicit preference shown by straight people. We think that this is because stigmatized group members develop negative associations about their group from their cultural environments, but also have some positive associations because of their own group membership and that of close others.

If my IAT shows that I have an implicit preference for one group over another, does that mean I am prejudiced?

Many people use the word 'prejudice' to describe people who report negative attitudes toward social groups. By this definition, most people who show an implicit preference for one group (e.g., White people) over another (e.g., Black people) are not prejudiced. The IAT shows biases that are not necessarily endorsed and that may even be contradictory to what one consciously believes. So, no, we would not say that such people are prejudiced. It is important to know, however, that implicit biases can predict behavior. If we want to treat people in a way that reflects our values, then it is critical to be mindful of hidden biases that may influence our actions.

Where do implicit attitudes come from? Is it me or my culture?

Implicit preferences for majority groups (e.g., White people) are likely common because of strong negative associations with Black people in American society. There is a long history of racial discrimination in the United States, and Black people are often portrayed negatively in culture and mass media. However, even if our attitudes and beliefs come from our culture, they are still in our own minds. Subtle psychological biases of all stripes can influence our behavior if we are not vigilant to their influence.

What can I do about an implicit preference that I don't want?

It is well-established that implicit preferences can predict behavior. But, there is not yet enough research to say for sure that implicit biases can be reduced, let alone eliminated, or whether implicit bias reduction will lead to behavior change. Therefore, we encourage people not to focus on strategies for reducing implicit preferences, but to focus instead on strategies that deny implicit biases the chance to operate. One such strategy is ensuring that implicit biases don't leak out in the first place. To do that, you can "blind" yourself from learning a person's gender, race, etc. when you're making a decision about them (e.g., having their name removed from the top of a resume). If you only evaluate a person on the things that matter for a decision, then you can't be swayed by demographic factors. Another strategy is to try to compensate for your implicit preferences. For example, if you have an implicit preference for young people you can try to be friendlier toward elderly people. Although it has not been well-studied, based on what we know about how biases form we also recommend that people consider what gets into their minds in the first place. This might mean, for example, going out of our way to watch television programs and movies that portray women and minority group members in positive or counter-stereotypical ways.

How can I support the research done at Project Implicit?

You can make a donation here. (https://secure3.4agoodcause.com/project-implicit/gift.aspx?id=1)

Dena R. Samuels, PhD
University of Colorado – Colorado Springs
dsamuels@uccs.edu

Challenging Implicit Bias

As troubling as it is to admit, the way we perceive people and treat them is significantly correlated with the stereotypes we hold to be true, even in spite of our best intentions. We may consider ourselves to already be inclusive of others. Unfortunately, we may not be aware that some of the stereotypes we have learned have in fact sunk in, whether we wanted them to, or not. The good news is that it is possible to challenge those automatic, unconscious, reductive stereotypes so we can begin to treat people as the complex individuals that they are.

3 ways to challenge our own bias:
1. We must be willing to accept that we do, in fact, have biases, and to make ourselves aware of them.
2.We must be determined not only to unearth our own stereotypes, but also to challenge them.
3. We need to learn how to exchange those automatic biases for different, more inclusive, notions. And we can, in fact, learn to challenge those prejudices before we act on them.

To figure out what your implicit biases are, you can take at least one Implicit Association Test (IAT) created by Harvard University's Project Implicit from the link below. Each quiz takes 5-8 minutes. Your immediate, personalized results are compared with the results of the 4.5 million other people who have taken these quizzes. Although sometimes difficult to accept the results we are given, from a scientific perspective, they have shown excellent validity and consistency. They have been shown to give us insight into what we don't know we don't know that is going on in our brain in terms of how we have internalized some potentially disturbing notions.

It is recommended that you start with the IAT on Race from the link below. Then take at least one other test.

https://implicit.harvard.edu/implicit/selectatest.html

Strategies for Challenging our Biases and Behaviors:

1. Know your own biases! Take the Implicit Association Test online

2. Priming – identify and utilize counter-stereotypic examples

3. Increase exposure and interaction with people from groups you have a bias against

4. *Build relationships* across difference!

5. Ask questions! Avoid making assumptions about people

6. Acknowledge that *differences exist* and embrace those differences

   a. (vs. colorblindness or identity-blindness)

7. In every space you are in, ask yourself:

   a. who is in *this* room?

   b. *whose voice* is being heard?

   c. and *whose voice(s) are missing* from the conversation? And WHY?

8. Be willing to make mistakes and show up again anyway

9. It's messy, it's hard work, and it's a life-long commitment!

   a. ***This work and these relationships will enrich your life and will build inclusiveness for all***

   b. ***And you will increase your ability to create spaces where* every person *feels like they belong***

Samuels, D. R. (2014). *The Culturally Inclusive Educator: Preparing for a Multicultural World.* NY: Teachers College Press.
~ Available on Amazon ~

Bloomberg BNA

MENU

🔍 📞 🛒 SIGN IN

News

Legal News ⌄

Tax & Accounting News ⌄

EHS News ⌄

HR & Payroll News ⌄

July 8, 2013

Implicit Bias Evidence and Employment Law: A Voyage Into the Unknown

🐦 f in g+ 🔊

From Bloomberg Law®

REQUEST A TRIAL

Bloomberg Law®, an integrated legal research and business intelligence solution, combines trusted news and analysis with cutting-edge technology to provide legal professionals tools to be...

By Maurice Wexler and Kate Bogard, Baker Donelson Bearman Caldwell & Berkowitz PC; Julie Totten and Lauri Damrell, Orrick, Herrington & Sutcliffe LLP

Despite a significant decline in overt prejudice in the past several decades, some social scientists say that most of us have lingering unconscious biases that impact our conscious decisionmaking and cause us to discriminate without knowing it. Implicit Bias, or Implicit Social Cognition, as the social scientists refer to it, has received increasing attention by employment law practitioners, academicians, and the courts, not to mention mainstream journalists like Malcolm Gladwell, who authored the best-selling book, Blink: The Power of Thinking Without Thinking.[1]

The concept has been zealously embraced by its proponents, and with equal zeal, criticized by its opponents. As a result, there has been a spirited debate over using implicit bias evidence in employment law jurisprudence, including regarding its validity, reliability, and value in predicting explicit discriminatory conduct.

Examples of the debate appear in the U. S. Supreme Court opinion, Wal-Mart, Inc. v. Dukes2 and in the Iowa State Court opinion, Pippen v. Iowa.3 While both courts rejected the application of implicit bias, it is unlikely that those opinions will dampen either the ardor of those advancing the idea of applying the theory of implicit bias to the jurisprudence of discrimination law, or the vigor of those opposing the idea.

This article presents our view of implicit bias through the lens of attorneys who practice in the trenches of employment law. We do not challenge the existence of implied bias, and we think its continued research worthwhile. We contend, however, that implicit bias has no place in today's legal landscape because it is not yet subject to reliable and valid measurement, nor has it been proven to cause explicit discrimination.

Voyaging into the unknown of our subconscious minds to weed out unconscious bias is intellectually appealing. But the usefulness of the "new science of unconscious mental processes"4 is as unknown as the unconscious thought process it purports to uncover. Some who advocate using implicit bias evidence in the employment setting complain that current law does not probe into the inner sanctums of the mind from which all decisions spring. They urge

courts and lawmakers to broaden the current legal landscape by accepting implicit biases as a source of unlawful discrimination. But this approach undervalues the importance of pure human instinct, discretion, and subjectivity in making successful employment-related selection decisions and job-related business decisions.

The concept of implicit bias is as nuanced and complex as the human mind. Importing the theory of implicit bias into the jurisprudence of employment law would require an equally nuanced and complex approach.

Introducing Implicit Bias: A 'New Science'

Professors Anthony G. Greenwald and Linda Hamilton Krieger,5 two of the leading advocates for the use of implicit bias as evidence in discrimination law, refer to it as a "new science of unconscious mental processes." As their article explains, the science of implicit cognition suggests that "actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions." Implicit bias is hidden from one's consciousness and may unknowingly "influenc[e] nondeliberate or spontaneous discriminatory behaviors.

Greenwald purports to test implicit

bias by testing reaction times through the Implicit Association Test (IAT), available at https:\\implicit.harvard.edu/implicit. The basic assumption underlying the IAT and similar reaction-time tests is "that mentally simple tasks take a (relatively) short time to complete, whereas mentally difficult tasks take a (relatively) long time to complete."6

The race IAT, for instance, asks test takers to identify black faces by pressing a computer key on one side of the keyboard and white faces by pressing a key on the other side. Next, test takers practice distinguishing "good" from "bad" words in a similar manner. Then, the faces and words are presented randomly and test takers are asked to use the same side of the keyboard for black faces and good words, and the other side of the keyboard for white faces and bad words. Finally, white faces share a response with good words, and black faces with bad words.

The test result is based on relative response speeds for the four category tasks. Results have shown that response speeds are often faster when a white image, rather than a black image, is paired with "good" words. According to IAT supporters, this pattern suggests that white/good is a stronger association than black/good, and that this shows an implicit preference for whites versus blacks. Greenwald and Krieger believe

that there is already substantial evidence that implicit attitudes produce discriminatory behavior.

While the research undertaken by Dr. Greenwald and his colleagues is interesting, it is premature to incorporate the theory of implicit bias into employment discrimination law. The IAT has not been established as a reliable measure of implicit bias, much less predictive of explicit bias and unlawful discriminatory conduct. For these reasons, evidence derived from the IAT and similar tests is insufficient to prove liability in either a disparate treatment or a disparate impact claim under Title VII. While these two types of claims are distinct in many ways, both fundamentally rely on a showing of causation, i.e, that the employer's conduct—intentional or not—caused the disparity complained of by the plaintiff. As described below, evidence of implicit bias cannot provide that causal link.

Implicit Bias Is Not Yet Subject to Reliable and Valid Measurement Since 1998, the IAT has been available on the Internet for self-administrated demonstration. Its advocates claim to have accumulated sufficient data to allow researchers to draw broad and general conclusions about the pervasiveness of implicit and explicit biases. Scientists who rely on aggregated studies testing a common hypotheses (called meta-analysis) generally claim that such analysis, by

reason of the expanded volume of pertinent data, thereby bolsters the validity of their conclusions.

However, Greenwald conceded while testifying in Pippen that while the "comprehensive race IAT has been taken on the website well over one million times[,] … the results of taking the IAT on the website is not a representative sample of the U.S. Population by research design."7

Greenwald and Krieger caution that their data comes from voluntary visitors to the IAT website. Thus participants are self-selected rather than randomly selected from a defined population. Accordingly, the conclusions suggesting the existence of unconscious racial bias in undefined general populations cannot be interpreted as depicting the implicit biases of specifically-identified populations of interest. Going from the general to the specific is not reasonably tenable.

Furthermore, infinite factors may influence an individual's response on the IAT. Prejudice may not be the cause of a negative result. For instance, "those associations may instead reflect sympathy or awareness of cultural stereotypes and depressing realities." "[E]ven people who express strongly egalitarian attitudes often show significant implicit biases. And, even if those biases are called to their attention, the urge to rationalize them

may be as strong as the desire to get rid of them."

Alternative possible explanations for negative scores include "figure-ground asymmetry (i.e., 'greater familiarity with one ethnic-racial group e.g., Whites over Blacks drives at least part of the race IAT effect'); stereotype threat (i.e., that the fear of being labeled a bigot will drive some people to behave in a manner that appears bigoted); sympathy (i.e., the prospect that high IAT scores 'are rooted more in a compassion or guilt about the predicament of African Americans than in hostility or contempt'); and knowledge of the prejudice over others."8

One person's responses on the IAT may also differ from day to day, and nothing in the test accounts for this variability.9 In fact, Dr. Greenwald's early IAT test score changed over time. This suggests IAT results are variable.

Implicit attitudes develop in a highly individualized way. Sources of our attitudes include early (even pre-verbal) experiences, affective experiences, cultural biases, and cognitive consistency principles.10 As Gladwell explains in Blink: "The giant computer that is our unconscious silently crunches all the data it can from the experiences we've had, the people we've met, the movies we've seen, and so on, and it forms an opinion. That is what is coming out on

the IAT." Gladwell also notes that "our unconscious...[is] fallible."

As Greenwald testified, other factors that may individually or jointly affect IAT scores include: gender, sexual orientation, obesity, race, religion, personal, social, and situational pressure, external environment, childhood experiences, cognitive agility, manual dexterity, and even political persuasion.

Greenwald and his colleagues have not controlled for the infinite individual differences in the broad, populationwide observations. Nor have they controlled for the number of times a single individual repeatedly takes the web-based IAT. The IAT is a metric that sorts people along a single dimension—reaction time. While it looks objective, it lacks any objective connection to legally actionable behavior.11

Experts who support the use of IAT scores in evidence will be required to pass the Supreme Court's Daubert test. When doing so, they will confront a rigorous challenge to the IAT's evidentiary reliability and validity and may find it difficult to supply valid, case-specific opinions.12 The law is interested in applying science to specific, not general, cases.13 Pippen and Dukes both rejected implicit bias evidence because it did not, and in those cases, could not prove that bias actually caused any of the challenged

employer's decisions.

Implicit Bias Does Not Necessarily Cause Discriminatory Behavior
Some scholars claim that there is already substantial evidence that implicit attitudes cause discriminatory behavior. In so arguing, they point to a handful of studies that arguably reflect that IAT measures predict non-deliberate or spontaneous discriminatory behaviors.14

One study involved undergraduate students interviewing separately with a white experimenter and a black experimenter. The students' IAT scores demonstrated a strong implicit preference for whites over blacks. When interviewing, the students hesitated less and made fewer speech errors when speaking to the white experimenter than when speaking to the black experimenter. Greenwald and Krieger cite other studies that have likewise found correlations of IAT-measured racial association with indicators of subtle or spontaneous discriminatory actions.

Pyramiding one inference upon another, Greenwald and other scientists contend that there is a substantial body of evidence that implicit race bias is pervasive and is associated with discrimination against minorities. When neutral causes can be rejected, the scientists argue that implicit bias must be probable, if not definitively established as a cause of the discrimination.

Other scientists have challenged these claims, contending that any purported linkage between implicit bias and discriminatory behavior found in various studies is weak and unstable, because it depends on measures of dubious reliability and validity and perhaps a small number of outlier respondents.15

Dr. Greenwald and his colleagues assume that one can decipher when and if neutral causes can be rejected as causes for disparities. But this is highly unlikely without closely examining each situation, given the number and variety of factors influencing human behavior. Ironically, those who support holding employers liable for their alleged implicit biases suggest that individuals can control their implicit biases. For instance, Irene Blair concludes that "automatic stereotypes and prejudice are not as inflexible as previously assumed." In fact, there is "now bountiful evidence that automatic attitudes—like self-reported attitudes—are sensitive to personal, social and situational pressures."16

If implicit attitudes are malleable, then it may be impossible to determine the cause of any employment decision without evaluating the circumstances of each specific situation. The difficulty of this task is compounded by the various factors—both biased and neutral—that may impact any given employment decision.17 Greenwald

and Krieger opine that "more direct confirmations of the causal role of implicit bias may emerge in the next few years, as researchers increasingly include measures of implicit bias in their studies of relevant domains in which racially disparate impact is a known phenomenon." This concession casts serious doubt upon the current validity, credibility and reliability of the IAT and its outcomes.

Implicit Bias Evidence Has No Place in the Current Legal Framework
Disparate Treatment
A disparate treatment claim requires proof that an employer intentionally discriminated on the basis of a protected class. Proof of motive or intent has historically played a significant and substantial role in these cases.[18]

A plaintiff in a disparate treatment case can make a prima facie case by proving actions taken by an employer from which discriminatory animus can be inferred.[19] Once the plaintiff establishes a prima facie case, the employer must produce (not prove) a legitimate nondiscriminatory reason for the challenged action. The plaintiff must then demonstrate that the expressed reason is a pretext. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[20]

Implicit bias is hidden from one's

consciousness. It is the antitheses of motive and intent and should not be the basis for liability. A few courts have addressed the role of implicit bias in the context of disparate treatment and have specifically rejected it. As the Supreme Court explained in Watson v. Fort Worth Bank & Trust, evidence of "subconscious stereotypes and prejudices ... may not prove discriminatory intent."21

As one later court explained, "[d]isparate treatment analysis is concerned with intentional discrimination... . [S]ubconscious attitudes ... are precisely the sort that disparate treatment analysis cannot and was never designed to police.22

One First Circuit case, Thomas v. Eastman Kodak Co.,23 however, may suggest otherwise. In a disparate treatment case which involved issues of timeliness and burden of proof, by way of dicta, the court noted that where "the employee has been treated disparately 'because of race,'" a disparate treatment claim survives "regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."

The EEOC has taken a similar position, stating that "intentional discrimination includes ... conscious or unconscious stereotypes about the abilities, traits,

or performance of individuals of certain racial groups."24

Those who define "intent" to include subconscious bias do so because they claim subconscious bias may have effects that are indistinguishable from conscious bias, and, as explained by the First Circuit in Thomas, Title VII was designed to protect any employee who has been treated disparately "because of" a protected category. In so doing, the court acknowledged that the fundamental issue in disparate treatment cases is one of causation.

Yet the Thomas court failed to acknowledge the substantial difficulties associated with linking a subconscious thought—about which the actor himself is unaware—to the ultimate action challenged. Rather, the court assumes that subconscious bias causes disparate treatment, which, as discussed above, is a dangerous assumption.

In fact the U.S. Supreme Court has confirmed that even when what appears to be unconscious bias is at issue, the employee must still demonstrate that it caused the discriminatory behavior:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the

applicant or employee was a woman. (footnote omitted).25

In Hopkins, the court gave the example of an employer that acts "on the basis of a belief that a woman cannot be aggressive or that she must not be." This example must be distinguished from the circumstance when the purported bias is completely unconscious and could not be articulated by the employer at all. This scenario would provide the grounds upon which an employee could prove that bias played a role in the decisionmaking, and a finding of disparate treatment would be improper.

Disparate Impact

Disparate impact claims involve facially neutral employment practices that have the unintended consequence of impacting one group more harshly than another. Unlike disparate treatment claims, disparate impact claims require no showing of "intent." However, plaintiffs must still demonstrate a causal relationship between the employment practice at issue and the statistical disparity.26 In that regard, introducing evidence of implicit bias in disparate impact cases presents many of the same challenges presented in disparate treatment cases.

In these types of cases, social science experts have recently pushed the envelope by attempting to link evidence gathered from the general population to an employer's entire population of decisionmakers and

their selection decisions, overlooking the requirement of providing a valid, case-specific opinion.27 In Dukes, for instance, Dr. William T. Bielby testified that research from the general population "demonstrates that gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors, because substantial decision-maker discretion tends to allow people to 'seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes.' "

Bielby then attempted to apply this general research to Wal-Mart to conclude that the company's personnel policies and practices make pay and promotion decisions "vulnerable to gender bias." The Supreme Court rejected this overgeneralization, because Bielby "conceded that he could not calculate whether 0.5 percent of 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." Justice Scalia concluded that this "is worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination.' " The Court also cast doubt on whether Bielby's testimony would meet the standards for admission of expert testimony under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc.

Along similar lines, Dr. Greenwald

attempted to introduce meta-analysis evidence of implicit bias in Pippen. There, "plaintiffs claimed that the state of Iowa's failure to enforce its statutory and regulatory policies caused a disproportionate number of African-Americans applicants to be denied employment." They argued that because implicit bias is so pervasive, "the natural unintended consequences of failure to follow rules designed to ensure equal opportunity in the workplace resulted in unfair treatment because of their race."

Greenwald opined that his meta-analysis showed a 70 percent automatic preference for whites over blacks. He noted that unconscious bias leads to discrimination particularly in subjective decisionmaking. However, Greenwald conceded that this meta-analysis was not based on specific acts of decisionmaking. Nevertheless, he testified that the "evidence is strongly presumptive" of Iowa managers and decisionmakers being implicitly biased.

Dr. Cheryl Kaiser,28 a colleague of Dr. Greenwald, also testified in Pippen. Unsurprisingly, she too views implicit bias as pervasive. She considers all persons to fall within a spectrum having polarities of explicit bias and limited implicit bias. She suggests that where one is uncertain as to the reason for another's conduct, the decisionmaker resorts to their implicit

bias to "fill in the gap." Kaiser also espouses perhaps the "mother of all generalizations" that implicit bias is so pervasive that any merit-based employment system merely serves to legitimize inequality. This is because the system gives the perception of being fair when, in fact, the inevitable presence of implicit bias dictates that it cannot be.

When these generalizations were tested on the crucible of a courtroom in Pippen, the court rejected them on two principal grounds. First, "the mere fact that a discretionary system produces a bottom-line racial disparity is not enough. A specific employment practice must be identified as the culprit." Second, "[d]elegated discretion without a specific employment practice, even supported by adverse outcomes in ultimate hiring statistics, will not suffice." Ultimately, "[i]mplicit bias does not mean prejudice, but merely reflects attitudes. More pointedly, [no expert opinion evidence demonstrated] that the bottom-line figures were caused by implicit racial bias."29

Significantly, neither Greenwald nor Kaiser "offered a reliable opinion as to how many, or what percentage, of the discretionary subjective employment decisions made by managers or supervisors in the State employment system were the result of 'stereotyped thinking' adverse to the protected class." The best Greenwald could do

was extrapolate from his Internet-based meta-analysis, opining that 70 to 80 percent of respondents in the United States had an "automatic preference for whites." He conceded this outcome was not a "representative sampling by research design," but "it could be representative of the United States." The court did not find the professor's opinion persuasive.

Greenwald had "relatively little data" about specifics of how the IAT would apply in Iowa, and simply inferred that the percentages he compiled from the internet would be the same for this state.

When first asked if he could opine with "scientific certainty" he stated that, "if a study were done" the percentage would be about 75 percent. Ultimately, Greenwald and Kaiser could only assume that 75 percent of the subjective discretionary employment decisions made in the State's hiring process resulted from unconscious bias. As the court concluded, "[i]n legal parlance, this is conjecture, not proof of causation."

The Coming Storm and Risks of Relying on the Unknown
Dukes and Pippen have made it substantially more difficult for plaintiffs to rely on implicit bias evidence in employment discrimination cases. But this will not likely deter practitioners from attempting to use it in the future.30 The Pippen plaintiffs conceded that their

class claim was novel, yet they "urge[d] the court to broaden the horizons of Iowa's legal landscape premised on their belief in our state's progressive stance on civil rights." One of the lead attorneys for the Dukes plaintiffs, Jocelyn Larkin, has similarly acknowledged that, "law and science are at odds" and "antidiscrimination doctrine lags far behind the psychological science of intergroup bias."
She believes that, "[t]o ensure the promise of anti-discrimination law is fulfilled, legal models of decision-making in the workplace should recognize and incorporate the empirical scientific understanding about the influence of unwitting bias." Should such strategy be adopted, it will still face the stringency of Daubert, as well as challenges when used only as generalization without being applied to specific fact situations.

To meet this challenge, two changes in plaintiff strategies are likely. First, some social scientists have been willing to testify that implicit bias research provides transportable evidence of widespread implicit bias based upon undifferentiated, general outcomes of IAT results or other lesser experiments. These social scientists will argue that such research establishes that every company (including its employees) will have a high percentage of biased managers who will engage in numerous, mostly subtle, acts of discrimination. In other words, when pressed to pick a percentage of personnel decisions

between 0.5 percent and 95 percent affected by bias, these experts are likely to pick a high percentage.31 Plaintiffs may also attempt to avoid the obvious pitfalls in using the IAT to demonstrate evidence of previous discrimination by disguising implied bias as stereotyping.

Though beyond the scope of this article, it is highly questionable whether such evidence would survive an evidentiary challenge under Daubert or other evidentiary rules.32 Yet, even if the evidence were to survive such challenges, it may disadvantage the very people whose rights the law purports to protect. As the Supreme Court previously warned in Watson, expanding the legal landscape could have an unintended "chilling effect" on "legitimate business practices" and put "undue pressure" on employers to adopt "inappropriate prophylactic measures." Furthermore, "[i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance …. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their workforces."

Placing unwarranted weight on implicit bias science would put employers in an untenable position of

attempting to anticipate what is inherently unknown. This may cause them to micromanage personnel decisions and over-rely on objective criteria, which may itself spur disparate impact suits.33 Individualized, subjective, discretionary decisions—albeit potentially "vulnerable" to certain individuals' implicit biases—are necessary features of employee evaluation. The Supreme Court has recognized that employers must evaluate "a wide array of factors that are difficult to articulate and quantify," including "individual personalities and interpersonal relationships," "personality conflicts," and "the varied needs and interests involved in the employment context."34

Conclusion

Evidence that employers are not insulated from the consequences of more general societal attitudes that continue to pervade our culture does not and should not signal an intentional or unintentional violation of Title VII. While it is important to identify and punish employers who discriminate and to compensate victims accordingly, the well-established legal framework that has greatly reduced overt discriminatory behavior in our country should not be disrupted and co-opted by current theories of implicit bias.

While most would concede some forms of impermissible bias remain unremedied, unless the theory of implicit bias is validated as reliably predictive of discriminatory behavior

in the employment setting, deference to it must be withheld.

Maurice Wexler, a founder of Baker Donelson Bearman Caldwell & Berkowitz, is senior counsel in the Memphis office. Kate Bogard is an associate in the advocacy group at the firm.

Julie Totten is a partner in charge of Orrick, Herrington & Sutcliffe LLP's Sacramento Employment Law Group. Lauri Damrell is a senior associate at the firm.

The authors can be reached at mwexler@bakerdonelson.com, kbogard@bakerdonelson.com,jatotten@orrick.com, and ldamrell@orrick.com, respectively.

©2014 The Bureau of National Affairs, Inc. All rights reserved. Bloomberg Law Reports ® is a registered trademark and service mark of The Bureau of National Affairs, Inc.

Disclaimer
This document and any discussions set forth herein are for informational purposes only, and should not be construed as legal advice, which has to be addressed to particular facts and circumstances involved in any given situation. Review or use of the document and any discussions does not create an attorney-client relationship with the author or publisher. To the extent that this document may contain suggested provisions, they will require modification to suit a particular transaction, jurisdiction or situation. Please consult with an attorney with the appropriate level of experience if you have any questions. Any tax

Request Bloomberg Law®

Bloomberg BNA

Company	Bloomberg BNA
About Us	Bloomberg Law
Careers	Tax & Accounting
Contact Us	Government
Media	Environment, Health & Safety
	Human Resources & Payroll
	Marketing Services

My Invoice / Terms & Conditions / Privacy Policy / Bloomberg.com / Accessibility

Law Practice Today

CURRENT ISSUE   PAST ISSUES ⌄   LAW PRACTICE NEWS ⌄   SUBSCRIBE ⌄   CONTACT ⌄   ABOUT ⌄

YOU ARE AT: Home » Articles » Implicit Bias in the Workplace

Implicit Bias in the Workplace

BY HILARIE BASS ON FEBRUARY 14, 2017 ·

392 SHARES   f 86   in 229   🐦   G+ 0   ✉ 21   🖨 56

Although women attorneys have made major progress in recent decades, we continue to face unique challenges to success in the workplace. In today's world, the challenges are not typically reflective of explicit bias, but rather implicit bias, which in many ways is much harder to address. The reason: it is a bias that is hidden, unseen and unrecognized in each of us. Many of us do not even believe that this implicit bias exists, which makes it much harder to root out.

Neuroscience and examinations of the human brain continue to demonstrate that all of us have certain attitudes or stereotypes that affect our understanding, actions and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Women have biases as well, often the same conceived biases regarding how women "should" behave. They too grew up with the same influences and social expectations that help to create these inherent biases.

Harvard.edu has a popular implicit bias test that more than 5 million people have taken; the results indicate most people have an inherent bias against those who do not look like them. Any combination of gender, ethnicity, sexual orientation or age can affect that bias.

Surely if we were consciously displaying a bias, all of us would reject it. Most everyone believes themselves to be gender neutral when it comes to workplace or similar decisions. We assume that statistics regarding gender disparity relate to other employers, not us. Since we all have sisters, daughters and spouses, of course we would treat women at work fairly.

The reality is that we all have some kind of implicit bias, often making us feel less comfortable around people who do not look like we do. The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, gender and appearance. These associations develop over the course of a lifetime, beginning at a very early age through exposure to direct and indirect messages, as well as life experiences. These biases are an individual's reaction to a person even before one meets them or they open their mouths to say hello. Often it is an assumption that the brain makes about that person's personality based on nothing more than their ethnicity, their gender or their appearance.

THIS ISSUE OF LP TODAY

The Women in Law Issue | February 2017

IN THIS ISSUE

The perception in the legal field is that getting ahead relies purely on objective merit, but at times the playing field is not level for women and other minorities. Inherent bias can unconsciously infiltrate into decisions about hiring, compensation and elevation. Chances are that your decision making has been affected by your own inherent biases, and impacted the objectivity brought to your decision-making process in the workplace.

The statistics continue to point to concerns that need to be addressed. Here are some examples.

Pay disparity:

- In 2014, women working full time in the U.S. were paid 79% of the wages paid to men for the same job.
- The wage gap narrowed in the 1970s, but women in the legal field currently work an average of 8 hours more per week than men work, but receive 80 % of the compensation that goes to their male colleagues.
- Women are often labeled as greedy and aggressive and not team-driven when asking for a well-deserved raise or bonus; men are viewed as strong and good negotiators.

For women lawyers specifically:

- Florida Bar 2015 Young Lawyer's Division Survey found that 43% of the state's young female attorneys have encountered one or more instances of discrimination, including gender bias, harassment, and pay differentials.
- While U.S. law school enrollment is statistically evenly split among men and women, and leadership on Law Review is comparable with 46% of the posts held by women, the level of equality switches radically once young women start work.
- With every passing year of attorney development, the number of women declines. The entering classes of new associates at most major U.S. law firms are 40-45 women, but women only account for 25 % of new partners and continues dropping to 18% of equity level partners.

Double standard in parenthood:

- Research shows mothers are penalized in pay and promotions because employers assume they will be less committed to
- Fathers get raises because employers think they will be more committed to "bread-winning."

What Can Be Done?

We all need to accept that we have implicit biases, and then choose to overcome them. How? Overall, decouple preconceived ideas of what women should look and act like. Step out of your personal comfort zones. Stop and evaluate decisions that may be affected by implicit bias. Speak out when you see others making decisions that you believe are affected by such biases.

This "call to action" requires a plan.

Elements for a Plan of Action:

- Take the initiative and spread the word in our circles of influence to help reduce implicit bias at work, home and in our communities.
- Speak up when you hear gender bias, if not with a boss at least with peers.
- Question the recommendations of peers to ensure that they are not influenced by bias.
- Discuss the issue with everyone in your life, including partners, family, sons and friends.
- Take steps in business to dissociate the gender and physical appearance from a decision by looking at resumes without names.
- Use standardized questions for interviews and introduce objective performance criteria.
- Go out of your way to provide leadership opportunities for women.
- Focus on creating or moving forward a culture of change that embraces women in leadership positions.
- As a woman, do not be afraid to ask for business and ask for more money.
- Do not just simply network with potential clients—ask them for their business.
- Look for leadership opportunities outside of the workplace, like a bar or community organization.

Those of us who have made it to the top now have an opportunity to lead the way for equal opportunities for others. The phenomenon of women choosing to leave the profession just at the point in their careers when they should be reaching the pinnacle of success has never been studied or explained.

To start the process of exploring the issues and framing solutions, during my year as president of the American Bar Association we will undertake a research project—Ladders, Labyrinths and Leaders: A First Look at the Life Cycles and Long-term Careers of Women Lawyers. This first-of-its-kind project will aim to bring national attention to the need to retain women lawyers and reverse this damaging attrition.

Along with the research study that will examine the attrition of women in all practice settings, a prominent summit will

focus on steps for the implementation of equitable compensation practices, and other best practices that are needed to help reverse this disturbing trend. If women continue to leave the practice of law in such high numbers, we can never hope to see parity of women in key firm leadership positions. Together we can work to create a level playing field and get rid of the old biases that still linger.

About the Author

Hilarie Bass serves as co-president of Greenberg Traurig and is president-elect of the American Bar Association.

(Feature Image Credit: ShutterStock)

ALEXANDRA WOODS

54 Savoy Avenue Elmont, NY
11003 (516) 252–7178
alexandra.woods12@stjohns.edu

EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Candidate for J.D., June 2019

Academics:	G.P.A. 3.98 (1/196)
Honors:	*Staff Member, St. John's Law Review*
	Moot Court Honor Society (deferred admission for 3L year)
	Second Best Oralist, Reverend Joseph T. Tinnelly Moot Court
	Competition, 2017
	St. Thomas More Scholarship (full tuition)
	Dean's Awards for Excellence in Civil Procedure, Criminal Law, and
	Constitutional Law II
	Dean's List (Fall 2016, Spring 2017)
Activities:	*Student Representative*, Theodore Roosevelt American Inn of Court
	Member, Health Law Society

FORDHAM UNIVERSITY, Bronx, NY
B.A., *summa cum laude in cursu honorum*, International Political Economy, May 2016

G.P.A.:	3.92
Honors:	Presidential Scholar (full tuition)
	Fordham College at Rose Hill Honors Program
	Dean's List (eight of eight semesters)
	Phi Beta Kappa
	Alpha Sigma Nu (Jesuit Honor Society)
Thesis:	"Causes of Persistent Recession in Greece"
Activities:	*Member*, Women's Choir

EXPERIENCE

PROF. MARC DeGIROLAMI, ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Teaching Assistant, Constitutional Law, Fall 2017 and Spring 2018
Hold weekly review sessions, answer questions students have about the course, and provide feedback on assignments.

HON. MARGARET C. REILLY, NASSAU COUNTY SURROGATE'S COURT, Mineola, NY
Judicial Intern, Summer 2017
Conducted research and assist in drafting decisions and orders. Observed court proceedings, pre-trial conferences, and hearings.

COMMUNITY SERVICE

ROSEDALE ACHIEVEMENT CENTER, Bronx, NY
Tutor, September 2013 – May 2016
Served as an individual tutor for one middle school student per semester in math, reading, and science; and mentored 8-12 students. Fostered students' personal growth and ambition. Helped students develop "Positive Impact Projects" designed to address community issues.

ST. RITA'S IMMIGRATION CENTER, Bronx, NY
ESL Teacher, January 2014 – May 2014
Taught a weekly English class to 15 adults. Designed lesson plans by selecting topics to be covered and procuring appropriate lesson materials. Helped students to improve their speaking, writing, and reading skills.

Hon. Andrea Phoenix

Andrea Phoenix is a Nassau County District Court Judge in Hempstead, New York. She is also an Acting Nassau County Court Judge. She was reelected to a second term in 2012. The judge presides over two problem-solving courts. These include the Drug Treatment Court and the Mental Health Court. She adjudicates both misdemeanor and felony cases. Prior to taking the bench, Judge Phoenix was an attorney in private practice. She was an active member of the New York State Law Guardian Panel and concentrated in the area of Family law.

In 2002, Judge Lawrence Brennan sponsored Judge Phoenix to become a member of the Theodore Roosevelt American Inn of Court. She is currently active in the Inn and sits on its Executive Board. She is also involved in a host of other professional and community organizations. Notably, Judge Phoenix is a past president of the Nassau County Women's Bar Association, the Women's Bar Association of the State of New York as well as the New York Chapter of the Association of Family and Conciliation Courts. She is the first African American to serve in the office of president of these organizations.

Curriculum Vitae for Marshal Shichtman

Marshal Shichtman has been an attorney for over 15 years, practicing in the areas of corporate, securities, finance, and family offices, primarily in the areas of capital markets and trade. However, in representing clients' interests, the area of actual practice could be said to be a circle drawn around a dollar bill. The practice consists of both transactional and litigation, and Mr. Shichtman has participated in litigations in approximately 10 states (both State and Federal), appeared before several Federal agencies, handled transactions in a multitude of states and over 25 countries in a diverse array of activities. These activities range from bringing small companies public (3 countries), intrastate, interstate and international estate planning and corresponding family trusts, liaising with accountants, and acting as special counsel for matters outside the ordinary course of business (e.g. corporate investigations, mediation/arbitration between concerned parties, incident management, creation of controls and procedures and policies, etc.), but mostly sundry trade and corporate matters. Essentially, Mr. Shichtman represents people and those people's business interests, and Mr. Shichtman handles the matter within his competence or finds and manages counsel who can.

Educationally, Mr. Shichtman attained his undergraduate degree from Boston University, his law degree from Touro Law Center, his MBA in Finance from Long Island University, his LLM in International Taxation and Offshore Financial Centers from St. Thomas University, and studied for passing the bar at Oxford-Brookes University in the United Kingdom. Mr. Shichtman is licensed to practice in the State of New York, 2nd Circuit Court of Appeals for the State of New York, the Eastern and Southern Federal Districts for the State of New York, and maintains a current practicing certificate in England and Wales. Prior to going to law school, Mr. Shichtman worked for several brokerage houses starting as a cold caller and working up to director of private placements and director of compliance.

Mr. Shichtman also works with several Not-For-Profit ("NFP") organizations and sits on the Board of Directors or as a Trustee for several NFPs, some of which are multimillion dollar organizations. Mr. Shichtman also participates in charitable events and helps to raise over $30,000 annually through various events for charities and scholarship awards, and sits a committee member for the charitable arm of two NFPs allocating donations to worthy causes from the NFPs, and is the lead coordinator for two annual gala events to help raise funds and awareness, and co-coordinator for an annual golf outing.

Mr. Shichtman has made presentations for CLE on various topics from Naked Short Selling and Cryptocurrencies, to more sundry matters such as buying and selling a business, in addition to giving talks on financial planning and financial literacy to non-lawyers.
Mr. Shichtman has been the subject of an article in the New York Law journal, and has been interviewed by the Wall Street Journal, and Coin Desk.

DANA GROSSBLATT
10 Wilshire Drive
Syosset, New York
(516) 819-8129
DGrossblatt@verizon.net

EXPERIENCE:

Law Office of Dana Grossblatt, Jericho, New York
Solo Practitioner, Criminal Practice (November 2002 to Present)
Handle all phases of criminal litigation including arraignments, conferences, hearings, legal research, plea negotiations and motion practice. Conduct trials in cases ranging from robberies, burglaries, narcotics violations, assaults, homicides and high publicity cases. Over 100 cases tried to verdict.

James P. Nunemaker, Jr. and Associates, Uniondale, New York
Associate (October 1997 to January 2002)
Represented State Farm Insurance policyholders in all phases of litigation. Conducted trials, hearings and depositions. Represented clients at arbitrations and mediations. Drafted and argued discovery motions, conducted settlement conferences, prepared clients for trial and depositions.

Kings County District Attorney's Office, Brooklyn, New York
Senior Trial Assistant District Attorney (August 1995 to October 1997)
Prosecuted complex criminal actions from investigation through trial including homicide, high publicity and multiple defendant cases. Drafted felony indictments, motion papers, discovery demands and memoranda of law. Interviewed and prepared witnesses for hearings and trial. Supervised junior Assistant District Attorneys during case investigation, arraignments, discovery, pre-trial hearings, and trial.

Assistant District Attorney (January 1992 to July 1995)
Drafted criminal complaints in Early Case Assessment Bureau. Litigated misdemeanor and felony prosecutions including robberies, burglaries, sex offenses, narcotics cases and assaults. Spent six months as a member of Homicide Bureau presenting cases to the Grand Jury. Researched and wrote appellate brief.

EDUCATION:

Brooklyn Law School, Brooklyn, New York
Juris Doctor, June 1991
Honors: Dean's Merit Scholarship

University of Massachusetts, Amherst, Massachusetts
Bachelor of Arts, English, June 1987
Honors: Cum Laude, English Honor Society, Vice President Mortar Board Honor Society.

PROFESSIONAL ORGANIZATIONS:

Nassau County Criminal Courts Bar Association, Mineola, New York
President May 2014 through May 2015, Board member 2003-2015
Promoted integrity within the criminal defense profession, advocated for betterment of the criminal justice system, dedicated to protecting and preserving the rights of the accused, created and moderated numerous continuing legal education programs

Nassau County Criminal Courts Bar Foundation, Mineola, New York
Founder and Past President 2010 -2015
Not-for-profit organization devoted to assisting disadvantaged individuals in Nassau County.

Jess Bunshaft most recently served as the Chief Human Resources Officer for Goodwill Industries of Greater New York and Northern New Jersey. He currently heads the consulting organization Synergist Workforce Solutions LLC.

An attorney for over 25 years, he has worked in human resources management for over twenty years. Prior to joining Goodwill Industries of Greater New York and Northern New Jersey, Mr. Bunshaft served as the Vice President for Labor & Employee Relations for Catholic Health Services of Long Island, a network of six hospitals, three nursing homes and affiliated operations, staffed by over 17,500 employees.

In addition to his HR experience, Jess is admitted to practice in New York and began his career as a Deputy County Attorney for Nassau County, becoming the Senior Trial Attorney in Tort & Civil Rights Litigation. He also is admitted to practice before the federal courts in New York, the US Court of Appeals for the Federal Circuit, the US Court of Appeals for the Armed Forces and the United States Supreme Court.

His extensive HR experience includes a broad range of disciplines, including employee benefits, compensation, engagement, employee relations, recruitment & retention initiatives, HRIS, employee development, labor relations, mediation, and labor negotiations with a diverse array of labor organizations, most recently having negotiated a three-year collective bargaining agreement with the International Association of Machinists and Aerospace Workers.

Mr. Bunshaft obtained his undergraduate degree from the Johns Hopkins University, his law degree from Hofstra Law School, and graduate education in HR Administration from the School of Management at NYIT, where he currently serves as a member of the Advisory Council. He has served as a member of the Theodore Roosevelt Inn of Court's Board for many years, is the past president of the Association of Healthcare HR Administrators of Greater New York and has lectured on a variety of legal and HR-related topics over the years.

Marilyn K. Genoa
Genoa & Associates, P.C.
12 Jaegger Drive
Old Brookville, New York 11545
T: 516-759-7940
E: mkgenoa@genoaandassociates.com

Marilyn K. Genoa is a principal of the Law Firm of Genoa & Associates, P.C., concentrating in the areas of commercial real estate, small and closely-held business representation and alternate dispute resolution.

The elected Village Justice for the Village of Old Brookville, she is an Officer of the Nassau County Magistrate's Association. Prior to being elected Village Justice, she was a Trustee of the Village of the Old Brookville and a former Deputy Police Commissioner for the Old Brookville Police Department.

The immediate past Chair of the Advisory Council of the Nassau County Bar Association Mediation and Arbitration Panels, Marilyn is a member of the Commercial Mediation Panel, Nassau County Commercial Division; the Nassau County Bar Association's Alternative Dispute Resolution Mediation Panel; and the Eastern District of New York Storm Sandy Mediation Panel. She serves as an Arbitrator under the New York State's Part 137 Attorney's Fee Dispute Resolution Program and mediator for Landlord Tenant disputes for pro se litigants in Landlord/Tenant Part, District Court Nassau County.

A past president of the Theodore Roosevelt American Inn of Court and of Yashar, the Attorneys' and Judges' Chapter of Hadassah, she continues to actively serve on the Board of Directors of both organizations, as well as on the Board of the Safe Center LI (formerly the Nassau County Coalition Against Domestic Violence).

A Former Director of the Nassau County Bar Association, Marilyn is a member of its WE CARE FUND's Advisory Board, and a Delegate to the New York State Bar Association.   She is the current Co-Chair of the NCBA's Animal Law Committee, and a former Chair of the Alternative Dispute Resolution Committee, the Business and Corporation Committee, as well as the House Committee. Marilyn has co-chaired the Nassau County Bar Association's Mock Trial Program for the past 12 years.

Marilyn is admitted to practice in the Courts of the State of New York, the United States District Courts for the Eastern and Southern Districts of New York, and the Supreme Court of the United States of America. She received her law degree, cum laude, from Hofstra University School of Law, her B.A. from Boston University, and an MSW from Adelphi University. She lectures in the areas of: mediation; business formation; purchase and sale of businesses and of real property; and contract law.

The former CEO of a national manufacturing and distribution company, Marilyn's pragmatic approach to problem solving has enabled her to find successful solutions to many difficult and diverse situations and to effectively represent clients with regard to complex real estate and corporate matters. She has successfully helped settle myriad cases in the areas of commercial litigation, real estate and bankruptcy.

Marjorie E. Bornes, Esq., earned her JD from Brooklyn Law School, where she graduated with honors, and received her BS in Business Administration from the State University of New York at Albany, where she graduated summa cum laude. She started her career with the Appeals Division of the Corporation Counsel of the City of New York, representing the City and its agencies in both state and federal appellate courts. She is now employed by American Transit Insurance Company and represents that carrier in disputes regarding coverage and disclaimer issues and litigates personal and property damage claims for its insureds, in both federal and state courts. She also represents other carriers in insurance coverage issues, and continues to prosecute and defend appeals on her own cases, as well as on cases handled by other law firms employed by the carrier. In addition, she serves as an Arbitrator for the Nassau District Court. Marjorie is a past President of the Inn of Court and a past President of Yashar, the Lawyers and Judges Chapter of Hadassah. She actively raises money for the National Multiple Sclerosis Society and was a long standing member of the Nassau County Women's Bar. She and her husband, Lucian, currently live in Westbury. Their daughter, Jessica, a graduate of Antonin Schalia Law School, lives in Virginia, with her husband. Their son, Jonathan, lives in Middle Island.

Mirna M. Santiago, Esq.

White Fleischner & Fino, LLP
Of Counsel
303 Old TarryTown Road
White Plains, NY 10603
(914) 509-2910
msantiago@wff-law.com

Mirna Martinez Santiago joined White Fleischner & Fino in 2010 and focuses her practice on national coverage matters and litigation. She has over 18 years of experience working with or on behalf of insurance companies in a variety of capacities, handling a range of matters including tort, professional liability, coverage and regulatory affairs. Mirna also lectures on an array of topics and has published articles on legal, as well as non-legal, subjects. Mirna is an active member of the New York State Bar Association, through which she has held a number of leadership roles. As of February 1, 2015, Mirna will assume the position of Chair of the New York State Bar Association's Torts, Insurance and Compensation Law ("TICL") Section. Mirna is the first Black woman and the first Latina to ever hold the Chair position in TICL. Mirna is also passionate and actively involved in championing diversity and is a member of the New York State Bar Association's Committee on Diversity and Inclusion, as well as the Committee on Tort, the Committee on Continuing Legal Education and the Committee on Membership. Mirna's many honors include the 2012 New York State Bar Association Torts, Insurance & Compensation Law Section Award for Outstanding Chair (Diversity) and the 2010 New York State Bar Association Sheldon Hurwitz Young Lawyer Award for Outstanding Contribution to the Practice of Law in the Field of Insurance. Mirna has also written numerous articles for a variety of publications, including many for the New York State Bar Association. Mirna is fluent in written and spoken Spanish and spoken Garifuna.

Paul A. Tsenesidis

1 Point Crescent, Malba, New York 11357 · Paul.Tsenesidis@gmail.com · (718) 423-8000

EDUCATION

St. John's University School of Law, Queens, New York
Candidate for J.D., June 2019

G.P.A.:	3.45; Top 26% (50/196)
Honors:	*Staff Member, Journal of Civil Rights and Economic Development*
	Member, Frank S. Polestino Trial Advocacy Institute
	Dean's List, Fall 2017
	Recipient, St. Thomas More Scholarship (full tuition)
Activities:	*Secretary,* Student Bar Association
	Vice President, Federal Bar Association
	President, Hellenic Law Students Society
	Blog Contributor, Labor and Employment Law Society
	Member, Real Property Law Society; Corporate and Securities Law Society; Bankruptcy Law Society

Stony Brook University, Stony Brook, New York
M.A., Public Policy, May 2015

G.P.A.:	4.00
Activities:	*Public Policy Senator*, Graduate Student Organization

Stony Brook University, Stony Brook, New York
B.A., *cum laude*, Political Science, Minor in International Studies, May 2014

G.P.A.:	3.54
Honors:	Dean's List (five of eight semesters)
	Member, Golden Key Honor Society
	Recipient, Theodore J. Ingall Scholarship
Activities:	*Candidate Educator,* Sigma Alpha Mu; *Member*, Entrepreneurship Club; Pre-Law Society

Bronx High School of Science, Bronx, NY

LEGAL EXPERIENCE

Consumer Justice for the Elderly Litigation Clinic, Queens, New York
Student Intern, Fall 2017

Honorable Joanna Seybert, U.S District Court, Eastern District of New York, Central Islip, New York
Judicial Intern, Summer 2017
Conducted legal research and drafted memoranda to assist clerks and Judge Seybert in resolving motions. Observed civil and criminal proceedings and discussed them with clerks and Judge Seybert.

Castle Connolly Private Health Partners, New York, New York
Legal and Financial Assistant, February 2016 – July 2016
Performed legal and financial tasks for concierge healthcare startup company. Audited over 2,300 member files to ensure HIPAA compliance. Reviewed membership agreements in order to resolve customer disputes. Used existing complex forms to draft membership, master transaction, and operating agreements. Created analytical financial reports to assess potential client viability.

Silberling & Silberling, Hauppauge, New York
Legal Assistant, January 2015 – June 2015
Performed legal and administrative tasks for tax and Social Security disability law firm. Prepared legal documents using existing forms. Proofread letters and documents and edited for style and content. Interacted with clients, attorneys, and government employees. Assisted potential Social Security disability recipients throughout appeals process.

McCulloh & Kelliher, PLLC, West Babylon, New York
Legal Intern, January 2014 – June 2014
Assisted attorneys in boutique law firm specializing in matrimonial law. Drafted and edited legal documents using existing complex forms. Performed general administrative tasks including organizing, editing, and reviewing case files.

OTHER EXPERIENCE

Astoria Laundromat and Cleaners, Astoria, New York
Assistant Manager, August 2009 – February 2016

COMMUNITY SERVICE

Saint Demetrios Cathedral of Astoria, Queens, New York
Volunteer, May 2006 – Current

LANGUAGES AND SKILLS

Greek (Native Speaker); Certified in LexisNexis, LexisNexis Professional Research, and Westlaw

SANDRA M. MORRONGIELLO
3 Lafayette Avenue
Lynbrook, NY 11563
(516) 837-9056
smmorrongiello93@gmail.com

EDUCATION

St. John's University School of Law, Queens, NY
Candidate for Juris Doctor, June 2019
Academics: G.P.A.: 3.50; Rank: 42/196 (top 22%)
Honors: Dean's List (Spring 2017); Dean's Award for Excellence in Legal Writing (Fall 2016, Spring 2017);
    Student Representative, Nassau County Bar Association's Theodore Roosevelt American Inn of Court

Hofstra University, Hempstead, NY
Bachelor of Arts, *summa cum laude,* Global Studies, May 2015
Academics: G.P.A.: 3.87
Honors: Phi Beta Kappa Society (Spring 2015); Provost's List (Fall 2014, Spring 2015); Mu Kappa Geographic
    Honor Society (Spring 2014); Dean's List (6 semesters)

WORK EXPERIENCE

St. John's University School of Law, Queens, NY
Legal Writing Teaching Assistant, August 2017 – Present
Review and critique students' memorandum assignments. Teach a class weekly to first-year law students on topics, including drafting legal memorandum and using proper citations. Tutor students on general legal writing skills.

Nassau County District Attorney's Office, Mineola, NY
Special Victims Bureau Intern, June 2017 – October 2017
Conducted legal research in the fields of evidence and criminal law. Assisted attorneys in preparation for court proceedings by formulating direct and cross-examination questions, organizing Rosario material for defense counsel, and preparing witnesses for trial.

Western Suffolk BOCES, Deer Park, NY
Paraprofessional, January 2016 – June 2016
Assisted teachers and special needs students. Tutored students with mathematics and writing skills. Aided students in ambulating to services including speech, physical, and occupational therapy.

Nassau County Medical Examiner's Office, East Meadow, NY
Intern, August 2014
Shadowed forensic pathologists and forensic scientists within the Chemistry, Biology, and Latent Prints Departments. Observed autopsies and recorded data for the forensic pathologists. Assisted with the organization of vials.

NSLIJ-Franklin Hospital, Valley Stream, NY
Intern, June 2013 – July 2013
Rotated through various departments of the hospital, including operating room, emergency room, radiology, pathology, hematology, wound care, and psychiatry.

The Long Island Brain Tumor Center, Great Neck, NY
Research Assistant, May 2012 –August 2012
Assisted with data collection for research involving cancer studies.

VOLUNTEER WORK

Volunteers Around the World, San Pedro La Laguna, Guatemala
Volunteer, January 2015
Two-week volunteer abroad program shadowing medical professionals. Performed triage, measured vital statistics, and managed the pharmacy. Taught public health classes focusing on personal hygiene.

Health Leads, East Meadow, NY
Health Leads Advocate, January 2014 – December 2014
Contacted assigned clients on a weekly basis regarding legal and health services, food, education, clothing, employment opportunities, housing, financial assistance, and other basic resources. Located resources specific to each client's needs.