

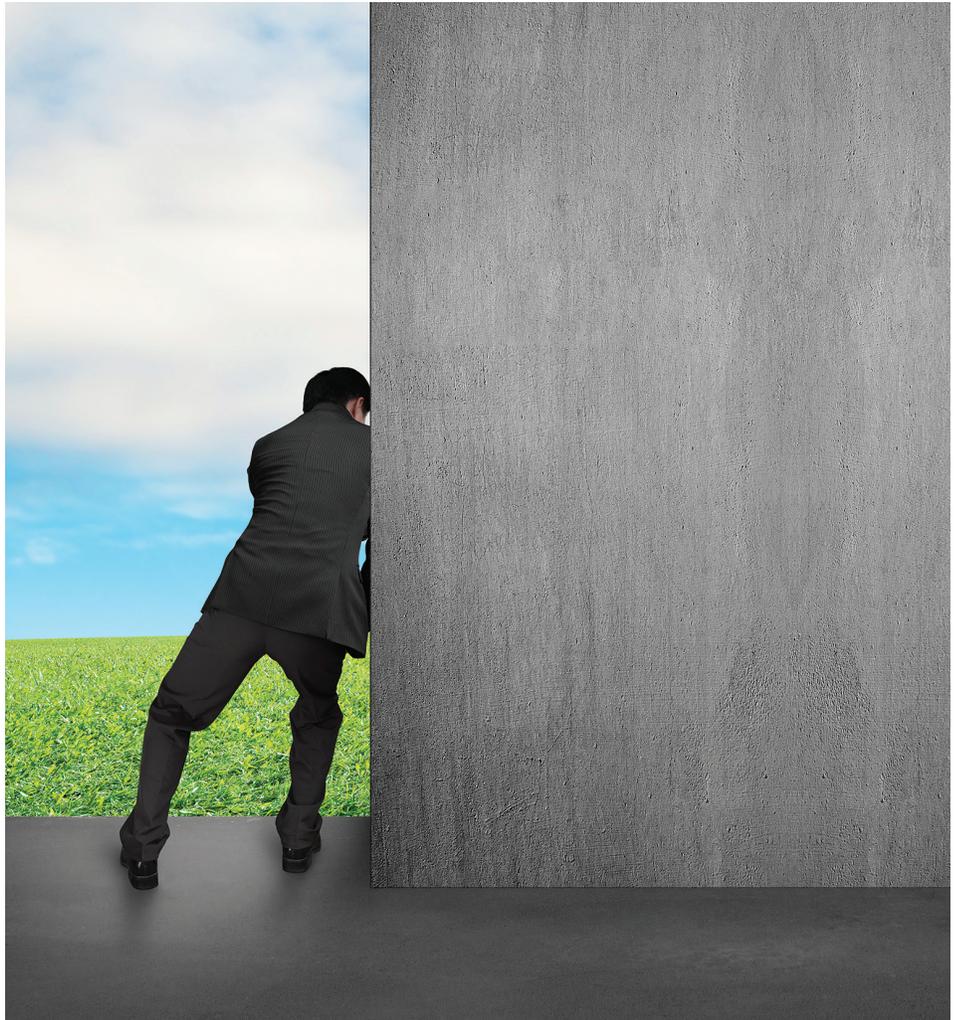


Structural Changes

By Kathleen Nalty

The legal industry will remain one of the least diverse professions unless lawyers and legal staff become knowledgeable about unconscious bias and then put interrupters into place to help limit the effect of implicit biases.

Interrupt Unconscious Bias Through Inclusion Nudges



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While there has been a great deal of activity aimed at advancing diversity and inclusion in the legal industry, outcomes have been poor. Most law firms have numerous programs and activities aimed at improving diversity and

inclusion. Yet there is very little to show for those efforts. Year after year, attorneys in already underrepresented groups, including female and racially or ethnically diverse lawyers, leave their law firms at higher rates than other attorneys. For example, the New York City Bar Association reported that attrition rates in 2015 for member law firms were 43 percent higher for female attorneys and 62 percent higher for racially or ethnically diverse attorneys compared to white male lawyers. The 2015 Vault and Minority Corporate Counsel (MCCA) Survey also documented higher attrition rates for attorneys in underrepresented groups.

Several national research studies point to the disparate impact of hidden barriers on female and racially or ethnically diverse lawyers as the major cause of higher attrition rates. According to these studies, key opportunities are shared unevenly by people in positions of power and influence, often without realizing that certain groups are disproportionately excluded, which causes attorneys in the excluded groups to remain on the margins in law firms. Specifically, research shows that female, LGBTQ, disabled, and racially or ethnically diverse attorneys often have less access to critical but intangible opportunities, including the following:

1. Networking—informal and formal
2. Insider information
3. Access to decision makers
4. Mentors and sponsors
5. Meaningful work assignments
6. Candid and frequent feedback
6. Social integration
7. Training and development
8. Client contact
9. Promotions

Research studies point to bias as the major cause of these hidden barriers. Certainly, conscious, overt discrimination still exists and contributes to this dynamic. But it turns out that a specific kind of unconscious and unintentional bias plays the biggest role. Affinity bias, which is a bias *for* others who are more like you, causes

people to develop deeper work relationships with those who have similar identities, interests, and backgrounds. When senior attorneys (the majority of whom are straight, white, and male) gravitate toward and share opportunities with others who are like themselves, they unwittingly leave out female, LGBTQ, disabled, and racially or ethnically diverse attorneys.

A New Movement: Inclusion Nudges

Unconscious bias is difficult to root out in organizations. But there is a new movement afoot to institutionalize diversity and inclusion through “inclusion nudges,” which fight unconscious bias at a whole new level. The term “nudge” comes from the field of behavioral economics. In 2008, Richard Thaler and Cass Sunstein published the book *Nudge: Improving Decisions About Health, Wealth, and Happiness*, which described how small changes in processes and procedures can nudge people to make better and less biased decisions. A classic example of a nudge involves switching the default from “opt-in” for 401(k) contributions to “opt-out,” which dramatically increases savings rates while still giving employees a choice.

The term “inclusion nudge” was first coined by Tinna Nielsen and Lisa Kepinski in their book *Inclusion Nudges Guidebook* (2015). They encourage advocates to design nudges for all kinds of systems and processes in organizations—to help people interrupt their unconscious biases and to foster an inclusive workplace in which diversity can thrive. They define an inclusion nudge as “a mental push that will mitigate unconscious association to help the brain make more objective decisions, and promote more inclusive behaviors that will stick.”

Inclusion nudges can also be called “bias interrupters” because they help people recognize and mitigate biases. Unconscious biases, in particular, are very difficult to root out because they are almost completely hidden from us. Training on unconscious bias can help people recognize how

to become aware of unintentional social and cognitive biases, as well as techniques for addressing them. But training alone is not enough. The real work involves intentional and repeated individual efforts to implement research-based tactics to interrupt bias as it occurs.

Unconscious bias thrives in situations that are high pressure, fast paced, and

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stressful, which pretty much describes the typical lawyer’s daily life. This is compounded particularly in law firms, where supervising attorneys have limited training in managing people and operate with considerable leeway in how they interact with talent. Some experts recommend slowing down decisions to limit the effect of unconscious bias. But that is just not always practical for lawyers.

Thus, it is up to legal organizations to change systems and processes and embed bias interrupters into them to help lawyers and staff live up to their good intentions. Institutionalizing diversity and inclusion requires nudging all processes and procedures so that inclusion becomes a natural part of what people do every day.

Any process or procedure in an organization can be nudged. In fact, no organization can achieve full inclusion without nudging *all* structural elements so that diversity and inclusion become woven into the fabric of the organization and a natural part of how everything operates. To “nudge” a system or process, you break it down into its smallest components and then reverse-engineer it, asking how each component could be conducted differently

to interrupt unconscious bias. It is especially important to focus on building in accountability and oversight mechanisms, which are powerful bias interrupters.

Initially, a nudged process might feel taxing. All new processes require some adjustment. After a while, though, following the new protocol should become second nature. That's when diversity and inclu-

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sion become embedded into an organization—when all processes and procedures are reworked to be fair and as bias-free as possible.

Introducing Inclusion Nudges into Recruiting and Hiring

Imagine, for the purpose of introducing nudges into a recruiting and hiring process, that your organization has identified 18 components, all of which play a part in recruiting and hiring. These components could include the obvious, such as job announcements, application forms, and applicant screening. A job description, after all, is by nature a list of biases—aspects that we assume are necessary to perform a job. Some components may seem less obvious, such as employee benefit packages. But evaluating benefit packages has a place. What does your organization need to change in its benefit packages to attract a wider variety of candidates? What do other industry or sector leaders offer as benefits and in employee policies?

Space limits here will not permit considering how your organization might introduce nudges into all the potential recruiting and hiring components by reverse-engineering them; however, four examples are discussed below.

Job Announcements

First, to begin the reverse-engineering, your organization would evaluate and rewrite job announcements to be more inclusive. Research indicates that women may not apply for jobs until they meet all the criteria, whereas men apply when they meet many, but not all, of the criteria. Do your job announcements include criteria that aren't really essential?

Also, research shows that job announcements that include more gendered terms can be subtly off-putting. E. Peck, *Here Are the Words That May Keep Women from Applying for Jobs*, Huffington Post (June 2, 2015). Can a job announcement be reworded so that it is more inclusive of both genders? Use web-based applications, such as Textio, to flag words and phrases that are cliché, gender based, or otherwise off-putting to certain groups.

Does a job description include phrases that go to personal qualities or a personality type that might keep an otherwise qualified candidate from applying (e.g., “outgoing”)?

If your organization is working to advance diversity and inclusion, do you include statements about diversity and inclusion competencies and cultural competence within your job criteria and announcements? After all, to foster an inclusive workplace where diversity thrives, everyone must play an active role, which means that this competence would be useful to add to the skillset required of new hires.

Where do you advertise your job announcements? Do you make efforts to ensure that they are visible to a wide variety of people? Think about asking specialty groups (bar affinity groups, professional associations, business chambers, and community groups) to disseminate job announcements. Draw on employee personal networks to advertise a job announcement. Ask employees in underrepresented groups to disseminate job announcements to their networks routinely. Because most people's networks are fairly homogenous, make sure that majority employees go

beyond their own networks or else they'll just replicate themselves. Consider modifying employee referral bonuses to put a premium on diverse referrals.

Finally, extend the time that a position is open to help get the word out to the broadest range of people. Unconscious bias (especially affinity bias) is more apt to show up in rushed circumstances. So make sure that everyone has sufficient time during the entire recruiting process.

Organization Website

To reverse-engineer here, your organization would first and foremost analyze its website. You would take a fresh look at the website and how it may attract, or potentially repel, diverse candidates. What kinds of pictures are featured on the site? Research shows that including equal numbers of pictures of men and women increases an organization's attractiveness to potential female candidates. P. Cecchi-Dimeglio, *Does Your Firm's Website Repel Women?*, The American Lawyer, Nov. 28, 2016.

What policies and values statements are included in the information on the website about your organization? How are diversity and inclusion messaged? Female and racially or ethnically diverse attorneys may respond differently to statements about the organization's approach. E. Apfelbaum, *Why Your Diversity Program May Be Helping Women but Not Minorities (or Vice Versa)*, Harvard Business Review (Aug. 8, 2016). Also, including comments from people in underrepresented groups in your organization about their experiences in their own words, as well as video messages from leaders about the value of diversity and inclusion, could help attract a wider pool of applicants.

In describing your organization's diversity and inclusion initiative, are specific actions included? Are diversity and inclusion woven throughout the website, or are they addressed on one separate page? Is the word “qualified” used just on the diversity page of the website?

Get some feedback from a diverse group of disinterested parties about what your website communicates to them. Use the feedback to make improvements.

Internal Diversity and Inclusion Education and Training

Ensure fluency in diversity and inclusion

among your employees. Start with your recruiters. Educate every person involved in the recruiting and the hiring processes about diversity and inclusion so that they can answer questions knowledgeably about your organization's efforts, including representation in the organization of people from a wide variety of backgrounds, at all levels, and specific efforts to remove hidden barriers to success for people in underrepresented groups.

Train marketing and recruiting professionals on diversity and inclusion and work with them to highlight not just your organization's traditional diversity programs (i.e., memberships, sponsorships, scholarships, IL programs, job fair participation, affinity groups) but inclusiveness efforts as well.

Ensure fluency and competency in unconscious bias concepts widely among employees by training all recruiters, screeners, interviewers, hiring personnel, and supervisors in unconscious bias and make sure that the training is constantly referenced during the recruiting and hiring process. Then follow up on training by asking all stakeholders to report on their progress with respect to actions that interrupt their own unconscious biases. Have a discussion among those involved in recruiting and hiring about how both implicit social and cognitive biases such as availability, attribution, confirmation, anchor, and affinity bias can show up, and create a one-page "bias interrupter sheet" for everyone to review before the process begins (e.g., before interview candidates are selected, before the interviews, before discussions about candidates).

Have regular discussions while recruiting and hiring about the "aha" moments that they are experiencing and the new awareness that they have about stereotypes and attitudes (without revealing specific biases about protected groups, of course). Ask people involved to be honest with themselves and others about whether they feel "affinity bias" in particular with respect to any candidate. ("She's like me; we have things in common.") Ask people to acknowledge any triggers that candidates may have that prompt their automatic disqualification, such as a less than firm handshake or manners of speech or dress, which have nothing to do with a person's competence. Discuss whether anyone had a nega-

tive gut reaction about a candidate and why he or she disliked the candidate.

In short, foster a "speak-up" environment in which people involved in the recruiting and hiring processes feel comfortable discussing, and more importantly, challenging perceived biases—both individual and institutional. Consider appointing one or more people to act as "devil's advocates" to challenge decisions, or to act as "bias interrupters" to call out possible bias during the processes.

Pipeline Cultivation

Research by the Corporate Executive Board shows that diverse candidates have greater trust for personal sources of information in the recruiting process (referrals from diverse employees, in-person campus recruiting, teachers and career advisers, family and friends, and employee resource group contacts) and less trust for information sources that organizations use more often (diversity-focused job boards, diversity associations, LinkedIn, print media advertising, search firms, and Twitter and Facebook). CLC Human Resources, *Creating Competitive Advantage Through Workforce Diversity 33* (Corporate Executive Board 2012). So take the time and effort to cultivate the pipeline with personal interactions.

Develop relationships with career services personnel at schools (particularly those that have larger populations of students in underrepresented groups), as well as staff in alumni offices, and ask them to keep your organization in mind with respect to students or alumni from diverse groups. Leave branded literature with the schools to share with students. Arrange to make presentations at the schools about your organization.

Teach classes or road shows at schools with diverse student populations to gain exposure for your organization. Host field trips for students from schools with diverse populations.

Consider using Door of Clubs, a campus recruiting platform that gives recruiters the ability to search through a pool of students based on a variety of social identity groups, as well as school, major, location, and skills.

Introducing Inclusion Nudges into Employee Promotions

Any process can be nudged. Examples of how to introduce inclusion nudges into

three components of an employee promotions process by reverse-engineering them are discussed below.

Promotion Criteria

Promotion criteria, similar to job description criteria, are essentially a list of biases— aspects that we presume are necessary to perform a new job. But are they all nec-



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essary? Take a fresh look. Update all promotion criteria by removing unnecessary requirements. Also ask whether the definition of success is skewed toward one group: does success reflect mostly male norms? Then stick with the predetermined criteria to help prevent interviewers from implicitly "moving the goalposts" to select a preferred candidate.

If your organization seeks to advance diversity and inclusion, just as you would seek new employees with demonstrated competency in diversity and inclusion, the people promoted should have some demonstrated competency in diversity and inclusion. So consider including criteria about diversity and inclusion that measure whether a candidate is "unskilled," "skilled," or "highly skilled." Examples of questions that you could ask promotion candidates to measure skill level include the following:

- What efforts have you made to identify and to eliminate hidden barriers to success in our organization?



- What have you observed in our organization with respect to the benefits of diversity and inclusion?
- Why is it important for the organization to advance diversity and inclusion?
- What efforts have you made to develop meaningful and productive relationships with colleagues from different backgrounds?
- Tell me about a time when you achieved superior outcomes by incorporating divergent perspectives.
- Tell me about a time when you engaged in behaviors that made a team member feel that he or she could be his or her true, authentic self at work.
- What have you done to mentor and sponsor someone in the organization who is different from you?
- How have you handled a situation when a colleague was not accepting of others' diverse backgrounds?
- What have you done to further your knowledge about diversity and inclusion? How have you demonstrated or used what you've learned?
- What processes have you changed in meetings to be more inclusive of others?
- What do you do to foster a "speak-up" environment?

Promotion evaluation mechanics do matter. Your organization should use a standard review form for each promotion candidate that devotes a space to each key criterion. In addition, the form should use narrative assessments, such as the "unskilled," "skilled," and "highly skilled" ratings mentioned above, over numerical rating systems because different evaluators may use numerical ratings differently. In fact, in one research study, male associates at a Wall Street law firm received higher numerical ratings in performance reviews than female associates even though the women's narratives were as strong or stronger than their male counterparts. Promotions at this firm were based on the numerical ratings, which unfairly advantaged the male attorneys. D. Cassens Weiss, *Study Finds Disconnect Between Numbers and Narratives in Associate Job Reviews—But Only for Women*, ABA Journal (October 26, 2011).

Promotion Candidate Selection

Require submission of a list of every remotely eligible person for a promotion

rather than relying on a mental list, which is prone to corruption by implicit biases (especially availability bias). Put everyone who is remotely eligible on the list for the promotion opportunity. Ask, "why not?" instead of assuming that someone isn't ready or interested. Women, in particular, underestimate their readiness and sometimes automatically take themselves out of the running for promotions. Organizations have been successful in increasing how many women hold higher positions by tweaking the processes that go into selection or self-nomination. At the very least, require supervisors to recommend two people to force them to evaluate the available candidates comparatively. Requiring written justifications for not putting forward a particular candidate can also help interrupt bias.

Promotion Decisions

Appoint someone or a group other than the promotion candidate-evaluating group to review promotion decisions and make sure that everyone involved knows that their decisions will be reviewed and analyzed for evidence of bias. This will help them neutralize any unconscious biases during the evaluation process and provide a checks and balances system. Just as you would select promotion evaluators with different social identities, backgrounds, and positions to involve in the promotion process, to ensure widely various perspectives, your organization should select promotion-decision reviewers with different social identities, backgrounds, and positions.

Inclusion Nudges in the Legal Profession

Legal organizations intent on getting ahead of the curve on diversity and inclusion are instituting inclusion nudges. Corporate law departments, law firms, and state bar associations have joined the movement.

Corporate Law

One global corporate law department engaged in introductory training sessions on unconscious bias and then held quarterly forums on discreet areas of unconscious bias, with the goal of creating tools to interrupt bias. The law department started with a session on presence disparity and location bias, which are common

when teams are dispersed geographically and have to interact frequently on telephone calls or videoconference platforms. This law department also held forums on personality differences, generational diversity, and gender bias. After learning about these types of biases, attendees brainstormed actions—specifically, changes to processes and procedures—that would help limit bias. For instance, they created a tips sheet to combat gender bias in meetings, which included setting clear ground rules for dealing with interruptions during meetings, which disproportionately affect women.

The law department also embedded diversity and inclusion competencies into all employees' job duties and responsibilities so that everyone was contributing to the department's efforts to advance diversity and inclusion. Additionally, law department leaders developed a one-page bias interrupter sheet that was attached to each employee's annual evaluation packet to remind supervising attorneys about how unconscious bias can influence their decisions, which helps try to interrupt any bias that might make its way into the process.

Law Firms

Law firms are also creating inclusion nudges to combat bias. Goodwin, a global 50 law firm, has been embedding bias interrupters into talent management processes. For example, the firm is piloting a structured interview process, with questions tied to core competencies to avoid the subjectivity that allows unconscious bias to take over. The firm also uses Tableau, an interactive data visualization tool, to track and understand diversity metrics.

The firm is also working to interrupt the bias that can creep into annual evaluations. Unconscious bias education and tools have been provided to reviewers and review committee members. The firm's partner promotion committee engaged in a workshop on bias elimination and brainstormed the ways that different types of cognitive biases might show up in decision making. This led to the creation of a bias interrupter "cheat sheet" for the annual promotion process. Additionally, assessment forms have been updated to include priming statements at the top to remind evaluators to slow down their

decision making and watch for the different types of cognitive biases that can skew evaluations. Senior professionals, who have been trained in unconscious bias principles, also sit in on the firm's attorney review, partner promotion, and compensation processes to act as "bias disruptors" and call attention to any potential biases that might make their way into those processes.

Goodwin is also nudging its allocations process to embed bias interrupters. The firm used the "ABA Toolkit for Gender Equity in Partner Compensation" to assess the firm's allocations practices and find areas that could be nudged. Based on the resulting recommendations, firm management is considering developing an initiative to diversify pitch and matter teams; enhancing tracking of data on pitch and matter team diversity, client relationships, and succession; and changing the firm's client origination credit default from 100 percent to a selection of drop-down alternatives.

Finally, the firm is using the Diversity & Inclusiveness Maturity Model created by the author of this article to assess the firm's culture and initiatives. The Maturity Model is designed to make hidden barriers more visible, which then allows firms to address and eliminate them.

State Bar Associations

Diversity and inclusion have become critical strategic imperatives for the Minnesota State Bar Association (MSBA), which, similar to most bar associations, has experienced declining membership. The MSBA leaders view diversity and inclusion as a critical pathway for enhancing organizational performance, increasing membership, and improving the value of bar membership. Thus, the bar association has made concerted efforts to embed diversity and inclusion into all of its processes—staff functions, leadership selection, and council, committee, and section work. As evidence of its deep commitment, the MSBA hired a full-time diversity and inclusion director dedicated to making institutional changes to advance its diversity and inclusion efforts.

The MSBA's volunteer leaders have set the tone at the top that diversity and inclusion are business imperatives and are

driving that message through the organization in various ways. For instance, bar leaders and staff engaged in a full day of training on diversity, inclusion, and unconscious bias and have participated in follow-up workshops throughout the year. Section and committee leaders are encouraged to institute diversity and inclusion-related goals and action plans. In their annual reports, sections and committees now respond to the following question: "What diversity and inclusion goals did your section/committee include in your 2016–2017 work plan, how did you approach these goals, and what was the result?" Sections and committees have identified goals, ranging from raising awareness of a section's commitment to diversity and inclusion and sharing best practices, to increasing diversity in leadership, membership, and programming, while continuously identifying avenues for improvement. One particular committee is focusing on inclusion and striving to engage members from underrepresented backgrounds in subcommittees, meetings, and all initiatives. This committee has created a robust mentorship program to pursue this goal.

The MSBA staff created a "Diversity and Inclusion Toolkit" to assist members in advancing diversity and inclusion. Staff and leadership revised the Qualifications and Interests Form used by the Elections and Appointments Committee to integrate diversity and inclusion by adding the following question:

The MSBA recognizes diversity as a core value and defines it as "recognizing the power of diversity of persons, viewpoints, beliefs, and human understanding." Explain what makes you a unique candidate for this board position (including aspects of your background that relate to diversity) and how you think your uniqueness will add value to this board.

Bar leaders examine what they do through the lens of diversity and inclusion by asking, for every council agenda item, whether and how it affects the MSBA's diversity and inclusion mission and objectives.

The diversity and inclusion director consults with the Minnesota CLE (MCLE) staff about how to integrate diversity and inclusion into their programming and

operations better by brainstorming ways to collect demographic data about past faculty, sharing contact lists and diversity and inclusion resources in an effort to support MCLE's ongoing work in this area, and assisting in identifying particular CLE faculty from diverse backgrounds, as well as CLE topic areas related to diversity.

Legal organizations

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Additionally, the MSBA revised staff evaluations to include the following diversity and inclusion competency: "Contributes to a positive and inclusive environment for all staff and members by striving to manage differences with skill and sensitivity, seeking out and valuing diverse ideas and differing points of view, and exhibiting respect for all."

Conclusion

Each of the organizations discussed above is leading their sectors on diversity and inclusion—not just because it is the right thing to do but also because it a critical business imperative. Making structural changes, by nudging processes and procedures, is essential to creating an inclusive environment in which diversity can thrive. The legal industry will not make any meaningful progress on diversity and will remain one of the least diverse professions unless lawyers and legal staff become knowledgeable about unconscious bias and then put bias interrupters into place within structures and procedures to help people limit the effect of their implicit biases. 