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We Speak the Queen's English

LINGUISTIC PROFILING IN THE LEGAL PROFESSION

Brenda D. Gibson[†]

Over the past sixteen years of grading students' written work, I often felt like I knew my students' identity, despite our anonymous grading policy. It was as if I could literally see my students—like they were standing in front of me reading their paper out loud. This was all based upon some common linguistic conceptions that I had about how my students spoke during classroom or other conversations, or how they wrote on previous assignments upon which I had provided feedback. I began to think—if I felt this way, what about others? Others who do not appreciate the linguistic differences that are found amongst and between the races, the genders, the generations, etc.? Others who let their unconscious bias govern their conscious selves in assessing the skillset of others? Or others who were simply unaware of their biases, whether conscious or unconscious? I was alarmed because these common linguistic conceptions, if left unchecked, can fester, and become the basis of accent bias and linguistic profiling, a phenomenon that cuts out the heart of many stellar minoritized students and future professionals before they can reach their full potential.

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As a child, I remember being admonished by my mother, an “old school” secondary school teacher, to speak “proper” English. Consequently, I titled this article, in part, using her constant reminder, “We Speak the Queen’s English.” At the time, I did not realize the significance of her instruction. I could not have expected that, as a little Black¹ girl from South Carolina, there were others who would judge me based solely on the way I spoke and wrote. I did not know that there was a language hierarchy in the United States. However, after being a professional writer for some twenty-four years and teaching legal writing for more than half of that time, I now fully appreciate why my mother emphasized the use of “proper” English, which has been designated by linguists as “Standard American English (SAE).”² Indeed, there are people who do not appreciate the linguistic differences that exist between us all; because implicit biases exist and cannot be cured; and because diversity and inclusion has been long sought but seems mired in these biases.³ Often when those with implicit biases judge others who do not speak the Queen’s English—or just not in the manner expected—they determine that those “non-standardized English speakers”⁴ are somehow less competent or less entitled to opportunities and resources than those who do.

¹ While I, like many, still identify as Black and African American and use the terms interchangeably, depending on the situation, I will use the term “Black” throughout this article for the sake of consistency. I will also capitalize the “b” in Black in this article as, like the Associated Press did in its style guide, I recognize that [t]he lowercase black is a color, not a person. John Daniszewski, *AP Stylebook Updates Race-Related Terms*, AM. COPY EDS. SOC’Y (Feb. 2, 2021), <https://aceseditors.org/news/2021/ap-stylebook-updates-race-related-terms> [<http://perma.cc/G955-W3WN>]. However, Black—used in “a racial, ethnic or cultural sense, conveying an essential and shared sense of history, identity and community among people who identify as Black, including those in the African diaspora and within Africa,” should be capitalized. *Id.* To that end, I accord similar courtesy to White people in this article as well. *See id.*

² William A. Kretzschmar, Jr. & Charles F. Meyer, *The Idea of Standard American English*, in *STANDARDS OF ENGLISH: CODIFIED VARIETIES AROUND THE WORLD* 139, 140 (Raymond Hickey ed., 2012); *see also* Laurie Walker, *Standard English and the Teaching of Literacy*, 15 *CANADIAN J. EDUC.* 334, 336 (1990) (“As a response to the needs of science and government for a national language to replace Latin, the written language in eighteenth-century Britain was codified on the dialect of the Southeast Midlands by published dictionaries and grammar texts. According to Milroy & Milroy (1985), this developed at least a partial standard for written English and made people conscious of a relatively uniform notion of ‘correct’ English as a desirable social and personal goal.” (citing JAMES MILROY & LESLEY MILROY, *AUTHORITY IN LANGUAGE: INVESTIGATING LANGUAGE PRESCRIPTION AND STANDARDIZATION* 36 (Routledge ed., 1985))).

³ *See* Erika K. Wilson, *Why Diversity Fails: Social Dominance Theory and the Entrenchment of Racial Inequality*, 26 *NAT’L BLACK L.J.* 129, 144 (2017) (citing Jerry Kang, *Trojan Horses of Race*, 118 *HARV. L. REV.* 1489, 1494–99 (2005)).

⁴ This is a term used by many linguists to describe holistically those minoritized people who do not speak standardized English. Ian Cushing, ‘*Say It like the Queen*’: *The Standard Language Ideology and Language Policy Making in English Primary Schools*, 34 *LANGUAGE CULTURE & CURRICULUM* 321, 322–23 (2020) (citing

As a Black attorney and legal writing professor, I am admittedly torn. I know the importance of language and the power of words, and I also appreciate that language is fluid, and its beauty is often in the ear of the listener and, on the page, “the eye of the beholder,” as the adage says. I reject the idea that standardized English must be spoken (and written) without accent or nuance. There is beauty and history in accent and nuance. As linguist John Baugh reminds us, “[l]anguage, dialects, and accents . . . serve to bind Americans, reminding us of the ancestors who left distant lands to seek their freedom and fortune here.”⁵ Indeed, our dialectical and accent differences should be the very things that bind us, making us ever mindful that our strength is in our differences. Established language ideals of the majority population in this country have rejected the notion of language fluidity that our diverse history mandates and diversity requires. This article posits that our language differences in this country have been used to stratify our educational systems and limit the success of many minoritized people, especially in the legal profession—a profession in which language is a powerful tool and good oration and writing skills are a must.

This article lays bare and connects seemingly unrelated research about implicit bias and linguistic profiling and shows the inextricable ties between the implicit bias found in those studies to that which shows up in the legal academy and subsequently in the legal profession.⁶ The article goes further to analyze some of the characteristics of legal education and the legal profession that make it so vulnerable to these biases and examines some of the existing strategies for addressing them—strategies that seem promising for the academy and profession alike. Indeed, this paper joins with the voices of the collective, who are or have previously been deemed nonstandardized English speakers. It raises the alarm and exposes the harm being done in our society generally, and in our law schools and law firms, more specifically—a harm that will not cease until we learn to address our implicit biases. We must look at the propensity to marginalize accented people and people of color in

Amanda J. Godley et al., “*I’ll Speak in Proper Slang*”: *Language Ideologies in a Daily Editing Activity*, 42 *READING RSCH. Q.* 100 (2007)). This term may include Black people, who speak English as their native language, as well as foreign nationals to whom English is a second language.

⁵ John Baugh, *Linguistic Profiling*, in *BLACK LINGUISTICS: LANGUAGE, SOCIETY, AND POLITICS IN AFRICA AND THE AMERICAS* 155, 163 (Siffree Makoni et al. eds., 2003).

⁶ Admittedly, the more general terms, conscious (or explicit) bias and unconscious (or implicit) bias, and the more specific terms, linguistic profiling and accent bias, have been discussed by scholars for quite some time.

such a way that law schools and the legal profession continue to miss the mark on diversity, equity, and inclusion.⁷ To that end, this article begins broadly in Part I, discussing some of the most common types of implicit bias in legal education and law practice. Part II discusses specifically how implicit bias informs accent bias and linguistic profiling and how these biases operate in legal education, often resulting in lower grades and harsher feedback for minorities.⁸ In Part III, this article discusses what implicit bias, specifically accent bias and linguistic profiling, means in the law school classroom and in the profession. Finally, in Part IV, the article discusses some of the strategies currently being used in both fora and the systemic measures that should be considered to address the issue, with the hope that awareness will lead to more concrete steps being taken towards diversity and inclusion in the legal profession.

I. GENERAL CONCEPTS OF IMPLICIT BIAS

There are various concepts and nomenclature that are invariably used when discussing implicit bias and it is important to understand them before discussing the specifics of linguistic profiling. To that end, a general overview of how the brain functions to support implicit bias and a discussion about a few of the forms most pertinent to the discussion about linguistic profiling in the legal academy and profession follows in the section below.

A. *Implicit Bias and the Human Brain*

Implicit bias is also known as unconscious bias or implicit social cognition.⁹ It is a term that has been around for quite a while, but it has only been in the spotlight for the last fifteen or

⁷ *New Study Finds Gender and Racial Bias Endemic in Legal Profession*, A.B.A. (Sept. 6, 2018), <https://www.americanbar.org/news/abanews/aba-news-archives/2018/09/new-study-finds-gender-and-racial-bias-endemic-in-legal-professi/> [<https://perma.cc/72CF-TRHU>] (“First-of-its-kind survey shows systemic bias across the legal profession presents significant barriers to gender and racial equity.”).

⁸ Note that I only found one study showing that White teachers grade minority students higher, and this generally occurred when their feedback was going to be communicated to those minority students. See Kent D. Harber, *Feedback to Minorities: Evidence of Positive Bias*, 74 J. PERSONALITY & SOC. PSYCH. 622, 622 (1998) (“This research tested the prediction that Whites supply more lenient feedback to Blacks than to fellow Whites.”). In his study, Harber acknowledges, however, that “[r]esearch on nonfeedback evaluations” typically show that White people have a propensity to judge minorities harshly. *Id.* at 622.

⁹ See Nicole E. Negowetti, *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection*, 15 NEV. L.J. 930, 935 (2015).

twenty years in the legal academy.¹⁰ Unlike our conscious attitudes, our unconscious (or implicit) biases are activated involuntarily without any awareness or conscious control.¹¹ “[I]mplicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions,” and because these biases reside deep in our subconscious, they are generally not accessed even during deep thought and introspection.¹² Noted psychologist Jennifer Eberhardt has conducted research on implicit biases and writes boldly and prolifically about the effects that our biases have on minorities in the United States.¹³ The Ohio State University’s Kirwan Institute for the Study of Race and Ethnicity notes that “beginning at a very early age through exposure to direct and indirect messages,” we develop associations over our lifetimes that live “in our subconscious.”¹⁴ These implicit associations result in our presumptive perspectives on other people based solely on their “race, ethnicity, age, and appearance.”¹⁵

Indeed, cognitive science explains why implicit bias operates as it does.¹⁶ Professor Nicole E. Negowetti explains that “[r]easoning occurs via a ‘dual process’ in which people employ two cognitive systems.”¹⁷ “System 1 . . . is rapid, intuitive, and error-prone,” while System 2 is described as “more deliberative, calculative, slower, and often more likely to be error-free.”¹⁸ A great deal of our “implicit mental processes” by definition occur

¹⁰ *Id.* at 933.

¹¹ Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 COLO. LAW. 45 (2016); see generally *Implicit Bias Module Series*, KIRWAN INST. ON THE STUDY RACE & ETHNICITY, <https://kirwaninstitute.osu.edu/implicit-bias-training> [<https://perma.cc/5DW2-938V>] (providing an online, self-contained series of modules that instructs on concepts around implicit bias).

¹² *Understanding Implicit Bias*, KIRWAN INST. FOR STUDY RACE & ETHNICITY (May 29, 2012), <https://kirwaninstitute.osu.edu/article/understanding-implicit-bias> [<https://perma.cc/R6MJ-2VM2>]; see also Douglas Starr, *The Bias Detective: Psychologist Jennifer Eberhardt Explores the Roots of Unconscious Bias—and Its Tragic Consequences for U.S. Society*, SCI. (Mar. 26, 2020), <https://www.sciencemag.org/news/2020/03/meet-psychologist-exploring-unconscious-bias-and-its-tragic-consequences-society> [<https://perma.cc/U3S5-FPBJ>].

¹³ See Starr, *supra* note 12.

¹⁴ *Understanding Implicit Bias*, *supra* note 12 (noting that “[i]n addition to early life experiences, the media and news programming are often-cited origins of implicit associations.”).

¹⁵ *Id.*

¹⁶ Russell G. Pearce et al., *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2423 (2015) (“The notion of an implicit bias extends more generally from a psychological theory called schema theory.”).

¹⁷ Negowetti, *supra* note 9, at 935 (citing DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2d ed. 2013)).

¹⁸ *Id.* (quoting Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 974 (2006)).

“outside of [a person’s] [consciousness and] conscious focus and are rooted in System 1, [which includes] implicit memories, . . . perceptions, . . . attitudes, and . . . stereotypes.”¹⁹ Although “System 1 mental processes [function] without conscious awareness . . . or control,” they nonetheless influence social judgments.²⁰ Unfortunately, the error-prone System 1 processes operate first, leaving System 2 to merely “endorse[] or rationalize[] ideas and feelings that were generated by [the flawed] System 1.”²¹

For that very reason, persons who think of themselves as racially and ethnically conscious, persist in some racially and ethnically unconscious biases.²² Negowetti notes, “Implicit biases are rooted in the fundamental mechanics of the human thought process, where people learn at an early age to associate items that commonly go together and to logically expect them to inevitably coexist in other settings: ‘thunder and rain for instance, or gray hair and old age.’”²³ The human brain organizes information into “categories and ‘cognitive structures’ called schemas.”²⁴ Negowetti defines schemas as “‘mental blueprints’ that allow an individual to understand new people, circumstances, objects, and their relationships to each other by using an existing framework of stored knowledge based on prior experiences.”²⁵ They are “cognitive shortcuts” that allow us to quickly understand new circumstances and think of new ideas based upon previous experiences.²⁶ Accordingly, we do not have to draw inferences and understand[a concept for the first time.²⁷ Schemas help us process information as we classify people, places, and things into categories.²⁸ For example, when we first meet someone, we automatically socially categorize and classify them through appearance—using gender, their age, and race—as well through information we learn about them such as their (dis)ability, sexual orientation, and role.²⁹ So, when we see a

¹⁹ *Id.* at 935–36.

²⁰ *Id.* at 936.

²¹ *Id.* (quoting KAHNEMAN, *supra* note 17, at 415).

²² See Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1139 (2010).

²³ Negowetti, *supra* note 9, at 936–37 (quoting Mahzarin R. Banaji et al., *How (Un)Ethical Are You?*, 81 HARV. BUS. REV. 56, 58 (2003)).

²⁴ *Id.* at 937 (quoting Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CALIF. L. REV. 1103, 1133 (2004)).

²⁵ *Id.* (quoting Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 700 (1994)).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* (quoting Kang, *supra* note 3, at 1499).

person or think of a concept, the schema for that person or concept is activated unconsciously. For example, when a person is introduced as a law professor, a “law professor schema” may be activated and we might associate the person with wisdom or authority, or past encounters with a law professor. Interestingly, “[p]eople have schemas for everything, including schemas for ourselves (‘self-schemas’), for other people (‘person schemas’), roles people assume (‘role schemas’), and event schemas, or scripts, which help us to understand how a process, or event, occurs.”³⁰ These schemas account for our human proclivity to classify people neatly into various social boxes using the aforementioned categories.³¹ The more common term we use for “schemas that we attach to people . . . is ‘stereotype.’”³²

We all have developed over time a racial schema (or stereotype) that triggers some feeling or emotion, a positive or negative assessment or belief, no matter how flawed, about a particular racial category and their intelligence or criminal propensity.³³ The ability for us all to recount different information about the same event is rooted in the schemas that we all have.³⁴ Because each person, consciously and unconsciously, draws on their personal knowledge, two people may hear (or experience) the same person (or event) quite differently.³⁵ A great example of this is shown in how one sees and experiences the news media: when one person hears (or reads) the events of a particular news story, another person of different race, gender, ethnicity, socioeconomic status, etc. may hear (or see) that same story and experience it quite differently.³⁶

³⁰ *Id.* (explaining that “[s]elf-schemas contain our knowledge and expectations about our own traits. Person schemas ‘represent knowledge structures about . . . characteristics and behaviors, and goals’ of other individuals’ . . . ‘Role schemas help to organize our knowledge about the “set of behaviors expected of a person in a particular social position’ . . . [and] self and person schemas, role schemas help us to make sense of and predict people’s characteristics and behaviors.” (footnotes omitted)).

³¹ *Id.*

³² Pearce et al., *supra* note 16, at 2424; *see also* CMTY. RELS. SERVS., U.S. DEP’T OF JUST., COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING: UNDERSTANDING BIAS: A RESOURCE GUIDE 2 (2016), <https://www.justice.gov/file/1437326/download> [<https://perma.cc/U369-9V5Q>] (noting “[w]hen . . . schemas are used to categorize people by age, gender, race, or other criteria, they are called stereotypes.”).

³³ *See* Pearce et al., *supra* note 16, at 2423–25.

³⁴ *See id.* at 2424.

³⁵ *See id.*

³⁶ The first time I ever had a client interview exercise in my legal writing classroom, it was a resounding failure. We all sat in the same room with the same client telling the same set of facts and it seemed like each of my students heard them differently. Do you believe this was based on conscious and unconscious bias? Thereafter, I had to create a Memo to File assignment to ensure all the students were starting the client’s case with the same set of facts. It was an important lesson learned about the complexity of the human brain and the importance of our learned experiences.

So now we know how this cognitive dissonance can show up in a situation that is clearly racist to some but not to others. Our brain may search through numerous schemas and find a view quite divergent from another's.

"[E]vent schemas, or scripts," that "function as cognitive shortcuts [in] provid[ing] meaning to a set of events" or circumstances, "also reinforce traditional cultural and societal values."³⁷ For most of us, these cultural and societal values include biases or prejudices.³⁸ But prejudices alone do not cause a problem. It is when people act upon their prejudices (or even deny that we have them) that these prejudices become dangerous. Prejudice acted upon is discrimination—a demonstrated danger to society.³⁹ More significantly, prejudice denied is even more dangerous, as we can only change when and what we acknowledge.⁴⁰

In sum, implicit bias is "a reflection of cultural issues that have a real-world impact."⁴¹ This is not some "cognitive glitch"; in fact, implicit bias is so engrained that it can predict behavior.⁴² It is no surprise that "[t]hose who are higher in implicit bias" tend to show a greater degree of discrimination.⁴³ As Negowetti detailed, "implicit bias predicts the rate of callback interviews; implicit bias predicts awkward body language which could influence whether people feel that they are being treated fairly or courteously;" etc.⁴⁴ This is particularly true in the legal profession, a service industry, where we interact with diverse members of our community and serve a diverse clientele, often making weighty decisions, which must be made without error.⁴⁵

³⁷ Negowetti, *supra* note 9, at 937–38; *see also* CMTY. RELS. SERVS., U.S. DEP'T OF JUST., *supra* note 32, at 2 (noting that "stereotypes and attitudes are shaped by personal experiences and cultural exposure that leave a recorded imprint on our memory").

³⁸ *See* Negowetti, *supra* note 9, at 939 (defining prejudice "as an association between social objects developed from memory and positive or negative valence").

³⁹ *See id.*; Saul McLeod, *Prejudice and Discrimination*, SIMPLY PSYCH. (2008), <https://www.simplypsychology.org/prejudice.html> [<https://perma.cc/N56F-JZLX>] ("A prejudiced person may not act on their attitude. Therefore, someone can be prejudiced towards a certain group but not discriminate against them.").

⁴⁰ *See* CMTY. RELS. SERVS., U.S. DEP'T OF JUST., *supra* note 32, at 2 (noting that a person "may be unaware that biases, rather than the facts of a situation, are driving his or her decision-making").

⁴¹ Negowetti, *supra* note 9, at 940.

⁴² *Id.*

⁴³ *Id.* (alteration in original) (quoting Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 153 (2010)).

⁴⁴ *Id.* at 941 (footnote omitted).

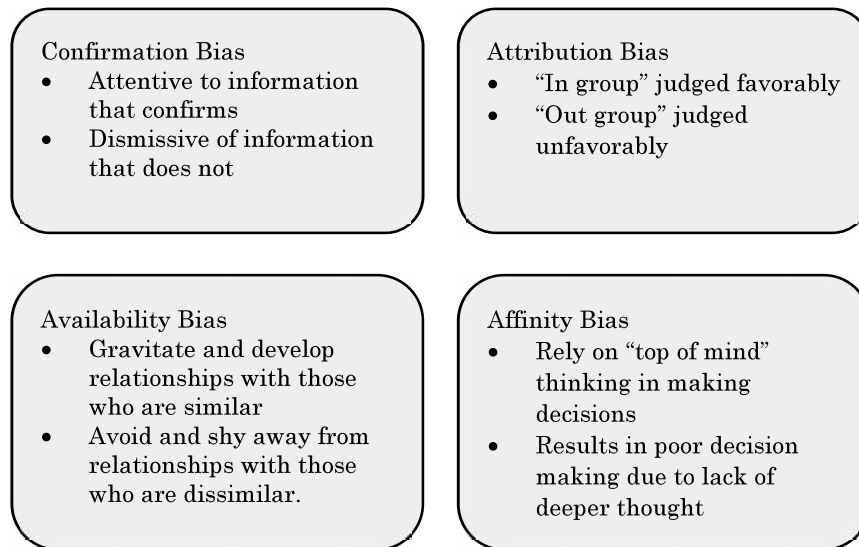
⁴⁵ Nalty, *supra* note 11, at 45.

To be a good attorney,⁴⁶ you must be aware of your biases and you must work to interrupt their negative influences.⁴⁷

B. *Cognitive Biases as a Form of Implicit Bias*

Having noted the way that the human brain operates to create and sustain our implicit biases, it is important to understand more about some of those biases. Though there are many,⁴⁸ the four types of implicit biases that are most germane to the discussion in this article are: (1) confirmation bias, (2) attribution bias, (3) availability bias, and (4) affinity bias.

Figure 1: Four Types of Implicit Biases



⁴⁶ In that same regard, to be a good law professor, you must do the same. Otherwise, the legal profession will continue to be White male dominated. See A.B.A., 10-YEAR TREND IN LAWYER DEMOGRAPHICS (2022), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2012-2022.pdf (explaining that, per a 2022 ABA survey, 81 percent of American lawyers are White; 62 percent male; 5 percent Black). See Tiffany D. Atkins, *Amplifying Diverse Voices: Strategies for Promoting Inclusion in the Law School Classroom*, 31 SECOND DRAFT: LEGAL WRITING INST. 10, 13 (2018); Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 352, 354 (2014).

⁴⁷ See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1169 (2012).

⁴⁸ See Gregory S. Parks, *Race, Cognitive Biases, and the Power of Law Student Teaching Evaluations*, 51 U.C. DAVIS L. REV. 1039, 1054–70 (2018) (providing a more exhaustive list of the various types of implicit biases and the way they may operate to diminish or call into question the capabilities of minoritized professors).

Confirmation bias is defined as that “unconscious bias that causes people to pay more attention to information that confirms their existing belief system and disregard that which is contradictory.”⁴⁹ Scholars recognize that confirmation bias can influence your evaluation of another’s work.⁵⁰ In 2014, a research study on confirmation bias was performed in the legal industry.⁵¹ That seminal study demonstrated that attorneys unconsciously believed that Black people produced inferior written work when compared to their White counterparts.⁵²

Attribution bias is associated with people assessing from their “in groups” more favorably, i.e., giving them “second chances and the benefit of the doubt,” while judging members of their “out groups” by negative stereotypes.⁵³ Similarly, affinity bias “is the tendency to gravitate toward and develop relationships with people who are more like ourselves and share similar interests and backgrounds.”⁵⁴ When we do this, our workplaces begin to look like the majority group, even unconsciously, because we invest more energy and resources in those who look like us—and in the legal profession that is most often a White male.⁵⁵

Finally, “availability bias” is the type of unconscious cognitive (or implicit) bias associated with “people . . . default[ing] to ‘top of mind’ information.”⁵⁶ This type of bias interferes with good decision-making because it makes you uncomfortable when you have to interact with a person who does not support your unconscious role schema.⁵⁷ For example, if you think of a law professor as a White male and a Black male as a criminal, you may become uncomfortable when you interact with a Black male law professor, particularly at an unconscious level.⁵⁸ Unfortunately, this happens every day to minorities in law school and the legal profession.

⁴⁹ Nalty, *supra* note 11, at 45.

⁵⁰ *Id.*

⁵¹ See generally ARIN N. REEVES, YELLOW PAPER SERIES: WRITTEN IN BLACK & WHITE—EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2014), https://www.ncada.org/resources/CLE/WW17/Materials/Wegner%20_%20Wilson--Confirmation%20Bias%20in%20Writing.pdf [<https://perma.cc/479E-S9TJ>]. The findings of this study are more thoroughly discussed in Part II.

⁵² *Id.*

⁵³ Nalty, *supra* note 11, at 46; Pearce et al., *supra* note 16, at 2423.

⁵⁴ Nalty, *supra* note 11, at 46.

⁵⁵ *Id.* (noting that “the legal profession can best be described as a ‘mirrortocracy’—not a meritocracy”). Statistics show that White males constitute approximately 62 percent of full and part-time law teaching faculty. ANDREW MCCLURG ET AL., LAW JOBS: THE COMPLETE GUIDE 642 (2019).

⁵⁶ Nalty, *supra* note 11, at 46.

⁵⁷ *Id.*

⁵⁸ See *id.*

I recall a conversation with a White colleague some years ago who bemoaned the fact that her short stature was an impediment to her being taken seriously in the classroom. I joined her bemoaning how my tall stature was often an impediment, because as a Black woman, I was often seen as unnecessarily loud and bossy. Neither one of us, as women, fit the stereotype of a law professor.⁵⁹ And it continues with our students, when the Black male student fails to answer the question correctly in class, no surprise.⁶⁰ However, when the White male student does not answer the question correctly, surprise.⁶¹ Confirmation bias—there is no expectation that the Black male student is able to answer the question, but there is the expectation is that the White male student can. But it does not end there. It appears that implicit bias carries over into our judging speech and writing—in the worst way.

II. ACCENT BIAS & LINGUISTIC PROFILING—IMPLICIT BIAS PERTAINING TO SPEECH: WHAT LISTENING EARS HEAR AND READING EYES SEE

After detailing the relevant implicit biases that affect our judgment of what we see and hear, it is time to look at a few examples of just how pervasive those biases are in our society—locally and globally, orally and in writing. Though seemingly distinct and distant from the legal profession, these biases show up in the hallowed halls of our courtrooms and the coveted spaces of our classrooms. Here, we begin to see the connectedness of our implicit biases through some seemingly unconnected phenomena of language and social scientific study of language (more aptly writing) assessment. Indeed, below are some stark examples of how implicit bias informs accent bias and linguistic profiling.

⁵⁹ See Negowetti, *supra* note 9, at 932, 937 (noting that “most Americans . . . associate women with family life” and describing how person schemas and role schemas influences the manner in which people experience and view others); see also Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 818 (2019).

⁶⁰ See Anthony L. Brown, *From Subhuman to Human Kind: Implicit Bias, Racial Memory, and Black Males in Schools and Society*, 93 PEABODY J. EDUC. 52, 53 (2018) (noting the “growing view that [B]lack males’ educational experiences in school reflect an implicit bias that undergirds the racial realities they face in classrooms around the nation”); see also David M. Quinn, *How to Reduce Racial Bias in Grading*, 21 EDUC. NEXT 72, 72 (2021), https://www.educationnext.org/wp-content/uploads/2022/01/ednext_XXI_1_quinn.pdf [<https://perma.cc/2ZHQ-GM4R>] (discussing how studies have shown that teacher’s evaluations of student work is often affected by stereotypes about the student’s race).

⁶¹ See Brown, *supra* note 60, at 56.

A. *A Tale of Two Languages*

Anthropologist Sabrina Billings tells a tale of beauty contestants in Tanzania, in her lauded work, “Speaking Beauties: Linguistic Posturing, Language Inequality, and the Construction of a Tanzanian Beauty Queen.”⁶² However, the story could very well be set in the United States of America. Tanzania, officially the United Republic of Tanzania, is a country in East Africa where Swahili and English are both spoken.⁶³ Significantly, while Swahili appears to be gaining favor over English,⁶⁴ English is still favored in Tanzanian beauty pageants.⁶⁵ Billings explains that in Tanzania, “Swahili and English are configured in an egalitarian relationship, a kind of ‘separate but equal’ framework, within the public sphere.”⁶⁶ Despite strong messaging by pageant officials in Tanzania that either Swahili or English may be spoken by the contestants, pageant statistics show that is not the case.⁶⁷ The data show that those contestants who became Miss Tanzania most often spoke English.⁶⁸ Not surprisingly, the need to speak English when answering questions during the interview round rose as the contestants moved from local to regional to national pageant ranks.⁶⁹ By the time the contestants get to the national pageant, held in the nation’s capital, Dodoma, the contestants are expected to speak almost perfect English.⁷⁰ Data show that few,

⁶² Sabrina Billings, *Speaking Beauties: Linguistic Posturing, Language Inequality, and the Construction of a Tanzanian Beauty Queen*, 38 LANGUAGE SOC’Y 581, 581 (2009).

⁶³ *Id.* at 584.

⁶⁴ *See id.*; ULRICH AMMON ET AL., *SOCIOLINGUISTICS 1967* (2006) (noting that Swahili is used in parliamentary debate, lower courts, and in primary school instruction, while English is used “in high[er] courts, foreign trade, diplomacy, and [secondary and] higher education,” and that the Tanzanian government plans to discontinue English as a language of instruction).

⁶⁵ Billings, *supra* note 62, at 589–90.

⁶⁶ *Id.* at 589. More than one hundred languages are spoken in Tanzania, making it the most linguistically diverse country in East Africa. Among the languages spoken are all four of Africa’s language families: Bantu, Cushitic, Nilotic, and Khoisan. AMMON ET AL., *supra* note 64, at 1967. In connection with his Ujamaa social policies, President Nyerere encouraged the use of Swahili to help unify the country’s many ethnic groups. HANDBOOK OF LANGUAGE & ETHNIC IDENTITY 361 (Joshua A. Fishman ed. 2001). Approximately 10 percent of Tanzanians speak Swahili as a first language, and up to 90 percent speak it as a second language. AMMON ET AL., *supra* note 64, at 1967. Many educated Tanzanians are trilingual, speaking English as a second or third language. Tomedes, *Tanzania Language Focus: What Do You Know About the Language Spoken in Tanzania?*, <https://www.tomedes.com/translator-hub/tanzania-language> [https://perma.cc/Z58J-LV67]; *see also* Billings, *supra* note 62, at 584.

⁶⁷ Billings, *supra* note 62, at 589–90.

⁶⁸ *Id.* at 590.

⁶⁹ *Id.* at 593.

⁷⁰ *Id.* at 584.

if any, contestants speak Swahili at the national pageant; and if they do, they rarely win the title of Miss Tanzania.⁷¹

In America, surprisingly (to many), English is not the official language.⁷² Indeed, there is no “official” language as the founding fathers did not elect to adopt an official language at the time of the country’s founding.⁷³ At that time (and to the present), however, English was the principal language spoken by the US leaders.⁷⁴ Notwithstanding past and more recent efforts to pass federal legislation to mandate that English be the United States’ official language,⁷⁵ it is not. However, there is an expectation, much like that described in the Tanzania beauty pageant example above, that the “Queen’s English”⁷⁶ be spoken, especially in the upper echelon of society, i.e., the legal academy and profession.

The United States, which was once hailed as “the great melting pot,”⁷⁷ like Tanzania, features a plethora of languages and dialectical differences in English speakers across populations. For example, I was born in the Low Country of

⁷¹ See *id.* at 584, 590.

⁷² *Learn About Life in the U.S.*, USAGOV, U.S. GEN. SERVS. ADMIN. (July 13, 2022), <https://www.usa.gov/life-in-the-us> [<https://perma.cc/5RXS-B9J7>] (“There is no ‘official’ language at the federal level for the United States. Although the most commonly used language is English, more than 300 languages are spoken or signed by the population. Some individual states list English as their official language.”).

⁷³ Saumyajit Ray, *Politics over Official Language in the United States: Aspects of Constitutional Silence on the Status of English*, 44 INT’L STUD. 235, 236 (2007). “The Constitution of the US, written in English, did not designate English (or any other language) as the official language of the new republic.” *Id.* at 236.

⁷⁴ *Id.* at 243–44 (“Even though 329 languages are spoken in the country, and 14 per cent [sic] of Americans speak a language other than English at home, the fact remains that 98 per cent [sic] of all Americans speak English ‘very well’ or ‘well.’”).

⁷⁵ See Harmeet Kaur, *FYI: English Isn’t the Official Language of the United States*, CNN (June 15, 2018), <https://www.cnn.com/2018/05/20/us/english-us-official-language-trnd/index.html> [<https://perma.cc/L3JP-ETBD>]; English Language Unity Act of 2017, H.R. 977, 115th Cong. (2017).

⁷⁶ There is a lot of history behind the term “Queen’s English,” aka “Standardized English” (SE). Initially known as the “King’s English” prior to Queen Elizabeth’s ascension to the throne, the Queen’s English is defined as “the English language as it is spoken in the south of England, considered by some people as a standard of good English.” *The Queen’s English*, CAMBRIDGE DICTIONARY (2022), <https://dictionary.cambridge.org/us/dictionary/english/queen-s-english> [<https://perma.cc/FCK9-9XJT>]. Historically, the thought was that the highest British monarch spoke the purest form of the English language. Currently, the term “Standard American English (SAE)” is used to refer to the most formal English utilized in most professional communications and taught in schools (in the United States), which, like the “Queen’s English,” is the dialect often associated with prestige, privilege, and power. See Cody Chun et al., *6.3.1 Standard American English*, SOUND WRITING, <https://soundwriting.pugetsound.edu/universal/SAE.html> [<https://perma.cc/FT3F-Q9J4>] (noting how SAE “is the language of people who have traditionally controlled American institutions of higher education,” and thus it promotes linguistic inequities).

⁷⁷ *Why Is America Called the Melting Pot?*, GOLDEN BEACON USA (Oct. 30, 2020), <https://goldenbeaconusa.com/why-is-america-called-the-melting-pot/> [<https://perma.cc/ZBA7-8W2J>].

South Carolina,⁷⁸ where Gullah is spoken. The Gullah language, which is also known “as ‘Geechee’ in Georgia, is . . . an English-based creole language,”⁷⁹ and is spoken by the Gullah people, who are people of African descent living in coastal regions of South Carolina and Georgia as well as the extreme northeast of Florida and the extreme southeast of North Carolina.⁸⁰ In the Low Country, much can be determined by the dialectical tenor of one’s speech, especially in casual conversation.⁸¹ For many White people and northern transplants, there is a southern twang or a northern lilt to the speaker’s voice. However, for the native Black person, there is the distinctive sound of the Gullah accent. As with any language or dialect, there are variations depending on the part of the Low Country in which one grew up, one’s level of education, and one’s vocation.⁸² There is a different tonality to the Gullah spoken by my husband, who grew up in Jasper County, versus that of his friends from Charleston County. Further, while both were from Jasper County, the Gullah tonality of my father-in-law who was a secondary

⁷⁸ Without disclosing too much, I was adopted and grew up in Sumter, South Carolina. However, my adopted mother was from the Low Country and I spent lots of time there growing up. Both of my biological parents are from the Low Country and I was born there. Therefore, my Gullah roots run deep. The Low Country region of South Carolina includes Allendale, Bamberg, Beaufort, Berkeley, Calhoun, Charleston, Colleton, Dorchester, Hampton, Jasper, and Orangeburg Counties. The area “is rich in history and cultural diversity,” but many counties experience high poverty and low education rates. See *Explore Our Region*, LOWCOUNTRY COUNCIL OF GOV’TS, <https://www.lowcountrycog.org/about/region/index.php> [<https://perma.cc/43TP-5VAA>]; *Population with Percent in Poverty by County 2011–2020*, S.C. REV. & FISCAL AFFS. OFF., <https://rfa.sc.gov/data-research/population-demographics/census-state-data-center/socioeconomic-data/Population-with-percent-in-poverty-by-county-2011-2020> [<https://perma.cc/8M43-C4ZJ>]; PLANNING DEPT., LOWCOUNTRY COUNCIL OF GOV’TS, *THE PEOPLE AND THE ECONOMY OF THE LOWCOUNTRY: A DEMOGRAPHIC OVERVIEW* 8, 9 (2010), <https://beaufortcountysc.gov/archives/county-government/employee-services/2010-lowcountry-demographicoverview.pdf> [<https://perma.cc/E25F-A2VT>].

⁷⁹ *Gullah: Hilton Head Island Stories & Recollections*, HILTON HEAD ISLAND-BLUFFTON CHAMBER COM. & VISITOR & CONVENTION BUREAU, <https://www.hiltonheadisland.org/gullah/stories-and-recollections/> [<https://perma.cc/4XBX-YG5D>].

⁸⁰ See Morris Jenkins, *Gullah Island Dispute Resolution: An Example of Afrocentric Restorative Justice*, 37 J. BLACK STUD. 299, 305–06 (2006).

⁸¹ See Ritassida Mamadou Djiguimde, *Another Look at Linguistic Profiling*, S. ARK. UNIV., <https://djiguimde.com/2018/06/24/another-look-at-linguistic-profiling/> [<https://perma.cc/U2UN-YY7E>] (noting, “[i]n an impromptu encounter . . . dialects also yield a great amount of information about the interlocutors involved”).

⁸² See generally Maciej Andrzej Baranowski, *Phonological Variation and Change in the Dialect of Charleston, SC* (2006) (Ph.D. dissertation, University of Pennsylvania) (ProQuest) (finding dialect features unique to American English speakers in Charleston compared to speakers of Southeastern and, broadly, Southern American English dialects).

education teacher was different to that of my grandfather who worked on the railroad.⁸³

Significantly, various members of my family (like my mother and my husband), who grew up in the Low Country, but who subsequently went away to college and spent some time away from the Low Country, do not speak with a Gullah accent—at least not outside of conversation with family members who still live there.⁸⁴ However, as many linguists point out, even when a born and raised speaker moves away from the area, the dialect informs how they speak and can often give the listener cues that they are from the Low Country.⁸⁵

For those who are not used to the dialect and who do not know its rich cultural heritage, it can be hard to understand, and its speakers can be dismissed as un- or undereducated. This is but one example of many dialects that are spoken in the United States.⁸⁶ This country is home to many different races and cultures resulting in widely differing dialects and accents.⁸⁷

⁸³ Notwithstanding the age difference, both were awesome family men and church deacons. I recall the tonality used by my grandfather and father-in-law speaking before their respective Baptist church congregations—slightly formal (for my grandfather), slightly informal (for my father-in-law) to reach the ears and hearts of their congregation. They each spoke with great knowledge using the appropriate tonality of the Gullah accent. Anything else would have been greeted with suspicion and disdain.

⁸⁴ Code-switching is a skill that minoritized and foreign English speakers use to toggle between their “home” (or more informal) language and a more formalized (or standardized) English. See Shana Poplack, *Code-Switching: Linguistic*, in INTERNATIONAL ENCYCLOPEDIA OF SOCIAL & BEHAVIORAL SCIENCES 2062–64 (Niel Smelser & Paul Baltes eds., 2001). As Djigumde has noted, it would be almost rude to speak a more formal dialect of English (or any language) when context clearly mandates that you not. Djigumde, *supra* note 81.

⁸⁵ Djigumde, *supra* note 81 (noting that “the use of a given dialect could reveal the speaker’s region” and pointing out that “certain dialects are associated with certain stereotypes”).

⁸⁶ There are several historically Black, Indigenous, or Latino dialects spoken in the United States. For example, Louisiana French Creole, which originates from the French language, as Louisiana was once a French colony. See Connie Eble, *Creole in Louisiana*, 73 S. ATLANTIC REV. 39, 41–45 (2008). In contrast to Louisiana French Creole is the African language(s) of the Gullah-Geechee dialect of the Low Country of South Carolina, Gullah, *supra* note 79 and accompanying text, and the language of the Black Seminoles, which “is called by its speakers Shiminoli or Maskogo, and which is referred to in the literature as Afro-Seminole.” *Creoles in Texas—“The Afro-Seminoles,”* INT’L MAG. KREOL (Mar. 28, 2014), <https://kreolmagazine.com/culture/history-and-culture/creoles-in-texas-the-afro-seminoles/#.Ws7wBFLMygQ> [https://perma.cc/2RVT-3H9P]. Other Creole languages “include the now extinct Mobilian trade language, also known as Yamá and Yoka-Anompa” and the “‘Tex-Mex,’ ‘Spanglish’ or ‘Pachuco’” dialects found in Texas. *Id.* More contemporarily, there is “Ebonics, also called African American Vernacular English (AAVE), formerly Black English Vernacular (BEV), [which is a] dialect of American English spoken by a large proportion of African Americans” in more casual settings. Salikoko Sangol Mufwene, *Ebonics*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Ebonics> (last visited Jan. 2, 2023).

⁸⁷ Linguists commonly divide the many dialects spoken in the United States by region. See Reid Wilson, *What Dialect Do You Speak? A Map of American English*, WASH. POST (Dec. 2, 2013, 10:48 AM),

Unfortunately, these language differences often form the basis of implicit biases.

B. How Language Operates in Implicit Bias (or Vice Versa) and How They Both Operate in the Legal System

Professor Mari J. Matsuda explains that everybody has an accent, but for some reason when we say a person “has an accent,” we mean it in a negative sense—to highlight some unrealistic norm of nonaccented language, “as though only some foreign few have accents.”⁸⁸ This belief that “only some foreign few have accents”⁸⁹ is the hallmark of accent bias—a belief that those with even the slightest accent are somehow unacceptably different, i.e., less intelligent than those who speak unaccented English and not worthy of the opportunities available to unaccented English speakers.

Indeed, “[t]he power differential is inverted in studies of immigrants’ use of the majority language.”⁹⁰ Billings notes that oftentimes, “immigrants speak majority languages in ways that are deemed incompetent by the host population.”⁹¹ It seems that, as long as the listener is from the majority group, the language will be deemed incompetent.⁹² However, what is most instructive

<https://www.washingtonpost.com/blogs/govbeat/wp/2013/12/02/what-dialect-to-do-you-speak-a-map-of-american-english/> [<https://perma.cc/3K3Z-4FGK>]. For example, approximately twenty years ago, reference librarian Robert Delaney composed a map of the 24 regions of “American English.” *Id.* They include: Eastern New England, Boston Urban, Western New England, Hudson Valley, New York City, Bonac, Inland Northern, San Francisco Urban, Upper Midwestern, Chicago Urban, North Midland, Pennsylvania German-English, Rocky Mountain, Pacific Northwest, Pacific Southwest, Southwestern, South Midland, Ozark, Southern Appalachian, Virginia Piedmont, Coastal Southern, Gullah, Gulf Southern, and Louisiana. *Id.* In Wilson’s article, he reiterates that how we speak—accents and phrases—are the sum total of “our upbringings.” *Id.* “And in a nation of more than 300 million people,” he reminds, “it’s little wonder that those accents vary widely.” *Id.*

⁸⁸ Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1330 (1991); William Y. Chin, *Linguistic Profiling in Education: How Accent Bias Denies Equal Educational Opportunities to Students of Color*, 12 SCHOLAR 355, 357, 357 n.5 (2010) (noting that the term “[a]ccent” refers to pronunciation differences, while dialect is a bit different in that “[d]ialect refers not only to pronunciation, but also to vocabulary and grammar differences.” (citations omitted)).

⁸⁹ Matsuda, *supra* note 88, at 1330.

⁹⁰ Billings, *supra* note 62, at 584.

⁹¹ *Id.*

⁹² I must qualify this statement as oftentimes when the accents are that of Western Europe versus Africa or Mexico, the reaction to the majority listener may be different. There are studies that show there is a preference for Western European accents, which are touted as “cute” or “high status,” while those of African or Hispanic accent are denigrated as flawed and difficult to understand. See Meltem Yilmaz Sener, *English with a Non-Native Accent as a Basis for Stigma and Discrimination in the US*, in DIGNITY IN MOVEMENT: BORDERS, BODIES AND RIGHTS 104 (Jasmin Lilian Diab ed., 2021), <https://www.e-ir.info/publications/download/file/92776/94430>.

is that fledgling attempts by majority populations to speak a foreign language are applauded, while quite the opposite generally occurs when minority speakers speak English with even the smallest hint of a foreign accent.⁹³

For example, consider the case of a Manuel T. Fragante, a Filipino veteran, who, despite speaking English with perfect syntax, was denied employment with a city agency in Hawaii because of “his ‘heavy Filipino accent.’”⁹⁴ He thereafter filed suit alleging discrimination based on national origin.⁹⁵ At trial, an expert, who was a linguist specializing in interactions between English and Filipino speakers, testified on his behalf.⁹⁶ This expert noted that Fragante spoke “grammatically correct, standard English, with the characteristic accent of someone raised in the Philippines.”⁹⁷ The expert further noted that the attorneys on both sides, who both spoke English as their first language, made numerous syntactic and grammatical errors when speaking.⁹⁸ Indeed, it was the expert’s opinion that “[a]ny nonprejudiced speaker of English would have no trouble understanding” Fragante.⁹⁹ The defendant’s witnesses, however, testified to the contrary.¹⁰⁰

Although none of the witnesses, the examining attorney, the court reporter, nor the judge appeared to have any difficulty understanding Fragante,¹⁰¹ the court ultimately concluded that “Fragante was denied the job *not* because of national origin, but because of legitimate difficulties with his accent.”¹⁰² Though the trial judge found that Fragante was quite proficient in English communication skills, he nonetheless pointed to Fragante’s Filipino

⁹³ See Nelson Flores & Jonathan Rosa, *Undoing Appropriateness: Raciolinguistic Ideologies and Language Diversity in Education*, 85 HARV. EDUC. REV. 149, 158 (2015).

⁹⁴ *Fragante v. City & Cnty. of Honolulu*, 888 F.2d 591, 593 (9th Cir. 1989). Historically, Hawaii has a long history of discrimination against those with a Filipino accent. Matsuda, *supra* note 88, at 1337.

⁹⁵ *Fragante*, 888 F.2d at 593.

⁹⁶ See *Fragante v. City & Cnty. of Honolulu*, 699 F. Supp. 1429, 1431 (D. Haw. 1987), *aff’d*, 888 F.2d 591 (9th Cir. 1989).

⁹⁷ Matsuda, *supra* note 88, at 1337. This article references primarily Matsuda’s article as neither the district court nor the Ninth Circuit appeals court details the testimony of the linguistic experts to the degree that Matsuda’s article does.

⁹⁸ *Id.* at 1338. “In an irony particularly noticeable to the linguist, lawyers for both sides, as well as the defendant’s witnesses, spoke with the accent characteristic of non-[W]hites raised in Hawaii—the Hawaiian Creole accent that would become the subject of another significant Title VII accent case [also] discussed [in the article].” *Id.*

⁹⁹ *Id.* at 1337–38.

¹⁰⁰ *Id.* at 1338.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1338–39; see *Fragante v. City & Cnty. of Honolulu*, 699 F. Supp. 1429, 1432 (D. Haw. 1987), *aff’d*, 888 F.2d 591 (9th Cir. 1989). Notably, for what it is worth, “[t]he judge was on assignment from Arizona.” Matsuda, *supra* note 88, at 1338.

accent and “military bearing” as impediments to effective communication with others.¹⁰³ The court found most compelling that the job required a great deal of communication, concluding that speech was an occupational qualification of the job.¹⁰⁴ Ultimately, the court determined there was no proof of discriminatory intent or subterfuge and dismissed Fragante’s complaint.¹⁰⁵

Most telling, however, after being denied employment by one state agency, Fragante was later hired by the State of Hawaii as a statistician, which required frequent telephone interviews¹⁰⁶—a task that would unquestionably be more difficult for someone with an unintelligible accent than face-to-face communication. This buttressed his belief that he had been wronged, and he subsequently appealed the federal district court’s order.¹⁰⁷ Ultimately, he lost his appeal before the Ninth Circuit; however, the court acknowledged “that accent discrimination could violate Title VII” of the Civil Rights Act.¹⁰⁸ And although the United States Supreme Court denied his subsequent petition for writ of certiorari,¹⁰⁹ Fragante always felt his employment with the state proved his claim that the city misjudged his accent.¹¹⁰ In fact, he went on to appear on many radio and television shows and to appear at numerous fundraising events in California and Hawaii to discuss his case and actively campaign against accent bias and discrimination.¹¹¹

This one case is not merely anecdotal; it is just one of many that illustrate the way that bias infiltrates everyone’s daily lives. Most compelling is that, as illustrated in the *Fragante* case, this bias is at play in the legal system. As the expert testified in *Fragante*, it was the American attorneys who spoke poorly, but it was the Filipino plaintiff who was judged deficient in his speech.¹¹² In an article titled “Want to Win Someone Over? Talk Like They Do,” Maxim Sytch and Yong H. Kim demonstrate that the closer a speaker or writer mirrors the listener’s preferred style or method of communication, the more receptive the listener is to

¹⁰³ Matsuda, *supra* note 88, at 1339; *Fragante*, 699 F. Supp. at 1432.

¹⁰⁴ Matsuda, *supra* note 88, at 1339; *Fragante*, 699 F. Supp. at 1432.

¹⁰⁵ *Fragante*, 699 F. Supp. at 1432.

¹⁰⁶ Matsuda, *supra* note 88, at 1339.

¹⁰⁷ *Id.*; *Fragante v. City & Cnty. of Honolulu*, 888 F.2d 591 (9th Cir. 1989).

¹⁰⁸ Matsuda, *supra* note 88, at 1339; *Fragante*, 888 F.2d at 593, 595–96.

¹⁰⁹ *Fragante v. City & Cnty. of Honolulu*, 494 U.S. 1081 (1990).

¹¹⁰ Matsuda, *supra* note 88, at 1339.

¹¹¹ *Id.* at 1339–40.

¹¹² *Fragante*, 888 F.2d at 598.

that person and the message that they were seeking to convey.¹¹³ This practice is called “linguistic mirroring.”¹¹⁴

In particular, Sytch and Kim looked at the influence of attorneys on judges “in patent infringement cases.”¹¹⁵ Their “research included firsthand observations of [those] cases; more than 50 semi-structured interviews with lawyers, in-house counsels, federal judges, and clerks; and a quantitative analysis of publicly available data from more than 1,000 patent infringement lawsuits.”¹¹⁶ Their observations confirmed that lawyers who had preexisting relationships with the judges before which they appeared had an advantage—they “exhibited more linguistic mirroring and won a greater proportion of cases than others.”¹¹⁷ Sytch and Kim noted, “[f]amiliarity with their evaluators gave the lawyers a huge leg up when it came to knowing what approach would resonate (and tailoring their communication style accordingly).”¹¹⁸

But what if a person cannot talk like that person? What if they do not know the person with whom they are communicating? And finally, what if the implicit biases of the audience lead them to think, sight unseen or without any real knowledge of the person, the person’s accent, or dialectic style of communicating means they are less intelligent or less deserving? Based on the courts’ holdings in *Fragante* and Sytch and Kim’s findings in the foregoing discussions, that person is at a decided disadvantage. The same is true when examining biases in the context of writing.

C. *Profiling in Writing*

As much as accent bias and linguistic profiling occur around speech, these biases also occur in the assessment of a person’s writing.¹¹⁹ Just as beauty is in the eyes of the beholder, unsurprisingly, so is linguistic acumen. Surprisingly, there has

¹¹³ Maxim Sytch & Yong H. Kim, *Want to Win Someone Over? Talk Like They Do.*, HARV. BUS. REV. (Dec. 8, 2020), <https://hbr.org/2020/12/want-to-win-someone-over-talk-like-they-do> [<https://perma.cc/9H76-TD42>]. It goes without saying that “a strong preexisting relationship with the person who’s evaluating you is likely to make you much more effective” when trying to win them over. *Id.* Sytch and Kim explain “that preexisting relationships give people greater insight into how their evaluators think, reason, interpret, and process evidence.” *Id.* These findings support the dictates of affinity bias—the brain (and people) likes those things are most familiar.

¹¹⁴ *Id.* (emphasis omitted).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Stephen Politzer-Ahles et al., *Preliminary Evidence of Linguistic Bias in Academic Writing*, 47 J. ENG. ACAD. PURPOSES (2020).

been a historic lack of research about the phenomenon. It appears that there is more written about the solutions than the problem itself.¹²⁰ This is particularly true in academic grading.

There is admittedly little empirical evidence to show that there is bias in academic grading, and Professor John Malouff, noted psychologist and researcher, explains that the very nature of grading practically ensures that there is no direct evidence of bias in grading at the college and graduate school levels.¹²¹ It is virtually impossible to design a study where the actual instructors do not know that they are being tested for bias, which would most probably affect the way they grade.¹²² Malouff, however, does not discount the efficacy of bias in academic grading simply because of the absence of a great deal of data to support it as he, like many academics, is able to recount stories of his own bent towards bias in grading.¹²³

Below, I detail two studies that show how linguistic profiling operates in assessing written communication.

1. Nextions Study

The Nextions Yellow Paper Series Paper, “Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills,” documents the ground-breaking study of confirmation bias conducted in Big Law.¹²⁴ In this 2014 study, Nextions, an equity and diversity focused firm that provides research-based assessments and advice to workplaces, studied bias in the context of writing skills in greater detail using the cognitive construct of confirmation bias.¹²⁵ Based upon

¹²⁰ See generally, e.g., Dawn L. Smalls, *Linguistic Profiling and the Law*, 15 STAN. L. & POLY 579 (2004) (discussing the rather random way evidence to prove linguistic profiling is gathered and assessed).

¹²¹ John Malouff, *Bias in Grading*, 565 COLL. TEACHING 191, 191 (2008).

¹²² *Id.*

¹²³ *Id.* at 191–92. In this article, Malouff begins his discussion about bias in grading with a story of his own—about a favorite student, who had shared some personal difficulties with him, who was applying to graduate school and needed as many A’s as she could get, and whose independent study paper he had to grade.

¹²⁴ “Big Law is a nickname for large, high-revenue law firms that are usually located in major U.S. cities, such as New York, Chicago and Los Angeles. These firms often have multiple branches, sometimes in smaller cities, as well as an international presence.” Ryan Lane, *Big Law: What It Is and What Salary You Should Expect*, NERDWALLET (Nov. 5, 2020), <https://www.nerdwallet.com/article/loans/student-loans/big-law-salary> [<https://perma.cc/5DUT-45GS>]. Note that the 2014 study was a follow up to a previous study that found “supervising lawyers . . . more likely than not to perceive [Black] lawyers as having subpar writing skills in comparison to their [White] counterparts.” REEVES, *supra* note 51, at 1.

¹²⁵ REEVES, *supra* note 51, at 2. Significantly, the study focused exclusively on unconscious or implicit bias, and did not include measures for explicit bias to the extent that it does exist.

their previous study, the researchers began the study with the premise “that unconscious confirmation bias in a supervising lawyer’s assessment of legal writing would result in a more negative rating if that writing was submitted by [a Black] lawyer in comparison to the same submission by a [White] lawyer.”¹²⁶

The study utilized a research memo collectively drafted by five partners from five different law firms to include “22 different errors, 7 of which were minor spelling/grammar errors, 6 of which were substantive technical writing errors, 5 of which were errors in fact, and 4 of which were errors in the analysis of the facts in the Discussion and Conclusion sections.”¹²⁷ The memo was thereafter distributed electronically and reviewed by sixty different partners from twenty-two different law firms.¹²⁸ Of the sixty participating reviewers, twenty-three were women, thirty-seven were men, twenty-one were racial or ethnic minorities, and thirty-nine were White.¹²⁹ Each participating reviewer had been asked and agreed to participate in a “writing analysis study.”¹³⁰ And while all the reviewers received the same memo, half of them received a memo identifying the author as Black, while the other half received a memo identifying the author as White.¹³¹

The reviewing partners were told they would be “participating in a study on ‘writing competencies of young attorneys,’” and were asked to “edit the memo for all factual, technical[,] and substantive errors.”¹³² They were instructed “to rate the overall quality of the memos” on a scale of one to five, with one being the lowest score and five being the highest.¹³³ Of the sixty partners who agreed to review the memos, fifty-three of them completed the process—twenty-four of them received and reviewed the memo written by the Black junior associate, and twenty-nine received and reviewed the memo written by the White junior associate.¹³⁴

To no surprise, although “the exact same memo” was being reviewed, the memo of the Black junior associate was rated lower quantitatively than that of the White associate—

¹²⁶ *Id.* at 4.

¹²⁷ *Id.* at 2. The legal research memo followed the simple memo format, which generally includes the following: “Question Presented, Brief Answer, Facts, Discussion, and Conclusion.” *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

3.2/5.0 versus 4.1/5.0, respectively.¹³⁵ Also, “[t]he qualitative comments on [the] memos, consistently, were . . . more positive for the” White junior associate than the Black associate.¹³⁶ Below is a chart comparing a few of the qualitative comments from the memos.¹³⁷

Comments for the White Junior Associate	Comments for the Black Junior Associate
<i>“generally good writer but needs to work on . . .”</i>	<i>“needs lots of work”</i>
<i>“has potential”</i>	<i>“can’t believe he went to NYU”</i>
<i>“good analytical skills”</i>	<i>“average at best”</i>

As to specific errors, the memo supposedly authored by the Black junior associate fared no better. A chart comparing the average number of spelling and grammar errors, technical writing errors, and factual errors follows:¹³⁸

Type of Error	Average Number of Errors for the White Junior Associate	Average Number of Errors for the Black Junior Associate
Spelling/Grammar	2.9/7.0	5.8/7.0
Technical	4.1/6.0	4.9/6.0
Factual	3.2/5.0	3.9/5.0

The researchers noted that analytical errors were admittedly “difficult to [break] out quantitatively because of the [differences] in” the partners’ comments about the writing errors.¹³⁹ However, as with the other categories of errors, the Black author’s memo was rated lower in regard to the analysis of facts and had more substantively critical comments.¹⁴⁰ While the study did not solicit “edits and/or comments on formatting[,]” forty-one of the fifty-three responding reviewers included them.¹⁴¹

¹³⁵ *Id.* at 3.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 4.

This unsolicited feedback included “changes that the partners would have liked to see on the formatting [of] the memo.”¹⁴² And once again, the memo purportedly written by the Black junior associate included more of these comments—twenty-nine comments, to be exact—than the memo written by the White junior associate who received a mere eleven comments.¹⁴³

Notably, the researchers did not find any meaningful “correlation between a [reviewing] partner’s race/ethnicity [or gender] and the [various] patterns of errors found between the two memos.”¹⁴⁴ Although, the study did show “that female partners generally found more errors and wrote longer narratives.”¹⁴⁵

In short, the study bore out the fact that when a person expects to find fewer errors, they do so. And when they expect to find more errors, they find them.¹⁴⁶ The data findings not only affirmed the researchers’ initial hypothesis—confirmation bias would lead to “a more negative rating” of a Black lawyer as compared to a White lawyer—but also showed confirmation bias occurred throughout the process, from data collection to evaluation and was not necessarily confined to the final, rating phase.¹⁴⁷ Unconscious bias resulted in the reviewing partners finding more errors in the Black sample.¹⁴⁸ Because the final rating process was premised upon the total number of errors found, the bias clouding the review of the Black sample had significant consequences.¹⁴⁹ Though a person may believe they are assessing a written product without bias since their assessment is based on an objective rating system, this is simply not the case. The Nextions researchers noted that “if there is bias in the finding of the errors, even a fair final analysis cannot, and will not, result in a fair result.”¹⁵⁰ To that end, the researchers concluded “that commonly held perceptions are biased against [Black people] and in favor of [White people]” in terms of writing ability.¹⁵¹

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* I find this particularly alarming as Legal Writing is taught predominantly by female professors, which may mean that minoritized students’ writing in law school will be assessed more harshly than majority students, though many may say that this data simply means that women tend to be better editors. See Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law School’s Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 3, 8 (2001).

¹⁴⁶ REEVES, *supra* note 51, at 4.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 5.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 6.

This phenomenon is common throughout the legal academy as well, and resultingly in the legal profession itself.¹⁵² In fact, these biased perceptions and the resulting impact upon the minoritized students show up early in the education system.¹⁵³

2. David Quinn's Second Grade Study

In another study, similar results were shown with a larger pool of evaluators and young grade school students.¹⁵⁴ The University of Southern California researcher David Quinn reported on a study that he had conducted of the writing assessment of second grade boys.¹⁵⁵ Much like the Nextions study, Quinn's study utilized a writing product that had been constructed by the same person, a second grade student.¹⁵⁶ The writing product was identical except one response mentioned the author's brother, DaShawn, which suggested that the essay was written by a Black boy, while the other mentioned a brother, Conner, which suggested that the essay was written by a White boy.¹⁵⁷

The evaluators were all secondary school teachers who had been selected by a well-thought-out method. Quinn describes that method as follows:

My experiment took the form of a web-based survey, including demographic questions, a two-part grading task, and a test to measure racial attitudes. I contracted with a private survey provider to recruit a multi-state sample of U.S. schoolteachers. Some 1,799 unique users responded to a survey invitation. Of those, 1,549 teachers working in preschool through 12th grade completed the main survey tasks.

¹⁵² Parks, *supra* note 48, at 1072–75 (2018); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 15–17 (2010).

¹⁵³ OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., 2013–2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 3 (2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [<https://perma.cc/T9HC-HHZ8>].

¹⁵⁴ Quinn, *supra* note 60, at 74, 77. The United States Department of Education's 2013–2014 Civil Rights Data Collection (updated in 2016) showed that Black children face bias as early as preschool. See OFF. FOR CIV. RTS., *supra* note 153, at 3. In fact, I remember my son's first White teacher at a five-star school that touted its racial, disability, and economic inclusivity describing my son in a way that was alarming and disheartening. After years of being told by his Black caregivers and family friends how delightfully verbal he was, this teacher pointed out that he was "nonverbal" and suggested that we use sign language to introduce language skills to him. I had heard from other Black mothers of boys that this day would come but was somehow not prepared for it. At that time, I did not know the term for it, but this teacher had confirmation bias.

¹⁵⁵ Quinn, *supra* note 60, at 72, 78.

¹⁵⁶ *Id.* at 72.

¹⁵⁷ *Id.* at 74. Quinn explains that his choice of names was based on "a list of the most racially distinct names reported by Steven Levitt and Stephen J. Dubner in *Freakonomics*." *Id.*

...

Respondents also answered questions about their gender, race, and number of years in the field, as well as the grade that they teach and the racial composition of their school. Overall, 69 percent were [W]hite and 54 percent taught in a predominantly [W]hite school.¹⁵⁸

At the outset, the evaluators were told that the surveyors were interested in how the evaluators assessed writing.¹⁵⁹ The teachers were randomly assigned to evaluate the writing sample of the second grade boy.¹⁶⁰ They were asked to rank the sample “on a relative grade-level scale with seven options, from weak to strong performance: far below grade level, below grade level, and slightly below grade level; at grade level; or slightly above grade level, above grade level, and far above grade level.”¹⁶¹ Performance criteria, however, were not explicitly delineated.¹⁶² To no surprise, Quinn reported that “[s]ome 35 percent of respondents rate the version written by a [W]hite student at grade-level or above compared with about 30 percent for the version written by a Black student.”¹⁶³ In addition, Quinn specifically measured and found a correlation between gender and bias in his study.¹⁶⁴ Like prior studies, Quinn found that affinity bias and confirmation bias resulted in lower ratings of the writing sample of the Black student when compared to that of the White student.¹⁶⁵ Quinn reported that while female teachers who assessed the Black young boy’s writing sample showed racial bias, male teachers did not.¹⁶⁶ In fact, female teachers were “7 percentage points less likely to rate the ‘Dashawn’ sample as being

¹⁵⁸ *Id.* Quinn noted that “[b]y comparison, about 79 percent of U.S. teachers are [W]hite and approximately 45 percent of all U.S. teachers work in schools that are less than 50 percent [W]hite, according to federal data from 2017.” *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 74–75.

¹⁶² *Id.* at 75. Quinn explained that “[t]he grade-level scale is general in the sense that it does not specify what dimensions the rater should consider, such as grammar, spelling, creativity, or organization. It also does not clearly specify the gradations among the seven possible ratings, or how a teacher should determine whether the writing is ‘slightly above grade level’ versus ‘above grade level.’” *Id.*

¹⁶³ *Id.* at 76.

¹⁶⁴ *Id.* Notably, Quinn’s study goes beyond the Nextions study in this regard. The Nextions researchers noted plans to study the impact of “gender and/or other identities” on confirmation bias in the evaluation of Black men in comparison to White men in the future. REEVES, *supra* note 51, at 5.

¹⁶⁵ Quinn, *supra* note 60, at 72. Quinn acknowledged prior research that found affinity bias in teachers, i.e., “show[ed] preference for students with identities similar to their own.” *Id.* at 76. He also acknowledged that prior research tended to show that confirmation bias led to lower grades for Black students as “[W]hite teachers tend to have lower expectations for Black students than for similar [W]hite students.” *Id.* (citing Seth Gershenson & Nicholas Papageorge, *The Power of Teacher Expectations*, EDUC. NEXT (Winter 2018), <https://www.educationnext.org/power-of-teacher-expectations-racial-bias-hinders-student-attainment/> [<https://perma.cc/H2AX-UHQ8>]).

¹⁶⁶ *Id.*

on grade level than the ‘Connor’ sample,” but the difference for male teachers was statistically insignificant.¹⁶⁷ “In looking at teachers by race,” Quinn noted that “[W]hite teachers [were] approximately 8 percentage points less likely to rate the Black student’s writing as being at grade-level or above compared to the [W]hite student’s writing.”¹⁶⁸ Contrastingly, minoritized teachers did not show any evidence of evaluation bias.¹⁶⁹ Quinn also noted that teachers who did not work in diverse school settings showed the most bias.¹⁷⁰ He explained that those teachers were “13 percentage points less likely to rate the writing sample as on or above grade level if it was written by a Black student.”¹⁷¹ However, those “teachers working in predominantly Black, Latinx, or [W]hite schools” showed “no [appreciable] differences in the ratings [they] assigned.”¹⁷²

3. The Connections Despite the Differences

Even though both the Nextions and Quinn’s studies explored implicit bias as it pertained to a Black male versus a White male, there were several things that were different than Quinn’s study, apart from variations such as the age of the subjects, setting, the methodology. Most relevant, as noted above, Quinn’s study explored the link between gender and implicit bias,¹⁷³ while the Nextions study did not.¹⁷⁴ Additionally, Quinn’s study included an examination of the evaluators’ racial attitudes.¹⁷⁵

Quinn’s findings regarding the relationship between the task of writing assessment and the way the assessor completes the task are a bit complicated, which is perhaps not surprising given the complex way the brain works to develop our implicit biases. It does appear that, based on “the implicit association test [(IAT)¹⁷⁶] and explicit ‘warmth’ questions”, the majority of

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* Note that nondiverse schools may include those that do not include a clear majority of any one race or ethnic group.

¹⁷¹ Quinn, *supra* note 60, at 76.

¹⁷² *Id.*

¹⁷³ *Id.* at 72, 76. Though Quinn’s study noted greater bias shown by female versus male teachers, he did not venture to guess why that was the case. As both of the writing samples were purportedly from male students, it would be interesting to see if this bias were borne out in assessment of female students.

¹⁷⁴ As noted previously, the relationship between gender and implicit bias was not explored in the Nextions study but was something that the Nextions researchers hoped to study in the future. REEVES, *supra* note 51, at 5.

¹⁷⁵ Quinn, *supra* note 60, at 75.

¹⁷⁶ The IAT, a five-part cognition test,

measures the strength of associations between concepts (e.g., [B]lack people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic,

the evaluators “showed attitudes that favor[ed] [White people].”¹⁷⁷ However, Quinn notes that these attitudes¹⁷⁸ do not appear to have any relationship to the assessors’ “levels of grading bias.”¹⁷⁹ He posits that perhaps the evaluators used their “explicit attitudes” to interrupt their implicit bias in evaluating the study’s writing sample, which would then account for a lack of correlation between the evaluators attitudes and their levels of grading bias.¹⁸⁰ Nonetheless, to the extent that they did, the study results show that they were not able to “entirely eliminate . . . the influence of implicit [bias in] their grading.”¹⁸¹

Perhaps an even more significant difference between the Nextions study and Quinn’s study is that Quinn implemented a second layer of evaluation for the student writing sample. In his study, the evaluators were asked to evaluate the samples using a rubric after their first evaluation of the writing samples.¹⁸² In that way, he sought to measure the effectiveness of grading rubrics to interrupt implicit bias.¹⁸³ His findings, as discussed in Part IV of this article, are promising.

I do not want to overstate the findings of the Nextions study of Big Law or Quinn’s study of second graders. But they are noteworthy. There are also a few earlier studies that show

clumsy). The main idea is that making a response is easier when closely related items share the same response key. When doing an IAT you are asked to quickly sort words into categories that are on the left and right hand side of the computer screen by pressing the ‘e’ key if the word belongs to the category on the left and the ‘i’ key if the word belongs to the category on the right.

About the IAT, PROJECT IMPLICIT (2011), <https://implicit.harvard.edu/implicit/iatdetails.html> [<https://perma.cc/C9SN-ZJ3U>].

¹⁷⁷ Quinn, *supra* note 60, at 77 (“The implicit attitudes test found that teachers had a significant association of [W]hite students as being more competent than Black students, by 41 percent of a standard deviation. [In contrast,] [t]he explicit ‘thermometer’ questions measure showed a small and not significant preference for European Americans compared to Black Americans.”). *Id.*

¹⁷⁸ *Id.* These attitudes include the association of White student with “being more competent” and “preference for European Americans.” *Id.*

¹⁷⁹ *Id.* Quinn is not sure if this lack of correlation is because of the limitations of implicit bias tests or the small sample size.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 74.

¹⁸³ *See id.* at 74, 77–78. Quinn’s position is that rubrics is one of the ways bias in grading can be nominalized. *Id.* at 77–78. While I only hinted at this benefit in my first academic article, see generally Brenda D. Gibson, *Grading Rubrics: Their Creation and Their Many Benefits to Professors and Students*, 38 N.C. CENT. L. REV. 41 (2015) (highlighting the benefits that rubrics can have on students and professors in grade evaluation), this concept is further explored in Part IV of this article. Without going into full details here, as this subject is discussed later in this article, suffice it to summarily note that Quinn’s study did indeed show “strong potential” for the use of rubrics to nominalize implicit bias in grading. Quinn, *supra* note 60, at 77–78.

evidence of bias in assessing the written work of Black versus White students.¹⁸⁴

Moreover, in Sytch and Kim's 2020 article that examines how bias affects the success of attorneys litigating patent infringement cases, we see a preference for writing that "mirrors" the reader's linguistic preferences.¹⁸⁵ There, Sytch and Kim quantitatively analyzed "the writing styles of more than 1,800 legal documents," which contained some "25.5 million words."¹⁸⁶ Using a well respected research "tool for computational linguistic analysis," Sytch and Kim reviewed publicly available documents and scored the writing styles of various judges and lawyers.¹⁸⁷ They evaluated the documents along "four dimensions": analytical thinking, clout, authenticity, and emotional content.¹⁸⁸ The typical average probability of winning in patent litigation was 11.5 percent, but those lawyers who successfully "mirrored the judges' linguistic styles" had greater likelihood of winning their cases.¹⁸⁹

All these studies comport with the concept of implicit bias and how everyone's brain operates, despite some best intentions, to foster those biases in society. Though these studies involve just a sampling of the greater whole of society, our law firms,

¹⁸⁴ In a 1977 study, Piché, Michellin, Rubin, and Sullivan performed a study that showed evidence of racial bias with Black students receiving lower scores than White students. Gene L. Piché et al., *Teachers' Subjective Evaluations of Standard and Black Nonstandard English Compositions: A Study of Written Language and Attitudes*, 12 NAT'L COUNCIL TCHRS. ENG. 107, 107, 115 (1978). In a 1985 study, Fajardo reported racial bias with Black students receiving higher scores than White students. Daniel M. Fajardo, *Author Race, Essay Quality, and Reverse Discrimination*, 15 J. APPLIED SOC. PSYCH. 255. In a 1975 study by Babad, Mann, and Mar-Hayim, and a 1980 follow-up study by Babad, evidence showed grading bias in graders where graders, who were told that children were gifted, tended to score those students higher than those students who had not been so identified. Elisha Babad et al., *Bias in Scoring the WISC Subtests*, 43 J. CONSULTING & CLINICAL PSYCH. 268 (1975); Elisha Y. Babad, *Expectancy Bias in Scoring as a Function of Ability and Ethnic Labels*, 46 PSYCH. REPS. 625, 625-26 (1980). In a 1973 study by Harari & McDavid and a 1984 study by Erwin & Calev, the evidence showed that children with more appealing surnames (read more Eurocentric) receive higher scores for essays. John W. McDavid & Herbert Harari, *Stereotyping of Names and Popularity in Grade-School Children*, 37 CHILD DEV. 453, 453-59 (1966); P.G. Erwin & Calev, *The Influence of Christian Name Stereotypes on the Marking of Children's Essays*, 54 BRITISH J. EDUC. PSYCH. 223 (1984). Significantly, the findings of these studies mirror the findings regarding linguistic profiling of oral communications that are set out above. See *supra* Section II.C.

¹⁸⁵ Sytch & Kim, *supra* note 113; see also *supra* Section II.B (discussing the study pertaining to oral communications).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* The graph of Sytch and Kim's findings, indeed, showed that the probability of winning the lawsuit went up to between 18 to 25 percent. *Id.* (noting higher rates "among lawyers who knew their judges well," i.e., "[t]hose who . . . clerked for the presiding judge and still lived" in the area).

judges, and secondary schools, the data is sufficiently alarming to raise questions about the role implicit bias plays in our society and, indeed, the legal profession.¹⁹⁰ It seems that, regardless of modality, age, or situs, linguistic profiling operates widely to confirm people's biases. This article highlights the connection between linguistic profiling and racial bias to demonstrate how prolific and pervasive a phenomenon it is and to sound the alarm for change starting with the legal academy and profession. This article, however, is in no way comprehensive on the subject of linguistic profiling. Indeed, as the Nextions researchers and Quinn noted, there is a gaping chasm of information, highlighting the need for more research on this very complex but important subject area.

III. EFFECTS ON MINORITY ACHIEVEMENT

Parts I and II showed that many people prefer standardized English over accented English.¹⁹¹ Moreover, this preference is often accompanied by a belief that White English speakers are more competent than minorities who speak accented variations of English.¹⁹² Consequently, writing by Black people and other minorities is considered less appealing and judged more harshly, which has a negative effect on the education and professional trajectory of minorities. Hence, this Part explores the characteristics of legal education and the legal profession that make them especially vulnerable to these biases.

A. *In Education*

Law Professor William Chin writes prolifically about the effect of accent bias on the educational opportunities of minority students in his similarly titled article.¹⁹³ Chin has noted that

¹⁹⁰ Levinson & Young, *supra* note 152, at 1; Negowetti, *supra* note 9, at 930–32; Connie Lee, *Gender Bias in the Courtroom: Combating Implicit Bias Against Women Trial Attorneys and Litigators*, 22 *CARDOZO J.L. & GENDER* 229, 231–35 (2015); Kang et al., *supra* note 47, at 1124.

¹⁹¹ Todd Ruecker & Lindsey Ives, *White Native English Speakers Needed: The Rhetorical Construction of Privilege in Online Teacher Recruitment Spaces*, 49 *TESOL Q.* 733, 734 (2015) (suggesting that even English online teaching services only want to hire English speaking teachers who are young and White and generally from countries where English is the official language, particularly United States, Britain, Ireland, Australia, etc. If you come from countries outside this approved list, they are generally not interested in hiring you.). See Sener, *supra* note 92, at 4; Smalls, *supra* note 120, at 581 (noting the difference in the treatment of a Black professional, who spoke nonstandardized English and his supervisor, a “Jamaican immigrant educated in England and Norway,” who spoke with a British accent).

¹⁹² See Sener, *supra* note 92, at 4.

¹⁹³ Chin, *supra* note 88, at 364–76.

accented students may be denied access to higher performing charter schools and limited to neighborhood schools, because oftentimes admission to these charter schools is based on “teacher recommendations and student interviews.”¹⁹⁴ Additionally, he submits that accented students are often placed in lower-track classes as these placements are often based upon “recommendations from teachers and other school personnel who are susceptible to accent bias.”¹⁹⁵ If reference letters, the interview process, and recommendations are tainted by accent bias or linguistic profiling, the accented or minority student is placed at a decisive disadvantage.¹⁹⁶ There is also bias in standardized tests, which are often utilized in secondary school to assess student achievement.¹⁹⁷ Notably, in higher education, where interviews may not be an impediment,¹⁹⁸ there is nonetheless admissions testing.¹⁹⁹ Though people often tout standardized testing as objective measures of knowledge, research has borne out that they are, in fact, culturally biased.²⁰⁰

¹⁹⁴ *Id.* at 364.

¹⁹⁵ *Id.* at 370.

¹⁹⁶ *Id.* at 367. Chin notes that charter schools tend to be racially segregated and cites one charter school student that found, “There is some concern that selective admissions policies could contribute to racial imbalance among schools.” *Id.* (emphasis and internal quotation marks omitted) (quoting Casey D. Cobb & Gene V. Glass, *Ethnic Segregation in Arizona Charter Schools*, 7 EDUC. POL’Y ANALYSIS ARCHIVES 1 (1999)).

¹⁹⁷ See generally Adam J. Kruse, *Cultural Bias in Testing: A Review of Literature and Implications for Music Education*, 35 NAT’L ASSOC. EDUC. UPDATE 23 (2016) (discussing the research regarding cultural bias in testing).

¹⁹⁸ Note that MBA Programs generally require in-person interviews. Anecdotaly, some law school admissions committees have thought about utilizing in-person interviews as well. See Rebecca C. Flanagan, *Do Med Schools Do It Better?: Improving Law School Admissions by Adopting a Medical School Admissions Model*, 53 DUQ. L. REV. 75, 94 (2015).

¹⁹⁹ To enter college, traditionally, a student must take the ACT or SAT; for graduate school, there is the GMAT; for law school, there is the LSAT; and for medical school, there is the MCAT.

²⁰⁰ See Jeffrey Evans Stake, *Minority Admissions to Law School: More Trouble Ahead, and Two Solutions*, 80 SAINT JOHN’S L. REV. 301, 313 (2006) (“The LSAT scores of [B]lack and Hispanic students are lower than the LSAT scores of [W]hite students.”); Rebecca Zwick, *Eliminating Standardized Test in College Admission: The New Affirmative Action*, 81 PHI DELTA KAPPAN 320, 322 (1999) (“Average SAT scores are higher for Asian American and [W]hite students than for [Black] and Latino students.”); Roy Freedle, *How and Why Standardized Tests Systematically Underestimate African-Americans’ True Verbal Ability and What To Do About It: Towards the Promotion of Two New Theories with Practical Applications*, 80 SAINT JOHN’S L. REV. 183, 183–84 (2006) (exploring why the LSAT and other similar standardized tests “underestimate [the] verbal intelligence” of minority students and discussing the new Fagan-Holland test—“a standardized test that demonstrates racial equality in verbal intelligence”); Gina Paul & Steve Verhulst, *What Role Does Schema Play in Preparing Minority Postbaccalaureate Students for the Reading Comprehension Section of the Medical College Admissions Test (MCAT)?*, 44 READING IMPROVEMENT 207, 207 (2007) (“Minority students often score lower than majority students on the Medical College Admissions Test (MCAT) Verbal Reasoning section.”); Anemona Hartocollis, *Tutors See Stereotypes and Gender Bias in SAT. Testers See None of the Above*, N.Y. TIMES (June 27, 2016),

The result is that minority students often fall by the wayside—in secondary school, college, and graduate or professional school. Because of accent bias, minority students are erroneously identified as needing English as a second language (ESL) services and placed in classes for low-performing students.²⁰¹ In the classroom, many times, teachers will not call on these students and they receive lower grades.²⁰² Research shows that “[t]alk is critical because it ‘helps us make sense of what we read and helps external knowledge become our own.’”²⁰³ In fact, “oral language provides the foundation for all learning” in that it is the precursor to what will “later be expressed in writing.”²⁰⁴ Significantly, not only are accented students given lower grades on oral presentations,²⁰⁵ but they also receive lower grades on their written work.²⁰⁶ In his article, Chin recounts the story of a Black female student who was given a “lower B grade” on a high school creative writing assignment because her “teacher was uncomfortable with the ‘radical’ content of the paper, which discussed a Black revolutionary’s gun pointed at the head of a White person.”²⁰⁷ Chin noted that “[t]he teacher tried to justify the lower grade by asserting that [the student] failed to use a term that accurately reflected the smell of gunpowder.”²⁰⁸ So, even when accent bias is not directly at work, teachers still grade minoritized students more harshly because of engrained implicit bias. Regardless, these biased judgments lead to lower self-esteem in the students and a diminution in their value in the eyes of their colleagues.²⁰⁹ Accented (often minoritized) students are frequently distanced from their

<https://www.nytimes.com/2016/06/27/us/tutors-see-stereotypes-and-gender-bias-in-sat-testers-see-none-of-the-above.html> (noting that “[t]he standardized testing industry has long grappled with questions of racial, socioeconomic, and gender fairness”).

²⁰¹ Chin, *supra* note 88, at 372.

²⁰² *Id.* at 373–75.

²⁰³ *Id.* at 373 (quoting DANLING FU, MY TROUBLE IS MY ENGLISH: ASIAN STUDENTS AND THE AMERICAN DREAM 197 (1995)).

²⁰⁴ *Id.* (quoting DARLENE LEIDING, RACIAL BIAS IN THE CLASSROOM: CAN TEACHERS REACH ALL CHILDREN? 104–05 (2006)).

²⁰⁵ *Id.* at 374–75. Oftentimes nonverbal cues of the biased teacher

causes the accented speaker to be nervous and to give a poor oral presentation, which leads to a lower grade. Or the accent-biased teacher fails to make any effort to understand the student’s accented oral presentation, thus causing the teacher to perceive the oral presentation as difficult to comprehend, which also leads to a lower grade.

Id. (citation omitted).

²⁰⁶ *Id.* at 375.

²⁰⁷ *Id.*

²⁰⁸ *Id.* After arguing that this “purported one-word mistake” did not justify a letter-grade reduction, the student was successful in getting her grade changed to an A. *Id.*

²⁰⁹ *Id.* at 372, 374.

teachers, and this distance contributes to the diminution of their confidence and their marginalization.²¹⁰

While Chin's article focuses on the effects of linguistic profiling as it pertains to educational opportunities at the secondary school level, his discussion mirrors the effects of linguistic profiling in higher education. There is a perception that law school students of color are less competent than their White peers.²¹¹ While there may be numerous reasons for a student's underperformance, research tends to show that at least a part of the blame rests with this tendency to judge people based upon linguistic preferences. Nowhere is the gap between White and minoritized students more visible than in the hallowed halls of graduate and professional schools, especially law schools.²¹² And until we address the problem, we will continue to struggle with diversity in the profession.

²¹⁰ *Id.* at 372, 374, 377. This ties together the accent bias and the greater marginalization of minorities. Often, minoritized students are of a different culture and feel distanced from the majority culture and its privileges, which includes the presumption of competency.

²¹¹ See Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1554 (2011) (discussing a study by Professor Richard Sander, who concluded that "affirmative action in operation results in a 'mismatch' of the qualifications of [Black] students and the rest of the student body at the law school to which they are admitted and enroll" and basically suggested law schools should not offer admissions and enrollment to minority students as the work may be above their capabilities); Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237, 245, 246, 273 (2001) (describing a general exclusionary climate at University of Michigan Law School for students of color who are "viewed as unintelligent and taking the place of 'more academically qualified' Whites" and where "people of color face charges of being unqualified, unworthy, and unwelcomed," and "[s]tudents [of color] describe being unfairly stigmatized as 'academically unqualified,' while White students' academic qualifications and standing go virtually unquestioned"). Most recently a Georgetown Law School Professor was recorded on a "hot mic" after a Zoom videoconference discussing how her minority students always finished at the bottom of her class. ABC News, *Georgetown Law Professor Fired After Zoom Conversation Made Public: GMA*, YOUTUBE (Mar. 12, 2021), <https://www.youtube.com/watch?v=R33C7FrsJYc> [<https://perma.cc/CT88-EDAT>]. Professor Amy Wax also has a body of scholarship that discounts the existence of implicit bias and its effects on diversity efforts. See Amy L. Wax, *Pursuing Diversity: From Education to Employment*, CHI. L. REV. BLOG (Oct. 30, 2020), <https://lawreviewblog.uchicago.edu/2020/10/30/aa-wax/> [<https://perma.cc/R5VK-9WWR>]; Naomi Schaefer Riley & Ian Rowe, *University of Pennsylvania Law Professor Amy Wax's Defense of Academic Standards: Are You Kidding Me? Episode 37*, AM. ENTER. INST. (May 12, 2021), <https://www.aei.org/podcast/university-of-pennsylvania-law-professor-amy-waxs-defense-of-academic-standards/>.

²¹² Deseriee A. Kennedy, *Access Law Schools & Diversifying the Profession*, 92 TEMP. L. REV. 799, 799 (2019); Gabriel Krus, *What Underrepresented Law School Applicants Should Know*, U.S. NEWS & WORLD REP. (June 8, 2020), <https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/what-underrepresented-law-school-applicants-should-know> (reporting that, according to 2019 ABA-sponsored study, 62 percent of law students were White; 12.7 percent Hispanic, 7.8 percent Black, and 6.3 percent Asian); see also *ABA Required Disclosures*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/statistics/ [<https://perma>

In a particularly compelling article, “This is Minnesota: An Analysis of Disparities in Black Student Enrollment at the University of Minnesota Law School and the Effects of Systemic Barriers to Black Representation in the Law”, several University of Minnesota law students spoke candidly about the stark numbers of minorities enrolled in their institution.²¹³

“In the 2019–20 academic year, 0.6 percent of Minnesota Law students identified as Black”—just 4 out of 667—while over 75 percent of J.D. students identified as White.²¹⁴ Troublingly, this figure is “lower than in 1894, the first year . . . a Black . . . student graduated from Minnesota Law.”²¹⁵ These students also recounted untenable treatment filled with overt racism as well as microaggressions (also known as covert racism) in their law school classrooms and more casual interactions with the law school faculty, administration, and their peers.²¹⁶

It is no secret, as noted by Blog post author Francesco Arreaga, that “law schools across the United States have actively participated in the discrimination of [Black people] and other communities of color through racist admission policies.”²¹⁷ In his post, he submits that law schools must “recognize the role they have played in systemic racism, commit to enacting institutional changes that help remedy these past wrongs, and work towards a more equitable and just future.”²¹⁸ In that same vein, I submit that recognizing the of role implicit bias through linguistic profiling in our classrooms is a necessary start in doing

.cc/K2WJ-V9V2] (including various statistics on ABA approved law schools from ABA required disclosures).

²¹³ See generally Maleah Riley-Brown et al., *This is Minnesota: An Analysis of Disparities in Black Student Enrollment at the University of Minnesota Law School and the Effects of Systemic Barriers to Black Representation in the Law*, 105 MINN. L. REV. HEADNOTES 251, 253 (2021).

²¹⁴ *Id.* at 252–53.

²¹⁵ *Id.* Note that Minnesota had one of the lowest minority populations of any of the top law schools. *This Is Minnesota* notes,

Average enrollment for Black students in the Top 25 hovered around six percent from 2011 to 2020. The smallest percentage of Black student enrollment at any law school in the Top 25, excluding Minnesota Law, was 1.61 percent, and only two institutions (Arizona State University and the University of Minnesota) saw Black student enrollment below two percent during this period.

Id. at 274–75 (citation omitted).

²¹⁶ *Id.* at 267–70.

²¹⁷ Francesco Arreaga, *Law Schools Have A Moral and Social Responsibility to End Systemic Racism*, CAL. L. REV. BLOG (July 2020), <https://www.californialawreview.org/law-schools-systemic-racism/> [https://perma.cc/HBV6-JVK7] (discussing *Pearson v. Murray*, 169 Md. 478 (1936) and *Sweatt v. Painter*, 339 U.S. 629 (1950), in which Black students were denied admission to law school).

²¹⁸ *Id.*

that work. Otherwise, the lack of diversity in our classrooms will persist and continue to inform the legal profession.

B. In the Profession

It is increasingly understood that implicit bias contributes to pay and position racial disparities.²¹⁹ Negowetti cited to a 2013 report released by the US Equal Employment Opportunity Commission (EEOC) acknowledging “unconscious biases and perceptions about [Black people] [were] the first of seven ‘obstacles to achieving equality for [Black people] in the federal workforce.’”²²⁰ Readily applicable to the legal profession, there is no mystery as to why there is a lack of diversity in the legal profession. Indeed, despite top law schools having a robust pool of women and people of color, their underrepresentation as law firm partners persists.²²¹ These coveted, high-power positions continue to be dominated by White males.²²² In his blog post for the California Law Review, Arreaga points to some rather dismal statistics. First, the ABA’s 2019 Profile of the Legal Profession reports that comparing representation in the US population to representation in the legal profession, almost *all* minorities are underrepresented.²²³ The racial background of the legal profession as reported by the Profile’s demographic data is as follows: “85 percent White, 5 percent [Black], 5 percent Hispanic, 2 percent Asian, and 1 percent Native American.”²²⁴ Further, “[a]ccording to the latest report by the National Association for Law Placement, only 16.98 percent of attorneys at U.S. law firms are people of color and 8.73 percent are women of color.”²²⁵ In looking at the bench, “[r]esearch by the Center for American Progress f[ound] that as of August 2019, people of color and women make up only about 20 percent and 27 percent of sitting federal judges, respectively.”²²⁶ To that end, a study of state supreme courts conducted by the Brennan Center in 2020 found that “while people of color make up nearly 40 percent of the population, only 15.5 percent of state supreme court seats are held by people of color.”²²⁷

²¹⁹ Negowetti, *supra* note 9, at 941.

²²⁰ *Id.*

²²¹ *Id.* at 935.

²²² Pearce et al., *supra* note 16, at 2421.

²²³ Arreaga, *supra* note 217.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

When the stakeholders are monoliths, many minorities cannot move past the interview process.²²⁸ For example, one study exposed the bias of hiring authorities by submitting two identical resumes for the same of job with “White-sounding names” and with “[Black]-sounding names.”²²⁹ To no surprise, the applicants with the “White-sounding names” received more interviews than those with the “Black-sounding names.”²³⁰ In another study, researchers found that “a hiring manager’s race affects” racial composition of new hires.²³¹ In that study, when a “non[B]lack” manager replaced a Black manager, the hiring of White people rose from approximately 60 percent to 64 percent and the hiring of Black people fell by that same amount from 21 percent to 17 percent.²³²

Even if one can get past the interview process, and get hired, the problem persists. Citing to the Nextions study discussed above, Kathleen Nalty speaks of how confirmation bias oftentimes skews the evaluation of another’s work and perhaps disrupts the careers of the minority associate’s work they are evaluating.²³³ First, the assignment process in most cases is very informal—often lacking any standardized mechanism to ensure “similarly situated associates” receive the same quality and quantity of work.²³⁴ Indeed, assignments are parceled out based on existing relationships.²³⁵ Again, to no surprise, such a process is heavily informed by the implicit biases of the predominantly White partners, who give the premium “assignments to those with whom they naturally f[eel] an affinity”—those “associates who [are] most like

²²⁸ This is true throughout the legal profession as it is heavily White male dominated. Hassan Kanu, *Exclusionary and Classist: Why the Legal Profession Is Getting Whiter*, GUARDIAN (Aug. 10, 2021, 7:49 PM), <https://www.reuters.com/legal/legalindustry/exclusionary-classist-why-legal-profession-is-getting-whiter-2021-08-10/> [https://perma.cc/5J25-7D8C].

²²⁹ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment and Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004); Negowetti, *supra* note 9, at 942. To determine the names that were “uniquely [Black]” and “uniquely White,” the researchers used “name frequency data calculated from birth certificates of all babies born in Massachusetts between 1974 and 1979.” Those names with the highest ratio of frequency were determined to be “[d]istinctive names” for a particular racial group. Examples of distinctive female and male, respectively, White names: Anne, Carrie, Emily, Jill, Brad, Brendan, Geoffrey, and Jay. Examples of distinctive female and male, respectively, Black names follows: Ebony, Kenya, Lakisha, Latoya, Darrell, Hakeem, Jamal, and Tyrone. Bertrand & Mullainathan, *supra*, at 995, 1012.

²³⁰ Bertrand & Mullainathan, *supra* note 229, at 992, 1006.

²³¹ Negowetti, *supra* note 9, at 942 (citing Laura Giuliano et al., *Manager Race and the Race of New Hires*, 27 J. LAB. ECON. 589, 589 (2009)).

²³² *Id.*

²³³ Nalty, *supra* note 11, at 45.

²³⁴ Negowetti, *supra* note 9, at 946.

²³⁵ *Id.*

themselves.”²³⁶ In fact, Negowetti references the findings from two surveys, conducted in large New York and Minnesota law firms respectively, examining the experiences of minority associates.²³⁷ In each, the minority associates reported the “subtle yet pervasive” existence of affinity bias in assigning work.²³⁸ Many minority associates reported “the lack of opportunity to work on important matters and a ‘lack of relationships’ as reasons for leaving their previous firms.”²³⁹ In Big Law, without work, you perish.²⁴⁰ You are evaluated on the amount of work you bring in.

Additionally, “[t]he nature of lawyering predisposes lawyers to evaluate each other using a subjective system of evaluation.”²⁴¹ It is said that “[g]ood lawyering is a practice that ultimately cannot be reduced to principles or rules that can be taught in the classroom.”²⁴² So we rely on the subjective judgments of the monolithic establishment, which is littered with implicit biases. Indeed, there tends to be higher rates of bias in instances where the nature of the job contradicts “gender or race stereotype[s].”²⁴³ For example, minoritized populations as well as women who work in White, male-dominated spaces, such as the legal profession, are most often judged harshly “for violating stereotype expectations.”²⁴⁴ Harkening to the study conducted by Dr. Arin Reeves, president of Nextions, and reported in the Nextions Yellow Paper Series, confirmation bias is instrumental in the skills of minorities in the legal profession being evaluated as less competent than their White counterparts.²⁴⁵

A colleague spoke anecdotally about her own experience as a young lawyer at a large law firm.²⁴⁶ After turning around a large research request in an unreasonably short period of time,

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ To some degree, this is true in all areas of the legal profession as lawyers are generally judged by the quantity of the work they do. David B. Wilkins & G. Mitu Gulati, *What Law Students Think They Know About Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students*, 69 U. CIN. L. REV. 1213, 1236 (2001) (“[T]he large elite firms are well known for their punishing work requirements; requirements that are increasing as quickly as salaries at these institutions.”).

²⁴¹ Negowetti, *supra* note 9, at 947.

²⁴² *Id.* (quoting David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 524 (1996) (alteration and emphasis omitted)).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 948–49 (citing REEVES, *supra* note 51, at 4).

²⁴⁶ Leslie J. Culver, Keynote Address at the North Carolina Central University School of Law Legal Writing Program Training (Aug. 2019).

the memo to the partner had a single typo, which cost her any additional work for that partner.²⁴⁷ In fact, she eventually left the firm as she did not get sufficient work from any of the other partners to succeed at the firm.²⁴⁸ In that case, her ability to work quickly and efficiently on a last minute request was wholly negated by the typo, which, for the White male partner, was a reflection of her lack of competence and not the lack of time to properly edit the document.²⁴⁹ This is the phenomenon that Reeves and fellow researchers wrote about in their 2015 Nextions study.²⁵⁰ A statement by a minority partner in one of the Big Law firms explaining the impact of implicit biases on the evaluation of minoritized associates is particularly poignant:

I almost don't want to recruit students of color here [into the firm] anymore. I bring these talented young people here, and I know that, behind the scenes, people are setting the stage for them to fail. No matter how qualified, no matter how much star quality these recruits have, they are going to be seen as people who will most likely not cut it. So, they are under the microscope from the first moment they walk in. And, every flaw is exaggerated. Every mistake is announced. And, it's like, aha. As soon as a minority makes a mistake, they immediately say that that's what they were expecting all along.²⁵¹

I have heard many stories like those of my colleague above from other minoritized (and nonminoritized) lawyers, some former students and some friends.²⁵² Without a more informed strategy to combat the pervasive and stealthy intrusion of implicit bias (particularly linguistic profiling) in the legal profession, efforts towards diversity and inclusion will continue to fall short.

IV. THE SOLUTION: COGNITIVE & STRUCTURAL CHANGE

The importance of diversity and inclusion cannot be overstated. Nor can how far the legal industry lags behind others with respect to diversity and inclusiveness.²⁵³ Despite the

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ REEVES, *supra* note 51, at 4.

²⁵¹ Arin N. Reeves, *Colored By Race: Bias in the Evaluation of Candidates of Color by Law Firm Hiring Committees*, MINORITY CORP. COUNS. ASS'N, <https://mcca.com/mcca-article/colored-by-race/> [<https://perma.cc/2JFQ-Y438>] (alteration in original).

²⁵² Gender bias is also an issue in the legal profession; however, gender bias will not be discussed in this article. See Kim Elsesser, *Female Lawyers Face Widespread Gender Bias According to New Study*, FORBES (Oct. 1, 2018, 3:34 PM), <https://www.forbes.com/sites/kimelsesser/2018/10/01/female-lawyers-face-widespread-gender-bias-according-to-new-study/?sh=32b9b7a4b55e> [<https://perma.cc/5X8C-Q3FT>].

²⁵³ See Nalty, *supra* note 11, at 45–47.

profession's decades long "legal and cultural commitment to equality"—chiefly by hiring and promoting a diverse workforce—White men still occupy a majority of the senior-level positions of power, especially considering the number of women and racial minorities currently entering the legal profession.²⁵⁴ Additionally, three decades of research shows that implicit biases cannot be cured.²⁵⁵ But there is a silver lining, in that, much like a toddler developing socialization skills “we can . . . redirect and reeducate our unconscious [selves to identify, assess, and reject negative] stereotypes and biases.”²⁵⁶ These changes require personal and structural changes.²⁵⁷ Though an admittedly formidable challenge, modifying and reducing our biases should be attainable goals, “especially for a profession that excels in problem-solving.”²⁵⁸ What follows is a discussion of some existing remedies for linguistic profiling and implicit bias that seem the most promising fit for typical practices within the legal profession.

A. *Implementing Behavior Change*

1. Awareness as Step One

The first step is to be more aware of our implicit biases and how they affect our decision making. We must ask the tough questions and challenge our own thinking.²⁵⁹ Kathleen Nalty, renowned diversity and inclusion consultant, suggests the following “easy ways to develop awareness of your unconscious bias[]”:

1. Keep track of your surprises . . . [as] [t]hose surprises offer a window into your unconscious[; and]
2. Take a free, anonymous implicit association test (IAT) online at implicit.harvard.edu/implicit/selectatest.html . . . There are over a dozen different tests, measuring unconscious bias with respect to disability, race, age, gender, gender roles, mental health, weight, sexual orientation, religion, and more.²⁶⁰

When it comes to linguistic profiling, specifically, we must be aware of our “perceptions of language variations . . . and . . . [acknowledge] accent[s] [or non-

²⁵⁴ Pearce et al., *supra* note 16, at 2409.

²⁵⁵ See *Speaking of Psychology: Can We Unlearn Implicit Biases? With Mahzarin Banaji, PhD*, AM. PSYCH. ASS'N (July 13, 2022), <https://www.apa.org/news/podcasts/speaking-of-psychology/implicit-biases> [<https://perma.cc/4EW3-CZSQ>].

²⁵⁶ Nalty, *supra* note 11, at 45.

²⁵⁷ See *id.* at 47–50.

²⁵⁸ Pearce et al., *supra* note 16, at 2438.

²⁵⁹ Nalty, *supra* note 11, at 47.

²⁶⁰ *Id.* at 47–48.

standardized English] as a *difference* [and not a] *deficiency*.”²⁶¹ More attention must be paid at the outset to how we handle nonstandardized English in the legal profession, so that everyone understands that their “unique background” will be treated as a “positive contribution.”²⁶² In the law classroom, we should see “accent variation not as a problem to solve, but as an opportunity to teach.”²⁶³ Instead of viewing nonstandardized English speakers as somehow deficient, we should see it as just “another feature of racial and ethnic diversity.”²⁶⁴

To ensure that we all become more aware of and knowledgeable about implicit bias generally, and linguistic profiling or accent bias specifically, schools and workplaces must incorporate implicit bias training programs into our “professional development programs.”²⁶⁵ Such programs will help to make law school faculty and staff aware of their biases and move them towards making the necessary behavioral changes.²⁶⁶ But research shows that training is not effective if forced upon its subjects.²⁶⁷ Indeed, it may have a reverse effect,

²⁶¹ Chin, *supra* note 88, at 377–78. While Professor Chin discusses ways in which teachers in K-12 classes can overcome biases in the classroom, the same logic can be used in the legal classroom as well.

²⁶² *Id.* at 380.

²⁶³ *Id.* at 383.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 381; see Sarah M. Jackson et al., *Using Implicit Bias Training to Improve Attitudes Toward Women in STEM*, 17 SOC. PSYCH. EDUC. 419, 434 (2014) (“[P]articipation in a training session on implicit bias had a positive effect on personal implicit attitudes. Combined with the continued underrepresentation of women in STEM fields, this finding suggests that there is still work to be done to improve the climate for STEM women. Education and awareness of the biases that occur toward this group could help to create a warmer climate, resulting in more women entering into, remaining in, and advancing through the ranks of STEM fields.”); Rebecca L. Fix, *Justice Is Not Blind: A Preliminary Evaluation of an Implicit Bias Training for Justice Professionals*, 12 RACE SOC. PROBS. 362, 373 (2020) (“Implicit bias is one malleable factor that contributes to disproportionate minority contact in the juvenile justice system. There is a pressing need for intervention with justice professionals to prevent these biases from harming the wellbeing of people and communities of color . . . [t]he current implicit bias training effectively increased most desired outcomes, including ethnocultural empathy.”); Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN’S L.J. 79, 83 (2020) (“The risks of implicit biases run deep in the courtroom. Educating jurors on implicit bias is critical to further elimination of bias in the courtroom. Implicit bias may be seen in the jury deliberation process because jurors may harbor stereotypes and not realize they are employing them towards witnesses and defendants.”); Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J.F. 391, 397 (Jan. 31, 2017) (“Unquestionably, there is a growing awareness of the effects of implicit bias in the legal system. Yet, at a training last year for 500 trial court judges in Florida, fewer than ten responded that they had previously taken an IAT test. . . . Experience in these trainings also indicate judges are unaware of their blind spots.”).

²⁶⁶ Chin, *supra* note 88, at 381–82.

²⁶⁷ See Roger W. Reinsch et al., *Student Evaluations and the Problem of Implicit Bias*, 45 J. COLL. & U. L. 114, 121 (2020) (noting that workshops like Harvard’s Project Implicit and University of Michigan’s STRIDE “often apply practices associated with adult learning and participants are taught evidence-based methods to reduce the likelihood of

causing frustration and rejection, particularly among White people.²⁶⁸ So, instead of mandatory training, policies that make diversity, equity, and inclusion a priority or centerpiece of an organization's mission statement or a part of the evaluation process must become commonplace. This would go a long way towards raising awareness of implicit and unhealthy biases.²⁶⁹

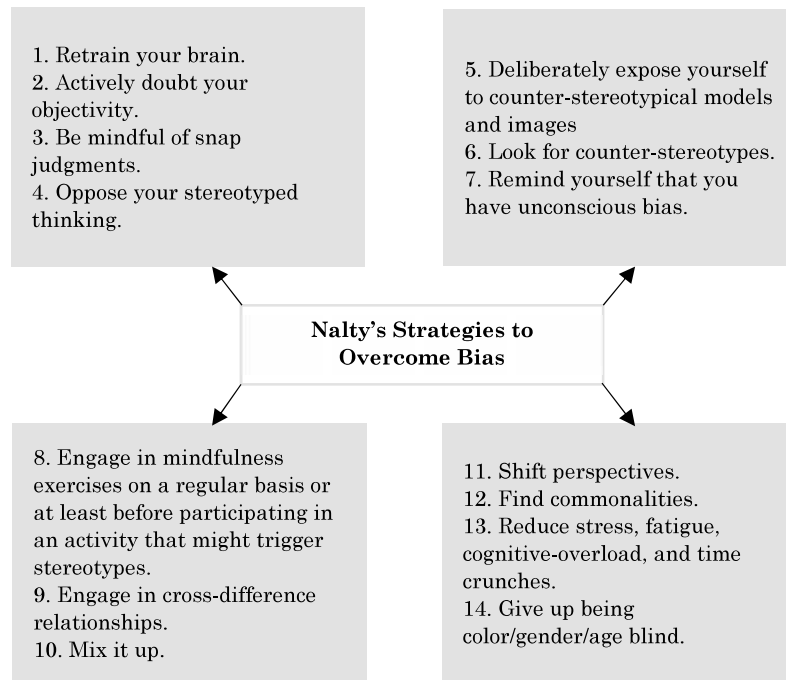
implicit bias. Indications are that, *although this training is often met with resistance*, it can be effective at reducing implicit bias." (emphasis added)); *see also* Rachel Godsil, Keynote, ALWD Biennial Conference, Milwaukee, Wisconsin (July 20, 2017).

²⁶⁸ Tiffany L. Green & Nao Hagiwara, *The Problem with Implicit Bias Training: It's Well Motivated, but There's Little Evidence that it Leads to Meaningful Changes in Behavior*, SCI. AM. (Aug. 28, 2020), <https://www.scientificamerican.com/article/the-problem-with-implicit-bias-training/> [<https://perma.cc/6KJ6-6QXJ>].

²⁶⁹ *See* Chin, *supra* note 88, at 382–83. In fact, training alone is simply not going to be enough. It must be accompanied by corporate investment to change the policies and procedures that have led to systemic and structural inequities. *See* Green & Hagiwara, *supra* note 268. Note that several academic institutions have recently added metrics for diversity and inclusion to their faculty evaluations or discussed doing so. They have also added diversity language to their mission statements. *See Diversity, Equity & Inclusion*, UNIV. MICH., <https://diversity.umich.edu/strategic-plan/dei-strategic-planning-toolkit/evaluation-and-assessment/> [<https://perma.cc/S6VK-VTQW>]; UNIV. SO. CAL., USC ACADEMIC SENATE FACULTY COMMITTEE ON EQUITY AND INCLUSION REPORT FOR AY 2021–2022 (2022), https://academicsenate.usc.edu/wp-content/uploads/sites/6/2022/06/FCEI_Final_Report_2021-2022.pdf [<https://perma.cc/A3DY-W3RC>] (including peer institution diversity, equity, and inclusion information from Colorado State University, Indiana University and Purdue University, Massachusetts Institute of Technology, Michigan State University, Oregon State University, Salisbury University, Stony Brook University, University of California, University of California, Berkeley, University of Oregon); *see* Miguel F. Jimenez et al., *Underrepresented Faculty Play a Disproportionate Role in Advancing Diversity and Inclusion*, 3 NAT. ECOLOGY & EVOLUTION 1030 (2019); *see generally* DEPT. OF EDUC., OFF. OF PLAN. EVAL. & POL'Y DEV., ADVANCING DIVERSITY AND INCLUSION IN HIGHER EDUCATION: KEY DATA HIGHLIGHTS FOCUSING ON RACE AND ETHNICITY AND PROMISING PRACTICES (2016), <https://www2.ed.gov/rschstat/research/pubs/advancing-diversity-inclusion.pdf> [<https://perma.cc/W3SW-824V>] (evaluating a myriad of data from higher education institution initiatives aimed at increasing diversity in their programs). Moreover, several organizations, in which I have membership, or committees, on which I have served, have grappled with including a statement about diversity and inclusion in their Bylaws or governing documents. Additionally, the ABA has added Standard 303(b) and (c) to require cultural competence be taught to law school students at ABA-accredited institutions. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, § 303(b)–(c) (AM. BAR ASS'N 2022–2023). The ABA has also promulgated ABA Model Rule 8.4(g), which makes it a violation of the Model Rules to “discriminat[e] “on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.” MODEL RULES OF PRO. CONDUCT. r. 8.4(g) (AM. BAR ASS'N 2020). To date, only Pennsylvania and California, have adopted provisions that track that language. Dane S. Ciolino, *Pennsylvania Adopts Lawyer Anti-Discrimination Rule*, LA. LEGAL ETHICS (Sept. 21, 2021), <https://lalegalethics.org/pennsylvania-adopts-lawyer-anti-discrimination-rule/> [<https://perma.cc/V37V-5XJF>]; CAL. RULES OF PRO. CONDUCT r. 8.4.1 (STATE BAR OF CAL. 2018). For the most part, reaction has been visceral to the Model Rule 8.4(g) and has been explicitly rejected by several jurisdictions. *See* Dennis Rendleman, *The Crusade Against Model Rule 8.4(g)*, A.B.A. (Oct. 2018), <https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g/> [<https://perma.cc/T63E-JRAG>].

2. Change the Behavior

While important, awareness is simply not enough; to interrupt implicit biases, there must be behavioral changes. In her article, Nalty lists several strategies to change behaviors and assist in overcoming biases:



(1) “[r]etrain your brain[;]”²⁷⁰ (2) “[a]ctively doubt your objectivity[;]”²⁷¹ (3) “[b]e mindful of snap judgments[;]”²⁷² (4) “[o]ppose your stereotyped thinking[;]”²⁷³ (5) “[d]eliberately expose

²⁷⁰ Nalty, *supra* note 11, at 48. This speaks to “develop[ing] the ability to be self-observant,” including “[p]lay[ing] attention to your thinking, assumptions, and behaviors and then acknowledg[ing], dissect[ing], and alter[ing] automatic responses to break the underlying associations.” *Id.*; see also Fix, *supra* note 265, at 362.

²⁷¹ Nalty, *supra* note 11, at 48. This requires some introspection. Nalty coaches, you must “[t]ake the time to review your decisions . . . and search for indicia of bias; audit your decisions to ensure they don’t disparately impact people in other groups.” Most compellingly, Nalty suggests that you “justify your decision by writing down the reasons for it. This[, of course] promote[s] accountability, which can help make unconscious attitudes more visible.” *Id.*

²⁷² *Id.* This requires some self-awareness. Nalty encourages, “Take notice of every time you jump to conclusions about a person belonging to a different social identity group.” And don’t stop there! “Have a conversation with yourself about why you are making [those] judgments or resorting to stereotypes. Then resolve to change your attitudes.” *Id.*

²⁷³ *Id.* This requires you to actively counter stereotypical thoughts. Nalty suggests an odd, but effective technique: “think of a stereotype and say the word ‘no’ and then think of a counter-stereotype and say ‘yes.’” Nalty also suggests that “limit[ing] your

yourself to counter-stereotypical models and images[;]"²⁷⁴ (6) "[l]ook for counter-stereotypes[;]"²⁷⁵ (7) "[r]emind yourself that you have unconscious bias[;]"²⁷⁶ (8) "[e]ngage in mindfulness exercises on a regular basis, or at least before participating in an activity that might trigger stereotypes[;]"²⁷⁷ (9) "[e]ngage in cross-difference relationships[;]"²⁷⁸ (10) "[m]ix it up[;]"²⁷⁹ (11) "[s]hift perspectives[;]"²⁸⁰ (12) "[f]ind commonalities[;]"²⁸¹ (13) "[r]educe stress, fatigue, cognitive overload, and time crunches[;]"²⁸² and (14) "[g]ive up being color/gender/age blind."²⁸³ While some of these strategies are more self-explanatory than others, they all boil down to mindfulness and self-awareness—the willingness to act intentionally after self-reflection to interrupt your personal implicit, likely unconscious, bias.

exposure to stereotyped images" will decrease your implicit biases. For example, "chang[e] the channel if the TV show or song features stereotypes." *Id.*

²⁷⁴ *Id.* This strategy goes along with the previous strategy. However, this strategy suggests that you to find pictures or perhaps listen to oral content that interrupts our biases. For example, if you think of law professors as White males, you may want to find successful Black males or female law professors and perhaps post their pictures or study their curriculum vitae.

²⁷⁵ *Id.*

²⁷⁶ *Id.* To no surprise, "[r]esearch shows that people who think they are unbiased are actually more biased than those who acknowledge they have biases." *Id.* (citing Eric Luis Uhlmann & Geoffrey L. Cohen, "I Think It, Therefore It's True": *Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207 (2007)).

²⁷⁷ Nalty, *supra* note 11, at 48 (quotations omitted). Nalty explains that "[r]esearch shows that mindfulness breaks the link between past experience and impulsive responses, which can reduce implicit bias." *Id.* (footnotes omitted).

²⁷⁸ *Id.* It is important in interrupting our implicit biases that we get outside of our comfort zone. Nalty suggests that you should "[c]ultivate work relationships (or personal relationships outside of work) that involve people with different social identities." *Id.* (footnote omitted).

²⁷⁹ *Id.* Nalty encourages everyone to "[a]ctively seek out cultural and social situations that are challenging for you—where you are in the distinct minority or are forced to see or do things differently." *Id.* (footnote omitted).

²⁸⁰ *Id.* This requires the proverbial "[w]alk in [an]others' shoes . . . to see how they view and experience the world." Nalty suggests joining a group that is different or being an ally for someone who is different. Nalty submits, "[t]his will help you develop empathy and see people as individuals instead of lumping them into a group and applying stereotypes." *Id.* (footnote omitted).

²⁸¹ *Id.* at 49 (citations omitted). Really, we are more alike than different. To that end, Nalty explains, "[i]t is also useful to look for and find commonalities with colleagues who have different social identities from yourself." *Id.* (footnote omitted).

²⁸² *Id.* (quotations omitted). Initially, many may think that this particular strategy is unrelated to the interruption of our implicit biases, but "[w]e are all more prone to revert to unconscious bias when we are stressed, fatigued, or under severe cognitive load or time constraints." *Id.* (footnote omitted).

²⁸³ *Id.* (quotations omitted). Colorblindness does not work. In fact, Pearce, Wald, and Ballakrishnen argue in their article that difference blindness, "[w]hile powerful in dismantling intentional discrimination," has played a part in "establishing the continuing and powerful influence of implicit and institutional bias" in the legal profession. Pearce et al., *supra* note 16, at 2407.

More specific to accent bias, a person must change their behavior to understand nonstandard English speakers or those with accents as different, not deficient, which goes along with acknowledging our racial differences without casting minorities as somehow incompetent or less than their White counterparts.²⁸⁴ In the classroom, teachers must call on *all* students, even those with accents.²⁸⁵ In his article, Chin even suggests that “a teacher could supplement an accented student’s oral presentation with a handout if the teacher fears other students might have difficulty understanding the student’s accent.”²⁸⁶ Indeed, it is also important for teachers to seek student feedback regarding what teaching methods best meet their needs.²⁸⁷ These things help the nonstandardized English speaker to feel good about themselves²⁸⁸ and less self-conscious, which is critical to a student’s learning process.

In its own category is the use of instruments that will assist law school faculty and law firm partners, alike, in being more objective in the assessment of a person’s oral and writing skills. Rubrics have long been touted as the ultimate interrupter of bias in that rubrics force their user to set out objective measures by which they will quantify the skills of the person being assessed.²⁸⁹ In 2014, I published an article touting the utility of rubrics, “Grading Rubrics: Their Creation and Their Many Benefits to Professors and Students,”²⁹⁰ never anticipating that the information contained there would be useful in the present conversation of untangling the web of linguistic profiling and accent bias. In that article, I wrote about the utility of rubrics in making the otherwise subjective evaluation of writing more objective.²⁹¹ These same rubrics may be used in assessing oral advocacy in the law school classroom and may be utilized in assessing an attorney’s (junior- and senior-level) work and progress in the law firm.

More recently, David Quinn, in his article, “How to Reduce Racial Bias in Grading,” discussed above, details his research showing that bias in grading is greatly reduced when graders used rubrics to assess the writings of the study’s subjects.²⁹² In Quinn’s study, when those teachers who had previously shown

²⁸⁴ See Chin, *supra* note 88, at 380; Atkins, *supra* note 46, at 11–13.

²⁸⁵ Chin, *supra* note 88, at 380.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 381.

²⁸⁸ *Id.*

²⁸⁹ See Quinn, *supra* note 60, at 76.

²⁹⁰ Gibson, *supra* note 183, at 41.

²⁹¹ *Id.* at 49–50.

²⁹² Quinn, *supra* note 60, at 76.

bias in assessing a written work product of an Black second grader versus that of a White second grader, reviewed the work “us[ing] a rubric with specific grading criteria, they give essentially identical ratings to the Black and [W]hite authors—about 37 percent rate both the ‘Dashawn’ and ‘Connor’ versions as [at grade level].”²⁹³ But I posit that grading rubrics alone are insufficient to ameliorate the problem of bias in assessing the competency of Black and White students or attorneys.

As noted in Quinn’s study and hinted at in various sources referenced in this article, there is clear bias in assessing language skills when the identities or names of the authors are known.²⁹⁴ While anonymity is not always possible, it is certainly an additional layer that is useful in interrupting our implicit biases. Coupled with rubrics, anonymous grading provides a better chance that a student (or attorney) of color’s language skills will not be profiled and judged less than competent simply because of their race.²⁹⁵ But even then, more is needed. We must look to the very systems in which implicit bias operates—educational and professional organizations as well as licensing bodies—to effect real and permanent change.

B. *The Solution: Structural Change*

Both Nalty and Chin acknowledged that individual efforts are simply not enough. Efforts must be made to change the structures that sustain our implicit biases.²⁹⁶ Nalty speaks of the need to “put structured, objective practices and procedures in place to help people interrupt their unconscious biases.”²⁹⁷ But this is a heavy lift and all hands are needed on deck; the work cannot be just that of those most affected—minoritized people, nor can it be those few who work in the area of diversity, equity, and inclusion. As Nalty suggests, we must “examine all systems,

²⁹³ *Id.*

²⁹⁴ *See id.*; *see, e.g.*, Syavash Nobarany & Kellogg S. Booth, *Understanding and Supporting Anonymity Policies in Peer Review*, 68 J. ASSOC. INFO. SCI. & TECH. 957 (2017) (noting that “[s]everal studies found that when the identity of authors was not masked, reviewers favored authors from English-speaking countries and from prestigious institutions”); Carole J. Lee, *Bias in Peer Review*, 64 J. AM. SOC’Y. FOR INFO. SCI. & TECH. 2, 13 (2013) (stating that “[i]mpartiality ensures both the consistency and meritocracy of peer review”).

²⁹⁵ *See* John M. Malouff, et al., *The Risk of a Halo Bias as a Reason to Keep Students Anonymous During Grading*, 40 TEACHING PSYCH. 233, 236 (2013).

²⁹⁶ Nalty, *supra* note 11, at 49 (“Individual behavior changes often have to be supported and encouraged by structural changes to have the greatest impact on interrupting implicit biases.”); *see also* Chin, *supra* note 88, at 381 (“The responsibility for ending accent bias must extend beyond the individual teacher to schools generally because ‘change happens at the level of the school.’”).

²⁹⁷ Nalty, *supra* note 11, at 49.

structures, procedures, and policies” to ferret out the hidden structural components to ensure that they are inclusive for everyone.²⁹⁸ “Structural changes should be designed to address the hidden barriers first, because research shows that these are the most common impediments.”²⁹⁹ For example, how easy and effective would it be to add one question to a partner or senior faculty member’s year-end evaluation: “What are the names of the associate attorneys you are mentoring or sponsoring?”³⁰⁰ Perhaps, even more basic is “How diverse are the associates you are hiring?,” or simpler, “Who are you hiring?”³⁰¹

Based on Quinn’s study, which shows that minoritized teachers tended to have less propensity to show bias in grading,³⁰² attention must be paid to hiring a diverse population of teachers and faculty. More diversity in the front of the classroom (regardless of whether it’s secondary or professional school) seems to militate less bias in grading.³⁰³ But this will not happen overnight and simply hiring diverse populations is not enough. Efforts must be made to retain them.³⁰⁴

To this end, diversity and inclusion efforts are paramount. Nalty submits that of all the possible structural changes that could be made to interrupt our biases and improve diversity and inclusion in the profession, “the structural change with the most potential for lasting change is [the] D+I competencies framework.”³⁰⁵ Indeed, research shows that

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ Nalty tells of a law firm that did just that and the firm was able to “determine who was falling through the cracks.” The firm went on to develop a Diversity and Inclusion Action Plan that focused on “mentorship and sponsorship” and “implement[ed] a ‘Culture of Mentorship’ to ensure that all attorneys receive equitable development opportunities so they can do their best work for the firm.” *Id.* at 49–50.

³⁰¹ *Id.*

³⁰² See Quinn, *supra* note 60, at 72.

³⁰³ See *id.*

³⁰⁴ Retention efforts include proper support and development opportunities, which include effective mentor relationships and formal and informal professional training. See Sandra S. Yamate, *Minority Retention: What Are Other Firms Doing? (And Is It Working?)*, 55 PRAC. LAW. 17, 18 (2009); see also Marian Cover Dockery, *No Time for Diversity Fatigue*, 12 GA. BAR J. 24, 25, 29 (2007); ASS’N AM. L. SCH. EXEC. COMM., RECRUITMENT & RETENTION OF MINORITY LAW FACULTY MEMBERS (2017), <https://www.aals.org/about/handbook/good-practices/minority-law-faculty-members> [<https://perma.cc/QXA2-FTGS>].

³⁰⁵ Nalty, *supra* note 11, at 50. “Competencies are the skills, knowledge, abilities, and behaviors that describe the standard to which a competent person is expected to perform.” *DEI Competency Areas*, TUSKEGEE UNIV. COOP. EXTENSION, <https://dei.extension.org/dei-competency-areas/> [<https://perma.cc/P9DH-WWGV>]. In the area of diversity and inclusion (D + I), there are any number of associated primary competencies, including understanding implicit bias, cultural competency, microaggressions, and social justice development that can make up a company’s D + I framework. See *id.*

“[those] companies that have instituted D+I competencies and hold employees accountable for inclusive behaviors in their job duties and responsibilities are making real progress with respect to diversity.”³⁰⁶ But first, people must know what those behaviors are, and so industry leaders must educate themselves and their employees about what diversity and inclusion really means.³⁰⁷

Partners and associates in our firms, as well as teachers and faculty in our classrooms, and all those involved must be trained, and their institutions must take the first step to ensure that this training is done properly.³⁰⁸ In reference to the educational institutions, these changes in hiring and training must come from top level school administrators and should be widespread from school districts to national professional development programs.³⁰⁹ The same would be true of other legal institutions.

In particular, increased diversity in hiring, training, and retention efforts would require training to ensure that those at each level of the process understood and overcame their biases.³¹⁰ Chin posits, that training teachers would help them “understand that they can be influenced not just by *what* a student says, but by *how* a student says it.”³¹¹ The same is true for those who would be hiring, training, and involved in retaining minoritized teachers and faculty (or even associates in law firms and law clerks in our courts). They too need training on how they are influenced by the very way their minoritized colleagues speak and write.

Regarding the feelings of many who label professional education programs that address bias as “useless, ‘touchy-feely’ gatherings,” Chin says they are “rather necessary tools for professional development for educators that ultimately benefit students of color.”³¹² In that same vein, secondary schools as well as institutions of higher education could better set the tone by drafting and instituting antidiscrimination policies.³¹³ Indeed,

³⁰⁶ Nalty, *supra* note 11, at 50.

³⁰⁷ *See id.* at 46, 50. And so we are back to training mentioned in Section IV.A.1. It seems that none of these strategies, without the other, is sufficient.

³⁰⁸ *See* Chin, *supra* note 88, at 381.

³⁰⁹ *See id.*

³¹⁰ *See id.*

³¹¹ *Id.* (citing Robert C. Granger et al., *Teacher Judgments of the Communication Effectiveness of Children Using Different Speech Patterns*, 69 J. EDUC. PSYCH. 793 (1977)).

³¹² *Id.* at 382 (quoting Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 401 (2005)).

³¹³ *Id.* at 382–83. In his article, Chin uses the term “anti-harassment policy.” He provides examples of three secondary education school districts that have policies that address the harassment of accented students. Significantly, the trend for most postsecondary educational institutions is to include an “anti-racist” or “non-racism” statement on their websites. *See, e.g., Anti-Racism Statement*, UNIV. N.H.,

whether a secondary school teacher or a law school professor, we must be more open to language philosophies that embrace language diversity, and because of the stealthy way that our implicit biases hinder that process, our leaders, on the local and national level must lead the way with insightful training opportunities. The work is necessary from the top down—from the lofty and hallowed courtrooms and corner offices of Big Law down to our primary schools—and the bottom up.

It all seems rather circuitous, which is both the beauty and the complexity of it all. Though seemingly disjointed and unconnected, these studies, cases, and reported experiences all point to one important connection—implicit biases and the brain. And once we endeavor to disrupt those biases in our classrooms, courtrooms, and boardrooms, the profession will begin to look like the diverse profession towards which we long have been working.

CONCLUSION

The more inclusive lawyer has been called the more effective lawyer, because having become aware of her unconscious biases and working to eliminate or modify those biases, she is better able “to interact with a diverse community and serve a wide variety of clients.”³¹⁴ While the cost to be kind is nominal, the cost of true diversity, equity, and inclusion is great and will require significant investments of time and money. One of the first steps towards true diversity, equity, and inclusion in the legal profession is acknowledging the mechanisms that hinder progress. As this article explains, one such mechanism is linguistic profiling, which serves as an impediment to diversifying our classrooms and the profession. Further, we are now aware of some of the risk factors within legal education and the legal profession that make our implicit biases more harmful. With this additional knowledge and some of the strategies discussed herein, we can all make more informed decisions.

The time has come to move past our “System 1” impulses to make snap judgments about those who look and sound

<https://chhs.unh.edu/social-work/about/anti-racism-statement> [<https://perma.cc/75UL-XQS9>]; *Reel Anti-Racist Statement of Principles*, UNIV. N.C. CHARLOTTE, <https://reel.charlotte.edu/about-us/anti-racist-statement> [<https://perma.cc/6X2J-TYND>]; see generally DEPT. OF EDUC., OFF. OF PLAN. EVAL. & POLY DEV., *supra* note 269 (discussing methods to promote access to higher education for diverse and underrepresented students).

³¹⁴ Nalty, *supra* note 11, at 45.

different and allow “System 2” to move us along a more tolerant continuum towards diversity and inclusion. The time has come for the legal educators and influencers in the legal profession to take up the mantle with renewed effort—now that we understand how the brain functions and why we do the things we do, we must use this knowledge and the strategies discussed to interrupt our biases, so we can do better. Specifically, this article fosters an understanding of why we judge the speech (and writing) of minoritized populations or other nonstandardized English speakers so harshly. With this understanding, we may move beyond judging without thought to what that judgment means to minorities students and to the interests of a diverse and inclusive society. Whether one speaks or writes the Queen’s English should not be the end of the inquiry; as demonstrated by this article, our speech and writing is subject to any number of social and cultural interpretations and judgments. Once we understand why we judge the way we do, and why the legal profession does too, and use the strategies suggested in this article—surely we can change our behaviors moving forward. The future of the legal profession and its diversity, equity, and inclusion depend on our collective conscious effort to ensure substantive change.