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### The Appearance of Professionalism

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# THE APPEARANCE OF PROFESSIONALISM

*Elizabeth B. Cooper\**

## Abstract

The dominant image of a lawyer persists: a neatly dressed man wearing a conservative dark suit, white shirt, and muted accessories. Many attorneys can conform to this expectation, but there are a growing number of “outsider” lawyers for whom compliance with appearance norms can challenge their fundamental identities. People of color, women, LGBTQ individuals, religiously observant persons, and those who inhabit intersectional identities are among those who disproportionately remain excluded from the dominant culture and centers of power in the legal profession.

Expectations of appearance conformity create profound concerns that go well beyond style preferences, raising questions of autonomy and core identity. Non-compliance with these expectations can also have profound employment consequences. Studies have demonstrated that individuals make quick judgments imbued with unconscious bias. These fast and faulty implicit biases manifest in individual microaggressions and the creation of microaggressive environments. When an outsider law student or new attorney goes on a job interview or starts a new position, the employer cannot help but use this skewed lens.

To facilitate acceptance, some outsiders may choose to “cover,” or find a way to minimize their perceived differences from the majority culture. Black women may feel pressure to straighten their hair. Lesbians may feel obligated to avoid wearing pantsuits and flat shoes. Religious men and women may consider removing their head coverings. But these acts of covering have their own cost: They potentially harm the new lawyer’s sense of identity, her self-confidence, her close relationships with others, and her job performance.

This Article argues that legal employers and law schools have an obligation to create culturally proficient environments where insider lawyers learn to disrupt their own implicit biases and microaggressions so outsiders can bring their full identities to work and school. Self-determination theory, which seeks to enhance a person’s autonomy,

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competence, and relatedness to others, should be a central part of these efforts.

The recommendations made in this Article provide a tangible way to uproot the implicit bias and microaggressions that still pervade our legal institutions. Doing so will ensure attorneys and law students are assessed based on their capacities and the substance of their work instead of their appearance. Our profession deserves nothing less.

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INTRODUCTION

Appearances matter in the legal profession. Leaders of the private bar, judges, juries, clients, and the media expect lawyers to appear a certain way—in a dark suit, white shirt, conservative shoes—with significant consequences for non-conformity.<sup>1</sup> This anachronistic expectation—developed in a different time and place, when lawyers were almost exclusively white and male—still pervades mainstream culture.<sup>2</sup> Women, people of color, and openly LGBTQ attorneys have been graduating from law school in increasing numbers.<sup>3</sup> These “outsider” lawyers belong in the legal profession, yet they present hair, clothing, and other visible identifiers that diverge from this traditional image.<sup>4</sup>

Legal scholars have identified many barriers that outsider attorneys face that contribute to their continued underrepresentation in the upper echelons of the legal profession.<sup>5</sup> The existing literature fails, however,

1. See *infra* Section III.C.

2. See *infra* Section I.A.

3. See *Statistics*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/resources/statistics/](https://www.americanbar.org/groups/legal_education/resources/statistics/) [<https://perma.cc/8K5G-JZ4X>] (click on the “Total Minority JD Enrollment” link to download the statistics spreadsheet) (presenting statistics showing an increase in law student diversity from 1987 to 2014); see also Aaron N. Taylor, *As Law Schools Struggle, Diversity Offers Opportunity*, CHRON. HIGHER EDUC. 1 (Feb. 10, 2014), <https://www.chronicle.com/article/As-Law-Schools-Struggle/144631> [<https://perma.cc/7KJS-N7WC>] (noting the gradual increase of students of color attending law school).

4. This Article chiefly focuses on those outward expressions of identity that are malleable and that employers may explicitly or implicitly want an employee or job applicant to adopt—chiefly those related to representation of race, gender, sexual orientation, gender identity and religion. Individuals present numerous other attributes of core identity (e.g., disability, age, socio-economic status) in the workplace and the theories explored in this Article are ripe for further development in these under-explored contexts. Professor Mari Matsuda coined the term “outsider” in her pioneering work on critical race theory and legal jurisprudence. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323 (1989). This Article uses the term “outsiders” in the same vein as Matsuda, as well as Devon Carbado and Mitu Gulati, who use it to describe those found less often in positions of power in the law. See Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000) [hereinafter Carbado & Gulati, *Working Identity*]; Devon Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1790 (2003) [hereinafter Carbado & Gulati, *Law and Economics*] (“[W]ithin most professional settings, whites are insiders and nonwhites are outsiders . . . .”); see also DERALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER AND SEXUAL ORIENTATION 13–14 (2010) (describing sexual orientation (LGBTQ), disability, religion, class, as well as race and gender, as markers of potential existence on “the margins . . . of social desirability and consciousness”). The term is used reluctantly in this Article due to its potential to reify outsider status.

5. Legal scholars have analyzed the ways in which the law and its institutions replicate structural racism, sexism, and homophobia and therefore continue to erect obstacles to the success of people of color, women, and LGBTQ individuals, among others. See, e.g., Kimberlé Williams

to appreciate the many ways in which the dominant expectations of appearance in the legal workplace profoundly harm attorneys who do not or cannot conform to these expectations. This Article seeks to fill that gap.<sup>6</sup>

This Article brings together the science of quick thinking and implicit bias, and the social psychology of microaggressions and their resulting harms to explain the challenges faced by outsider attorneys and law students.<sup>7</sup> From the pinstripes of Wall Street to the more casual culture of Silicon Valley,<sup>8</sup> social norms—supported in some contexts by

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Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1255 (2011) (discussing critical race theory); Suzanne Goldberg, *Sticky Institutions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 1375 (2010) (discussing queer theory and discrimination law); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 810 (2004) (arguing that courts should consider racial stigma to properly adjudicate claims of discrimination); Mari Matsuda, *Beyond, and Not Beyond, Black and White: Deconstruction Has a Politics*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 393, 394 (Valdes et al. eds., 2002) (discussing critical race theory); Robin West, *Re-Imagining Justice*, 14 YALE J.L. & FEMINISM 333, 334 (2002) (calling for a feminist and progressive reimagining of legal justice).

6. Although some scholars have addressed questions of appearance or professional development, none take the approach of this Article. See, e.g., Cynthia Batt & Harriet N. Katz, *Confronting Students: In the Process of Mentoring Student Professional Development*, 10 CLINICAL L. REV. 581, 598–99 (2004) (discussing professional attire and linking it to the proper etiquette and formality required in the legal profession); Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 4 (1995) (arguing that sex discrimination doctrine should prohibit discrimination based on gender and sexual orientation); Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1112 (2006) (proposing that workplace dress codes should be analyzed not only under anti-discrimination law, but also under a right to privacy); *id.* at 1118 n.13 (citing articles discussing “appearance requirements”); Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1426–28 (1992) (exploring the capacity of anti-discrimination law to ban personal appearance requirements in employment); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 8 (2000) (examining the imperfect relationship between antidiscrimination laws and employer requirements regarding physical appearance); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 149 (2004) (criticizing the judicial rhetoric in numerous cases that indirectly condone sex discrimination in employment).

7. It is possible for a person to be an insider in some contexts and an outsider in others. A white lesbian for example, may benefit from her insider status as a white person but may be an outsider as a woman or a lesbian. This reflects the complex nature of intersectionality. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991).

8. See Vanessa Friedman, *How to Dress Down Like a Power Player*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/fashion/allen-co-sun-valley-conference-mogul->

accompanying legal rules—set expectations of professional appearance.<sup>9</sup> Both *de facto* and *de jure* expectations of workplace presentation favor historical norms,<sup>10</sup> which have been created and reinforced by the dominant culture.<sup>11</sup>

Courts, law firms, government offices, and legislatures have their respective sets of conservative appearance norms that reflect those who have traditionally held powerful positions: White, heterosexual, cisgender males.<sup>12</sup> Yet, with the broader range of identities present in the legal industry,<sup>13</sup> the inability or choice not to conform to appearance expectations can have significant career consequences.<sup>14</sup>

As Daniel Kahneman’s work on “fast thinking” reveals,<sup>15</sup> the human brain instantaneously forms impressions about people based on appearances.<sup>16</sup> These impressions are informed by persistent exposure to messages about social hierarchies—based on race, gender, sexual orientation, and other attributes of identity—all of which are integrated

dress-code.html [<https://perma.cc/T7HS-Z7JL>] (describing the casual outfits worn by attendees of a “summer camp for billionaires”).

9. See *infra* Part I.

10. See RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* 80 (2013) (noting that professional dress in the legal context is rooted in the history of the clerical gown); *id.* at 100 (describing “hierarchy, as well as tradition, status quo, and ‘branding’” as the rationales for maintaining expectations of traditional garb in the courtroom); *id.* at 94–95 (finding that the main purpose for this historical tradition is hierarchical: “a person’s individuality is subsumed by a costume that symbolize[s] respect for the profession and the dignity of it”).

11. See DIANA CRANE, *FASHION AND ITS SOCIAL AGENDAS: CLASS, GENDER, AND IDENTITY IN CLOTHING* 174 (2000) (noting that the traditional suit can symbolically represent a person’s commitment to his profession and that general attitudes toward the suit remain consistent in the legal profession). Although it is true that professional expectations of appearance may vary by type of practice (e.g., the large law firm or the public interest setting) or by region (e.g., the relative prevalence of wingtips in New York City and cowboy boots in Denver), this Article focuses on the more traditional institutions in which lawyers practice.

12. See *infra* Section I.A. “Cisgender” describes “a person whose gender identity corresponds with the sex the person had or was identified as having at birth.” *Cisgender*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/cisgender> [<https://perma.cc/V98C-ESF8>].

13. See Jennifer Beaudoin & Kate Frost, *Increasing Diversity in the Legal Ranks*, A.B.A. WHITE COLLAR CRIME COMMITTEE NEWSL. (2018) (discussing the increasing emphasis law firms place on diversity hiring).

14. See *infra* Part III (describing ways in which non-conformance can affect one’s career).

15. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20–26 (2011) (describing fast thinking).

16. See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013) (describing how the human brain forms “hidden” biases without conscious recognition).

into our cognitive processing.<sup>17</sup> These “blindspots,” or implicit biases, can lead to flawed interpretations, assumptions, and judgments about people and events.<sup>18</sup>

These initial impressions made by fast thinking employers can lead to job offers, quality assignments, and promotions—or not.<sup>19</sup> Although everyone must negotiate their presentation and performance in the workplace, outsider attorneys carry a much heavier burden as a result of unconscious biases related to appearance.<sup>20</sup>

Appearance norms and other manifestations of implicit bias contribute to the abundance of microaggressions that outsiders face in the legal profession.<sup>21</sup> Individually and as a whole, these microaggressions convey the message to outsiders that they do not belong, and more specifically, that they must conform their appearance to be accepted.

Outsiders typically hesitate to confront these microaggressions because such statements and acts can be vague and perhaps unintentionally derogatory.<sup>22</sup> Accordingly, outsiders often try to

17. SUE, *supra* note 4, at 9, 20 (stating “it is difficult for anyone born and raised in the United States to be immune from inheriting racial biases” or biases regarding sex, gender, or sexual orientation).

18. See BANAJI & GREENWALD, *supra* note 16, at 20 (stating that to the extent unconscious biases “slant how we see, remember, reason, and judge, they reveal a particular disparity . . . between our intentions and ideals, on one hand, and our behavior and actions, on the other”). No one is immune from developing these unconscious biases.

19. See *infra* Part II (describing the correlation between unconscious or implicit bias and discriminatory beliefs and actions).

20. See generally DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?* (2013) (discussing the challenges associated with being an African American attorney in the workplace). Tanya Hernandez and Devon Carbado, among others, have brought awareness of implicit assumptions to legal theory, and before them, Peggy Cooper Davis wrote about microaggressions performed by the law and its actors. See Devon Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 152–53 (2014); Carbado & Gulati, *Working Identity*, *supra* note 4; Davis, *infra* note 75; Tanya Kateri Hernandez, *One Path for 'Post-Racial' Employment Discrimination Cases—The Implicit Association Test Research as Social Framework Evidence*, 32 J.L. & INEQUALITY 309, 310–11 (2014); Devon W. Carbado et al., *Concealed Biases* (2014) (unpublished manuscript) (on file with the author).

21. SUE, *supra* note 4, at 5 (“Microaggressions are the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group.”); see also *infra* Part III (discussing microaggressions).

22. SUE, *supra* note 4, at 24 (describing microaggressions as “subtle, nebulous, and unnamed”). For example, a Black man may be told his beard looks unprofessional, at the same time that white men in his office with more seniority wear beards. See Beth Landman, *More Men Are Growing Beards – But Are Employers Hiring Them?*, N.Y. POST (Oct. 10, 2014, 5:38 PM), <http://nypost.com/2014/10/10/more-men-are-growing-beards-but-are-employers-hiring-them/> [<https://perma.cc/3DDC-6RD5>] (finding employer acceptance of facial hair dependent both on the industry and a subjective judgment of “whether he would fit in”). A “too-masculine” woman may experience odd looks when she wears a pantsuit, tailored shirt, and oxfords (rather than a

mitigate these workplace harms by covering.<sup>23</sup> Depending on the individual, such mitigation strategies have varying degrees of success and personal cost.<sup>24</sup> In fact, numerous studies have found that choosing

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skirt suit, blouse, and heels) to court. *See infra* Section I.B for a discussion of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), where the U.S. Supreme Court rejected defendant’s argument that plaintiff was insufficiently feminine to be promoted to partner. For a discussion of this phenomenon as it relates to a “too feminine man,” see KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 76–79 (2006), which describes ways in which gay men may feel pressure to appear more masculine at work.

23. Covering is defined as seeking to minimize one’s appearance differences from the norms created by insiders. YOSHINO, *supra* note 22, at ix. As elaborated in Part III, the concept of covering was defined by noted sociologist Erving Goffman. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 102 (1963). Some use the term code switching to describe this adapting to the unwritten rules of the environment. KIKANZA NURI-ROBINS & LEWIS BUNDY, *FISH OUT OF WATER: MENTORING, MANAGING, AND SELF-MONITORING PEOPLE WHO DON’T FIT IN* 19 (2016) (“Code switching involves learning to engage according to the unwritten rules of the environment’s culture.”).

24. For example, a Black woman will always be seen as Black and female, regardless of how she wears her hair or how conservatively she dresses (although her choices about presentation may affect how she is perceived by insiders). By contrast, an observant Muslim woman can cover more seamlessly, deciding to remove her head coverings to get and keep a job. *See* Michelle Chen, *Choosing Between a Headscarf and a Job*, *NATION* (May 2, 2017), <https://www.thenation.com/article/choosing-between-a-headscarf-and-a-job/> [<https://perma.cc/T37T-TE6K>] (exploring the inner struggle Muslim women may face between remaining faithful to their Islamic faith and being seen as desirable job candidates); J. Weston Phippen, *For Muslim Women Workers, Bias Can Start with the Interview*, *ATLANTIC* (Oct. 30, 2015), <https://www.theatlantic.com/politics/archive/2015/10/for-muslim-women-workers-bias-can-start-with-the-interview/433278/> [<https://perma.cc/SK9A-5G78>] (discussing the implicit bias Muslim women may encounter as a result of wearing religious head coverings to job interviews); Staci Zaretsky, *Why This Biglaw Associate Wears A Hijab To Work*, *ABOVE L.* (June 29, 2016, 3:25 PM), <http://abovethelaw.com/2016/06/why-this-biglaw-associate-wears-a-hijab-to-work/> [<https://perma.cc/EC7A-DEGJ>] (describing a female Muslim attorney’s intention to not only succeed professionally, but also stay true to her cultural identity). Orthodox Jews, Sikhs, and other religiously-observant individuals may face similar dilemmas. *See, e.g.*, Jack Abramowitz, *Why Do Jewish Men Wear Yarmulkes (Kippahs)?*, *JEW IN THE CITY* (Jan. 17, 2017), <https://jewishthecity.com/2017/01/why-do-jewish-men-wear-yarmulkes-kippahs/> [<https://perma.cc/Q9XC-5NRU>] (discussing situations when Orthodox Jewish men may chose not to wear a kippah to work); Kiran Preet Dhillon, *Covering Turbans and Beards: Title VII’s Role in Legitimizing Religious Discrimination Against Sikhs*, 21 *S. CAL. INTERDISC. L.J.* 213, 215 (2012) (describing how Sikhs often must choose between “retain[ing] their jobs or stay[ing] true to their religious beliefs”). Analogously, LGBTQ employees may adopt strategies of “partial passing” by being out to their peers but not to their supervisors, for example, or deciding not to display pictures of partners or friends in the office. *See* Clare Huntington, *Staging the Family*, 88 *N.Y.U. L. REV.* 589, 609–11 (2013) (describing the multiple ways individuals convey their family status, including choosing whether to display family photos in the workplace). Carbado and Gulati more generally apply “partial passing” to describe the strategic manipulation of one’s identity “to modify the stereotypical assumptions about or otherwise suppress the salience of that status. A person might partially pass in two ways: distancing herself from the Outsider group or embracing the Insider group.” CARBADO & GULATI,

to minimize aspects of one's core identity can cause stress,<sup>25</sup> significantly erode self-esteem,<sup>26</sup> damage emotional well-being, negatively affect physical health,<sup>27</sup> and compromise one's performance in the workplace or at school.<sup>28</sup>

This Article recommends ways legal employers and law schools can respond to these harms by creating culturally proficient work and learning environments. First steps include recognizing the existence and effect of implicit bias and microaggressions, both broadly and specifically with regard to professional appearance. Additionally, law schools must better prepare students to negotiate the tension that may arise between the appearance demands of the professional workplace and their core identities.<sup>29</sup>

These efforts are most likely to succeed when employers and law schools employ self-determination theory,<sup>30</sup> which focuses on

*supra* note 20, at 29. Acts of conforming one's physical appearance may be seen as "affirmatively identifying or associating" with majority power structures. *Id.*

25. SUE, *supra* note 4, at 88 (describing microaggressions as clinical "stressors," representing "external events or situations that place a psychological or physical demand on targets").

26. *Id.* at xi (describing microaggressions as "insidious, psychologically and physically draining"); *id.* at 89 ("The psychological toll [of microaggressions] may not be immediately visible, as in the development of low self-esteem.").

27. See, e.g., Elizabeth Brondolo et al., *Race, Racism and Health: Disparities, Mechanisms, and Interventions*, 32 J. BEHAV. SCI. 1, 1–2, 4 (2009) (identifying the physiological consequences resulting from the emotional and mental stress caused by microaggressions); Jennifer Wang et al., *When the Seemingly Innocuous "Stings": Racial Microaggressions and Their Emotional Consequences*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 1666, 1667, 1674–75 (2011) (describing the emotional impact of everyday microaggressions).

28. See SUE, *supra* note 4, at 101 ("[T]he constant, vague, just-below-the-surface acts of covert racism impair performance by draining psychological energy or detracting from the task at hand."); *id.* (describing the cognitive disruption that can occur from the initial incident and its ongoing impact); see also CLAUDE M. STEELE, *WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US* 5 (2010) (explaining the phenomenon of "stereotype threat," referring to the risk of confirming negative stereotypes about one's own racial, ethnic, or cultural group); see *infra* Section III.B (discussing stereotype threat).

29. See generally ROBSON, *supra* note 10 (reviewing historical and constitutional strictures on dress); STEELE, *supra* note 28 (discussing stereotype threat); Devon Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 701–02 (2001) (discussing the theory of identity performance); Maureen Howard, *Beyond a Reasonable Doubt: One Size Does Not Fit All When It Comes to Courtroom Attire for Women*, 45 GONZ. L. REV. 209, 210 (2009) (discussing the general advice to dress conservatively in the courtroom). All sectors of the law school community must be involved in these efforts. Although not everyone may feel or be equipped to take on this challenge, schools must better train and prepare administrators and faculty to better address microaggressions in the law school and the legal profession. See *infra* Part IV.

30. See Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Role of Basic Psychological Needs in Personality and the Organization of Behavior*, in HANDBOOK OF

supporting the attorney's autonomy, competence, and relatedness to her peers. This approach perfectly combats the harms of microaggressions, which inherently undermine each of these attributes.<sup>31</sup>

Because this Article cannot address all of the complex challenges outsider attorneys might face, it focuses on the legal profession's implicit demands concerning identity and appearance. Ultimately, this Article's proposal to establish culturally proficient institutions that incorporate self-determination theory is innovative because it addresses both systemic and individual sources of implicit bias plaguing outsider attorneys today.

\* \* \*

Part I of this Article describes the normative and legal expectations of appearance in the legal profession. Part II explains how fast thinking permits implicit bias to form and manifest in interpersonal interactions. Part III describes the ubiquitous nature of microaggressions, the ways outsiders may choose to cope with them, and their effects. Finally, Part IV proposes recommendations for both legal workplaces and law schools to interrupt this harmful process. These practical steps can lead to substantial cultural reform within the legal profession, allowing all attorneys to succeed in the workplace.

## I. IDENTITY, APPEARANCE, AND PROFESSIONALISM

Examining the function of appearance norms in legal practice, as well as how the legal system treats these norms, lays the foundation for understanding how pervasive implicit bias can be. Concomitantly, challenging appearance expectations can disrupt these biases and create lasting change in the profession. Part I reviews these expectations and briefly describes the jurisprudence of employment appearance codes.

### A. *Expectations of Appearance in the Legal Workplace*

For some people, decisions about clothing and presentation are made subconsciously or without much thought.<sup>32</sup> For most, however, the ritual

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PERSONALITY: THEORY AND RESEARCH 654, 655 (Oliver P. John et al. eds., 3d ed. 2008); *see also infra* Section IV.B.1 (discussing recommendations for employers).

31. *See generally* Ryan & Deci, *Self-Determination Theory*, *supra* note 30 (discussing the self-determination theory); *infra* Part IV.B.1.

32. The people who do not give much thought to their daily work attire likely fall into two categories. The first group includes those who easily fit the expected norms, who are successful in their careers, and who likely have developed a look that is readily replicated from one day to the next. *See* Drake Baer, *The Scientific Reason Why Barack Obama and Mark Zuckerberg Wear the Same Outfit Every Day*, BUS. INSIDER (Apr. 28, 2015, 9:47 AM), <http://www.businessinsider.com/barack-obama-mark-zuckerberg-wear-the-same-outfit-2015-4> [<https://perma.cc/VQ23->

of morning dress requires planning, deciding how one wishes to be perceived, and wondering how clothing and presentation decisions will be interpreted by others. Common questions range from assessing the fit, match, and color of one's clothes to appearing professional and stylish but not provocative. For many outsider attorneys, concerns cut more deeply, implicating race, gender, sexual orientation, and religious beliefs.<sup>33</sup>

Appearance expectations are largely unstated. In the courtroom, most attorneys wear conservative business dress<sup>34</sup> and courts rarely opine on attorneys' attire.<sup>35</sup> Most law firms do not set forth explicit dress codes,

WBDN] (describing the deliberate choice to wear a daily "uniform" to preserve mental resources for decisions deemed more significant). The second group may be composed of those who do not understand the norms of their work environment.

33. See DEBORAH L. RHODE, *THE BEAUTY BIAS* 12 (2010). This Article deliberately addresses matters of appearance that are related to core (traditionally constitutionally protected) identities; see also Note, *Sixth Amendment Challenge to Courthouse Dress Codes*, 131 HARV. L. REV. 850, 851–52 (2018) (describing problematic enforcement of dress code standards when combined with identity categories such as race, gender, and sexual orientation, as well as socio-economic class).

34. See Lynda K. Hopewell, *Appropriate Attire and Conduct for an Attorney in the Court Room*, 12 J. LEGAL PROF. 177, 179 (1987) (explaining that conservative business attire required in the courtroom typically means "a coat and necktie" for men). Hopewell notes that, conversely, "[f]or women, no standard or tradition exists [because] [s]tyles for women are constantly changing; thus, establishing precise limitations on dress virtually is impossible." *Id.* The most cited justifications for requiring business attire in court include: looking professional; encouraging the judge and jury to focus on the argument, not the lawyer; respecting the client; and tradition. See ROBSON, *supra* note 10, at 101 (emphasizing the attorney's "dress for success" credo means prioritizing the client's interests above their own); *id.* at 100 (recognizing tradition, originating with the English courts, as one of the reasons for formal dress); Ann Farmer, *Order in the Closet Why Attire for Women Lawyers is Still an Issue*, 19 PERSP. 4, 5 (2010) ("Your goal in dress should be vanilla—you don't want the jury to notice your clothes in either a good or bad way." (quoting Kat, *What to Wear for a Month in Court*, CORPORETTE (Feb. 4, 2010), <http://corporette.com/what-to-wear-for-a-month-in-court> [<https://perma.cc/2EGD-KA4D>])); Karen DaPonte Thornton, *Parsing the Visual Rhetoric of Office Dress Codes: A Two-Step Process to Increase Inclusivity and Professionalism in Legal-Workplace Fashion*, 12 LEGAL COMM. & RHETORIC: JALWD 173, 173 (2015) ("To impress a client or jury it is . . . important to command the *look* of a lawyer—confident, truthful, and authoritative [and doing so] begins with an individual's carriage and clothes.").

35. Courts have rejected the request of a male attorney to wear jeans to court, *Bank v. Katz*, No. 08-CV-1033, 2009 WL 3077147, at \*1 (E.D.N.Y. Sept. 24, 2009) (describing a lawyer alleging constitutional right to wear jeans and an Operation Desert Storm baseball cap in court); and to not wear a tie, *Sandstrom v. State*, 309 So. 2d 17, 23 (Fla. Dist. Ct. App. 1975) (holding that the judge did not violate attorney's civil rights when he ordered him to wear a tie in court). A New Jersey appellate court, however, threw out a contempt citation against a woman legal services attorney who wore slacks, an open-necked shirt, and a sweater. See *In re De Carlo*, 357 A.2d 273, 275–76 (N.J. Super. Ct. App. Div. 1976); see also N.Y. Cty. Lawyer's Ass'n Comm. on Prof'l Ethics, Op. 688, 1991 WL 755944, at \*1–2 (1991) (stating that although women should be permitted to wear pantsuits to work, the bar association cannot require judges to accept this

beyond perhaps stating that attorneys should wear business or business-casual attire.<sup>36</sup> Attorneys who work for the government or in public interest offices may have more flexibility. New lawyers are expected to observe their practice environments to intuit how they should appear at work.<sup>37</sup>

Business dress for men tends to be fairly straightforward: a suit and tie when in court or meeting with clients.<sup>38</sup> Compliance standards for women, however, are more complex. Questions arise about whether she must wear a skirt suit or whether a pantsuit would be permissible; if the latter, she may wonder how high her heels must be to sufficiently “feminize” her look without overly sexualizing it.<sup>39</sup>

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opinion); *cf.* ROBSON, *supra* note 10, at 101 (referencing *Friedman v. District Court*, 611 P.2d 77 (Alaska 1980) where the court rejected “a gender discrimination challenge to the requirement of a necktie (and jacket) for male attorneys”); Howard, *supra* note 29, at 210 (“As a general proposition, the advice—for both men and women—can be reduced to some version of ‘dress conservatively, simply, and inconspicuously.’”); Martha Neil, *Judge Creates a Stir by Developing a Dress Code for Female Attorneys*, A.B.A. J. (June 13, 2013, 5:40 PM), [http://www.abajournal.com/news/article/judge\\_creates\\_a\\_stir\\_by\\_developing\\_a\\_dress\\_code\\_for\\_female\\_attorneys/](http://www.abajournal.com/news/article/judge_creates_a_stir_by_developing_a_dress_code_for_female_attorneys/) [<https://perma.cc/WWS2-UES7>] (reporting on the controversy of a recommended dress code pertaining only to female attorneys).

36. *See* Thornton, *supra* note 34 (“Employer expectations for professional dress in the legal office are rarely written and largely unspoken.”). Although most law firms expect attorneys to wear business attire, there are exceptions. Jones Day has announced a “business casual” policy for in-office meetings, and Quinn Emanuel has rejected any dress code whatsoever. *See* Elie Mystal, *It’s the Jones Day Dress Code*, ABOVE L. (May 24, 2011, 10:23 AM), <http://abovethelaw.com/2011/05/its-the-jones-day-dress-code/> [<https://perma.cc/9JNZ-UT9N>] (instructing attorneys to dress according to parameters described in a firm-wide memo); Staci Zaretsky, *Quinn Emanuel: Shoes Needed, Class Optional*, ABOVE L. (June 23, 2011, 4:56 PM), <http://abovethelaw.com/2011/06/quinn-emanuel-shoes-needed-class-optional/> [<https://perma.cc/5QJM-Q99W>] (eschewing any dress code to emphasize quality of work instead of appearance).

37. *See* Thornton, *supra* note 34, at 174.

38. Some attorneys may experience a learning curve—for example, appreciating that a brown suit and yellow shirt are not as acceptable as a charcoal grey suit and white shirt. *See* Sally Kane, *Law Firm Dress Code for Men*, BALANCE, <https://www.thebalance.com/law-firm-dress-code-for-men-2164254> [<https://perma.cc/J57U-9G8X>] (last updated May 9, 2018) (providing a standard dress code for male attorneys including clothing, accessories, and hair); Sally Kane, *Law Firm Dress Code for Women*, BALANCE, <https://www.thebalance.com/law-firm-dress-code-for-women-2164255> [<https://perma.cc/N967-PZ5S>] (last updated Apr. 16, 2018) [hereinafter Kane, *Women’s Guide*] (presenting a dress code for women including clothing, accessories, and hair with particular emphasis on “err[ing] on the conservative side”).

39. Legal employers expect feminized styles of conservative dress for women, adapted from sartorial expectations of men and often appreciably less comfortable. *See* Farmer, *supra* note 34 (describing awkward and uncomfortable workplace attire for women). Notwithstanding the generalized expectation that women wear heels to look professional, “[h]igh heels are a major contributor to serious back and foot problems, and four-fifths of women eventually experience such difficulties.” RHODE, *supra* note 33, at 3; *see also* Farmer, *supra* note 34, at 7 (describing how most women find pantyhose very uncomfortable, but wear them to appease professional norms).

Dressing business casual poses a number of additional challenges for people of all genders.<sup>40</sup> Although the lack of a more rigid uniform allows for more creative individual expression,<sup>41</sup> it can also cause anxiety and confusion when assessing the boundaries of appropriate work attire.<sup>42</sup> Whether business dress or business casual is expected, women often find themselves seeking to strike the correct balance between professionalism and femininity while ensuring they are not overly sexualized—concerns rarely shared by men.<sup>43</sup>

For LGBTQ lawyers, these issues take on heightened significance. The lesbian who is uncomfortable wearing skirts may consider whether she should adopt more traditional, yet for her, profoundly uncomfortable, symbols of femininity. She may wonder if her physical awkwardness in this feminine costume will actually facilitate her acceptance at work—or undermine it if her discomfort shows. Similarly, a transgender woman may wonder if she would be more successful if

40. For men, business casual options tend to be relatively uncomplicated: slacks or khakis, a button-down shirt, and some combination of jacket, tie, or sweater. By contrast, a women's correlation to men's khakis on business casual days is not khakis—unless they are cropped at the ankle and worn with small heels. See Kane, *Women's Guide*, *supra* note 38 (stating that one should not wear “[c]apri pants that end close to the knee”). While slacks may be more acceptable in winter months, skirts are more likely expected in warmer weather. See Staci Zaretsky, *Summer Associates: Please Don't Dress Like Fashion Victims*, ABOVE L. (June 5, 2012, 12:22 PM), <http://abovethelaw.com/2012/06/summer-associates-please-dont-dress-like-fashion-victims/> [<https://perma.cc/4P2Q-56GG>] (stating that some believe a “skirt suit registers better than a pant suit” because “they are more appealing to men”).

41. Not being limited to grey, black, or navy, and having more selection in suit, skirt, and blouse styling, gives women somewhat more flexibility regarding their presentation. This flexibility, however, typically operates within somewhat rigid boundaries. See Teresa Lo, *How to Dress Business Casual for the Law Office*, JD J. (Dec. 13, 2016), <http://www.jdjournal.com/2016/12/13/how-to-dress-business-casual-for-the-law-office/> [<https://perma.cc/FTU2-MP7G>] (stating that “women attorneys have it harder when it comes to dressing” business casual not only due to the number of options, but also because women must still operate within the confines of traditional conservative dress).

42. See generally *About*, CORPORETTE, <https://corporette.com/about-corporette/> [<https://perma.cc/8NTZ-B8N9>] (stating that Corporette is a fashion and lifestyle blog for female lawyers, bankers, and other female professionals who “need to look professional but want to look fashionable,” founded by a former litigator at a Wall Street law firm); Matt Levine, *Endless Horror and Business Casual*, BLOOMBERG OPINION (June 6, 2016, 8:07 AM), <https://www.bloomberg.com/view/articles/2016-06-06/endless-horror-and-business-casual> (observing there is confusion surrounding “business-casual attire” and many employees continue wearing suits to avoid any fashion mistakes).

43. See Farmer, *supra* note 34, at 4–6 (describing the heightened scrutiny that female attorneys receive about their wardrobe, including testimonials from both practicing attorneys and judges); Lara Bazelon, *What It Takes to Be a Trial Lawyer If You're Not a Man*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/> [<https://perma.cc/W4VB-FNU4>] (providing testimonials recounting intense scrutiny in the courtroom based on perceived femininity and dress).

she dressed as a biological man, knowing she will pay a deep emotional cost if expected to remain closeted.<sup>44</sup> Analogous questions may arise for lawyers of color and lawyers who are religiously-observant, who may have to decide whether they can present their core identities or must assimilate to dominant appearance norms and expectations to thrive in their respective workplaces.

The resistance to change regarding professional appearance mirrors other ways in which the legal profession has been slow to progress. Although roughly equal numbers of women and men have graduated from law school over the last thirty years,<sup>45</sup> the partnerships at major law firms remain overwhelmingly male,<sup>46</sup> men constitute well over half of tenured law faculties,<sup>47</sup> and the judiciary remains disproportionately male.<sup>48</sup> Lawyers of color are even less represented among law's leaders.<sup>49</sup> In short, the legal profession remains remarkably unchanging

44. This hypothetical presumes that the transgender woman has not had gender confirming surgery. See Natalie Kitroeff, *The Struggle to Change Your Gender While Keeping Your Job*, BLOOMBERG (Aug. 12, 2015), <https://www.bloomberg.com/graphics/2015-transgender-at-work/> (providing examples of hardships encountered by transgender employees before, during, and after transitioning).

45. See generally AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW (2018), <https://www.americanbar.org/content/dam/aba/administrative/women/a-current-glance-at-women-in-the-law-jan-2018.authcheckdam.pdf> [<https://perma.cc/DJP7-D26C>] (presenting statistics of women in the legal profession divided into categories such as women in private practice, women's participation on law review journals, and women acting as general counsels of Fortune 500 companies).

46. Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues*, 100 WOMEN L.J. 25, 26 (2015) (finding that the number of female partners in law firms has barely increased in the last decade).

47. See ELIZABETH MERTZ ET AL., AM. BAR FOUND, AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE U.S. 14 (2011), [http://www.americanbarfoundation.org/uploads/cms/documents/after\\_tenure\\_report-final\\_abf\\_4.1.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/after_tenure_report-final_abf_4.1.pdf) [<https://perma.cc/GT2V-4QEY>] (noting that women composed slightly more than 25% of tenured law faculty); see also AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, *supra* note 45, at 4 (finding women compose 32.4% of law school administration deans).

48. Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Court*, AM. CONST. SOC'Y 7, <https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf> [<https://perma.cc/5C3H-TSPV>] (finding white men comprise 58% of state court judges despite comprising less than one-third of the population).

49. See, e.g., Ediberto Roman & Christopher B. Carbot, *Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?*, 83 IND. L.J. 1235, 1238 (2008) (underscoring the absence of Latinx faculty on law school faculties); *Despite Small Gains in the Representation of Women and Minorities Among Equity Partners, Broad Disparities Remain*, NAT'L ASS'N L. PLACEMENT (June 2015), <http://www.nalp.org/0615research> [<https://perma.cc/A44A-Q2DQ>] (stating that despite recent gains, "[e]quity partners in multi-tier law firms continue to be disproportionately white men"); Casey C. Sullivan, *How Law Firms Can Improve Diversity in the Legal Industry*, FINDLAW (Dec. 28, 2016, 2:47 PM), <http://blogs.findlaw.com/strategist/>

in its structure and expectations. It should be no surprise, perhaps, that expectations of lawyers' dress and appearance have also remained static.

### B. *The Law of Workplace Appearance*

Constitutional and statutory law has shaped how employees present themselves in the workplace.<sup>50</sup> Courts routinely allow other industries, from the military to fast-food restaurants, to regulate their employees' appearances. They have upheld requirements that workers wear uniforms,<sup>51</sup> sport "conventional" hairstyles (that is, those worn more easily by white employees),<sup>52</sup> or wear stockings, makeup, and nail

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2016/12/how-law-firms-can-improve-diversity-in-the-legal-industry.html [https://perma.cc/J3RP-Q3F6] (suggesting ways to increase diversity within the legal profession).

50. See ROBSON, *supra* note 10, at 1 (examining the "constitutional considerations [that] constrain and confirm our daily choices" of dress, hairstyle and shoes, particularly with regard to hierarchy and sexuality). Compare Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031–32 (2015) (holding for plaintiff after company declined to hire her as a sales associate because her hijab violated the company's "look policy," which prohibited employees from wearing head scarves), with Goldman v. Weinberger, 457 U.S. 503, 510 (1986) (holding that Jewish officer did not have constitutional right to wear a yarmulke in contravention of Air Force regulation prohibiting wearing headgear indoors).

51. See ROBSON, *supra* note 10, at 88–90 (describing how courts have upheld employer requirements that certain workers wear uniforms).

52. Hairstyles commonly considered to be professional include those naturally occurring in white employees, while naturally occurring hairstyles for many people of color are considered unprofessional and inappropriate. See D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GENDER, RACE & JUST. 405, 407–08 (2011) (reflecting on "the role of hair in Black women's attainment and maintenance of equal employment opportunities" and commenting on the privilege, stigmatization, and stereotyping that occurs when women of color wear natural hairstyles); Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL'Y 407, 407 (2007) ("[S]ocial science research [proves] women and minorities suffer a disadvantage in crafting [a] professional image due to . . . workplace norms . . . that reward White male standards of behavior and appearance."); see also *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 259–61 (S.D.N.Y. 2002) (upholding UPS dress code requiring driver to cut his Nubian locks or wear them under a UPS-issued cap). UPS requires male drivers to wear hairstyles in a "businesslike manner," finding "locked hair"—along with "ponytails, mohawks, green hair, [and] 'carved' shapes unacceptable. *Id.* at 259. However, supervisors are permitted to interpret and enforce these guidelines based on their "common sense." *Id.* In the New York area, of eighteen UPS drivers who were required to wear hats to cover their hairstyles to comply with UPS's appearance policy, seventeen were Black. *Id.*; see also *Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1144 (S.D. Ala. 2014) (finding employer's policy prohibiting dreadlocks was not discriminatory against Black employee under Title VII); *Burchette v. Abercrombie & Fitch Stores, Inc.*, No. 08-Civ-8786(RMB)(THK), 2010 WL 1948322, at \*12 (S.D.N.Y. May 10, 2010) (granting defendant's motion for summary judgment against Black female plaintiff who claimed she was terminated from employment for having a blonde streak in her hair); *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306,

polish.<sup>53</sup>

In contrast, relatively few legal opinions have addressed expectations of professional appearance in white-collar environments.<sup>54</sup> The most compelling case involved Price Waterhouse employee Ann Hopkins, a management consultant with impeccable employee reviews.<sup>55</sup> After being initially denied partnership, she was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” if she wanted a second chance at partnership.<sup>56</sup> The defendants’ partnership evaluations also suggested that Ms. Hopkins’s “aggressive” demeanor was insufficiently feminine to please upper-level management.<sup>57</sup> Following her second review, Ms. Hopkins was again denied partnership.<sup>58</sup> She sued, and the United States Supreme Court held that the firm’s partners had engaged in sex-based discrimination under Title VII of the Civil Rights Act.<sup>59</sup>

at \*6 (M.D. Ga. Apr. 25, 2008) (preserving employer’s prohibition against uncovered natural hairstyles, which forbade plaintiff from wearing her hair in a cornrow hairstyle).

53. See *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1083, 1085 (9th Cir. 2004) (upholding under Title VII, the casino’s policies that women in beverage service positions wear makeup, including foundation, blush, mascara, and lipstick; stockings; hair “teased, curled, or styled”; and colored nail polish; and further mandating men not wear makeup or nail polish and keep their hair short). See Gowri Ramachandran, *Intersectionality as “Catch 22”: Why Identity Performance Demands Are Neither Harmless nor Reasonable*, 69 ALB. L. REV. 299, 300–02 (2005) (underscoring the discrimination inherent within “innocent” identity performance demands, made worse for those who inhabit an intersectional identity). See generally Erica Williamson, *Moving Past Hippies and Harassment: A Historical Approach to Sex, Appearance, and the Workplace*, 56 DUKE L.J. 681 (2006) (examining the evolution of sex-based grooming challenges under Title VII).

54. See Ritu Mahajan, *The Naked Truth: Appearance Discrimination, Employment, and the Law*, 14 ASIAN AM. L.J. 165, 177 (2007) (noting the difficulty in maintaining a lawsuit based on appearance discrimination because the appearance policy must involve race, religion, color, national origin, or sex under the governing statutes (e.g., Age Discrimination in Employment Act, Americans with Disabilities Act, Civil Rights Act of 1964) because courts have viewed such grooming policies as neutral).

55. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231, 233–34 (1989) (plurality opinion). The firm is now known as PwC, or PricewaterhouseCoopers. See PwC, [www.pwc.com \[https://perma.cc/X2Y3-7PQ9\]](https://perma.cc/X2Y3-7PQ9).

56. *Price Waterhouse*, 490 U.S. at 235.

57. *Id.* at 233 n.1.

58. *Id.* (stating that the partnership evaluation form revealed that defendants referred to plaintiff as “macho,” suggesting that she needed to take “a course at charm school” and that she “overcompensated for being a woman”).

59. *Id.* at 255. It was not until five or more years after *Hopkins* was decided that scholars began to look at it as a “grooming” case. See Williamson, *supra* note 53, at 684–85 (“[S]ex-based grooming challenges under Title VII [are different] . . . in their chronological context . . . from other areas of sexual discrimination jurisprudence.” (footnote omitted)).

For many years, plaintiffs raising appearance-related claims struggled to prevail under Title VII.<sup>60</sup> In the last decade courts have increasingly understood that sex-based expectations of appearance constitute a form of sex discrimination,<sup>61</sup> even when the claims

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60. See, e.g., *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985) (holding that while a female anchor alleged she was demoted due to her failure to appear sufficiently feminine, she failed to prove that the station's appearance policies were impermissibly motivated by "stereotypical notions of female roles and images, despite ample evidence that the station expected all of its female employees to appear soft and feminine when on the air," and that the station's feminization demands were not demeaning, but simply a result of "the greater degree of conservatism thought necessary in the Kansas City market"); *Baker v. Cal. Land Title Co.*, 349 F. Supp. 235, 238 (C.D. Cal. 1972), *aff'd*, 507 F.2d 895 (9th Cir. 1974) ("[Title VII] . . . certainly should not be used, as the defendant asks us to do here, to compel the continued employment of an employee who persists in affecting some whim of style which his employer deems to be inappropriate to the business image which the employer is attempting to create."). In part, courts expressed concern that such claims were simply vehicles to expand the rights of LGBTQ claimants who were otherwise unprotected against discrimination in the workplace. See *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003), *overruled by Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 339 (7th Cir. 2017) (in *Hamm*, Judge Posner acknowledged that "distinguishing between failure to adhere to sex stereotypes . . . and discrimination based on sexual orientation . . . may be difficult" when "a perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes"; but, held in favor of defendant because sexual orientation is not a protected class under federal antidiscrimination law). See generally Angela Clements, *Sexual Orientation, Gender Nonconformity and Trait-Based Discrimination: Cautionary Tales From Title VII & An Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 185 (2009) (observing that plaintiffs must be careful not to focus on harassment based on their perceived homosexuality because courts are resistant to attempts to "bootstrap" sexual orientation claims to Title VII); Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, YALE J.L. & FEMINISM (1995) (reporting on courts' rejection of claims brought by lesbians and gay men alleging sexual harassment). Cf. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 200–01 (2d Cir. 2017) (distinguishing between a plaintiff's Title VII claims for discrimination based on failure to conform to gender stereotypes and those based on sexual orientation, recognizing the former and declining to address the latter).

61. Plaintiffs have experienced success in federal court and before the EEOC. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1317 n.5 (11th Cir. 2011) ("[S]ex discrimination includes discrimination against transgender persons because of their failure to comply with stereotypical gender norms."); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (noting no distinction exists between the rights of a transgender "litigant who fails to conform to traditional gender stereotypes and . . . [a] 'macho' female who . . . is perceived by others to be in nonconformity with traditional gender stereotypes"); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375, 2003 WL 22757935, at \*4 (W.D.N.Y. Sept. 26, 2003) (holding that a transgender plaintiff can bring a Title VII claim "based on the alleged discrimination for failing to 'act like a man'"). See also *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*11 (E.E.O.C. Apr. 20, 2012) ("[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex' and such discrimination therefore violates Title VII."). See also N.Y. COMP. CODES R. & REGS. tit. 9, § 466.13 (2016); N.Y.C., N.Y., LOCAL LAW NO. 3 (2002); N.Y.C., N.Y., ADMIN. CODE § 8-102(23) (2016) (forbidding employers from enforcing dress codes on the basis of

implicate sexual orientation or gender identity.<sup>62</sup> Only a minority of courts have resisted this broader interpretation of Title VII.<sup>63</sup>

By contrast, courts continue to take a more restrictive view of race-based claims under Title VII. For example, employers have been permitted to mandate certain hairstyles and other appearance attributes, notwithstanding the greater burden on people of color. Courts have considered these requirements race-neutral and mutable—and thus unprotected under non-discrimination law.<sup>64</sup> This limited understanding

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gender).

62. See, e.g., *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883, 892 (11th Cir. 2016) (reversing summary judgment for the employer on plaintiff's claim that she was terminated from her job as an auto mechanic because she is transgender); *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005) (holding that a demotion based on a failure to conform to sex stereotypes supported a claim of sex discrimination under Title VII); *Smith v. City of Salem*, 378 F.3d 566, 576 (6th Cir. 2004) (finding that transitioning firefighter had pled sufficient facts to allege sex discrimination); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (stating that, consistent with *Price Waterhouse*, plaintiff could have brought a claim of sex discrimination alleging that harasser was motivated by a belief that plaintiff did not conform to gender stereotypes, but plaintiff did not allege such facts); *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (stating that harassment, which mostly consisted of homophobic insults that reflected defendant's "belief that [the plaintiff] did not act as a man should act," gave rise to a colorable *Price Waterhouse* claim); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (finding plaintiff's claim that she was not hired because she disclosed her identity as a transgender woman could be brought under Title VII); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (finding that transgender plaintiff could bring a claim under the plain language of Title VII and that the discrimination plaintiff encountered was because of sex). See also *supra* note 60 (describing earlier courts' rejection of LGBTQ-linked appearance discrimination claims).

63. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218 (10th Cir. 2007) (holding that Title VII does not protect transsexual employee from discrimination based on her transsexual identity and that plaintiff failed to establish she was discriminated against for failure to conform to traditional gender norms); *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 291 (2d Cir. 1998) (finding against plaintiff who alleged disparate treatment based on her gender non-conforming appearance, in contrast with the treatment of her attractive, stereotypically feminine coworker); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at \*11 (N.D. Ind. Jan. 5, 2009) (finding plaintiff had been fired for failure to comply with a legitimate gender-based appearance code notwithstanding evidence of transphobic comments). More recently, the Trump Administration's Justice Department has filed an amicus brief arguing the 1964 Civil Rights Act does not ban discrimination based on sexual orientation. See Alan Feuer, *Justice Department Says Rights Law Doesn't Protect Gays*, N.Y. Times (July 27, 2017), <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html> [<https://perma.cc/8RVZ-YFNV>] (reporting on Trump Administration efforts to curtail LGBTQ civil rights).

64. See generally Sharon Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483 (2011) (explaining that employers can consider only mutable characteristics when establishing appearance requirements); see also D. Wendy Greene, *Title VII: What's Hair (And Other Race-Based Characteristics) Got To Do With It?*, 79 U. COLO. L. REV. 1355, 1358 (2008) (observing that courts have held that race-based

of the import of identity and appearance, even when largely constrained to blue- and pink-collar positions, continues to affect workplace appearance expectations more broadly—including in the law office.<sup>65</sup>

Part II explains the science of fast thinking and implicit bias, revealing how they compound the negative impact appearance expectations can have on outsider attorneys.

## II. UNCONSCIOUS ASSUMPTIONS AND ACCIDENTAL INSULTS: FAST THINKING AND IMPLICIT BIAS

In the legal profession, where appearance is unrelated to ability,<sup>66</sup> appearance should not affect hiring and promotion decisions. Studies have established, however, that people perceived as physically appealing are more likely to be seen as “smart, likeable, and good,” which influences perceptions of a person’s competence and abilities.<sup>67</sup> The inverse is also true: Those who are not conventionally attractive or who do not conform to traditional expectations of presentation may find themselves excluded from opportunities for professional development and success.<sup>68</sup>

No one likes to think she is susceptible to making significant decisions based on superficial or unconscious reactions. More than fifty years ago, however, sociologist Erving Goffman insightfully described identity as two-fold—how we understand ourselves internally, which he termed “actual social identity,” and how we are perceived by others, which he called “virtual social identity.”<sup>69</sup> As Goffman explained,

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mutable characteristics disproportionately affect employees of color). See also *supra* note 52 (describing courts’ treatment of hairstyles worn primarily by Blacks as mutable and not race-based).

65. *Shahar v. Bowers*, 114 F.3d 1097, 1110 (11th Cir. 1997) (ruling that revocation of an employment offer when defendant learned of pending “marriage” ceremony between female employee and another woman [prior to marriage equality holdings] did not amount to discrimination).

66. See RHODE, *supra* note 33, at 6 (stating that “appearance has no demonstrable relationship to ability” in law).

67. See *id.* at 6, 24 (stating that being attractive can positively affect how one is perceived at work, as well as one’s income and status); Vicki Ritts et al., *Expectations, Impressions, and Judgments of Physically Attractive Students: A Review*, 62 REV. EDUC. RES. 413, 413 (1992).

68. See, e.g., Carbado & Gulati, *supra* note 29.

69. Goffman explains that, ultimately, we “realize that all along we had been making certain assumptions as to what the individual before us ought to be. [These assumptions, and all that] we impute to the individual [based thereon, constitute that person’s] *virtual social identity*. The category and attributes he could in fact be proved to possess [is] his *actual social identity*.” GOFFMAN, *supra* note 23, at 2. Other discrepancies may cause the person to be elevated in others’ perception, such that it “causes us to alter our estimation of the individual upward.” *Id.* at 3; see also Fisk, *supra* note 6, at 1144 (“Every observer of appearance regulation, at least since Erving Goffman’s influential . . . book *Stigma*, has noted that appearances are meaningful because they

“[w]hen a stranger comes into our presence . . . first appearances are likely to enable us to anticipate his category and attributes,” or his virtual social identity.<sup>70</sup> When a person’s virtual social identity renders him “less desirable,” he is “reduced in our minds from a whole and usual person to a tainted, discounted one.”<sup>71</sup> This status reduction, or stigma, says Goffman, is a powerful label that can be both imposed externally by others and internalized by the stigmatized individual.<sup>72</sup> Further, stigma is a context-specific attribute: what is stigmatizing in one setting may not be in another.<sup>73</sup>

Goffman’s work remains quite relevant. Potential employers are not immune from unconsciously judging outsider law students and recent graduates as having certain attributes, including negative or stigmatizing traits, based on their race, gender, sexual orientation, or religion.<sup>74</sup> Further, outsiders may internalize these sentiments, undermining their self-esteem<sup>75</sup> and undercutting their potential for success in the workplace.<sup>76</sup>

Over the last two decades, social psychologists have developed new tools to study how people make quick assessments of others. Nobel Prize winner Daniel Kahneman, in *Thinking, Fast and Slow*, describes

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enable both the viewer and the viewed to establish a social identity by association with a category.”).

70. GOFFMAN, *supra* note 23, at 2.

71. *Id.* at 3.

72. *Id.* at 6–7 (stating that although a stigmatized individual may “not seem to be impressed or repentant” about this identity, he is susceptible to “self-hate and self-derogation”).

73. *Id.* at 3 (stating that stigma is “a language of relationships, not attributes”). Goffman describes the “professional criminal” who did not want to be seen going into a public library because it would be stigmatizing, noting that the same act by an educated person would have no stigma at all. *Id.*

74. See Dennis Nickson et al., *Bringing in the Excluded? Aesthetic Labour, Skills, and Training in the ‘New’ Economy*, 16 J. EDUC. & WORK 185, 185–86 (2003) (stating that employers “seek[] employees who can portray the firm’s image through their work”; therefore, some “employees will be excluded . . . because employers determine who is aesthetically acceptable during [the] recruitment and selection processes”); cf. Cecil J. Hunt, *Guests in Another’s House: An Analysis of Racially Disparate Bar Performance*, 23 FL. ST. U. L. REV. 721, 771 (1996) (describing a law professor’s flawed attempt to protect students of color by not calling on them).

75. See Robert S. Chang & Adrienne D. Davis, *An Epistolary Exchange Making up Is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J.L. & GENDER 1, 13 (2010) (stating that the microaggressions experienced as a student can “form the principal foundation that verifies [one’s later sense of] inferiority”); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (describing microaggressions as “‘subtle, stunning, often automatic, and non-verbal exchanges which are ‘put downs’” . . . [that can be viewed] as ‘incessant and cumulative’ assaults on [] self-esteem”).

76. See *infra* Part III.

how our brains function, metaphorically, along two systems.<sup>77</sup> System 1 works “automatically and quickly, with little or no effort.”<sup>78</sup> We are born with some of its capacities,<sup>79</sup> while others “become fast and automatic through prolonged practice.”<sup>80</sup> Examples of System 1 include the ability to orient oneself to the source of a sudden sound and the capacity to read words on a large billboard.<sup>81</sup>

System 2 allows us to concentrate, perform a difficult task, or try to learn something new. To perform well, System 2 requires us to pay attention and employ effort,<sup>82</sup> activities that are reflected in physiological changes.<sup>83</sup> Examples of System 2’s functions include maintaining a faster walking speed than natural or evaluating the appropriateness of one’s behavior in a social situation.<sup>84</sup>

Neither system is objectively better than the other and humans need both to survive.<sup>85</sup> Further, neither system is flawless. System 1 makes fast judgments that are sometimes incorrect. For example, most people looking at the images below would insist that the table tops are different sizes.<sup>86</sup>

77. See KAHNEMAN, *supra* note 15. Kahneman and Amos Tversky, his long-time collaborator, first wrote about many of the ideas presented here in jointly written articles. See generally Daniel Kahneman & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) (discussing the three heuristics that are used in making judgments under uncertainty); Amos Tversky & Daniel Kahneman, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341 (1984) (discussing the cognitive and psychophysical determinants of choice in risky and riskless contexts). Malcolm Gladwell popularized some of these concepts in his book BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).

78. KAHNEMAN, *supra* note 15, at 21.

79. *Id.* at 22 (“Several [System 1 capacities] are completely involuntary.”).

80. *Id.* at 21–22.

81. *Id.* at 21. Other examples of System 1’s functions include the ability to detect hostility in a voice or to understand simple sentences. *Id.*

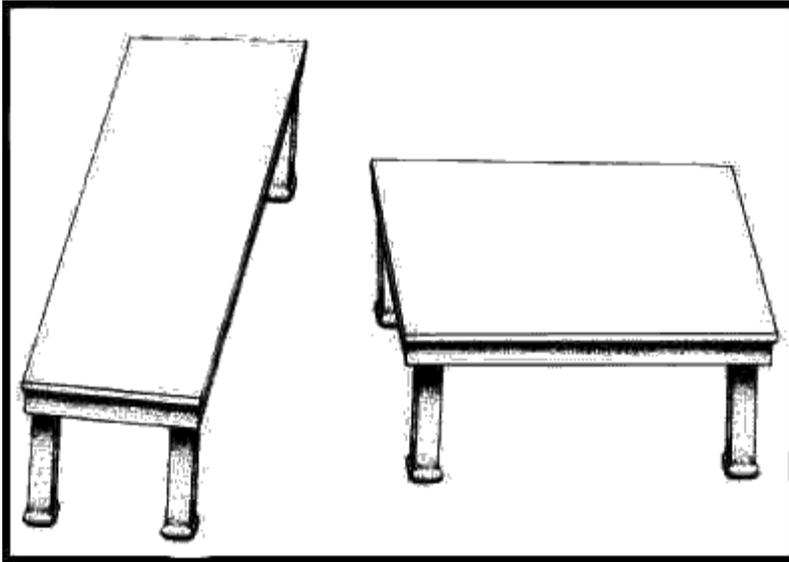
82. *Id.* at 23, 31. Kahneman describes System 2 as lazy and reluctant “to invest more effort than is strictly necessary.” *Id.* at 31.

83. *Id.* at 32–35 (describing how a “pupil dilates by about 50% of its original area and heart rate increases by about 7 beats per minute” when a person expends mental effort). Kahneman describes how expending mental effort in one area can cause us to become “effectively blind” to other stimuli. *Id.* at 23 (citing CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA* (2010)).

84. *Id.* at 22. Other examples of System 2’s capacities include focusing on the voice of a particular person in a crowded and noisy room, searching memory to identify a surprising sound, or telling someone your phone number. *Id.*

85. *Id.* at 28–30 (observing that though each system performs different functions, together they allow the individual to function in society).

86. BANAJI & GREENWALD, *supra* note 16, at 3–4; James Dean, *Table Tops Optical Illusion*, MIGHTY OPTICAL ILLUSIONS (May 9, 2006), <http://www.moillusions.com/table-tops-optical-illusion/> [<https://perma.cc/9SHR-QMDD>].



Cutting out the top of one of the tables and holding it over the other would quickly reveal, however, that the tabletops are exactly the same size.<sup>87</sup> This “mindbug”<sup>88</sup> is an example of how the speed of System 1 does not always yield accuracy and how first impressions—of things and people—can be incorrect.<sup>89</sup>

A close link exists between Kahneman’s findings on fast, unconscious brain functioning and work by Mahzarin R. Banaji and Anthony G. Greenwald, cognitive psychologists who explain how our brains contain blindspots—places that contain “a large set of biases”—that our brains keep “hidden” from our own awareness.<sup>90</sup> Kahneman’s

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87. BANAJI & GREENWALD, *supra* note 16, at 4 (citing ROGER N. SHEPARD, MIND SIGHTS: ORIGINAL VISUAL ILLUSIONS, AMBIGUITIES, AND OTHER ANOMALIES (1990) (creating this illusion)).

88. *Id.* (“[M]indbugs [are] ingrained habits of thought that lead to errors in how we perceive, remember, reason, and make decisions.” (emphasis omitted)). Kahneman uses a similar example of two lines that deceptively appear to be of different lengths. KAHNEMAN, *supra* note 15, at 27 fig.3 (employing the Muller-Lyer illusion).

89. Such System 1 “mindbugs” are related to “illusions of thought,” which Kahneman labels “cognitive illusions.” KAHNEMAN, *supra* note 15, at 27 (emphasis omitted). System 2 also is susceptible to error because it requires significant effort to keep on track. *Id.* at 41 (describing the impact of a “few drinks,” a “sleepless night,” or other mechanisms that facilitate disinhibition on self-control). When System 2 is loosened or overtaxed, System 1 tends to assert control, which makes people more prone “to make selfish choices, use sexist language, and make superficial judgments in social situations.” *Id.* at 41 (describing what occurs when people are “cognitively busy” (emphasis omitted)).

90. BANAJI & GREENWALD, *supra* note 16, at xii. As described by Banaji and Greenwald, “[o]nce lodged in our minds, hidden biases can influence our behavior toward members of particular social groups, but we remain oblivious to their influence.” *Id.*

System 1 errors are found not only in misperceiving the sizes of the tabletops, a harmless “mindbug,” but also in the potentially more destructive blindspots and implicit biases that affect human interaction.<sup>91</sup>

According to Banaji and Greenwald, these occasionally false “bits of knowledge” lodge in our minds “because we encounter them so frequently” in daily life.<sup>92</sup> These biases are beyond conscious control, occurring within fractions of a second as we assess our physical and social surroundings.<sup>93</sup> Both the development and persistence of these blindspots, as unwanted as they are, are part of the human condition.<sup>94</sup>

Anthony Greenwald developed the Implicit Assumption Test (IAT) as a means to observe and assess biases outside of an individual’s “conscious awareness and control.”<sup>95</sup> Indeed, data collected by IAT researchers over the last decade have established that an “automatic White preference is pervasive in American society,” with almost 75 percent of those taking the Race IAT revealing an “automatic White

91. *See id.* at 94–122, 140–44 (describing “the hidden costs of stereotypes” and providing examples involving improper medical diagnoses and inadequate recommended treatment).

92. *Id.* at xii; *see also* SUE, *supra* note 4, at 2 (“Scholars suggest that it is nearly impossible for any of us not to inherit the racial, gender, and sexual-orientation biases of our forebears.”).

93. BANAJI & GREENWALD, *supra* note 16, at 16–18.

94. *See id.* at 68 (“Whether we want them to or not, the attitudes of the culture at large infiltrate us.”); *id.* at 91 (“It is not possible to be human and to avoid making use of stereotypes.”); *id.* at 17 (“Social mindbugs are not restricted to decisions based on a person’s race or ethnicity. They stem from psychologically and socially meaningful human groups of all sorts. Age, gender, religion, class, sexuality, disability, physical attractiveness, profession, and personality are only a few examples . . .”).

95. Over a period of many years, Greenwald developed what has become known as the Implicit Assumption Test (IAT), beginning by examining associations among insects, flowers, “words pleasant in meaning[,] . . . and unpleasant-meaning words,” observing the more fluid connections made between flowers and pleasant words on one hand and insects and unpleasant words on the other; trying to make the opposite connections proved far more challenging. *Id.* at 37 (emphasis omitted); *see id.* at 34–38. Greenwald began developing the IAT in 1994, *id.* at 32, and first reported on it in 1998. Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197, 197 (2003). The IAT also allows researchers to detect biases about which people may be unwilling to report. *See About Us*, HARV.: PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/aboutus.html> [<https://perma.cc/UU4X-KKZG>]; *Education: Overview*, HARV.: PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/education.html> [<https://perma.cc/6S5B-QZFA>]. This methodology allows researchers to cut past impression management, whereby people tend to give answers that will lead others to see them in the most favorable light. BANAJI & GREENWALD, *supra* note 16, at 27; *see also* ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 10–11 (1959) (discussing the tendency “to suppress . . . immediate heartfelt feelings, conveying a view . . . others will be able to find at least temporarily acceptable [and creating] a veneer of consensus”).

preference.”<sup>96</sup> Analogous preferences are found in IATs that measure implicit assumptions regarding sexual orientation, weight, and gender, among other categories.<sup>97</sup>

For years, Banaji and Greenwald were hesitant to draw a connection between a discriminatory preference and discriminatory behavior, especially among research participants who embrace egalitarian beliefs.<sup>98</sup> More recently, however, they have found that the Race IAT “reliably and repeatedly” predicts discriminatory behavior as observed in a research setting.<sup>99</sup> Such situations include a simulated hiring context, in which white job applicants were preferred over equally qualified Black applicants;<sup>100</sup> a medical setting, where physicians and residents recommended the optimal medical treatment to white patients more than Black patients even though both presented with the same cardiac symptoms; and college students “being more ready to perceive anger in Black faces than in white faces.”<sup>101</sup>

Banaji and Greenwald clarify that an automatic white preference does not necessarily correlate to the racial prejudice one associates with “hostility, dislike, and disrespect.”<sup>102</sup> In other words, although people may make choices stimulated by subconscious bias, this is not

96. BANAJI & GREENWALD, *supra* note 16, at 47. The authors found the 75% preference figure to be “surprisingly high.” *Id.* This statistic applies across demographic groups, with the exception of African Americans, of whom about one-third show “automatic White preference on the Race IAT.” *Id.* at 221 n.6. The researchers acknowledge that the sample of those taking the Race IAT “is not a representative sample of the American population.” *Id.*

97. *Id.* at 69; Yoel Inbar, et al., *Disgust Sensitivity Predicts Intuitive Disapproval of Gays*, 9 *EMOTION* 435, 438 (2009) (finding implicit bias present in simulations measuring sexual orientation discrimination).

98. BANAJI & GREENWALD, *supra* note 16, at 46–47.

99. *Id.* at 47.

100. This Article capitalizes “Black” for the reasons described by Lori L. Tharps, *The Case for Black With a Capital B*, N.Y. TIMES (Nov. 18, 2014), [https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html?Smid=tw-share&\\_r=1](https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html?Smid=tw-share&_r=1) [<https://perma.cc/YBY7-YQ4H>] (stating that capitalizing the word Black is a matter of respect, reflecting that Black people “are indeed a people, a race, a tribe”), and chooses not to capitalize “white” for the rationale provided by Luke Visconti, *Why the “B” in “Black” Is Capitalized at DiversityInc.*, DIVERSITYINC (Aug. 10, 2009), <https://www.diversityinc.com/why-the-b-in-black-is-capitalized-at-diversityinc> [<https://perma.cc/WY6K-BFVR>] (“Our capitalization of ‘Black’ is both a reflection of reality and of respect”; “‘white’ [does not] need[] to be capitalized because people in the white majority don’t think of themselves that way . . . [t]he exception is white supremacists.”).

101. BANAJI & GREENWALD, *supra* note 16, at 49. Banaji and Greenwald describe the results of thirty-two studies in which “[race-relevant] behaviors . . . [were] predicted by . . . automatic White preference.” *Id.*

102. *Id.* at 52.

voluntary<sup>103</sup>—it is, in fact, something most would like to change.<sup>104</sup> Yet these “blindspots”—the “relatively unconscious and relatively automatic features of prejudiced judgment and social behavior”—can nonetheless lead people to disfavor “socially stigmatized groups.”<sup>105</sup>

Lawyers are not immune from making these mistakes. In 2014, Nextions, a leadership and consulting company,<sup>106</sup> reported on its study asking law firm partners to review a writing sample identified as having been authored by Thomas Meyer, a third-year associate and a graduate of NYU Law School.<sup>107</sup> Half of the partners were told Mr. Meyer was African American and half were told that he was white.<sup>108</sup> The memo was rated 4.1/5.0 when Mr. Meyer was identified as white, but 3.2/5.0 when he was identified as African American.<sup>109</sup>

The partners’ remarks reflect their implicit bias. The comments for the white associate included the following: “generally good writer but needs to work on . . .”; “has potential”; and “good analytic skills.”<sup>110</sup> The comments for the African American associate included the following: “needs lots of work”; “can’t believe he went to NYU”; “average at best.”<sup>111</sup> Nextions identifies these results as “confirmation bias,” which it describes as a “mental shortcut—a bias—engaged by the brain that makes one actively seek information, interpretation and memory to only observe and absorb that which affirms established beliefs while missing data that contradicts established beliefs.”<sup>112</sup>

103. *But see* Carbado et al., *supra* note 20.

104. *See* BANAJI & GREENWALD, *supra* note 16, at 60.

105. Michael Brownstein, *Implicit Bias*, STAN. ENCYCLOPEDIA PHIL. (Feb. 26, 2015), <https://plato.stanford.edu/entries/implicit-bias/> [<https://perma.cc/7X3B-PMZG>].

106. *See* NEXTIONS CONSULTING, <http://www.nextions.com/consulting-services/> [<https://perma.cc/9M2Y-RPT4>].

107. *See* Dr. Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS CONSULTING (2014), <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf> [<https://perma.cc/C9X9-D7YN>].

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* This phenomenon has also been described as the availability heuristic (or schema), which causes individuals to “judge the likelihood of an event by the ease with which they can recall examples of similar events.” Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 L. & HUM. BEHAV. 5, 12 (2003). This occurs more frequently when the individual already has specific details in mind relating to what is being judged. *See* João N. Braga et al., *The Effects of Construal Level on Heuristic Reasoning: The Case of Representativeness and Availability*, 2 DECISION 216, 218 (2015); *see also infra* Section IV.A.3 (discussing the backfire effect).

Although no magic bullet exists to eliminate these blindspots, researchers have identified a number of correctives.<sup>113</sup> Kahneman suggests that by using the capacities found in System 2 to slow System 1, people can seek to unlearn implicit biases.<sup>114</sup> Enhancing insiders' awareness of such biases has been used in numerous settings, including the legal workplace.<sup>115</sup>

Blocking or inhibiting such biases has also proven successful, for example, in diversifying orchestras.<sup>116</sup> By using a screen to prevent the selection committee from learning any demographic information about those auditioning, orchestras have hired increasing numbers of women.<sup>117</sup> In the legal context, employers could consider using similar blocks—removing names or extra-curricular activities from resumes of applicants—to diminish the impact of inadvertent bias.<sup>118</sup>

Similarly, experts have begun to develop evidence-based procedures to remove discretion from decision-making processes that might allow mindbugs to take hold, particularly in medical settings.<sup>119</sup> Legal employers can adapt this principle by using uniform interview questions to assess candidates, more specific fact-based criteria to provide feedback to employees, and formal mechanisms for assigning sought-after work experiences.<sup>120</sup>

Finally, it appears that exposure to counter-stereotypes—for example, women as scientists, older people as admirable and accomplished, and people of color as high academic achievers—also helps individuals counter the mindbugs they have unwittingly accumulated.<sup>121</sup> Thus, the more successful legal employers are in

113. The question here is “how do we make the ‘invisible’ visible for well-intentioned people who harbor unconscious racist, sexist, or heterosexist attitudes and beliefs?” SUE, *supra* note 4, at 50–51.

114. Banaji and Greenwald believe blindspots can be corrected. See BANAJI & GREENWALD, *supra* note 16, at 69–70 (noting that the “reflective mind” can be used to overrule “the power of the unconscious mind”).

115. See *infra* Part IV.

116. BANAJI & GREENWALD, *supra* note 16, at 146–47.

117. See *id.* at 147 (noting that by using “blind auditions, the proportion of women hired by major symphony orchestras doubled—from 20 percent to 40 percent”).

118. See *infra* Section IV.B.1.a.

119. BANAJI & GREENWALD, *supra* note 16, at 149. Employing evidence-based techniques led to gender-neutral screening recommendations that everyone over the age of twenty get their cholesterol levels checked at least every five years, replacing a bias that favored testing only men. *Id.* at 153–54. Historically, men were inaccurately perceived as being at greater risk for heart disease than women. Using evidence-based guidelines obviates any false perceptions or stereotypes the doctor may have about the relative risks faced by men and women. *Id.* at 154.

120. See *infra* Section IV.B.1.a.

121. BANAJI & GREENWALD, *supra* note 16, at 149–52, 163–64. Mindbugs, indeed, “may prove modifiable by exposure to role models.” *Id.* at 164. This approach, however, seems to

diversifying their ranks, the more likely they will be able to continue to do so.<sup>122</sup>

Admittedly, one of the difficulties in breaking implicit biases is that the human brain “must think with the aid of categories [that] . . . are the basis for normal prejudice. We cannot possibly avoid this process. Orderly living depends on it.”<sup>123</sup> This very human tendency to create order through the use of categories—relying on System 1—is, however, exactly what may end up most undermining the efforts of outsider lawyers and law students who do not conform to appearance expectations to be hired or to be perceived as doing quality work.<sup>124</sup> These difficulties are explored further in Part III.

### III. IDENTITY PERFORMANCE AT WORK: MICROAGGRESSIONS, COVERING, AND THEIR HARMS

Implicit biases, even when inadvertent or vaguely articulated, can create harmful—even hostile—environments for those standing outside the dominant culture.<sup>125</sup> Norms concerning expected dress or appearance often reflect these biases, continuing traditions embraced long ago, when heterosexual white men were virtually the only people employed in white collar positions, including in law offices.<sup>126</sup>

The outsider lawyers entering the profession in increasing numbers often experience the desire or pressure to minimize their (perceived) differences from their insider colleagues. For example, some may speak formal English in the office, but more idiomatic English with friends;

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produce less durable change. *Id.* at 152; *see, e.g.*, Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 829 (2001) (describing exposure to counter-stereotypes as imagining or referencing notable counter-stereotypes); Nilanjana Dasgupta & Luis M. Rivera, *When Social Context Matters: The Influence of Long-Term Contact and Short-Term Exposure to Admired Outgroup Members on Implicit Attitudes and Behavioral Intentions*, 26 SOC. COGNITION 112, 120 (2008) (finding engagement with counter-stereotypes to be effective for “unlearning” the associations that underlie implicit bias); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 751 (2006) (observing increased counter-stereotyping when contact is made between individuals of equal status in the workplace).

122. *See infra* Section IV.B.

123. BANAJI & GREENWALD, *supra* note 16, at 78 (quoting GORDON ALLPORT, *THE NATURE OF PREJUDICE* 20 (1954)).

124. *See supra* notes 106–12 and accompanying text (discussing the Nextions study of implicit racial bias in a law firm); *see also infra* Part III (discussing the difficulties outsider lawyers may experience fitting in at work).

125. *See infra* Section III.B (defining environmental microaggressions).

126. *See* Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT’L L.J. 335, 335–36 (2006) (identifying the historical demographics of American lawyers); ROBSON, *supra* note 10 (specifying hierarchy and tradition as the primary rationales for legal dress).

select clothing thought to be more gender-conforming; omit references to same-sex partners at the workplace; or remove religious head-coverings while at work.<sup>127</sup>

Derald Wing Sue and others have shown that encountering expectations that impose on one's core identity (microaggressions), deciphering appearance-related (or other) expectations of the dominant culture, and conforming to or resisting these criteria (covering), require a great deal of effort, can appreciably diminish one's sense of belonging and self-esteem, and even reduce one's workplace performance.<sup>128</sup> Part III explores the maze of challenges and harms caused by these obstacles.

### A. *The Paradox of Dominant Culture*

A great paradox of belonging to the dominant culture is that this belonging and its attendant privilege is often invisible.<sup>129</sup> Further, although appearance expectations in the workplace are steeped in history and rarely have external or objective purpose,<sup>130</sup> they are presented as “morally neutral, normative, and . . . ideal.”<sup>131</sup> Inevitably, the dominant culture can be more visible to outsiders as they attempt to decipher and then accommodate to these norms. As a profound reflection of this paradox, while most white people see race as a diminishing concern,<sup>132</sup>

127. See *infra* Section III.C.2 (describing covering).

128. See *infra* Section III.C.2.

129. See, e.g., Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 245 (2005) (citing Barbara Flagg's observation that “white people have an option, every day, not to think of themselves in racial terms” and quoting Flagg's insight that, “whites appear to pursue that option so habitually that it may be a defining characteristic of whiteness: To be white is not to think about it” (quoting Barbara J. Flagg, “*Was Blind But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 (1993))).

130. One can argue that there is a reason for dress codes in the courtroom, where the attorney must put first the needs of her client. See *supra* text accompanying note 34 (describing the importance of the lawyer not distracting the judge and jury from the needs of one's client); cf. Minna J. Kotkin, *My Summer Vacation: Reflections on Becoming a Critical Lawyer and Teacher*, 4 CLIN. L. REV. 235, 239–40 (1997). Kotkin observed that although there were few women regularly practicing in New York federal courts at the time, those who did “‘dress[ed] for success’ in a traditional way, which mean[t] no pants.” *Id.* She notes, however, that “if we continue to feed into this pattern, things will never change. . . . We'll never know until we try, and to the extent there is any adverse reaction, it's time to confront the issue and educate the judiciary about gender discrimination . . . .” *Id.* Those same arguments could apply to the issues discussed in this Article.

131. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, in RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 188, 189 (Worth Publishers, 6th ed. 2004) (1998).

132. A 2017 survey conducted by the Public Religion Research Institute found that only 50% of white Americans believe Blacks face a lot of discrimination, while 85% of Blacks, 66% of Hispanics, 64% of mixed-race Americans and 55% of Asian-Pacific Islanders responded that Blacks “face significant levels of discrimination today.” Daniel Cox et al., *Who Sees*

people of color experience “racism [as] a constant and continuing reality in their lives.”<sup>133</sup>

Reconsider in this context the work of Erving Goffman, who used the terms “stigmatized” and “tainted” to label those who possess “an attribute that makes [them] different from others” or who stand in contrast to the “whole and usual person.”<sup>134</sup> Stigma is a contextualized, relational concept.<sup>135</sup> The key is who gets to make such determinations;<sup>136</sup> virtually always, it is the dominant culture.<sup>137</sup> When identity-based realities clash, the dominant culture typically defines and imposes its realities upon others.<sup>138</sup> Where leadership remains overwhelmingly white, male, heterosexual, and cisgender, such as in law firms and legal organizations, this culture and its attendant priorities constitute the norm.<sup>139</sup>

Not surprisingly, because people are expected to accommodate norms of behavior and productivity in the workplace, most employees hide some attributes from their superiors and colleagues.<sup>140</sup> Devon

*Discrimination? Attitudes on Sexual Orientation, Gender Identity, Race, and Immigration Status*, PUB. RELIGION RES. INST. (June 21, 2017), <https://www.prii.org/research/americans-views-discrimination-immigrants-blacks-lgbt-sex-marriage-immigration-reform/> [<https://perma.cc/S7VV-FNR7>]; see also Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J.L. & SOC. POL’Y 473, 484 n.94 (2011) (alluding to the perspective of many white individuals that “if I do not notice race, then I cannot be racist” (quoting Michael I. Norton et al., *Colorblindness and Interracial Interaction: Playing the Political Correctness Game*, 17 PSYCHOL. SCI. 949, 949 (2006))).

133. Derald Wing Sue et al., *Racial Microaggressions Against Black Americans: Implications for Counseling*, 86 J. COUNSELING & DEV. 330, 330 (2008).

134. GOFFMAN, *supra* note 23, at 3; see also *supra* Part II (quoting Goffman’s observation that when a person’s virtual social identity renders him less desirable, he is reduced in people’s minds as tainted).

135. See GOFFMAN, *supra* note 23, at 3.

136. See *id.* (“An attribute that stigmatizes one type of possessor can confirm the usualness of another, and therefore is neither creditable nor discreditable as a thing in itself.”).

137. Goffman notes that what is identified as stigmatizing to one may be acceptable, or even valued, by others. See *id.*; Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, in *WOMEN: IMAGES AND REALITIES* 427, 428 (Amy Kesselman et al. eds., 3d ed. 2003) (“In [A]merica, this norm is usually defined as white, thin, male, young, heterosexual, christian, and financially secure.”).

138. SUE, *supra* note 4, at 47 (citing studies concluding that “the most disempowered groups have a more accurate assessment of reality, especially relating to whether discriminatory behavior is bias-motivated”).

139. See *supra* note 49 and *infra* notes 199, 231 for data on the continuing low numbers of women and people of color in leadership positions in the law. See also Carbado & Gulati, *Law and Economics*, *supra* note 4, at 1759 (describing the “internal dynamics of the workplace as a determinant of race” and noting that “certain institutional arrangements within the workplace are more likely to produce problematic racial outcomes than others”).

140. Both insiders and outsiders are motivated to blend in and seek acceptance in the workplace. This leads some people to hide parts of themselves that they fear will lead to rejection and failure. Post-modern theories exploring how well a person can or does know herself are

Carbado and Mitu Gulati describe this masking of one's true self as a regular negotiation that everyone must endure in the workplace.<sup>141</sup> Employees must understand and comply with not only explicit information and expectations, such as the time to arrive at work, but also implicit messages, such as the office dress code. Many employees, responding to these motivators, wake up earlier than they would like, work later than they would like, and flatter their supervisors more than they feel is deserved.<sup>142</sup>

Kenji Yoshino references the work of D.W. Winnicott to explain this phenomenon.<sup>143</sup> Most people have a sense of their "true selves"<sup>144</sup> and feel genuine and fully alive when acting in concert with their primary values, morals, or identity.<sup>145</sup> Most are also familiar with the "false self," the less genuine representation that mediates between one's core identity and societal expectations, which facilitates compliance with everyday demands.<sup>146</sup>

The distance between one's true self and office-based conformance demands tends to be greater for those who do not belong to the dominant culture.<sup>147</sup> Outsider attorneys routinely grapple with the extent to which they are willing to conform, suffering an additional distracting burden.<sup>148</sup> By contrast, insiders do not carry these burdens, spending less energy second-guessing the potential subtext of a comment or workplace policy, and instead devoting more of their full mental facilities toward their work product and bonding with coworkers.<sup>149</sup>

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beyond the scope of this Article. *See generally* JUDITH BUTLER, UNDOING GENDER (2004) (explaining post-modern gender theories).

141. *See* Carbado & Gulati, *Working Identity*, *supra* note 4, at 1263.

142. Workplace performance reflects an ongoing negotiation the employee engages in between the employee's "true identity" and the values of the employer. *See id.* at 1263–66 (describing a shy employee who decides to attend after-work events and engage in office small talk, compromising his true self, to impress his employer who values collegiality and teamwork).

143. YOSHINO, *supra* note 22.

144. Yoshino describes the work of D.W. Winnicott, an object-relations psychologist prominent in the mid-1900s, who discussed the wholeness of the "True Self." *Id.* at 184–86; *see id.* at 185 (noting that finding the True Self is "more than existing; it is finding a way to exist as oneself, and to relate to objects as oneself, and to have a self into which to retreat for relaxation" (quoting D.W. WINNICOTT, *Mirror-Role of Mother and Family in Child Development*, in PLAYING AND REALITY 111, 117 (1971))).

145. Yoshino observes that the True Self "is associated with human spontaneity and authenticity" and creativity. *See id.* at 185. Consider the potential relationship between the "true self" and the autonomy prong of self-determination theory. *See infra* Section IV.A.2.

146. YOSHINO, *supra* note 22, at 185.

147. *Cf.* NURI-ROBINS & BUNDY, *supra* note 23, at 19, 54 (describing how the dominant culture determines the "[h]ouse rules" and "sets the norms for interactions").

148. *See infra* Section III.C (discussing the harms of microaggressions and relevant appearance-based coping mechanisms).

149. *See* SUE, *supra* note 4, at 6.

At the heart of this dissonance is the experience of microaggressions, which at their core reflect the quick thinking and implicit bias described in Part II. The sections that follow define microaggressions and explore their impact in the workplace—in other words, they consider what happens when fast-thinking brains and insiders’ implicit biases go to work.

### B. *Microaggression Defined*

According to Derald Wing Sue, microaggressions consist of “the brief and commonplace daily verbal, behavioral, and environmental indignities [and invalidations], whether intentional or unintentional, that communicate hostile, derogatory, or negative . . . slights and insults to the target person or group,” typically based on perceived outsider status.<sup>150</sup> When insider individuals permit implicit biases to escape—through words, silence, or actions—the harm to outsiders can be significant, even when invisible to the perpetrator.<sup>151</sup>

Microaggressions are different from acts or language used to intentionally discriminate based on race, gender, or other attributes of core identity.<sup>152</sup> Microaggressions are typically expressed by those who mean well, believe in equality, and who are “fair-minded and decent people who would never consciously discriminate.”<sup>153</sup> As a result, the “perpetrator” most often means no harm and is not aware that “she has engaged in a behavior that threatens and demeans the recipient.”<sup>154</sup> Indeed, as Kahneman’s explanation of fast thinking and Banaji and

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150. *Id.* at 5; *see also id.* at xv (defining microaggressions as “the constant and continuing everyday reality of slights, insults, invalidations, and indignities visited upon marginalized groups”); Chester M. Pierce et al., *An Experiment in Racism: TV Commercials*, 10 EDUC. & URB. SOC’Y 61, 65 (1977) (coining the term and defining microaggressions as “subtle, stunning, often automatic, and non-verbal exchanges which are ‘put downs’ of blacks by offenders”). The term “micro-inequities” sometimes is also used to describe the small events that are “often ephemeral and hard-to-prove, often unintentional and unrecognized by the perpetrator.” JANIE F. SCHULMAN & STEPHANIE L. FONG, MORRISON FOERSTER, IMPLICIT BIAS IN THE LEGAL PROFESSION 36 (2014), <https://www.acc.com/chapters/sandiego/upload/Implicit-Bias-in-the-Legal-Profession.pdf> [<https://perma.cc/D776-7X4S>].

151. *See SUE, supra* note 4, at xv (“The power of microaggressions lies in their invisibility to the perpetrator, who is unaware that he or she has engaged in a behavior that threatens and demeans the recipient of such a communication.”). Microaggressions and implicit biases both are “difficult to identify, quantify, and rectify because of their subtle, nebulous, and unnamed nature.” *Id.* at 24.

152. *Id.* at 30–31 (contrasting microaggression with “old-fashioned” or “true racism,” which is “direct, deliberate, obvious, and explicit”).

153. *Id.* at xv. There are those who assert that the harms from microaggressions are minimal, if they exist at all. *See id.* at 52 (citing and discussing alternative views).

154. *Id.* at xv.

Greenwald's exploration of implicit bias have shown,<sup>155</sup> they probably had no conscious idea that their brains made such false and hurtful leaps.<sup>156</sup>

Examples of microaggressions stemming from implicit bias include asking a Black lawyer who walks into a conference room if she knows when the attorney will be joining the meeting; addressing the Latino man holding files in the courtroom as the defendant, not the attorney; and assuming that the older white man in the deposition room is the law firm partner, not the stenographer.<sup>157</sup> The lack of harmful intent in each of these scenarios does not diminish their potential harm and can actually make the situation all the more confusing to the recipient.<sup>158</sup>

Isolated microaggressions also contribute to environmental microaggressions, which similarly reflect the unintentional, perhaps unconscious, behavior of institutions and the people who compose them.<sup>159</sup> Thus, a Jew or Muslim may feel that his religion or culture is invisible when invited to the firm's Christmas—not holiday or winter—party, or when the main dish served at the event is ham.<sup>160</sup> Similarly, a gay man—upon finding no openly-LGBTQ people in his workplace—may remain closeted, experience isolation, and feel unwelcome. Further, upon being asked numerous times by her white colleagues whether her hair is “real,” a Black woman may feel that she just does not belong at her workplace.

Both individual and environmental microaggressions send the message that outsiders are atypical,<sup>161</sup> untrustworthy,<sup>162</sup> intellectually

155. See *supra* Part II (describing the work of Kahneman and Banaji & Greenwald).

156. See SUE, *supra* note 4, at xv (observing that “[o]n a conscious level they may endorse egalitarian values, but on an unconscious level, they harbor” less positive feelings).

157. These examples are drawn from experiences relayed to the author.

158. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1140–51 (2008) (detailing the psychological and social costs resulting from experiencing microaggressions); *infra* Section III.C (describing the harms).

159. See SUE, *supra* note 4, at 25 (“The term ‘environmental microaggression’ refers to the numerous demeaning and threatening social, educational, political, or economic cues that are communicated individually, institutionally, or societally to marginalized groups.”).

160. Traditional Judaism and Islam prohibit the eating of pork products. See *Leviticus* 11:3 (forbidding the consumption of any animal that does not have cloven hooves and does not chew its cud, which includes the pig); QURAN, *al-Baqarah* 2:173 (forbidding consumption of “the flesh of swine”).

161. SUE, *supra* note 4, at 78. Messages that one's appearance is “abnormal” can occur when insiders make inappropriate comments when a Black woman wears her hair in a natural style or a man wears traditional African dress. *Id.* Similarly, a message of abnormality is transmitted when a cisgender person asks intrusive or otherwise inappropriate questions of someone who is transgender. See Kitroeff, *supra* note 44 (describing questions faced by transwomen at work).

162. SUE, *supra* note 4, at 79. The message that one is untrustworthy is transmitted when outsiders are not given plum assignments or asked to work for major clients. *Id.*

inferior,<sup>163</sup> indistinguishable from one another,<sup>164</sup> and, ultimately, are less welcome.<sup>165</sup> To minimize these experiences, outsiders will often try to assimilate to expectations of the dominant culture. Yet, this process itself can cause harm.

### C. *The Harms of Microaggressions*

The burden on outsiders to negotiate microaggressions is actually three-fold: First, they are called upon to decipher or interpret what is expected of them by the dominant work culture; second, they may feel compelled to “cover,” or perform their identities in a way that is acceptable to coworkers and supervisors; and third, as a result of the foregoing, they often suffer harm to their self-confidence and experience alienation from others. Each of these harms is explored in greater detail in the sections that follow.

#### 1. Deciphering

To succeed, outsiders often say they must read the minds of those who belong to the dominant culture.<sup>166</sup> For some outsiders, these cultural expectations are relatively easy to decipher;<sup>167</sup> for most, however, the process is complex.<sup>168</sup> Not only are some of the cues of identity performance norms difficult to read,<sup>169</sup> but the “noise” created by navigating the dissonance between one’s true self and one’s workplace self can distract from satisfying workplace demands.<sup>170</sup> By

163. *Id.* at 78. Messages concerning intellectual inferiority may arise, for example, from stereotypes that women are not good in math and science or Asians are not assertive leaders. *Id.* They also can be experienced when an insider falsely assumes that a woman of color is an assistant rather than the manager or supervisor. *Id.*

164. *Id.* The message that each Black or Asian or gay person is fungible for another is experienced when people make statements such as, “You people all look alike,” which implies that “individual differences do not exist” and that the Black, Asian, or gay “experience is universal.” *Id.*

165. *Id.* at 77. This message of not belonging can be transmitted when a Latina attorney is mistaken for a legal assistant in a law firm.

166. *Id.* at 47. Sue notes one of the advantages to this work of mindreading is that “[t]here is considerable evidence to suggest that oppressed groups have developed an ability to discern the truth and to determine reality better than those who occupy positions of power and privilege.” *Id.* at 84.

167. Those better able to read identity performance norms may be familiar with them because their parents held white collar jobs or they were mentored by people with relevant knowledge.

168. See Carbado & Gulati, *Working Identity*, *supra* note 4, at 1269.

169. For example, some law graduates may not be aware that it typically is not acceptable to wear a dark brown suit instead of the more traditional dark gray suit, or that there is an “appropriate” color and width of a tie, or that a heel of over three inches is considered “unprofessional” in most legal settings. See Zaretsky, *supra* note 40.

170. See Anna-Kaisa Newheiser et al., *People Like Me Don’t Belong Here: Identity*

contrast, insiders bear little concomitant burden to understand the experiences of outsiders to succeed.<sup>171</sup>

Employer policies and actions can also reflect implicit bias and incorporate environmental microaggressions. Harmful messages appear on a systemic level<sup>172</sup> and may not even involve interpersonal interactions.<sup>173</sup> For example, a Black associate may not know whether to trust the encouragement he receives or affirmations that he is on partnership track when he sees few people of color on the firm's management team.<sup>174</sup>

Similarly, new attorneys joining a practice that has announced a policy of "color blindness,"<sup>175</sup> yet displays portraits of its all-white, all-male past executive directors, may feel invisible and like they do not belong.<sup>176</sup> Further, when an LGBTQ attorney has been recruited to an institution claiming to seek diversity, but later learns that the firm has an unspoken, yet strict, gender-based dress code, that attorney similarly may feel unwelcome.<sup>177</sup>

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*Concealment is Associated with Negative Workplace Experiences*, 73 J. SOC. ISSUES 341, 342 (2017) ("[I]dentity concealment in fact reduces feelings of belonging, ultimately resulting in negative work-related outcomes (e.g., lower job satisfaction and commitment)" (emphasis omitted)). Newheiser observes that "[h]iding a stigmatized identity can be psychologically and socially costly . . . [and is] associated with negative affect, anxiety, and depression[,] . . . an elevated risk of physical and mental illness[,] . . . lower job satisfaction, lower affective organizational commitment, and greater job-related anxiety." *Id.* (citations omitted).

171. See SUE, *supra* note 4, at 85 ("[T]hose in power are seldom called upon to learn and experience minority cultures . . .").

172. See Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOL. 271, 277 (2007).

173. See SUE, *supra* note 4, at 25.

174. See *id.* at 72.

175. *Id.* at 38 ("The denial of differences is really a denial of [one's own] power and privilege.").

176. See *id.* at 26; see also NURI-ROBINS & BUNDY, *supra* note 23, at 43 (stating that to be color blind "is to fail to see differences or to refuse to acknowledge that differences from the dominant culture make a difference"); SUE, *supra* note 4, at 216–17 (describing how color blind approaches tend to exclude and devalue the experiences of employees of color, making them "more suspicious and mistrustful of the organization"); Destiny Peery, *(Re)defining Race: Addressing the Consequences of the Law's Failure to Define Race*, 38 CARDOZO L. REV. 1817, 1829–30 (2017) (finding majority or high-status individuals prefer a color blind, status quo approach to diversity, which actually fails to improve racial relations).

177. See SUE, *supra* note 4, at 33–34. Decisions of whether to be open about one's LGBTQ status can remain fraught. See NAT'L ASS'N FOR LAW PLACEMENT, INC., REPORT ON DIVERSITY IN U.S. LAW FIRMS 18 (2017) (reporting the low numbers of law firm attorneys identifying as LGBT); Omar J. Alaniz, *The Closet Case: Coming out in the Legal Profession*, A.B.A. (Nov. 7, 2013), <http://apps.americanbar.org/litigation/committees/lgbt/articles/fall2013-1113-closet-case-coming-out-legal-profession.html> [<https://perma.cc/P59A-AR6H>] (describing the personal stress of revealing one's sexual orientation to colleagues in the legal workplace).

In all of these situations, outsiders must decipher and wrestle with the dominant culture, leaving them with an uneasy feeling, wondering whether they are being overly sensitive,<sup>178</sup> depleting their energy and focus.<sup>179</sup> As described in the next section, to mitigate these challenges, many outsiders seek to “cover,” or to bridge the gap between their authentic identity and their workplace identity.

## 2. Covering

Once the expectations of the dominant culture are intuited, understood, or articulated, outsiders may take preemptive steps to diminish insiders’ perceptions that they do not belong.<sup>180</sup> To mitigate these risks or experiences of microaggressions, they opt to cover.<sup>181</sup> Covering can come in many forms, such as appearing to adopt majoritarian values,<sup>182</sup> choosing to avoid affiliation with ethnic/identity organizations, exercising what privilege—such as race or gender—one may have, and conforming one’s appearance to deciphered norms.<sup>183</sup>

People of color, women, and LGBTQ people long have been called upon to cover, with regard to behavior and presentation.<sup>184</sup> An Asian-American man may feel compelled to counter stereotypical expectations that he will be quiet and unassuming by being assertive and taking on leadership roles.<sup>185</sup> A Black woman may be concerned that she will be

178. See SUE, *supra* note 4, at 43–44; *id.* at 55 (describing “attributational ambiguity”).

179. *Id.* at 54.

180. See *id.* at 103. Sue describes “[f]orced compliance” as “a chronic demand placed on marginalized groups.” *Id.*

181. See Carbado & Gulati, *supra* note 29, at 714–19.

182. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 813 (2002) (describing gay men trying to cover by engaging in hyper-masculine acts such as bringing female friends to work parties and laughing at homophobic jokes).

183. See generally YOSHINO, *supra* note 22 (describing ways in which gay men may feel pressure to appear more masculine at work). Yoshino borrows the term covering from Goffman, who describes it as the adaptive efforts that stigmatized people make to reduce the stigma they may otherwise encounter. See *id.* at 18. “Covering” is “a more complex form of assimilation than . . . passing,” the former being a way to “ease matters for those in the know,” the latter being a way to “conceal” stigma, although there is no hard line between the two. *Id.* at 91–92. For example, a gay associate may wish to “cover” among his younger peers at a law firm but feel he must try to “pass” to appease the older partners.

184. Historically, attempts to avoid stigma led some to try to disguise aspects of their true identity: Some light-skinned Blacks presented themselves as white, and gay people have been legally required, or expected, to pass as heterosexual. See Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145–56 (2001). Yoshino describes “Asian-Americans [who] got eyelid surgery, African-Americans [who] straightened their hair, Latinos [who] planed the accents off their names,” as ways outsiders have covered. YOSHINO, *supra* note 22, at 120; see also Carbado & Gulati, *supra* note 29, at 714–19 (discussing race, gender, and covering).

185. See Carbado & Gulati, *Working Identity*, *supra* note 4, at 1268–69 (providing this example).

perceived as loud and confrontational and thus works hard to not reinforce this stereotype, deciding to not address microaggressions or overtly offensive acts.<sup>186</sup>

Women may cover by finding ways “to mute attributes stereotypically associated with women, such as compassion,” or to not highlight their identity as mothers.<sup>187</sup> Ironically, they also may be called upon to “reverse cover” and perform their femininity to establish that they are not like stereotypical men in their dress and comportment.<sup>188</sup> The push and pull of these covering demands have classically been labeled a “double bind.”<sup>189</sup>

People who are LGBTQ also have acceded to the pressure to cover, or not “flaunt,” their sexual orientation in many ways.<sup>190</sup> The choice to not hold the hand of one’s partner in public, to dress in a more masculine or feminine manner than is consistent with one’s gender identity, or to attend professional events ostensibly as a single person are chief among them.<sup>191</sup>

Notwithstanding laws that may prohibit *de jure* discrimination on the basis of race, sex, or sexual orientation,<sup>192</sup> the dominant message is

186. See *id.* at 1289–90 (describing this scenario); see also Daniel Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 42 (2002) (detailing how a Black female undergraduate student from Berkeley, responding to a survey question, stated that “[t]here are times when I want to be angry, but I don’t want to fall into what they think every Black woman is and so a lot of times, I find myself restricted from saying what I feel or doing what I feel because I don’t want to perpetuate negative stereotypes”).

187. YOSHINO, *supra* note 22, at 143. Yoshino also cites the landmark study, *Becoming Gentlemen: Women, Law School, and Institutional Change*, authored by Lani Guinier, Michelle Fine and Jane Balin in 1997, which reported that women at Penn Law School “experienced pressure to desexualize themselves, to eschew stereotypically feminine traits, and to avoid feminist activism”—in other words, to “behave like a gentleman.” *Id.* at 145.

188. See *id.* at 144–57 (describing the experience of Ann Hopkins, who sued Price Waterhouse after it denied her partnership for being, *inter alia*, insufficiently feminine); see also *supra* Section I.B (discussing the *Hopkins* case and the law of workplace appearance more generally).

189. YOSHINO, *supra* note 22, at 145; see also Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 306, 352 (1995) (referring to stereotypical expectations of female associates as a “double bind”).

190. YOSHINO, *supra* note 22, at 19 (explaining how the pressure to pass is “giving way to the demand to cover—gays are increasingly permitted to be gay and out so long as we do not ‘flaunt’ our identities”).

191. See *id.* at 77. Consider, too, the religious man and woman who remove their head coverings to better fit in at the workplace, likely feeling deep guilt about their actions, perhaps hiding their attempts at assimilation from family and community.

192. See, e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–2000e (2012) (prohibiting “discrimination or segregation on the ground of race, color, religion, or national origin” in employment and public accommodations, among other settings). Although LGBT individuals are protected from discrimination in twenty states and the District of Columbia, Congress has still not

clear: although “individuals no longer need[] to *be* white, male, straight, Protestant, and able-bodied; they [still need] to *act* white, male, straight, Protestant, and able-bodied.”<sup>193</sup> Outsiders, weighing how much of their true selves they can bring to the workplace and how much they should cover,<sup>194</sup> continue to hear the message: “Don’t uncover yourself.”<sup>195</sup>

This is not equality—and it can cause significant harm to the outsider.<sup>196</sup> Social psychologists explain how encountering expectations that impose on one’s core identity (microaggressions), and then attempting to conform to them (covering), can lead the outsider to experience a loss of integrity, and thus a decreased sense of confidence and belonging.<sup>197</sup> Deciding whether and how much to cover, as well as the act of covering itself, takes a toll, further distracting the outsider from work assignments and making it more difficult to succeed.<sup>198</sup> In essence, the outsider has a narrower path to workplace acceptance and success.<sup>199</sup>

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enacted a federal non-discrimination law. *Cf.* Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) (providing an explicit, comprehensive federal prohibition against employment discrimination on the bases of sexual orientation and gender identity); *see also* Carbado & Gulati, *Working Identity*, *supra* note 4, at 1293–98 (describing the failure of employment discrimination law to address the demands of covering or otherwise counter stereotypes). *But see supra* Section I.B (identifying decisions protecting LGBTQ people from discrimination under Title VII).

193. YOSHINO, *supra* note 22, at 22.

194. *Id.* at 185 (“[I]n the healthy individual, the False Self is reduced to a ‘polite and mannered social attitude,’ a tool available to the fully realized True Self.” (quoting D.W. WINNICOTT, *Ego Distortion in Terms of True and False Self*, in *THE MATURATIONAL PROCESSES AND THE FACILITATING ENVIRONMENT* 140, 143 (1965))).

195. *Id.* at 22.

196. *Id.*; *see also* Carbado & Gulati, *supra* note 29, at 719–20 (arguing that needing to perform and conform one’s workplace identity is the functional equivalent of workplace discrimination).

197. *See* Tayyab Mahmud, *Citizen and Citizenship Within and Beyond the Nation*, 52 CLEV. ST. L. REV. 51, 58–59 (2005) (observing that microaggressions are “affronts to human dignity and self-respect” that “leave[] scars on their psyche”); *infra* Section IV.A.2 (discussing self-determination theory).

198. *See generally* STEELE, *supra* note 28 (explaining the pervasive difficulty of confronting stereotypes); *see also* Carbado & Gulati, *Working Identity*, *supra* note 4, at 1270 (“[E]mployees not only work at their work, but also work at performing their identities. How hard they work at the latter task turns on whether a positive or negative relationship exists between a stereotype about their identity and workplace criteria, and on the strength of that relationship.”).

199. *See* Jennifer Beaudoin & Kate Frost, *Increasing Diversity in the Legal Ranks*, WHITE COLLAR CRIME COMMITTEE NEWSL. (A.B.A. Crim. Just. Sec., D.C.) (Winter/Spring 2018), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2018/pwc.pdf> [<https://perma.cc/UD83-S2DK>] (noting the slow pace of diversification of the legal profession and the disproportionately low representation of outsider attorneys in leadership positions at law firms, as general counsel, and in other notable positions).

### 3. The Physical and Emotional Toll

Scholars have found that even “trivial” or isolated expressions of unintentional bias can cause harm to the recipient,<sup>200</sup> including repressed anger, low self-esteem, and physical health problems.<sup>201</sup> Microaggressions, however, tend to be “constant, continuing, and cumulative,”<sup>202</sup> creating a generally “hostile and invalidating” environment.<sup>203</sup>

As described earlier, the vague nature of microaggressions makes them particularly powerful. Although one might expect indirect blows to be less unsettling than overt racism,<sup>204</sup> studies have shown that they can actually be more difficult to process than explicit and intentional expressions of bigotry.<sup>205</sup> Indeed, they can lead one to feel powerless

200. SUE, *supra* note 4, at 50 (“[U]nintentional and unconscious bias, while seemingly trivial, can cause significant and major harm to the recipients.”); *see also id.* at 53 (“On the surface, at times, such singular incidents of microaggressions can appear quite innocuous and innocent, but they nevertheless contribute to major harm for the recipients.”).

201. *See* Tara J. Yosso et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate for Latina/o Undergraduates*, 79 HARV. EDUC. REV. 659, 661, 681 n.3 (2009) (“Symptoms associated with racial battle fatigue include: suppressed immunity and increased sickness, tension headaches, trembling and jumpiness, chronic pain in healed injuries, elevated blood pressure, constant anxiety, ulcers, increased swearing or complaining, insomnia or sleep broken by haunting conflict-specific dreams, rapid mood swings, difficulty thinking or speaking coherently, and emotional and social withdrawal.”). Sue notes that “[d]eveloping healthy cultural identities and self-esteem is challenging for [outsiders] as they continuously combat an oppressive society that equates differences with deviance and pathology.” SUE, *supra* note 4, at 86.

202. SUE, *supra* note 4, at 52. The “cumulative weight” of “often innocuous” microaggressions is “diminished mortality, augmented morbidity, and flattened confidence.” *Id.* at 66 (quoting Pierce et al., *supra* note 150).

203. *Id.* at 51; *see also* Keri Lynn Stone, *Decoding Civility*, 28 BERKELEY J. GENDER L. & JUST. 185, 205 (2013) (describing the negative effects of encountering biased speech in the workplace). *See generally* Meera E. Deo, *Two Sides of a Coin: Safe Space & Segregation in Race/Ethnic-Specific Law Student Organizations*, 42 WASH. U. J.L. & POL’Y 83 (2013) (describing how white law school environments are often particularly inhospitable and unfriendly to students of color).

204. *See* SUE, *supra* note 4, at 52–53.

205. *See, e.g., id.* at 31 (noting that overt racist acts are “easier to deal with by marginalized groups because their intent is clear and the psychological energies of people of color, for example, are not diluted by ambiguity”); Solórzano et al., *supra* note 186, at 62, 69 (examining the psychological and emotional harms resulting from racially hostile environments, which include anxiety, depression, and feeling marginalized).

and invisible,<sup>206</sup> or fungible with other members of the outsider group.<sup>207</sup> All of this can create a sense of alienation from one's peers and the workplace.<sup>208</sup>

The conundrum of whether to confront a microaggression is extraordinarily complex and further stress-inducing. This "response indecision"<sup>209</sup> is common, as outsiders fear the ramifications of confronting microaggressive statements and often wonder whether it is worth it to raise the point at all.<sup>210</sup> Although opting not to respond can be a valid and appropriate choice, repeatedly taking this route can also harm one's psychological and physical well-being.<sup>211</sup>

Conversely, responding to perceived microaggressions can lead to an outsider being labeled "overly sensitive and paranoid."<sup>212</sup> This catch-22, and the energy it takes to determine an appropriate reaction, may lead outsiders to become less intellectually and emotionally engaged in their work or studies.<sup>213</sup> These dilemmas grow only more taxing with increased exposure to microaggressions.<sup>214</sup>

These experiences also give credence to the concept of stereotype threat.<sup>215</sup> Claude Steele first proposed this theory to better explain why

206. SUE, *supra* note 4, at 80 (describing powerlessness as being labelled "hypersensitive or angry" for confronting a microaggression, which in turn leaves one with "little effect or control" over later affronts). Women typically feel invisible in the context of "mansplaining," when a man explains something "without regard to the fact that the explainee knows more than the explainer." Lily Rothman, *A Cultural History of Mansplaining*, ATLANTIC (Nov. 1, 2012), <https://www.theatlantic.com/sexes/archive/2012/11/a-cultural-history-of-mansplaining/264380/> [<https://perma.cc/WTQ6-BGNP>].

207. SUE, *supra* note 4, at 82; *see also id.* at 80–81 (describing the experience of being mistaken for another member of the same outsider group). Paradoxically, while experiencing invisibility, outsiders also may experience pressure to represent well their outsider group, meaning they feel "a heightened awareness that every mistake, every failing, and every deficiency exhibited by them would be attributed to their respective minority groups." *Id.*

208. *Id.* at 52 (referencing a decline in productivity and problem-solving capacities).

209. *Id.* at 55.

210. *Id.*

211. *See id.* at 57 (describing how microaggressions can cause "major psychological and physical harm"); Yosso et al., *supra* note 201 ("In anticipation of a racial conflict, reported symptoms include a pounding heartbeat, rapid breathing, an upset stomach, and frequent diarrhea or urination.").

212. SUE, *supra* note 4, at 58.

213. *Id.* at 54 (reporting that the "work productivity, problem-solving abilities, and learning capabilities [of outsiders] can suffer immensely" when exposed to repeated microaggressions); *see also id.* at 235 (finding that microaggressions in the educational context "present a hostile and invalidating learning climate," negatively affecting outsider students in powerful ways).

214. *Id.* at 72–73.

215. *Id.* at 51; *see also* STEELE, *supra* note 28 (discussing stereotype threat). Steele identifies stereotype threat as an "identity contingency"—in other words, "the things you have to deal with in a situation because you have a given social identity, because you are old, young, gay, a white male, a woman, black, Latino, politically conservative or liberal, diagnosed with bipolar disorder,

Black students disproportionately tend to underperform on standardized tests.<sup>216</sup> Through numerous studies, he discovered that contrary to stereotype, the results were not due to “biology, lack of preparation, or poor motivation,” but rather were linked to the students’ anticipatory concern that they would confirm the stereotype.<sup>217</sup> This fear actually yielded “negative intrusive thoughts that interfered with [the students’] performance.”<sup>218</sup> Further research about this phenomenon has revealed that a wide range of individuals, when placed in contexts where they would stereotypically be expected to perform poorly, do just that.<sup>219</sup> Stereotype threat—yet another response to fast thinking, implicit bias, and microaggression—explains why outsider attorneys often encounter obstacles to success in the workplace that are invisible to insiders.<sup>220</sup>

Legal employers and law schools must identify new mechanisms to displace the harms of microaggression.<sup>221</sup> Further, they must support outsiders in strengthening their core identities to enhance their ability to succeed.<sup>222</sup> Part IV provides an innovative roadmap to take these steps.

a cancer patient, and so on.” STEELE, *supra* note 28, at 3; *see also* Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 PSYCHOL. SCI. 1132, 1132 (2009) (finding “stereotyped students performed better than nonstereotyped students” when taking tests under conditions that reduced stereotype threat).

216. *See generally* STEELE, *supra* note 28, at 1–30 (detailing Steele’s observation of Black students’ academic experiences and his reasons for studying stereotype threat). Stereotype threat has also been observed in women who underperform on math tests, as well as for other outsiders in other contexts. *Id.* at 30–32.

217. SUE, *supra* note 4, at 102; *see also* STEELE, *supra* note 28, at 30, 40 (contrasting hypotheses about academic underperformance of outsider groups and explaining experiment results that empirically demonstrate the negative intellectual performance effect of “the threat of stigma confirmation”).

218. SUE, *supra* note 4, at 102 (observing that stereotype threat “instigates . . . apprehension that one will be evaluated by the stereotype and confirm it”); *see also* STEELE, *supra* note 28, at 26 (describing the “concentration of factors” that negatively affected student mindset and performance).

219. *See* STEELE, *supra* note 28, at 97–98. When discussing the design of a study involving women and math tests, Steele notes that “[f]rustration would make the cultural stereotype come to mind and be seen as relevant to them personally.” Hence, “nothing extra was needed to impose this pressure.” *Id.* at 37–38. Steele describes this experience as “stigma pressure.” *Id.* at 40.

220. Steele analogizes stereotype threat to “a balloon over [one’s head, which] can be very hard to shake.” *Id.* at 5.

221. *See* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1752–53 (1989) (“[A]lthough the overt forms of racial domination . . . [are] enormously destructive, *covert* color bars have been, in a certain sense, even more insidious. After all, judgments based on expressly racist criteria make no pretense about evaluating the merit of the individual’s work. Far more cruel are racially prejudiced judgments that are rationalized in terms of meritocratic standards.”).

222. *See* SUE, *supra* note 4, at 66 (observing that microaggressions tend to “grind down and wear out the victims”). Sue reports on research that has concluded that “[m]icroaggressions sap

#### IV. THE ROAD FORWARD

Although this Article began with a focus on professional appearance, simply updating workplace appearance rules will not correct the problems of implicit bias and microaggression discussed in Parts II and III. The innovative proposals described here—addressing both legal employers and law schools—have the potential to create genuine and lasting change. Specifically, they require these institutions to pursue cultural proficiency<sup>223</sup> and to implement self-determination theory, a vehicle to support outsiders' agency, self-confidence, and connection with others.<sup>224</sup>

Many prior initiatives for change have not succeeded because they focus either on the individual or the institution instead of addressing both components.<sup>225</sup> Some have failed because they have not used appropriate metrics.<sup>226</sup> Others have been abandoned after the initial energy to achieve change wanes.<sup>227</sup>

Part IV explains how institutions actually can create inclusive working and learning environments for all members, simultaneously addressing issues of outsider identity and appearance.

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the spiritual energies of recipients, lead to low self-esteem, and deplete or divert energy for adaptive functioning and problem solving." *Id.* at 15 (citations omitted); *see also id.* at 82 ("[P]otential microaggressive incidents set in motion a chain of events that may be energy-depleting and/or disruptive to cognitive, emotional, and behavioral domains.").

223. *See infra* note 233 and accompanying text (identifying the five principles of cultural proficiency).

224. *See infra* Section IV.A.2 for a discussion of self-determination theory.

225. *See* Karen Clanton, *Overview*, in *DIVERSITY AND INCLUSION 360 COMMISSION: EXECUTIVE SUMMARY 2*, 2–3 (2016), <https://www.americanbar.org/content/dam/aba/administrative/diversity-portal/diversity-inclusion-exec-summ-360-comm.pdf> [<https://perma.cc/EL5L-CPFC>] (proposing ten creative suggestions legal organizations should take to increase attorney diversity). This report was issued by the ABA 360 Commission on Diversity and Inclusion, which was established to review and assess diversity in the legal profession, with the overarching goal of developing a sustainable and effective action plan. *Id.* at 2.

226. *See* JOAN C. WILLIAMS ET AL., *YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION* 12 (2018), <https://www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.pdf> [<https://perma.cc/64JQ-YWA3>] (discussing previous recommendations that failed to incorporate relevant quantitative data).

227. *See id.* (emphasizing the importance of reinforcing repetition of the recommendations).

### A. Cultural Proficiency, Self-Determination Theory, and the Risk of Backfire: Mechanisms to Reduce Implicit Bias and Microaggression

Legal employers<sup>228</sup> and law schools<sup>229</sup> must create environments where everyone has the opportunity to thrive. Cultural proficiency and self-determination theory can be used to help employees and students develop the skills necessary to perform their best. Although the two theories originate from different disciplines,<sup>230</sup> they complement each other, and can assist institutions committed to making lasting change.<sup>231</sup>

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228. See TUCKER B. CULBERTSON ET AL., AM. BAR ASS'N, PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 25–26 (2011), [https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/diversity/041511\\_aba\\_nextsteps\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/diversity/041511_aba_nextsteps_authcheckdam.pdf) [<https://perma.cc/Z66L-7KZF>]; Clanton, *supra* note 225, at 2.

229. The American Bar Association requires law schools to “demonstrate by concrete action a commitment to diversity and inclusion . . . and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.” STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. 2018–2019 § 206(a) (AM. BAR ASS'N 2018). The commitment to diversity and inclusion also extends to faculty and staff. *Id.* at 206(b); see also BYLAWS OF THE ASS'N OF AM. LAW SCH. § 6-3 (ASS'N OF AM. LAW SCH. 2018) (requiring member schools to have diverse faculties, staffs, and student bodies). Effective January 1, 2018, New York State instituted a Diversity, Inclusion and Elimination of Bias Continuing Legal Education (CLE) requirement for experienced attorneys, which “must relate to the practice of law and may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel.” N.Y. COMP. CODES R. & REGS. tit. 22, § 1500.2(g) (2018). In 2018, California began requiring attorneys to complete one CLE credit in the “Recognition and Elimination of Bias in the Legal Profession and Society” every three years. See MCLE Provider Information, *Qualifying MCLE Activities for Providers*, CAL. BAR (2018), <http://www.calbar.ca.gov/Attorneys/MCLE-CLE/MCLE-Providers/Qualifying-Activities> [<https://perma.cc/78EW-M6XT>].

230. Theories of cultural proficiency and cultural competence originally were developed in educational theory. See generally RANDALL B. LINDSEY ET AL., CULTURAL PROFICIENCY: A MANUAL FOR SCHOOL LEADERS (2d ed. 2003) (providing a system, based upon cultural proficiency, for educators to address issues related to diversity). Self-determination theory was developed by psychologists, but now is employed in numerous disciplines. See generally EDWARD L. DECI & RICHARD M. RYAN, INTRINSIC MOTIVATION AND SELF-DETERMINATION IN HUMAN BEHAVIOR (1985) (discussing self-determination theory); SELF-DETERMINATION THEORY, <http://selfdeterminationtheory.org/> [<https://perma.cc/5LNH-AQXG>] (identifying applications of self-determination theory in ten different fields).

231. See Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1076 (2011) (noting that law firms must create “firm priorities,” not commitments to women or attorneys of color); Veronica Root, *Retaining Color*, 47 U. MICH. J.L. REFORM 575, 599–601 (2014) (observing that although many firms adopted the *Diversity in the Workplace Statement of Principle* (1998), it led to little change; and expressing hope that *A Call to Action: Diversity in the Legal Profession* (2004) would be more effective). The commitment to diversifying the legal industry cannot be permitted to recede in challenging financial times, as happened after the recession of 2007–09. See *id.* at 592.

## 1. Cultural Proficiency

Cultural proficiency is described as the ability to learn about, live productively among, and work efficiently with people whose cultural expectations differ from one's own.<sup>232</sup> To reach this goal, an institution must embrace five principles: value diversity; develop the capacity for cultural self-assessment; become conscious of the dynamics likely to occur when cultures interact; emphasize the importance of learning about underrepresented cultural groups and their experiences; and develop a rich understanding of cultural diversity to enhance communication, decision-making, and problem-solving.<sup>233</sup> Above all, institutional leadership must commit to being consistent and deliberate in this process.<sup>234</sup>

Fundamentally, cultural proficiency aims to make implicit rules visible, question embedded assumptions, and ultimately create new expectations that meet the needs of all members of the legal community.<sup>235</sup> In the appearance context, insider attorneys must challenge their own implicit biases about what constitutes professionalism, as well as the environmental microaggressions that reinforce these expectations.<sup>236</sup> Thus, in a culturally proficient institution, outsider employees and law students should be able to

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232. Nuri-Robins & Bundy define culture as “the set of beliefs and practices shared by a group that give meaning to the interactions and identity of the members of the group.” NURI-ROBINS & BUNDY, *supra* note 23, at 35. They further observe that culture “is the water in which people swim [and] when you are an alpha in your own culture, you don’t notice it.” *Id.* at 34–35; *see also id.* at 36 (crediting Terry Cross and his colleagues for developing the concept of cultural proficiency).

233. *See generally* DELORES B. LINDSEY ET AL., REACH THE HIGHEST STANDARDS IN PROFESSIONAL LEARNING: OUTCOMES (2016); *see also* NURI-ROBINS & BUNDY, *supra* note 23, at 36 (describing cultural proficiency as “an approach to learning about, living productively among, and working effectively with people and within organizations that have cultural expectations that differ from yours”).

234. *See* Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 47 (2014) (“The phenomenon of implicit bias must be addressed if we are really determined to eliminate bias, ‘root and branch,’ from our legal system.” (footnote omitted) (quoting *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968))).

235. *See* NURI-ROBINS & BUNDY, *supra* note 23, at 169 (noting that the “house rules” should be “fluid, inclusive, and aligned with the values of the organization”; further, “awareness and sharing of codes [should] become institutionalized”).

236. Hyman, *supra* note 234. Justice Hyman observes that individuals in the dominant culture should adopt strategies to “address implicit bias include staying alert to automatic responses, . . . discussing the existence of unconscious bias with other[s], seeking out non-superficial contact with people unlike oneself, attending diversity training seminars, . . . and slowing decision-making [in situations] likely to raise concerns of implicit bias.” *Id.* at 46.

present their authentic selves without the need to diminish their identities or otherwise cover.<sup>237</sup>

## 2. Self-Determination Theory

As established in Part III, the harms associated with implicit bias and microaggressions tend to imbue in outsiders a lessened sense of self, reduced feelings of competence, and diminished interpersonal connections.<sup>238</sup> These harms run counter to what psychology's self-determination theory requires for intrinsic well-being.<sup>239</sup> Exercising autonomy, experiencing competence, and developing relationships with others.<sup>240</sup>

Autonomy—one's ability to assert her own agency or to be her authentic self—is the central tenet of self-determination theory's three factors.<sup>241</sup> An "autonomy-supportive" environment "facilitate[s] self-determined motivation, healthy development, and optimal functioning."<sup>242</sup> By contrast, external motivators, such as wealth or status, typically are unreliable sources of satisfaction, undermining one's autonomy and intrinsic well-being.<sup>243</sup>

237. *See id.* ("[T]aking time to deliberate, rather than relying on intuition, can detect and correct initial negative assumptions or stereotypes in our thought process.")

238. *See supra* Section III.C (discussing the harms of microaggression).

239. *See generally* DECI & RYAN, *supra* note 230, at 8 (defining "intrinsic motivation" as "[t]he life force or energy for [human] activity" and discussing the vulnerability of the "human organism . . . to being passive and developing fractionated structures [of self]" (emphasis omitted)).

240. *See* Ryan & Deci, *supra* note 30, at 658 (identifying "only three basic and universal psychological needs: those for autonomy, competence, and relatedness"); *id.* at 659 ("The criterion for distinguishing a need from a motive . . . pertains to its necessity for growth, integrity, and wellness."); *see also* Edward L. Deci & Richard M. Ryan, *The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11 PSYCHOL. INQUIRY 227, 262 (2000) [hereinafter Deci & Ryan, *Goal Pursuits*] (noting the necessity of "nutriments or supports from the social environment to function effectively"—namely, "satisfaction of . . . competence, autonomy, and relatedness").

241. Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, 55 AM. PSYCHOL. 68, 70 (2000).

242. *Perceived Autonomy Support: The Climate Questionnaires*, SDT: SELF-DETERMINATION THEORY, <http://selfdeterminationtheory.org/perceived-autonomy-support/> [<https://perma.cc/JCW2-WNKY>] (describing assessments of autonomy support in school and work environments); *see also* Ryan & Deci, *supra* note 30, at 71 (defining self-determined behavior as intrinsically motivated).

243. External forces that motivate some will elicit resistance or passivity from others. *See* Ryan & Deci, *supra* note 30, at 75. It is difficult, though not impossible, to internalize an external motivator, essentially transforming it into an intrinsic motivator. *See* Deci & Ryan, *Goal Pursuits*, *supra* note 240, at 235–36, 244 (confirming internalization as a "natural process in which individuals attempt to transform socially sanctioned mores or requests into personally endorsed values and self-regulations"). For example, although financial gain is an external motivator, if

Competence, the second element of self-determination theory, is the desire to control personal outcomes and experience mastery.<sup>244</sup> Studies of this factor reveal that (well-deserved) positive feedback enhances one's intrinsic motivation, while negative feedback decreases it.<sup>245</sup> Thus, feeling good about doing high quality work and receiving reaffirming reactions can lead to an enhanced sense of well-being.<sup>246</sup>

The third factor, relatedness, is defined as "feeling connected with others and having a sense of belonging within one's community,"<sup>247</sup> which enhances one's sense of security and permits one to have an expanded sense of well-being.<sup>248</sup> This sense of belonging allows for the formation and preservation of lasting relationships.<sup>249</sup>

When the three predicates of self-determination theory—autonomy, competence, and relatedness—are met, individuals function and grow optimally.<sup>250</sup> To actualize this inherent potential, the social environment must nurture, or at the very least facilitate, these needs.<sup>251</sup> This focus on intrinsic well-being makes it particularly powerful in combating the harms of microaggression in the workplace and in law schools.

### 3. Backfire Effect and White Fragility

Not all members of a law office or law school will be eager to engage in the processes outlined here or believe it will produce positive results. Studies have indicated, for example, that attempts to create cultural

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achieving this goal would enhance one's sense of autonomy, it can be converted into an intrinsic motivator.

244. See Deci & Ryan, *Goal Pursuits*, *supra* note 240, at 233 (describing people's innate desire to engage with activities in which they experience efficacy). Ryan & Deci observe that "feelings of competence will not enhance intrinsic motivation unless accompanied by a sense of autonomy." Ryan & Deci, *supra* note 30. By linking autonomy and competence, a person is more likely to have sustained confidence in her competence. See Deci & Ryan, *Goal Pursuits*, *supra* note 240, at 234; see also *supra* notes 144, 194 and accompanying text (describing Winnicott's theory of the importance of the true self).

245. See Deci & Ryan, *Goal Pursuits*, *supra* note 240, at 234 ("[P]ositive feedback enhance[s] intrinsic motivation . . . negative feedback decrease[s] intrinsic motivation . . .").

246. See *id.* at 234 (observing that receiving positive feedback on a particular assignment generates intrinsic motivation toward continuing similar or future assignments).

247. Ryan & Deci, *supra* note 30, at 658–59 ("Relatedness satisfactions entail a sense that one is significant to others, which is often manifest in others' willingness to care for one or to receive the care one has to offer.").

248. See Deci & Ryan, *Goal Pursuits*, *supra* note 240, at 235 ("[A] secure relational base appears to provide . . . a sense of security . . .").

249. See Ryan & Deci, *supra* note 30, at 671 ("SDT maintains that healthy and satisfying close personal relationships require satisfaction of the basic psychological needs for autonomy and competence as well as for relatedness.").

250. See *id.* at 673.

251. See *id.* at 659.

proficiency or to implement self-determination theory may result in a “backfire effect”<sup>252</sup>: the strengthening of an original belief even when faced with refuting information.<sup>253</sup>

Particularly when asked to engage with possible disparities due to race, white individuals may experience a state of “fragility,” in which “even a minimum amount of racial stress becomes intolerable, triggering a range of defensive moves.”<sup>254</sup> White fragility embodies the backfire effect as an unwillingness or resistance to discuss diversity-related topics, further disrupting efforts to achieve cultural proficiency.<sup>255</sup> This response can lead outsider attorneys to remain silent about their experiences, instead of expressing how the dominant culture has negatively affected them,<sup>256</sup> and similarly creates a disincentive for sympathetic allies to voice their concerns.<sup>257</sup>

252. The backfire effect is “the result of a cognitive bias [leading] some individuals . . . to [continue to] believe information that is being refuted if that information has special personal relevance.” Gregory J. Trevors et al., *Identity and Epistemic Emotions During Knowledge Revision: A Potential Account for the Backfire Effect*, 53 DISCOURSE PROCESSES 339, 341 (2016). Defensive responses can include “undermining and counter-arguing the refutation and reinforcing the original belief.” *Id.* at 343. Others have found that “[o]ne explanation for the backfire effect is *psychological reactance*,” which “proposes that because of a fundamental human need for freedom, people who are pressured to change their behavior may become more resistant to change.” Kyle Arnold, *Is Delusional Imperviousness a Backfire Effect of Being Disbelieved?*, 8 PSYCHOSIS 369, 370 (2016). This phenomenon is “stronger the more important the specific freedom is that is infringed upon, and the more powerfully it is affected.” *Id.* at 370.

253. See Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 323 (2010). Studies have found that corrections fail to reduce misconceptions for the most committed participants and strengthened them among ideological subgroups, especially those most likely to hold those misrepresentations. See *id.*; David P. Redlawsk et al., *The Affective Tipping Point: Do Motivated Reasoners Ever “Get It”?*, 31 POL. PSYCHOL. 563, 589 (2010) (tracking attitudes toward fictional political candidates when presented with new information). Further, if individuals do not understand that “there is a gap between what they currently know and what they could know . . . they won’t take on board new information.” David Nield, *Scientists Say They’ve Found the Driver of False Beliefs, And It’s Not a Lack of Intelligence*, SCI. ALERT (Sept. 9, 2018), <https://www.sciencealert.com/feedback-study-explains-why-false-beliefs-stick> [<https://perma.cc/NXA4-DMBN>].

254. Robin DiAngelo, *White Fragility*, 3 INT’L J. CRITICAL PEDAGOGY 54, 57 (2011). Defensive moves include “the outward display of emotions such as anger, fear, and guilt, and behaviors such as argumentation, silence, and leaving the stress-inducing situation.” *Id.*

255. See generally *id.* (discussing the dynamics of white fragility).

256. Culture “insulates and protects whites as a group through institutions, cultural representations, media, school textbooks, movies, advertising, [and] dominant discourses.” *Id.* at 55 n.1. This is exacerbated because a large percentage of white people live “primarily segregated lives in a white-dominated society [and] they receive little to no authentic information about racism and are thus unprepared to think about it critically or with complexity.” *Id.* at 58.

257. See Robin DiAngelo, *How White People Handle Diversity Training in the Workplace*, MEDIUM (June 27, 2018), <https://medium.com/s/story/how-white-people-handle-diversity-training-in-the-workplace-e8408d2519f> [<https://perma.cc/D7D4-5M24>] (describing how white

To adequately achieve lasting change, individuals within the legal field must “build the stamina to sustain conscious and explicit engagement with race.”<sup>258</sup> Indeed, there is a “tipping point,” when individuals begin modifying pre-established beliefs and become more open to new information, facilitating reform efforts.<sup>259</sup>

The complementary theories of cultural proficiency and self-determination can help diffuse such resistance.<sup>260</sup> As described in the next section, both theories require institutions to respect all constituent members while seeking to eliminate policies and practices that prevent outsiders from succeeding.

### B. Recommendations for Change

Law schools and legal employers increasingly recognize the significance of diversity to their success.<sup>261</sup> Notwithstanding the growing diversity of law students throughout the country, legal workplaces have remained largely homogeneous, particularly among their leadership.<sup>262</sup> The proposals that follow first identify mechanisms to eliminate implicit bias and microaggressions in the workplace, then identify steps law schools must take to help achieve systemic change to legal culture.

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fragility can function “as a form of bullying,” making anyone who tries to confront such a person feel so miserable “that you will simply back off, give up, and never raise the issue again”).

258. DiAngelo, *supra* note 254, at 66.

259. Redlawsk et al., *supra* note 253, at 564.

260. Although this fragility makes it difficult for white people to “build the cognitive or affective skills or develop the stamina that would allow for constructive engagement across racial divides,” meaningful engagement with the resistance creates the potential for long-term self-examination and change. DiAngelo, *supra* note 254.

261. See ALISA CUNNINGHAM & PATRICIA STEELE, ACCESSLEX CTR. FOR LEGAL EDUC. EXCELLENCE, DIVERSITY PIPELINE PROGRAMS IN LEGAL EDUCATION: CONTEXT, RESEARCH AND A PATH FORWARD 15–18 (2015) (identifying key factors associated with successful diversity programs and providing further recommendations for schools); see also Root, *supra* note 231, at 600 (describing the steps law firms have taken since the *Call to Action* to increase diversity in their ranks, including “sponsoring diverse law student groups, recruiting at the law schools of Historically Black Colleges and Universities (HBCUs), and recruiting at hiring conferences targeting attorneys of color” (footnotes omitted)); Alice Pettway, *Law Schools Innovate to Recruit and Retain Underrepresented Students*, INSIGHT INTO DIVERSITY (June 26, 2017), <http://www.insightintodiversity.com/law-schools-innovate-to-recruit-and-retain-underrepresented-students/> [<https://perma.cc/B724-2LJ5>] (describing successful programs incorporated in law schools including, *inter alia*, diverse faculties and diversity statements in law school applications).

262. See Jared Lindzon, *Law Schools are Very Diverse, So Why Aren't Law Firms?*, FAST CO. (July 30, 2018), <https://www.fastcompany.com/90201095/law-schools-are-very-diverse-so-why-arent-law-firms> [<https://perma.cc/77SZ-DTA8>] (discussing the Law360 Diversity Snapshot results and the large increases of diverse law school attendees relative to the small gains of diverse attorneys at law firms).

## 1. The Pathway for Legal Employers

This section identifies a series of recommendations that employers must adopt to create workplace environments that are welcoming and supportive of all employees. It then applies these proposals to issues of appearance and presentation in the legal workplace.

### a. Workplace Initiatives

To achieve cultural proficiency, legal employers must start with a commitment to visibly increase diversity,<sup>263</sup> particularly in leadership roles,<sup>264</sup> ensuring that diverse members of the organization populate their centers of power, such as equity partners and management.<sup>265</sup> This approach will not only have the effect of uplifting the visibility and status of outsider attorneys, but will also create a new “in-group” better positioned to continue improving the workplace culture.<sup>266</sup>

Legal organizations must also critically reflect on their workplace status quo.<sup>267</sup> Insiders must break their often unconscious practice of hiring and mentoring those who most resemble them and instead create new relationships between insider and outsider attorneys,<sup>268</sup> reach out to

263. See CUNNINGHAM & STEELE, *supra* note 261, at 3, 18 (emphasizing the need for diversity pipeline programs not only for law schools, but also for “law firms, institutions, legal organizations, and other community-based programs”).

264. See Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL’Y 11, 47 (2003) (stating that equality in legal education must start with top-down leadership). Leadership diversity is necessary for numerous reasons, including ensuring that institutions properly reward their members by giving them access to centers of power; modeling appropriate behavior to the rest of the workforce; and making certain that workplace policies and practices reflect the needs of its diverse workforce. See Root, *supra* note 231, at 642 (diversifying leadership “will help to create policies and procedures that will increase demographic diversity throughout the organization”).

265. This section follows the principles identified by Nuri-Robins & Bundy (cultural proficiency) and Ryan & Deci (self-determination theory). See generally NURI-ROBINS & BUNDY, *supra* note 23 (discussing cultural proficiency); Ryan & Deci, *supra* note 30 (discussing self-determination theory). Nuri-Robins & Bundy call upon institutions seeking to change to deeply value diversity. See *supra* Section IV.A; see also Rhode, *supra* note 231, at 1072 (recommending that legal employers “centralize responsibility for developing and overseeing diversity initiatives” and that they be led by “diverse and respected members who have credibility with their colleagues”).

266. Root, *supra* note 231, at 620.

267. See *supra* note 233 and accompanying text (identifying the five principles of cultural proficiency).

268. See Root, *supra* note 231, at 578–79, 618 (reporting that “the overwhelming percentage of owners at large law firms are white males” who, studies show, typically “feel more comfortable in working relationships with other white men”). Echoing the findings reported *supra* Part II, Professor Root observes that “lawyers are affected by the same psychological developments as the rest of society,” which “indicates that many white Americans developed negative feelings against blacks and Hispanics ‘through early socialization coupled with almost unavoidable biases

outsider attorneys and assure they also receive plum assignments, and sponsor outsider attorneys by introducing them to influential colleagues and clients.<sup>269</sup> Taking each of these actions would reflect a true commitment to changing the power dynamics in the legal workplace.

To understand the challenges likely to occur and to ensure they are achieving tangible change, employers must collect data on their initiatives.<sup>270</sup> For example, legal employers should adopt objective metrics to more fairly evaluate applicants, from removing identifiers from resumes to asking uniform questions of each candidate.<sup>271</sup>

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associated with categorizing people into different groups.” *Id.* at 608 (quoting John F. Dovidio & Samuel L. Gaertner, *New Directions in Aversive Racism Research: Persistence and Pervasiveness*, in 53 NEBRASKA SYMPOSIUM ON MOTIVATION: MOTIVATIONAL ASPECTS OF PREJUDICE AND RACISM 43, 45 (Cynthia Willis-Esqueda ed., 2008)); *see also* Luis J. Diaz & Patrick C. Dunican, Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947, 977 (2011) (citing numerous reports finding that white law partners “favor those who looked similar to themselves” as mentees; that women tend to be assigned less often to “high-profile, high-revenue assignments because male partners made certain negative assumptions about the type of work they wanted”; and that women more often were assigned to pro bono projects, reducing the opportunities they had to get to know paying clients with more clout); Rhode, *supra* note 231, at 1055 (“In-group favoritism is . . . apparent in the [informal] allocation of work and client development opportunities.”).

269. *See* WILLIAMS ET AL., *supra* note 226 (reporting that among in-house counsel, women and people of color regularly report that they are treated differently than their peers, are excluded from desirable assignments, and lack access to informal and formal networking opportunities); *see also* Root, *supra* note 231, at 596 (summarizing answers given by attorneys of color describing the reasons they left law firms, including not receiving “an opportunity to work on important matters,” feeling that there were barriers to working on “more lucrative projects,” and experiencing a “lack of relationships” with mentoring attorneys).

270. *See supra* NURI-ROBINS & BUNDY, *supra* note 23, at 36 (observing that achieving cultural proficiency requires being conscious of the dynamics likely to occur when different cultures interact); *see also* WILLIAMS ET AL., *supra* note 226, at 30–31 (emphasizing the importance of collecting quantitative and qualitative data to understand the inequities seen among women in legal professions). The Commission significantly relies on the work of the Center for WorkLife Law and the “bias interrupters” it identifies as essential to removing implicit bias from the workplace. *See Our Mission*, WORKLIFE L., <https://worklifelaw.org> [<https://perma.cc/QHD8-DTHS>]. The Center, part of UC Hastings College of the Law, “seeks to advance gender and racial equity in the workplace and in higher education,” focusing on “initiatives with the potential to produce concrete social, legal, and institutional change within a three to five year timeframe.” *Id.*; *see also* Rhode, *supra* note 231, at 1074 (noting that “what gets measured gets done” and recommending data collection on “advancement, retention, compensation, satisfaction, mentoring, leadership opportunities, and work/family conflicts”).

271. Employers may wish to review resumes without candidates’ names or extracurricular activities, should ask uniform questions throughout the interview process, and must develop a clear rubric for assessing candidates. *See* WILLIAMS ET AL., *supra* note 226, at 15–16 (noting also that candidate answers or skill-based assessments should be rated on a consistent scale and supported by evidence). Additionally, elite employers should consider hiring high-performing applicants from lower-ranked schools. *See id.* at 15. Although these recommendations were

Once hired, employers should allocate work assignments to ensure that all employees have the opportunity to take risks and develop new skills essential to maximizing learning and growth.<sup>272</sup> Performance reviews should incorporate clear and specific criteria,<sup>273</sup> require evidence to justify an employee's rating (instead of permitting more generalized statements),<sup>274</sup> assess actual performance separately from a person's potential,<sup>275</sup> and identify personality attributes apart from skill sets.<sup>276</sup> Each of these steps is designed to remove the implicit bias that can undermine even the best intentions.<sup>277</sup> These "bias interrupters" will help exchange the informal practices of those that have traditionally perpetuated the dominant culture, for systems and structures designed to hire, assess, and promote all attorneys equally.<sup>278</sup> A workplace cannot be culturally proficient without taking these steps.<sup>279</sup>

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identified with law firms in mind, they also can be undertaken by in-house counsel, *see id.* at 30–41, and other types of legal employers.

272. *See id.* at 18 (observing that women and employees of color tend to get fewer plum assignments when employers use the "hey, you" system of allocating work, more often being relegated to "office housework" instead of "glamour work"). Equal distribution of quality work assignments benefits both individual employees and the employer, as attrition rates among outsiders are particularly high when they "keep getting stuck with the same low-profile assignments." *Id.* ("[T]he cost to the firm of attrition per associate is up to \$400,000.").

273. *See* Diaz & Dunican, *supra* note 268, at 973 ("[F]irms must do a better job at removing subjectivity from the [evaluation] process . . ."); *see also* WILLIAMS ET AL., *supra* note 226, at 23 (comparing "[h]e is able to write an effective summary judgment motion under strict deadlines" with "[h]e writes well").

274. *See* WILLIAMS ET AL., *supra* note 226, at 23 (comparing, "[i]n March, she argued X motion in front of Y judge on Z case, answered his questions effectively, and was successful in getting the optimal judgment," with "[s]he's quick on her feet").

275. *See id.* (observing that performance and potential should be judged separately considering the greater likelihood for men to be judged on potential and outsider attorneys to be judged on performance).

276. *See id.* ("Personal style should be appraised separately from skills because a narrower range of behavior often is accepted from women and people of color."). In addition, managers should offer alternatives to traditional means of self-promotion. *See id.* (stating that managers should be encouraged or required to "set up more formal systems for sharing successes, such as a monthly e-mail that lists employees' accomplishments").

277. The metrics described in this section must include a vehicle for discounting regular outliers and for conducting "bouncebacks" with such individuals (i.e., meetings to discuss evidence of their implicit bias and identifying ways to combat it). *See id.* at 24.

278. *Id.* at 12 ("Bias interrupters change systems, not people."). Bias interrupters acknowledge the dynamics that occur when different cultures interact (e.g., backfire), while taking affirmative steps to diffuse them. *See id.*

279. *See supra* note 233 and accompanying text (identifying the five principles of cultural proficiency).

Legal employers also must create new policies and practices affirmatively supportive of outsider attorneys.<sup>280</sup> For example, they could identify an ombudsperson to whom employees can bring concerns about inequitable treatment.<sup>281</sup> Equally important, employers should encourage the development of supportive, identity-based communities in which outsider employees are encouraged to bond and share experiences.<sup>282</sup>

However, these efforts take time, which is one of the most valuable assets in the legal workplace.<sup>283</sup> Employers must implement them without creating an additional harm, namely the burdening of successful outsider attorneys who have obtained power or status in the organization.<sup>284</sup> Further, to reinforce the importance of these changes and to increase their likelihood of success, employers must allow the time spent enhancing diversity and removing unconscious bias from employment practices to be billable.<sup>285</sup>

By adopting these practices—exhibiting fundamental respect for their employees’ identity and autonomy—the employer provides a sense of “increased well-being and internal motivation” for work.<sup>286</sup> This will

280. Creating inclusive policies emphasizes the importance of the dominant group’s learning about underrepresented groups and their experiences. *See id.* (identifying the five principles of cultural proficiency).

281. *See* SCHULMAN & FONG, *supra* note 150, at 48 (identifying positive steps employers can take, including creating dispute resolution programs and establishing affinity groups that provide outlets to discuss perceived inequities in the workplace).

282. *See* SUE, *supra* note 4, at 86 (“[O]ppressed groups rely heavily on one another for a collective sense of identity, for validation and confirmation of their experiences, and for sharing with one another healthy coping mechanisms to overcome invalidation. . . . Racial and ethnic pride also seems to immunize minority groups against forces like racism.”); *see also* Aderson Bellegarde Francois, *Acts of Meaning: Telling and Retelling the Narrative of Race-Conscious Affirmative Action*, 57 HOW. L.J. 467, 474–75 (2014) (emphasizing the importance of storytelling in relating and contextualizing both the individual and the group experience with discrimination); *Affinity Groups in the Workplace*, THOMSON REUTERS (Sept. 2017), <https://store.legal.thomsonreuters.com/law-products/news-views/corporate-counsel/affinity-groups-in-workplace> [<https://perma.cc/79N9-CVWX>] (“Many employers choose to recognize and support [affinity] groups because of the benefits they provide to both the employer and its employees . . . [including] employee recruitment, retention, and professional development.”).

283. *See* Steven J. Harper, *The Tyranny of the Billable Hour*, N.Y. TIMES (Mar. 28, 2013), <https://www.nytimes.com/2013/03/29/opinion/the-case-against-the-law-firm-billable-hour.html> [<https://perma.cc/4ZS3-4TFA>] (noting that “the billable hour remains entrenched and the barriers to change are formidable,” especially as they remain “a key measure of associate and partner productivity”).

284. Successful outsiders typically carry disproportionate responsibility for mentoring newer outsider employees. *See* Root, *supra* note 231, at 622 n.253, 624, 635.

285. *Id.* at 624 (“[T]reating diversity hours as billable for purposes of compensation is an incremental step and a soft incentive that will slowly change the culture of the firm and the incentive structure for white males to participate in diversity efforts.”).

286. *Id.*; *see supra* Section IV.A.2 (discussing self-determination theory).

improve the experience of the outsider attorney, allowing her to focus more directly on her work, strengthening her self-confidence, and enhancing her desire and ability to build relationships with others. In other words, employers will not only be pursuing cultural proficiency, they will also be implementing self-determination theory.<sup>287</sup>

This approach also benefits the employer by enhancing productivity of outsider attorneys who have felt alienated from the workplace and providing incentive for more attorneys to remain in their positions longer.<sup>288</sup> Indeed, creating an environment that incorporates all voices and experiences improves workplace cultural understanding, simultaneously enhancing employee communication, decision-making, and problem-solving for all attorneys.<sup>289</sup>

As noted throughout this Article, most employers assume they are treating their employees equally and fairly, regardless of race, sex, sexual orientation, religious observance, or other attributes of their core identities, but studies have shown this is not always so.<sup>290</sup> Taking the concrete actions identified here will constitute an important acknowledgement of the (often inadvertent) harms caused by implicit bias and microaggressive actions and policies in the workplace and create new opportunities for outsider attorneys to succeed.<sup>291</sup>

287. See *supra* Section IV.A.2 (discussing self-determination theory).

288. See Lawrence S. Krieger & Kennon M. Sheldon, *Walking the Talk: Value Importance, Value Enactment, and Well-Being*, 38 MOTIVATION & EMOTION 609, 609–10 (2014); Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 585, 623–24 (2015) [hereinafter Krieger & Sheldon, *What Makes Lawyers Happy?*] (describing studies indicating that instead of focusing so heavily on external motivations such as money, employers would benefit tremendously from supporting the intrinsic motivations of their employees).

The continual “revolving door” of making diverse hires who choose to leave the organization because they feel they were not respected, or experienced repeated negative experiences, is quite expensive—financially and in terms of “intellectual, multicultural, and social capital.” Diaz & Dunican, *supra* note 268, at 965; see also LEVEL PLAYING FIELD INST., THE CORPORATE LEAVERS SURVEY: THE COST OF EMPLOYEE TURNOVER DUE SOLELY TO UNFAIRNESS IN THE WORKPLACE 11 (2007), <https://www.smash.org/wp-content/uploads/2015/05/corporate-leavers-survey.pdf> [<https://perma.cc/W73C-LBA7>] (noting that, according to a 2007 survey, almost 25% of people of color would have stayed in their jobs if their work environment had been more respectful). This turnover is costly for employers. See WILLIAMS ET AL., *supra* note 226, at 18 (“[T]he cost to the firm of attrition per associate is up to \$400,000.”).

289. Research indicates that self-determination theory “enhances [subordinates’] ability to perform maximally, fulfill their psychological needs, and experience well-being.” Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 288, at 565; see also *supra* Section IV.A.3 (discussing the potential backfire effect when creating a culturally proficient environment).

290. See WILLIAMS ET AL., *supra* note 226 (“[W]orkplaces that view themselves as being highly meritocratic often are *more* biased than other organizations.”).

291. The dominant culture, not outsiders, must lead efforts to create change. See Root, *supra* note 231, at 633–34.

## b. Identity and Appearance in the Legal Workplace

To address appearance-based implicit bias and microaggression in the workplace, the legal employer will need to adapt cultural proficiency principles and self-determination theory. Employers should begin by identifying the implicit and explicit expectations of appearance in the workplace,<sup>292</sup> making clear the rules its attorneys think they must observe.<sup>293</sup>

Recognizing that these norms rely on the values of the dominant group, legal employers must then develop more inclusive appearance expectations, being cognizant to create policies that affirm employees' decisions to present themselves consistently with their core identity.<sup>294</sup> Complementing such policies, employers should undertake educational and other programs to clarify the importance of this initiative.<sup>295</sup>

Equally important, employers must use the appropriate metrics to assess whether these new initiatives are being implemented fairly. Without the objective measurements, the risk remains that they will fail. When implemented correctly, however, such proposals embody the principles of cultural proficiency and self-determination theory and therefore are more likely to succeed.

## 2. Reimagining Legal Education

Like most legal employers, law schools are also steeped in tradition and continue to be overwhelmingly led by insiders.<sup>296</sup> They too must challenge their historical policies and practices and respond to the needs

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292. This inquiry might be accomplished through a survey asking how strongly the respondent agrees (or disagrees) with a series of statements (e.g., I believe I must wear a suit to work each day; women wearing suits should wear skirt suits; women are expected to wear heels rather than flat shoes; religiously observant attorneys should remove outward indicators of their identity (e.g., head coverings)). In addition, the survey should inquire whether employees alter their self-presentation to conform to perceived rules.

293. See *supra* note 233 and accompanying text (identifying the five principles of cultural proficiency).

294. The process of devising new guidelines could lead employers to debunk myths that for women, skirtsuits are preferred over pantsuits, heels are more desirable, and pantyhose are necessary when not wearing slacks. The guidelines could clarify that people of color need not wear their hair in styles more typically worn by white people (e.g., straight hair; no locs, natural cuts, or cornrows). And, they should plainly state that religious observance—including the wearing of outward expressions thereof—is welcome in the workplace.

295. Workplace initiatives should remind employees that LGBTQ individuals (and their families) are welcome and that gender-diverse individuals should present in the manner that affirms their identity.

296. See *Statistics, supra* note 3 (click on the “Law School Faculty & Staff by Ethnicity and Gender” link to download the statistics spreadsheet) (presenting statistics that show 79.2% of current deans and 77.2% of current associate deans are white).

of outsider students. By creating a culturally proficient environment, law schools can improve the context in which students learn and also better prepare them to enter the legal profession. These recommendations also incorporate self-determination theory, enhancing students' capacities to make decisions that ultimately will enhance their personal and professional well-being.

#### a. Institutional Priorities

Law schools must display their commitment to cultural proficiency by creating a more diverse welcoming environment for outsider students.<sup>297</sup> First, law schools should prioritize the hiring and advancement of outsiders, particularly in roles from which they traditionally have been excluded, such as deanships and tenured positions.<sup>298</sup> This dearth of diverse role models, in combination with the absence of white male mentors who seek to mentor those different from them, perpetuates the status quo.

Second, career-planning offices must prioritize expanding opportunities for students and graduates. They must push back against the passive and powerful assumption that only those who perform well in their first year will later excel as attorneys.<sup>299</sup> Using 1L exam grades, which typically measure knowledge through a high-stress timed exam,

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297. See *supra* note 233 and accompanying text (identifying the five principles of cultural proficiency).

298. Women and people of color are more often found in (perceived) lower-status positions—in the clinic or legal writing programs. See Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 648 (2004) (finding that exposure to women in leadership positions can temporarily undermine women's own gender stereotypic beliefs and that this effect is improved by the frequency with which women encounter female leaders); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL. 1, 41 (2010) (“Making a commitment to hire women in implicit male prototype positions in the legal profession will not only help reverse years of numerical disparities, but will likely have a bias reducing [e]ffect on the next generation.”); Teri A. McMurtry-Chubb, *On Writing Wrongs: Legal Writing Professors of Color and the Curious Case of 405(c)*, 66 J. LEGAL EDUC. 575, 575 (2017) (reporting that approximately 77.5% of professors who teach legal writing are women).

299. See DAVID B. WILKINS, HARVARD LAW SCH. CTR. ON THE LEGAL PROFESSION, *THE WOMEN AND MEN OF HARVARD LAW SCHOOL: PRELIMINARY RESULTS FROM THE HLS CAREER STUDY* 44 (2015) (finding grades did not correlate with whether one becomes a partner at a law firm); Diaz & Dunican, *supra* note 268, at 969 (“[Attorney] success at Corporate Firms is not significantly correlated to law school grades or class rank, although these do help associates secure their first employment. . . . [S]uccess is instead more a function of gaining access to meaningful work assignments from powerful partners, earning good evaluations, and receiving good mentoring and training opportunities.”); see also *supra* Section IV.B.1.a (discussing why legal employers should assess employees on the basis of actual capacity, rather than perceived potential).

fails to consider students who might blossom in later years or practice.<sup>300</sup> This change in focus is particularly important considering the disproportionate impact of stereotype threat on outsiders' performance on exams.<sup>301</sup> Further, it should enable students to prioritize understanding the law, rather than focusing on exam performance, allowing them to feel more autonomous and competent in the process.<sup>302</sup>

Law schools must also promote diverse candidates for coveted judicial clerkships. Most clerks tend to be white males, mirroring the demographics of those most involved with helping them secure these positions.<sup>303</sup> Law faculty must embrace the opportunity to mentor new leaders to avoid perpetuating the status quo.<sup>304</sup> By promoting diverse candidates for these positions, law schools signal to outsider students not only that they belong, but also that they are equally competent to their peers.

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300. See Wilkins, *supra* note 299. Some students perform better in smaller classes or in experiential settings where they learn by doing. See Todd A. Berger, *Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for "Practice-Ready" Graduates Will Impact the Faculty Status of Clinical Law Professors*, 43 WASH U. J.L. & POL'Y 129, 131–32 (2013) (describing law school clinics as a vital opportunity to gain hands-on legal experience in law school).

301. See *supra* notes 215–20 and accompanying text (discussing stereotype threat).

302. See *supra* Section IV.A.2 (discussing the salient effects of self-determination theory).

303. See *Increasing Diversity of Law School Graduates Not Reflected Among Judicial Clerks*, NALP BULL. (Sept. 2014), <http://www.nalp.org/0914research> [<https://perma.cc/WUB9-AQB2>] (finding that the percentage of graduates of color in clerkships does not reflect the increase in students of color, which had grown from about 14% in 1993 to over 25% in 2013); see also Debra Cassens Weiss, *Supreme Court Law Clerks Are Still Mostly White Men; Which Justices Had the Most Diverse Clerks?*, A.B.A. J. (Dec. 12, 2017, 8:00 AM), [http://www.abajournal.com/news/article/supreme\\_court\\_law\\_clerks\\_are\\_still\\_mostly\\_white\\_men\\_which\\_justices\\_had\\_the](http://www.abajournal.com/news/article/supreme_court_law_clerks_are_still_mostly_white_men_which_justices_had_the) [<https://perma.cc/KY7M-3TR5>] (theorizing that the lack of diversity among federal law clerks may be caused in part by the lack of diversity among the “feeder professors”); Maria Chutchian, *Statistics Show Little Change in Law Clerk Diversity*, LAW360 (May 3, 2012, 6:56 PM), <https://www.law360.com/articles/336973/statistics-show-little-change-in-law-clerk-diversity> [<https://perma.cc/Z8E2-CVDY>] (noting that race and gender commonality between law student and faculty mentors contributes to the disproportionate number of white, male law clerks in the federal appellate and district courts).

304. See Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1112 (2011) (“The legal profession has a duty to pursue formal and substantive diversity.”); Edward Williams, *Diversity, the Legal Profession, and the American Education Crisis: Why the Failure to Adequately Educate American Minorities is an Ethical Concern for the Legal Profession*, 26 GEO. J. LEGAL ETHICS 1107, 1107 (2013) (“The legal profession must be concerned about the potential effects of being significantly more racially homogenous than the increasingly heterogeneous society in which we live. The future of the legal profession promises to continue to lack diversity if the American education system continues to disproportionately fail to educate minority students.”).

Addressing the needs of outsider students is only part of the law school's responsibility. Schools must also help insider students become cognizant of their automatic membership in the dominant culture, which though invisible to them, is perceived by their outsider peers.<sup>305</sup> Though mandated sensitivity trainings and presentations admittedly receive mixed reviews,<sup>306</sup> law schools should still provide opportunities for students, administrators, and faculty members to participate in implicit bias and microaggression awareness programs.<sup>307</sup> Indeed, when given the chance, most insiders wish to eliminate their own implicit biases and ways in which they may unconsciously perpetuate microaggressions.<sup>308</sup>

Over time, and with persistence, a law school can change its culture. Specific recommendations to accomplish this are described in the following sections.

#### b. The Role of Law School Administrators

Law school administrators must play a key role in creating cultural proficiency,<sup>309</sup> normalizing discussions of implicit bias,

305. See *supra* Section III.A (discussing the invisibility of dominant culture to insiders).

306. See Bonita London et al., *Studying Institutional Engagement: Utilizing Social Psychology Research Methodologies to Study Law Student Engagement*, 30 HARV. J.L. & GENDER, 389, 395–96 (2007) (finding law students value diversity but resent any semblance of forced interaction).

307. DiAngelo, *supra* note 257 (describing the potential value of diversity training, particularly for creating an environment in which people of color can give honest feedback to insiders); Danisha Brar, *Keep the Patels: How Culturally Competent Teamwork Can Alleviate the Law's Diversity Retention Problem*, 2 CONCORDIA L. REV. 118, 119, 126 (2017) (describing the importance of cross-cultural conversations in the workplace, which can be facilitated by diversity trainings). Admittedly, some members of the law school community will not be interested in programming about implicit bias and microaggression. Their indifference, resistance, or even hostility should not, however, be reason to withhold these opportunities. See, e.g., PERCEPTION INST., <https://perception.org/about-us/theory-of-change/> [<https://perma.cc/HC6V-CQBH>]. Such programs receive positive reviews when handled appropriately and start early in a student's law school career. See Cynthia M. Ward & Nelson P. Miller, *The Role of Law Schools in Shaping Culturally Competent Lawyers*, 89 MICH. B.J. 16, 16–17 (2010) (advocating for increased cultural-competence training).

308. See Anastasia M. Boles, *Seeking Inclusion from the Inside Out: Towards a Paradigm of Culturally Proficient Legal Education*, 11 CHARLESTON L. REV. 209, 246 (2017) (identifying the essential elements of cultural proficiency as assessing culture, valuing diversity, managing the dynamics of difference, adapting to diversity, and institutionalizing cultural knowledge); Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 329–39 (2015) (suggesting ways to reduce stereotype threat, including buttressing social belonging, offering wise criticism, promoting the growth-mindset of intelligence, affirming values, removing triggers of stereotype threat, introducing cues to reduce stereotype threat, and helping students to cope with stereotype threat).

309. Some law school administrators may not feel equipped to handle these responsibilities.

microaggressions, and microaggressive environments. By grounding these initiatives in principles of self-determination theory—focusing on student autonomy, competence, and relatedness—they are more likely to enact lasting change.

For outsider students, this process can reduce second-guessing, which is particularly distracting when encountering microaggressions,<sup>310</sup> empowering them to make conscious autonomy-enhancing choices.<sup>311</sup> Concomitantly, insider students can learn about the burdens that outsider students face while simultaneously recognizing their own implicit biases.<sup>312</sup>

Specific actions a law school can undertake include designating an ombudsperson who can receive pertinent concerns and has the authority to pursue change;<sup>313</sup> creating opportunities for administrators to better understand the experiences of outsider students, perhaps by convening a student advisory council; and supporting the development of affinity groups in which outsiders can build community.<sup>314</sup>

As institutions of higher learning, law schools should establish centers, institutes, and initiatives that recognize the existence of ongoing systemic disparities, exploring both theory-based solutions and pragmatic interventions.<sup>315</sup> Through such entities, schools can further

Deans have an obligation, though, to ensure that administrators are provided with educational and training opportunities to enable them to execute their responsibilities well. Although this section focuses on the responsibilities of administrators, and the next on the role of faculty, better results can be achieved through their collaboration.

310. See *supra* Section III.C.1 (defining and discussing the harms of this second guessing); see also NURI-ROBINS & BUNDY, *supra* note 23, at 60 (underscoring the importance of communicating contextual expectations); SUE, *supra* note 4, at 106 (describing the benefit of reducing the ambiguity and uncertainty associated with microaggressions).

311. See Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 288, at 583 (“[S]atisfaction of the lawyers’ three basic needs [autonomy, competence, relatedness] . . . also increased well-being and internal motivation for their work.”).

312. See *supra* note 233 and accompanying text (identifying the five principles of cultural proficiency).

313. See SCHULMAN & FONG, *supra* note 150, at 48 (emphasizing the importance of ombudspersons); cf. Rhode, *supra* note 231, at 1059 (“Women and minorities . . . are often reluctant to complain about [bias] publicly. They don’t want to ‘rock the boat,’ seem ‘too aggressive’ or ‘confrontational,’ look like a ‘bitch,’ or be typecast as an ‘angry [B]lack [person].’”).

314. See Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 65 (2011) (“There is no dispute that having a critical mass of diverse students can help set the stage for an entire student body to share and learn from one another’s unique perspectives and experiences.”); Francois, *supra* note 282 (emphasizing the importance of validation from one’s own community when sharing experiences of discrimination).

315. See generally Deborah Moss-West & Stephanie M. Wildman, *A Social Justice Lens Turned on Legal Education: Next Steps in Representing the Vulnerable and Inspiring Law*

address issues of injustice and disparity by inviting speakers to lecture about these issues and spark initiatives for change, connecting outsider law students with alumni who are open to validating and frank conversations, and encouraging the development of supportive systems where outsiders can bond and share experiences.<sup>316</sup>

With this increased understanding, outsider students will better understand the workplace environments they may encounter, allowing them to select jobs and professional appearances consistent with their intrinsic values. In other words, consistent with self-determination theory, outsider students can exercise their autonomy, making conscious decisions about what compromises they are willing to make as they enter the workplace.<sup>317</sup>

These complementary approaches will make it possible for more members of the law school community to creatively challenge implicit bias and microaggressions.<sup>318</sup> Outsider students will be better equipped to navigate ambiguous incidents, allowing them to focus more on their legal education.<sup>319</sup> Equally important, insider students can become better allies to outsider students, diminishing the gap in the legal profession caused by implicit bias.<sup>320</sup>

### c. The Role of Faculty

Faculty have numerous opportunities to raise issues of cultural dominance, unconscious bias, and the impact of microaggressions, even

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*Students*, 37 J. LEGAL PROF. 179, 185 (2013) (analyzing the unique ability of law schools to provide a culturally sensitive education) (“Centers for Social Justice in law schools can play the role of providing an institutional context and support . . . that brings students, faculty, staff, alumni, and members of the community together while increasing the teaching, learning, and service opportunities that can provide more legal assistance to underrepresented communities.”). Numerous schools have also established centers for the study of race, law, and justice. *See, e.g.*, Center for Diversity, Inclusion, and Belonging, N.Y.U. SCH. L., <http://www.law.nyu.edu/centers/belonging> [<https://perma.cc/87A8-NAXP>]; Center on Race, Law, and Justice, FORDHAM U. SCH. L., [https://www.fordham.edu/info/25249/center\\_on\\_race\\_law\\_and\\_justice](https://www.fordham.edu/info/25249/center_on_race_law_and_justice) [<https://perma.cc/LQW3-J248>]; Center for the Study of Race & Race Relations, U. FLA. LEVIN COLL. L., <https://www.law.ufl.edu/areas-of-study/centers/csrrr> [<https://perma.cc/Z6RZ-9KDJ>].

316. *See supra* note 233 and accompanying text (identifying the five principles of cultural proficiency).

317. *See supra* Section IV.A.2 (discussing self-determination theory).

318. *See* Ellen Yaroshesky, *Waiting for the Elevator: Talking About Race*, 27 GEO. J. LEGAL ETHICS 1203, 1204 (2014) (discussing the importance of teaching cultural competence and noting that doing so better equips students for the practice of law).

319. SUE, *supra* note 4, at 74–76 (describing how outsiders benefit from being able to navigate ambiguity from a position of empowerment).

320. *See id.* at 86 (noting the importance of “a collective sense of identity, for validation and confirmation”).

where those issues are unrelated to professional appearance.<sup>321</sup> This Article does not presume every faculty member will want, or be equipped, to engage in conversations or actions addressing the challenges presented.<sup>322</sup> Though the following recommendations may be difficult to implement, retaining the status quo is not an option.

When the groundwork has been laid during orientation, first-year law professors can readily spark conversation about how implicit bias may have affected the underlying facts of a case, how cases were litigated, and how the adjudicator understood the parties' concerns.<sup>323</sup> In some

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321. See generally Blanca Banuelos et al., *Embracing Diversity and Being Culturally Competent is No Longer Optional*, 2012 A.B.A. SEC. LAB. EMP. L. 1, 2 (“Absent cultural competence, a lawyer will fail to meet his professional duties.”); Mary Lynch, *The Importance of Experiential Learning for Development of Essential Skills in Cross-Cultural and Intercultural Effectiveness*, 1 J. EXPERIENTIAL LEARNING 129, 132, 138–39 (2014) (arguing for increased skill development of intercultural communication and effectiveness in law students because of the increasingly globalized nature of our world and because such skills can be effectively taught “through well-designed, well-supervised, experience-based courses in which law students can more easily overcome their resistance to or defensiveness against learning about cross-cultural issues”); see also MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 26 (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1353554](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353554) [<https://perma.cc/4PY8-KQJ5>] (identifying the ability “to see the world through the eyes of others” among the top 26 attributes of effective lawyers); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 35, 100–03 (2001) (describing the methodology she developed with Professor Jean Koh Peters to increase the cross-cultural competence of lawyers).

322. For example, male faculty members may hesitate to discuss issues of professional appearance with female students out of concern that their actions may be perceived as inappropriate. Similarly, white faculty members may feel self-conscious talking about issues of appearance with students of color, as might heterosexual faculty with LGBTQ students. Faculty members belonging to a dominant culture should be encouraged to help outsider students whose core identities may differ from their own. That support, however, should come only after they have attained a degree of cultural proficiency. At the same time, this responsibility must not fall primarily on the faculty members already carrying a heavier load in their mentoring and student counseling, particularly faculty of color, LGBTQ faculty, and female faculty. Meera Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. 943, 988–92 (2015) (observing that female faculty of color mentor outsider law students at a disproportionately higher rate than their colleagues).

323. A professor can ask the class if they think a case might be decided differently based on the age, race, sex, sexual orientation, gender identity, or religion of the judge hearing a matter. Relatedly, they can probe challenging and charged moments in legal history. For example, a professor might explore with the class the resistance Thurgood Marshall faced when he argued *Brown v. Board of Education*, 347 U.S. 483 (1954), in front an all-white Supreme Court. Additionally, a professor might discuss the unique struggles experienced by Ruth Bader Ginsburg during her first appearance before the Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973), where she argued the issue of sex discrimination before a panel of all male justices. See generally Richard L. Berke, *The Supreme Court: the Overview; Clinton Names Ruth Ginsburg, Advocate for Women, to Court*, N.Y. TIMES, June 15, 1993, at A1, A22 (providing the timeline and historical context of the nominations to the Supreme Court of Justice Ginsburg (1993), Justice O’Connor (1981) and Justice Marshall (1967)). Although questions of appearance may be less germane in

classes, professors can almost seamlessly raise these topics. For example, questions of identity and bias dominate Constitutional Law and Criminal Law in the 1L curriculum.<sup>324</sup>

Similarly, professors can raise these topics in upper-level courses such as Corporations, Evidence, or Professional Responsibility.<sup>325</sup> Certain upper-level seminars, such as those addressing civil and human rights, are also appropriate settings to assign readings and cultivate discussion about implicit bias and microaggressions.<sup>326</sup>

All of these contexts also provide an opportunity to foster conversations among students. This increased dialogue satisfies the principles of cultural proficiency in three ways: raising consciousness of insider-outsider power dynamics within the legal profession, allowing for increased understanding of underrepresented identity groups, and enabling insiders to better understand the experiences of outsider students.<sup>327</sup>

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some 1L courses, there are plenty of opportunities to discuss implicit bias and microaggressions.

324. See Taunya Lovell Banks, *Teaching Laws with Flaws: Adopting a Pluralistic Approach to Torts*, 57 MO. L. REV. 443, 446 (1992) (encouraging law school faculty to adopt “a pluralistic approach” to legal education, ensuring all course structure includes “multiple perspectives” (e.g., race, culture, class, and gender), because “[t]he traditional perspective, perhaps unconsciously, is almost always privileged, white, and androcentric”); Jane H. Aiken & Ann Shalleck, *Putting the “Real World” into Traditional Classroom Teaching*, 1 in THE NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY’S LEGAL PRACTICE 51–73 (Elizabeth Mertz, Stewart Macaulay, & Thomas W. Mitchell eds., 2016) (explaining the importance of integrating legal realism and critical thinking into the traditional law school classroom).

325. For example, Corporations professors can raise questions about the demographics of corporate boards, which are acknowledged as gateway experiences to the C-suite and remain predominantly white and male. Evidence professors can spark discussions about perceptions of credibility and the reliability of eyewitness accounts. Professional Responsibility professors can readily create space to examine the respective power and authority of judges, lawyers, and clients.

326. Creative classroom techniques such as use of media, quick-writes, small group discussions, and simulations can make these conversations more productive. They can also lead to important conversations among students. See, e.g., Danxi Shen, *Quick Write*, HARV. U., <https://ablconnect.harvard.edu/quick-write> [<https://perma.cc/6REJ-QXLP>] (describing a “quick write” exercise as a two to ten minute written response to an open-ended question designed to facilitate reflection and critical thinking). Acknowledging the complexities of implicit biases and microaggressions during the seminar can lead to further discussions with students during office hours—and may facilitate further discussions among students.

327. See *supra* note 233 and accompanying text (identifying the five principles of cultural proficiency).

Settings such as clinics,<sup>328</sup> externship seminars,<sup>329</sup> and individual meetings allow for more candid student-faculty interactions.<sup>330</sup> In these contexts, students are more likely to feel sufficiently comfortable to articulate concerns about professional appearance and conformance.<sup>331</sup>

Many students will be keenly aware of the pressure to perform well during interviews with potential employers, wondering how best to present themselves.<sup>332</sup> Law school is not the first environment in which outsider students will have been encouraged to assimilate or make compromises about self-presentation.<sup>333</sup> It will be the first time, though, in which many students will be shaping their professional identity.<sup>334</sup>

All conversations, regardless of context, should generate reflection about the role of the dominant culture in setting rules—including those regarding appearance—and should encourage students to think critically

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328. See generally TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY (Susan J. Bryant et al. eds., 2014) [hereinafter TRANSFORMING EDUCATION] (discussing clinical legal education).

329. Externship seminars, taught by full-time faculty or adjunct faculty, are designed to foster students' "guided reflection" on their experiences at their placements and to provide students "with an ideal opportunity to explore the moral, ethical, and professional dilemmas that lawyers regularly encounter." Kelly S. Terry, *Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240, 243 (2009). Matters of social justice (inclusive of implicit bias and microaggressions), professionalism, and attorney role constitute regular points of inquiry by faculty, as it is in these contexts that students often will work with individual clients for the first time. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 126–61 (2007) (discussing the importance of forming a professional identity and discerning one's personal reasons for embarking on a legal career).

330. See Kathleen A. Sullivan, *Self-Disclosure, Separation, and Students: Intimacy in the Clinical Relationship*, 27 IND. L. REV. 115, 119–23 (1993) (discussing the complicated boundaries that do—and do not—get drawn between faculty and students when working in close proximity, e.g., in an in-house clinic).

331. See Deo, *supra* note 322, at 988–89 (discussing the personal disclosures students make to faculty, career-related and otherwise).

332. The author has prepared numerous students for job interviews, which inevitably has included discussions of how they plan to present themselves (e.g., what they plan to wear, how they will style their hair, whether they will remove piercings); students often express relief that it is appropriate to ask questions about the subject.

333. See Tanzina Vega, *Students See Many Slight as Racial "Microaggressions,"* N.Y. TIMES, Mar. 21, 2014, at A1 (identifying microaggressive incidents experienced, in particular, on college campuses); Eve Vawter, *Microaggressions Hurt Young Teens More Than You Realize*, SHEKNOWS (Feb. 17, 2016, 12:01 P.M.), <https://www.sheknows.com/parenting/articles/1072663/microaggressions-hurt-young-teens-more-than-you-realize-video> [<https://perma.cc/F5HK-ME44>] (describing the impact of microaggressions on teens and young children).

334. See generally SULLIVAN ET AL., *supra* note 329 (discussing the importance of forming a professional identity and discerning one's personal reasons for embarking on a legal career); TRANSFORMING EDUCATION, *supra* note 328, at 75–76 (addressing professional role assumption in law school).

about decisions they will need to make in the context of legal practice.<sup>335</sup> As the next section explains, appearance conversations should particularly address not only concerns of cultural proficiency, but also those of self-determination theory.

#### d. Identity and Appearance Conversations

In conversations regarding professional appearance, law professors should focus on promoting student self-awareness, encouraging students to identify their primary personal and professional goals and make decisions accordingly.<sup>336</sup> Law professors have a duty to be honest about the implicit, concealed, and even explicit bias students may encounter as practicing attorneys.<sup>337</sup>

Faculty members should acknowledge that questions regarding professional appearance—hairstyles, gender presentation, indicia of religious observance—are not merely questions of style, but also involve core issues of autonomy and identity.<sup>338</sup> Indeed, these inquiries

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335. See Susan Bryant & Elliott Milstein, *Planning and Teaching the Seminar Class*, in *TRANSFORMING EDUCATION*, *supra* note 328, at 77–78 (discussing the pedagogical function of asking students to reflect on lawyer role assumption). When preparing for a lawyering activity, the professor’s inquiry may start with such questions as: What is your goal for the meeting? What is your relationship with the person with whom you will be meeting? What would you like that relationship to be? Given your goals, have you given thought to what you plan to wear? Through a fairly short discussion, it is possible to uncover a number of themes: the importance of context (e.g., where the lawyering activity will occur); what it means to act like a lawyer and to look like a lawyer (e.g., the tension between being “overdressed” and “underdressed”); as well as students’ own concerns about whether any of these expectations might impinge on their core identities. Quite quickly, the conversation moves from a discussion of clothes to one of the meaning of how one presents oneself professionally and what that might mean for the student. This approach encourages all students to be conscious of their choices, as well as of how professional expectations may affect insider and outsider students differently.

336. See *supra* Section IV.A.2 (discussing self-determination theory and the autonomy principle).

337. See *supra* Part III.

338. See *supra* Part I (discussing identity); *supra* Section IV.B.1 (discussing autonomy). Clinic professors, in particular, may have the opportunity to interact with students about identity and appearance issues. Interviewing clients, going to court, and meeting with legislators can all spark such conversations. They also provide faculty with the opportunity to ask students what they will wear when they prepare to meet with clients, make court appearances, or advocate with legislators—and to engage with identity presentation concerns. Further, through the clinic seminar (in readings, class discussions, and simulations), faculty encourage students to become more aware of what it means to step into the role of lawyer. Clinic faculty often ask their students to reflect on how their experiences may affect the type of law and the setting in which they wish to practice. In both informal and more structured rounds—a pedagogical vehicle for applying theory to practice—faculty urge students to consider the implications of how they are perceived by their clients, judges, and other attorneys, as well as by bailiffs, prison guards, and support staff. See generally Susan Bryant & Elliott Milstein, *Generating Conversations: Planning and Facilitating Rounds*, in *TRANSFORMING EDUCATION*, *supra* note 328, at 131 (discussing legal clinics).

implicate how much of one's "true self" can be presented, especially when the student does not conform to the archetype of the traditional lawyer.<sup>339</sup>

Both faculty and administrators must avoid reinforcing outdated stereotypes,<sup>340</sup> speak honestly about the tensions that may arise when presenting one's core identity at work, and discuss the impact of these decisions on the students' careers. In these conversations, students should be asked to articulate their goals and be reminded of how important the intrinsic values of autonomy, competence, and relatedness are to their well-being.<sup>341</sup> Students need to assess how willing they are to compromise their authenticity, if at all, as they transition into practice. The legal academy should acknowledge the pain and confusion that may accompany an individual's decisions to modify her appearance. Ultimately, each student's professional presentation must be rooted in her respective identity and values.<sup>342</sup>

Outsider students, like all students, must be reassured that initial employment decisions are not necessarily permanent. This is true both in the broad sense, where one might begin a career in the private sector but transition to government work, but also in terms of how they express or cover their core identity.<sup>343</sup> Thus, a student might choose to compromise her identity expression—through hairstyle, dress, religious attire, or otherwise—earlier in her career, yet later decide that she is no longer willing to make such sacrifices and that her need for personal autonomy must prevail.<sup>344</sup>

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339. See *supra* Section III.A (discussing the true self).

340. See *supra* Section I.A (describing the traditional appearance expectations of attorneys).

341. See *supra* Section IV.A.2 (discussing self-determination theory).

342. This approach to student counseling is quite similar to that of client-centered counseling, which focuses on the client's goals rather than on what the attorney thinks the client needs. See generally DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH* (3d ed. 2011) (discussing client-centered counseling); ROBERT DINERSTEIN ET AL., *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* (Thomson Reuters 2009) (discussing complex issues of client counseling); DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977) (originating the phrase "client-centered counseling");

343. See Jennifer G. LaGuardia, *Developing Who I Am: A Self-Determination Theory Approach to the Establishment of Healthy Identities*, 44 *EDUC. PSYCHOLOGIST* 90, 90 (2009) ("The process of identity development and maintenance extends across the lifespan.").

344. See Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 *BEHAV. SCI. L.* 261, 281 (2004) (noting that attorneys may be less willing to make personal compromises as their careers progress); see also *supra* Section IV.A.2 (discussing the autonomy principle of self-determination theory).

## CONCLUSION

Notwithstanding the lack of an explicit dress code in most legal workplaces, the majority of attorneys and law students adhere to contextual expectations of professional appearance. For those belonging to the dominant culture, following these appearance norms may not be enjoyable, but doing so does not tend to come at significant expense to their well-being. In contrast, when considering the weight of appearance demands, fast thinking, implicit bias, and microaggressions, the burden on outsiders can be substantial, as even covering carries additional weight.

To address these harms, legal employers and law schools have an obligation to create culturally proficient environments. Insider lawyers not only must make the norms of dominant culture explicit, but also partner with outsiders to create a new organizational culture, which does not expect attorneys to compromise their core identities.

Similarly, law schools must teach their students to recognize and resist the trappings of implicit bias and microaggressions. Administrators and faculty must create a learning environment in which outsider students are encouraged to explore issues of identity and appearance in a manner that supports their agency and authenticity, reinforces their competence, and strengthens their relational connections. Prioritizing students' intrinsic well-being in this manner increases their ability to transition successfully to their professional roles.

By incorporating these recommendations, legal employers and law schools will help transform the profession to eliminate the distinction between "insider" and "outsider" attorneys. Instead, attorneys and students will present their authentic selves, doing the work of this most noble profession.

