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The Insidious Nature of Subtle Bias in the Modern Day Legal Community

#metoo has brought renewed attention to the topic of gender discrimination, at least insofar as it pertains to overt forms of harassment and discrimination. It has fostered a collective empowerment of victims and generated a culture of reporting. This feat, alone, is a step in the right direction. However, issues still arise when exploring the subtle gender bias that permeates the workplace and, quite frankly, the entire legal industry. Subtle gender bias is perhaps the most problematic form of discrimination because it is so pervasive, yet so difficult to define. Many do not even recognize it when they see it and others engaging in subtle gender bias are oblivious to its impact.¹ It is this obscurity and obliviousness that perpetuates subtle gender bias and discrimination in the legal community.

Social scientists have recognized three different categories of sexism: overt, covert, and subtle.² The former two, overt and covert, are intentional.³ Overt sexism is defined as obviously unequal and unfair treatment of women relative to men.⁴ It is readily apparent, observable, and can easily be documented.⁵ Covert sexism, on the other hand, is unequal treatment of women that is recognized, yet purposefully hidden from view.⁶ Both overt and covert sexism are well understood. They are the basis for many claims before the Equal Rights Division and are the driving force behind the #metoo movement. Conversely, subtle sexism represents unequal and unfair treatment of women that is not recognized by many people because it is perceived to be normative, and therefore does not appear unusual or harmful. It is so engrained in one's perception of societal norms and gender appropriateness that it consistently goes unrecognized. It is hidden. It is unintentional. It is the linchpin in the perpetuation of gender bias and discrimination in the legal community.⁷

Perhaps most interesting about subtle sexism is that it is not gender specific. Empirical data supports the proposition that both males and females engage in subtle sexism. A 2012 study tested the presence of hidden gender bias in a largely male-dominated setting.⁸ Faculty at three public and three private, geographically diverse universities in the United States were recruited to test the quality of applicants, differentiated by solely their gender, for a manager position.⁹ The

participants were randomly assigned identical application materials for the position, differentiated solely by the male or female name on the application.¹⁰ The participants then rated the student's competence, selected an annual starting salary for the student, as well as indicated how much career mentoring they would provide to the student.¹¹ Overwhelmingly, participants rated the male applicant as significantly more competent than the identical female applicant, selected a higher starting salary for the male applicant, and offered more career mentoring to the male applicant.¹² Interestingly, the gender of the participant was immaterial as both male and female participants were equally likely to exhibit bias against the female.¹³ It is well-established that this is common in traditionally masculine domains, such as the law.¹⁴ Women are inherently judged as less competent than men and must provide more evidence of job-related skills before evaluators feel confident of their competence.¹⁵

This ideology is seemingly so pervasive that it also affects a female's perception of herself. In another study, men and women were asked to set what they believed was fair pay for performing a fixed amount of work without any information on expected or baseline rates.¹⁶ The study found that the women paid themselves sixty-one percent of what the men paid themselves when no social comparison information was provided.¹⁷ In a related follow-up study, the males and females were asked to perform as much work as they thought was fair for a fixed, prepaid amount of money.¹⁸ The study found that the females worked significantly longer, performed more work, and were more accurate than the males.¹⁹ As this study illustrates, females not only pay themselves less if they do not have any comparison information, but will work more extensively for the same amount of pay.²⁰ In practice, these external and internal perceptions are believed to generally derive from two different forms of bias: descriptive and prescriptive.

Descriptive bias purports to assign certain characteristics to a group, whereas prescriptive bias is the belief about how a certain group should behave regardless of a particular individual's characteristics. Put simply, descriptive bias is the belief that women are communal and prescriptive bias is

the belief that women *should be* communal.²¹ Under descriptive bias, women are automatically assumed to be nurturing, expressive, and concerned about the wellbeing of others.²² Of course, these characteristics on their own are generally viewed as positive. However, issues arise when these same positive attributes influence the legal community's perception of a female as a professional, and further, as an attorney.²³ It is this descriptive bias that leads to the all-too-common cases of mistaken identity where, for example, a female attorney is mistaken for the paralegal, assistant, or secretary. It is an instinctual, perhaps unintentional, split-second judgment about a professional female based on her membership in a particular social group.²⁴ Ultimately, it is seen as harmless—it is not.

Descriptive bias contributes to a female's need to "prove herself" as being competent, aggressive, and as a leader.²⁵ As the aforesaid studies show, descriptive bias underlies the situation where a female applicant is regarded as less qualified than her male counterpart, despite the fact the substance of their experience is indistinguishable. Unfortunately, once a female acquires a job in a primarily male-dominated profession, she continues to face a discontinuity of competency as descriptive bias also influences performance evaluations.²⁶ Not only must women work harder to establish competence, but women are also allotted fewer mistakes than men before they are deemed incompetent.²⁷ For lawyers who are also mothers, the standards are even higher. A 2007 study found that mothers are 79% less likely to be hired, 100% less likely to be promoted, offered an average of \$11,000 less in salary, and are held to higher punctuality and performance standards.²⁸ In turn, females in the legal profession, especially mothers, must exhibit more masculine qualities to

move beyond this descriptive bias and be seen as competent and assertive. However, upon doing so, prescriptive bias manifests itself.²⁹

Descriptive bias is set aside when females exhibit more agentic qualities.³⁰ Unfortunately, once a female displays more agentic qualities, she faces the issue of failing to conform with social gender norms, which results in her being seen as "aggressive, selfish, greedy, and cold".³¹ Women in a professional setting face a catch-22. If they exhibit agentic behaviors, they are rewarded with competence ratings equal to men, yet at the same time suffer social repercussions, referred to as the "backlash effect".³² Decades of research, as well as anecdotal evidence, demonstrates that women who do not display feminine characteristics are often judged as less psychologically healthy and evaluated less favorably than those who do.³³ Specifically, agentic women are viewed as socially deficient, which results in hiring and promotion discrimination. In performance reviews, self-promotion further complicates competency disparity for females as it is often viewed negatively.³⁴ Another study found that women in a masculine profession who spoke in a direct, self-confident manner, highlighted past accomplishments, and attributed successes to skill rather than luck were viewed less positively than women who were more modest about skills and accomplishments.³⁵ Female attorneys are caught in this constant quandary of being automatically seen as communal thus incompetent, and exhibiting agentic qualities thus socially inappropriate.

Subtle gender bias is an everyday occurrence for females in the law, whether communally recognized or not. It prevents career advancement and perpetuates an overarching belief that females are incompetent until proven otherwise. At the same time, self-promotion ultimately does more ➡



harm than good. Modesty is expected, yet inhibits its promotion opportunities. Ultimately, female attorneys are forced to decide between embracing a traditionally feminine persona to gain societal approval or adopting more traditionally masculine behaviors to be seen as able, which at the same time ultimately leads to hostile disapproval. It is a constant double-edged sword. Thus, while the #metoo movement's impact on overt sexual harassment and gender bias is encouraging, it fails to encompass subtle gender bias in its success. Accordingly, legal professionals of both genders must recognize this ambivalence and make a concerted effort to minimize the impact of both descriptive and prescriptive bias in the legal community now that it is, hopefully, more easily recognizable.

ENDNOTES

1. One story perfectly exemplifies this situation and is worth noting. A friend and fellow attorney, who is female, was hired at a large corporation a few years ago. While being introduced to her team, her male superior introduced her as, "the new female attorney". In response, she looked at her male superior and the team and said, "I would like to say thank you to my male boss." While this exchange was lighthearted, and something most females can relate to, the male superior's qualifier is part of the problem. In fact, another member of the team approached her afterward and thanked her for speaking up.
2. NIJOLE V. BENOKRAITIS & JOE R. FEAGIN, MODERN SEXISM, 2d (1999).
3. *Id.*
4. Janet K. Swim & Laurie L. Cohen, *Overt, Covert, and Subtle Sexism: A Comparison Between the Attitudes Toward Women and Modern Sexism Scales*, 21 PSYCHOL. WOMEN Q. 103 (1997).
5. *Id.*
6. *Id.*
7. As will likely become apparent throughout this article, the principals throughout are equally applicable to other professions. However, all of the anecdotal evidence provided throughout this article comes directly from females in the legal profession.
8. Moss-Racusin, et al., *Science faculty's subtle gender biases favor male students*, 109(41) PROC. NAT'L ACAD. SCI. USA 16474-79 (Oct. 9, 2012).
9. *Id.* at 16478.
10. *Id.* at 16475. The participants either received an application from Jennifer or from John. *Id.* at 16478.
11. *Id.* at 16477.
12. Moss-Racusin, et al., at 16477.
13. *Id.* at 16478. This presumption of incompetence is equally as prevalent in legal academia. See Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J. L. & FEMINISM 333, 336 (1996) (citing a study showing that "forty-eight percent of all women students believe that female professors, more than male professors, must prove their competence to their students"); Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*,
- 44 J. LEGAL EDUC. 311, 315 (1994) (exploring the "hostility or presumption of incompetence from students, especially male students" toward female law professors).
14. JOAN C. WILLIAMS, FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS 2D EDITION (2008).
15. *Id.*
16. John T. Jost, *Negative Illusions: Conceptual Clarification and Psychological Evidence Concerning False Consciousness*, 16 POL. PSYCHOL. 397, 404 (1995).
17. *Id.*
18. *Id.* at 404-05.
19. *Id.* at 404.
20. *Id.*
21. Michael J. Gill, *When information does not deter stereotyping: Prescriptive stereotyping can foster bias under conditions that deter descriptive stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 620 (2004).
22. *Id.* at 619.
23. See generally Andrea S. Kramer, *Developing Clout While Navigating Gender Bias*, 100(3) NAT'L ASS'N WOMEN LAWYERS 10 (2015).
24. See Swim & Cohen, at 104 ("Subtle sexism is also consistent with research demonstrating that stereotyping can reflect automatic cognitive processes that may be unintentional or outside of the stereotyper's awareness."). Anecdotal evidence further supports descriptive bias in day-to-day interactions. As an example, I recently went to the Wisconsin Law Library to return some books, which takes all of five minutes. Upon leaving the library, a male standing near the entrance who had seen me enter turned to his colleague and laughingly exclaimed, "I guess she decided to go shopping instead!" Upon attending a #metoo panel discussion at the Wisconsin Defense Counsel's Spring Conference earlier this year, it became apparent that the "shopping" comment is frequently encountered by female attorneys and insurance clients. Descriptive bias, exhibited through comments like this, ultimately belittle a female's competency and commitment.
25. Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J. L. & FEMINISM 334, 342 (1996).
26. WILLIAMS, at 20.
27. *Id.*
28. Shelley Correll, Stephen Benard, & In Paik, "Getting a Job: Is There a Motherhood Penalty?", 112 AM. J. OF SOC. 1316 (2007) (measuring resumes that listed membership in the "Parent-Teacher Association" against identical resumes that did not).
29. Gill, at 620.
30. Michael J. Gill, *When information does not deter stereotyping: Prescriptive stereotyping can foster bias under conditions that deter descriptive stereotyping*, J. OF EXPERIMENTAL SOC. PSYCHOL. 619, 621 (2004).
31. *Id.*
32. Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74(3) AM. PSYCHOL. ASS'N INC 629-45, 631 (1998).
33. WILLIAMS, at 22.
34. *Id.* at 23.
35. Rudman, at 631.