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## The Devil You Don't Know: Implicit Bias Keeps Women in Their Place

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## **The Devil You Don't Know: Implicit Bias Keeps Women in Their Place**

**By Michele N. Struffolino\***

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## I. Introduction

The existence of gender bias affects decision-making by all involved in domestic relations matters.<sup>1</sup> Theories of implicit social cognition have shifted the discussion of gender bias from explicit expressions of discrimination to the effects of unconscious bias on decisions affecting the role of women within the family.<sup>2</sup> This shift, while exposing a more subtle form of prejudice, may also at times be an acceptable haven for basic stereotyping that was long ago identified as discriminatory, actionable, and harmful.<sup>3</sup> This shift, however, does not signify the end of explicit bias.

We recently experienced a presidential election in which explicit gender bias was often displayed, but excused.<sup>4</sup> A clear description of an assault on women was minimized in both men and women's decision-making process.<sup>5</sup> When explicitly derogatory references to a woman's private body area are

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1. See *infra* Part II.

2. See *infra* Part II(B).

3. See *infra* Part II.

4. See Joanna L. Grossman & Linda C. McClain, *Battle of the Sexist: The Implicit, Explicit, and Unrelenting Bias of Trump's Presidential Campaign*, JUSTIA: VERDICT (Oct. 11, 2016), <https://verdict.justia.com/2016/10/11/battle-sexist-implicit-explicit-unrelenting-bias-trumps-presidential-campaign> (“[W]hile Trump apparently has the strength and stamina of a professional football player in his 30s, Clinton, he suggested, is flat out weak. She had the nerve to get pneumonia while campaigning for president . . . [and] doesn't have the strength to fight ISIS . . . . Trump mocked Clinton during the debate for being at home resting rather than campaigning, and during a campaign event, he imitated her stumbling to her car while battling pneumonia. ‘Here's a woman,’ he told a cheering crowd, ‘[s]he's supposed to fight all of these different things, and she can't make it fifteen feet to her car. Give me a break. . . . We need stamina. We need stamina.’”).

5. See Emma Gray, *Trump's Latest Comments About Women are Rape Culture in a Nutshell*, HUFFPOST, [http://www.huffingtonpost.com/entry/donald-trump-billy-bush-rape-culture\\_us\\_57f80a89e4b0e655eab4336c](http://www.huffingtonpost.com/entry/donald-trump-billy-bush-rape-culture_us_57f80a89e4b0e655eab4336c) (last updated Oct. 10, 2016) (“Comments like these . . . are an embodiment of a culture that normalizes sexual harassment and violence against women.’ . . . Rape culture is what allows famous men like Bill Cosby to remain untarnished in the public eye until more than 50 women publicly accused him of sexual assault.”); see also PostTV, *Donald Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), [https://videos.posttv.com/washpost-production/Obtained by The Washin gton Post/20161007/57f7d412e4b0bc3a464f7746/57f7f4a5e4b037a240c7ac60\\_t\\_1475867848644\\_master.m3u8](https://videos.posttv.com/washpost-production/Obtained%20by%20The%20Washing%20ton%20Post/20161007/57f7d412e4b0bc3a464f7746/57f7f4a5e4b037a240c7ac60_t_1475867848644_master.m3u8).

excused by men and women as necessary collateral damage in the public discourse,<sup>6</sup> it is unlikely that decisions made regarding the most important social system—the family—will escape the effects of bias regarding the role of women.

These explicitly prejudicial statements are accepted because they are based on beliefs “embedded in popular culture.”<sup>7</sup> The unspoken opinion is that women who complain about this harmless banter are simply “hyper-vigilant” or “feminazis” who take these customary, harmless behaviors too seriously.<sup>8</sup> These notions of hypersensitivity are not supported in reality: “[T]he weight of evidence suggests that under-perception of gender bias is closer to the norm than hyper-vigilance.”<sup>9</sup> These notions are also consistent with the traditional social norms upon which implicit biases are often based.

Applying existing implicit bias science when examining the family law system, however, provides a rationale for the persistence of gender bias and its effects on decision-making in family matters despite explicit perceptions and expressions of gender neutrality and fairness. Once traditional gender norms and their effects on societal perceptions are identified as the foundations for unconscious attitudes and beliefs, the impact on the individual and the law is apparent. It is through this realization that solutions can be explored and techniques implemented to avoid the effects of implicit bias on women in family matters.

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6. See Andi Zeisler, *The B-Word? You Betcha.*, WASH. POST (Nov. 18, 2007), [http://www.washingtonpost.com/wp-dyn/content/article/2007/11/16/AR2007111601202\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/11/16/AR2007111601202_pf.html) (explaining how the B-word is used in our society to describe “any woman who is strong, angry, uncompromising and, often, uninterested in pleasing men . . . who doesn’t back down from a confrontation”); see also Andrea S. Kramer & Alton B. Harris, *How Women Can Talk Themselves Out of Speech-Based Gender Biases*, FAST COMPANY (Mar. 20, 2017), <https://www.fastcompany.com/3069044/how-women-can-talk-themselves-out-of-speech-based-gender-biases> (“[In the workplace,] [g]ender stereotypes allow men to bark orders, issue directives, and demand results in direct, even harsh ways.”).

7. Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives That Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679, 684 (2007).

8. *Id.*

9. *Id.* at 685 (footnote omitted).

In systems expressing explicit bias against women, which is centered on the premise that women are inferior, justice occurs when explicit notions of gender are applied to the facts.<sup>10</sup> There is a conscious expectation that outcomes will be based upon identified and publicized expectations of gender inequality and the rights of the parties are defined by these stated beliefs.<sup>11</sup> As a result, outcomes that would be considered unacceptable under our stated and publicized intolerance for gender bias may actually be more just.<sup>12</sup>

Justice in our system occurs when the parties are heard by a neutral fact-finder and the law is applied to the facts without bias.<sup>13</sup> In systems rejecting explicit bias, there is a perception that all are equal and that the law will be applied to women and men without consideration of stereotypical traits or bias. As a result of the women's fight for equality, a successful feminist movement, and men's groups crying foul, what was once a misogynistic family law system became equal by design.<sup>14</sup> The judicial system and the players involved, however, are still

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10. See Karin Carmit Yefet, *The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb*, 34 HARV. J.L. & GENDER 553, 603 (2011).

11. See *id.* at 555, 58, 60-61 ("Classical Islamic law grants a husband the unilateral right to terminate a marriage at will. One of the rationales most often invoked to justify men's unfettered divorce power is that "[t]he question of settling divorce should be in the hands of the wiser party, and that is men. Men are wise, which is why they do not have to go to court. Islamic law would consider the wise wife an exception and you cannot generalize an exception". . . . In contrast to a husband's virtually unlimited power to divorce, a wife's way out of an undesirable marriage is almost entirely blocked. A female divorce right, Muslim scholars feared, would emasculate men and be susceptible to a women's highly emotional and irrational natures. . . . Consequently, all schools of Islam agree that a wife does not enjoy any privilege whatsoever to initiate a private divorce, unless her husband delegates such power to her.") (footnotes omitted) (quoting HUMAN RIGHTS WATCH, *DIVORCED FROM JUSTICE: WOMEN'S UNEQUAL ACCESS TO DIVORCE IN EGYPT* 19 (2004)); *infra* Part II(A). The definition of justice is: "The fair and proper administration of laws." *Justice*, BLACK'S LAW DICTIONARY (10th ed. 2014). Systems that apply laws that are explicitly unequal may accomplish this goal better than those based on expressed neutrality but administered based on unstated and unpublicized biased attitudes. See *infra* Parts IV-V.

12. See Michele N. Struffolino, *For Men Only: A Gap in the Rules Allows Sex Discrimination to Avoid Ethical Challenge*, 23 AM. U. J. GENDER, SOC. POL'Y & L. 487, 506 (2015) [hereinafter *For Men Only*].

13. *Id.* at 526.

14. See *infra* Part IV(A).

unconsciously acting based on unspoken and unrealized bias; and some may be consciously taking advantage of the fiction that equality exists, or should exist, within the system.<sup>15</sup> The application of traits based on implicit notions of women and their role in the family and in the work world creates an injustice whose cause cannot be determined by looking at what it appears to be.<sup>16</sup>

Women who assume the stereotypical roles during marriage may be harmed the most by implicit bias upon divorce.<sup>17</sup> A woman who intentionally foregoes employment or career opportunities in order to assume the primary family caretaking role during marriage finds that her contributions are undervalued upon divorce.<sup>18</sup> In addition, societal perceptions of equal opportunities in the workforce further an opinion of a limited need for future financial contributions by her husband.<sup>19</sup> The premise is that women can do it all, child-rear and work.<sup>20</sup> They are expected take advantage of apparent work opportunities while the implicit assumptions that women are natural and, sometimes, perfect caregivers remain.<sup>21</sup> Men, however, who ask to take on more of a parenting role upon divorce are admired—they are stepping up to the plate.<sup>22</sup> They are willing to take on more and should be rewarded.<sup>23</sup> With caregiving responsibilities being presumptively shared upon the dissolution of the relationship, women are free to take advantage of increasing opportunities for women in the workforce.<sup>24</sup> This further supports the perception of a woman's decreased need for child support or other financial contributions from the husband upon divorce.<sup>25</sup> Women get what they asked for—go out and work.

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15. *See infra* Part IV(B).

16. *See infra* Part III.

17. *See infra* Part V(A).

18. *See infra* Part V(A).

19. *See infra* Part IV(B).

20. *See infra* Part V(A).

21. *See infra* Part V(A).

22. *See infra* Part V(A).

23. *See infra* Part V(A).

24. *See infra* Part IV.

25. *See infra* Part IV(A).

While men's claims of gender bias in the family law system are acknowledged, this article focuses on how bias, whether implicit or explicit under the guise of unconscious attitudes or behavior, continues to place women at a systemic disadvantage. Although implicit bias also impacts outcomes in child abuse and neglect actions involving the state,<sup>26</sup> the focus of this article is the impact of implicit bias in actions between women and men in the family courts, in particular those issues involved in the dissolution of the relationship and the family unit. First, the emergence of implicit social cognition theory will be explored in order to set the stage for understanding how bias continues to effect decision-making in the legal system. Next, this article explores the continued existence of gender bias against women in our society and the external and internal justifications for its persistence. This article will then discuss the persistence of gender bias in the family court system. Existing implicit bias science and research is then applied to the family court environment as a means to explain why and how bias against women continues to affect outcomes in family matters. Finally, although no strategies have been proven to have a long-term impact on eliminating implicit bias against women,<sup>27</sup> this article looks to the findings of existing explicit and implicit bias research and scholarship as a means to discover techniques to eliminate the barrier implicit bias creates for a woman's ability to obtain a just result in family matters.

## II. Implicit Bias Becomes the Focus of Discrimination Discourse

Gender bias has been traditionally examined using a social or social-psychological approach to expose and address stereotyping and its systemic effect.<sup>28</sup> A recent shift to a psychological approach focusing on exposing unconscious beliefs and behaviors has led to efforts to self-identify implicit biases

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26. See Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 556 (2012).

27. See *infra* Part VI.

28. See Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates Over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 222 (2014).

and minimize its effect on decision-making.<sup>29</sup> Implicit social cognition theory explains the existence of implicit bias and describes this form of stereotyping based on social norms as a kinder, less self-culpable condition.

#### A. Implicit Social Cognition Theory

Traditional notions of gender bias are based on attitudes, positive or negative, and stereotypes or traits, associated with a specific gender.<sup>30</sup> These traditional biases are explicit, meaning they are conscious, recognized, and endorsed by the person who holds them.<sup>31</sup> These explicit biases are constant and consistent in different situations.<sup>32</sup> Because they are explicit and “consciously accessible through introspection,” they can explain that a person has stated beliefs or behaviors.<sup>33</sup> Additionally, they are exposed through the “marketplace of ideas”<sup>34</sup> and subject to the criticism and disapproval by others.<sup>35</sup>

These traditional beliefs, however, have been overshadowed by recent developments in the social sciences.<sup>36</sup> In 1995, the term “Implicit Social Cognition” was introduced into the discussion regarding the existence and effect of bias.<sup>37</sup> This field of psychology focuses on unconscious mental processes that form attitudes based on stereotypes that are not accessible through introspection.<sup>38</sup> A person’s beliefs are formed without awareness

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29. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012).

30. See *id.* at 1128-29.

31. See *id.* at 1129.

32. See *id.*

33. *Id.*

34. Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 649 (2006) (“The model of the ‘marketplace of ideas’ governs critical decisions in American jurisprudence on regulating communications. This theory holds that, over time, we collectively process ideas and information to separate truth from falsehood.”).

35. See Breger, *supra* note 26, at 561.

36. See Kang et al., *supra* note 29, at 1129.

37. *Id.* (citing Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995)).

38. *Id.*

of their existence and reinforce automatic responses affecting one's behavior.<sup>39</sup> These beliefs and behaviors form automatically and in ways are often contrary to the individual's conscious and stated beliefs.<sup>40</sup> Because these beliefs are not subject to self-introspection or external condemnation,<sup>41</sup> they can "harden[]" over time, becoming part of one's core set of beliefs."<sup>42</sup>

Authors Banaji and Greenwald provide a striking illustration of how implicit bias affects decision-making by likening it to the physiological condition each individual experiences.<sup>43</sup> Each eye has a blind spot that blocks information from view.<sup>44</sup> Rather than recognizing the gap or interruption in the picture, the mind automatically and unconsciously fills in the missing detail with information that makes "reasonable sense."<sup>45</sup> The individual is, therefore, unaware of any visual gaps or that the full picture was interrupted in any way.<sup>46</sup> Implicit bias affects our experiences in the same way; unconsciously filling in information about social groups that makes "reasonable sense."<sup>47</sup>

Implicit social cognition theory is supported by decades of research by social psychologists.<sup>48</sup> This research has shown that unlike the decisions or actions that result from a conscious, reflexive thinking and reasoning process, implicit bias results from an automatic thinking process that is driven by one's feelings or effect.<sup>49</sup> Often, actions are driven by automatic

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39. *Id.*

40. *Id.*

41. See Bambauer, *supra* note 34, at 696 ("The fact that cognitive biases interfere with our ability to make good decisions has serious consequences for the marketplace of ideas model for regulating communications.").

42. Breger, *supra* note 26, at 561 (alteration in original) (quoting Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1255-56 (2002)).

43. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE* 134-35 (Random House 2013).

44. *Id.* at xi.

45. *Id.*

46. *Id.*

47. *Id.*

48. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 945-46 (2006).

49. BANAJI & GREENWALD, *supra* note 43, at 54.

preferences despite stated rational beliefs,<sup>50</sup> resulting in decisions that are contrary to one's own conscious beliefs.<sup>51</sup> Psychologists recognize this contradiction as "*disassociation* . . . [one of] psychology's most powerful concepts."<sup>52</sup>

The existence of these contradictions indicates implicit bias.<sup>53</sup> Rather than attitudes about others being based on experiences with the individual, the perception of the person is driven by what traits our unconscious cognitive process associates with the particular social group to which they belong.<sup>54</sup> As Banaji and Greenwald explain, we make decisions about people with "less than perfect knowledge."<sup>55</sup> Two factors allow the actor to justify contradictory behavior or assessment. First, the actor has categorized the situation as an assessment of an entire social group, thus distancing and minimizing the dissociation with stated beliefs.<sup>56</sup> Second, there is little, if any, impact on the actor when the dissociation occurs because the behavior is based on unspoken beliefs.<sup>57</sup>

Research also exposed the role "implicit attitudes" and "implicit stereotypes" play in discrimination.<sup>58</sup> Humans are consistently inundated with new information and situations in everyday life. Cognitive structures, called schemas, allow humans to quickly and efficiently categorize the information into pre-existing "mental blueprints."<sup>59</sup> These mental blueprints are created through life experiences.<sup>60</sup> They act as shortcuts that allow humans to deal with new situations without having to construct a new blueprint in order to understand the situation.<sup>61</sup> The information presented in the new situation is automatically

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50. *Id.* at 55.

51. *Id.* at 57.

52. *Id.* (emphasis in original).

53. *See id.*

54. *Id.* at 16.

55. BANAJI & GREENWALD, *supra* note 43, at 16.

56. *Id.*

57. *Id.*

58. Greenwald & Krieger, *supra* note 48, at 948.

59. Nicole E. Negowetti, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L.J. 930, 937 (2015) [hereinafter *A Call for Self-Reflection*] (quoting Richard K. Sherwin, *The Narrative Constr. of Legal Reality*, 18 VT. L. REV. 681, 700 (1994)).

60. *Id.* at 938.

61. *Id.*

and unconsciously sorted and organized into “categories that function like containers.”<sup>62</sup> These containers act like scripts that allow the individual to assess the new situation based on “the social knowledge embedded in the script, rather than on the unique characteristics of the [new] situation.”<sup>63</sup> Because the scripts are created through life experiences, they are often based on traditional values and beliefs.<sup>64</sup>

Although this process is cognitively convenient and efficient, the process prevents the personal growth often associated with experiencing new situations.<sup>65</sup> The automatic sorting of the situation into an existing schemas blocks the new information from being organized into a new script.<sup>66</sup> In addition, the importance of the new information and how or if the new information is remembered, is also sorted through the preexisting script: “People give more consideration to information that is consonant with a stereotype and give less credence to information that is stereotype-inconsistent . . . .”<sup>67</sup> We are more inclined to remember information in a way that is consistent with our unconscious bias.<sup>68</sup>

Along with the focus on implicit social cognition as the cause of bias, and possibly as a means to define its existence, social scientists created a tool to expose this unconscious phenomenon.<sup>69</sup> The Implicit Association Test (“IAT”) is a widely accepted and frequently used tool that not only provides an opportunity to expose the existence of implicit bias, but also provides data to support further studies and findings in the area of implicit bias.<sup>70</sup>

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62. Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 278, 285 (2014) [hereinafter *Navigating the Pitfalls of Implicit Bias*] (citing Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISCIPLINARY L.J. 259, 264 (2009)).

63. *Id.* at 286 (footnote omitted).

64. *Id.*

65. *Id.* at 287; see also BANAJI & GREENWALD, *supra* note 43, at 63.

66. *Navigating the Pitfalls of Implicit Bias*, *supra* note 62, at 287.

67. *Id.* (footnote omitted).

68. *Id.*

69. See Kang et al., *supra* note 29, at 1129.

70. See *id.* at 1130.

## B. The Implicit Association Test

Implicit social bias is revealed through the use of innovative new techniques that measure attitudes and stereotypes that cannot be exposed through self-reporting.<sup>71</sup> The creation of the IAT furthered the shift in focus away from mainstream discussions regarding explicit stereotyping and discrimination to identifying the existence of unconscious attitudes affecting situational responses.<sup>72</sup> This test exposes the existence of implicit bias by providing a glimpse into the information and assumptions the mind automatically, and unconsciously, adds to an experience.<sup>73</sup> The IAT measures response speed when presented with opposing traits and pleasant, and unpleasant, words: “The IAT measures the strength of association between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The main idea is that making a response is easier when closely related items share the same response key.”<sup>74</sup>

Although the “Race IAT” is the most commonly used IAT, research expanded its use to other social groups and categories.<sup>75</sup> There are over one dozen IAT assessments currently on the Project Intake Website; two of these focus on gender.<sup>76</sup> The gender—liberal arts—science IAT, “often reveals a relative link between liberal arts and females and between science and males.”<sup>77</sup> More relevant to an analysis of the effect of implicit gender bias in family matters, however, is the gender-career IAT.<sup>78</sup> The four categories for this test are male, female, career, and family.<sup>79</sup> Not surprisingly, the website states that this test “often reveals a relative link between family and females and

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71. *Id.* at 1129.

72. Greenwald & Krieger, *supra* note 48, at 954-55.

73. See BANAJI & GREENWALD, *supra* note 43, at 39.

74. *About the IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html> (last visited Mar. 31, 2018). The IAT is available at <https://implicit.harvard.edu/implicit/>.

75. Greenwald & Krieger, *supra* note 48, at 952-54.

76. See PROJECT IMPLICIT, *supra* note 74.

77. *The IAT*, BLINDSPOT, <http://blindspot.fas.harvard.edu/IAT> (last visited Mar. 31, 2018).

78. *Id.*

79. *Id.*

between career and males.”<sup>80</sup>

Exposing the disassociation between implicit and explicit biases is key to identifying unrealized prejudicial beliefs. Researchers have compared self-reported, avowed beliefs and those measured through the IAT to identify the prevalence of implicit bias.<sup>81</sup> In order to understand the effect implicit attitudes have on behavior, researchers included measures of social behaviors that are typically associated with the attitude.<sup>82</sup> Researchers found that implicit biases were a greater predictor of behavior than explicit attitudes, when dealing with socially sensitive prejudicial attitudes.<sup>83</sup> This is because “impression-management processes might inhibit people from expressing negative attitudes . . . .”<sup>84</sup> In these socially sensitive situations, implicit attitudes were found to be better predictors of spontaneous social behaviors, such as “eye contact” and “seating distance”—behaviors that silently and unconsciously communicate the level of “warmth or discomfort” one is feeling in that situation.<sup>85</sup>

The research using IAT results, much of which is from data accumulated from the websites that allow the public to take the assessments, supports not only the finding that implicit bias is present, but also that implicit bias is especially likely to have an impact on spontaneous, non-deliberate responses.<sup>86</sup> The findings that implicit bias can be a greater predictor of behaviors in socially sensitive situations, especially spontaneous behaviors, exposes the impact these beliefs can have on litigants, attorneys, and judges who often need to make decisions regarding sensitive family issues, in stressful environments under time constraints.<sup>87</sup>

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80. *Id.* See also PROJECT IMPLICIT, *supra* note 74. Quite surprisingly, however, the author of this article received a result of a *strong association* for male and career and females and family on this IAT. See PROJECT IMPLICIT, *supra* note 74.

81. Greenwald & Krieger, *supra* note 48, at 949, 53-54.

82. *Id.* at 953-54.

83. *Id.* at 954-55.

84. *Id.*

85. *Id.* at 955.

86. Greenwald & Krieger, *supra* note 48, at 961.

87. See *infra* Part II(C).

### C. The Effects of Implicit Bias in the Legal System

Although few studies focus on the impact implicit bias has on women upon the dissolution of her relationship with a male partner, the impact implicit bias has on decision-making in legal matters has been the subject of much research and scholarship.

The existence of implicit biases in those involved in the legal system is especially problematic because decisions can be driven by unconscious attitudes that are inconsistent with one's stated beliefs: "The very existence of implicit bias poses a challenge to legal theory and practice, because discrimination doctrine is premised on the assumption that, barring insanity or mental incompetence, human actors are guided by their avowed (explicit) beliefs, attitudes, and intentions."<sup>88</sup>

It is not only the litigants that are guided by these implicit attitudes and stereotypes, lawyers and judges are also susceptible to this automatic and unconscious sorting for information.<sup>89</sup> Judges, highly educated and explicitly committed to impartiality, often must rely on their intuition when making numerous decisions under institutional time limits.<sup>90</sup> This is exactly the type of situation in which decisions may be influenced by unconscious bias.<sup>91</sup> As with all individuals, judges bring their life experiences to their roles and these experiences frame their attitudes and beliefs.<sup>92</sup> As one judge admits, implicit bias is "powerful and pervasive enough to affect [our] decisions about . . . whom we believe."<sup>93</sup>

Attorneys are likewise "not immune from the [effects] of implicit biases."<sup>94</sup> Implicit bias can influence the attorney-client

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88. Greenwald & Krieger, *supra* note 48, at 951 (footnote omitted).

89. *Navigating the Pitfalls of Implicit Bias*, *supra* note 62, at 282.

90. *Id.* at 300-01.

91. *Id.* at 301.

92. *Id.* at 300.

93. *Id.* at 282 (quoting Hon. Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POL'Y REV. 149, 150 (2010) [hereinafter *Implicit Bias in Jury Selection*]).

94. *Navigating the Pitfalls of Implicit Bias*, *supra* note 62, at 310 (citing Hon. Mark W. Bennett, Essay, From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective, 57 N.Y.L. SCH. L. REV. 685, 706 (2013)).

relationship at every stage of a legal matter.<sup>95</sup> The explicit and stated belief of attorneys is that they act based on their training, relying on reason and logic, when guiding their client in the decision-making process.<sup>96</sup> An attorney's obligation extends beyond the individual client, or case because they have a "special responsibility for the quality of justice"<sup>97</sup> and are obligated "to seek the administration of justice."<sup>98</sup>

Most importantly, the existence of implicit bias can interfere with the attorney's ability to establish a meaningful relationship with the client. Because implicit bias influences behaviors, an attorney's unconscious bias may prevent establishing the trust and communication critical for a successful attorney-client relationship.<sup>99</sup> For example, attorneys may unwillingly create physical barriers to the relationship by "leaning back" from the client, crossing their legs, or arms, and evading or limiting eye contact.<sup>100</sup> This body language, driven by unconscious attitudes, creates a barrier to the free flow of information needed to accurately assess the client's needs and desires.

Implicit attitudes, therefore, interfere with the ability of the attorney to assist the client in accomplishing their goals. Empathy is needed to understand the client's objectives and to plan the means for accomplishing the desired result.<sup>101</sup> "An attorney must not only comprehend her client's story, but [she] must then 'stand in the shoes' of the client when she communicates the client's experiences, goals, and aspirations to a legal audience."<sup>102</sup> When advising a client, an attorney is required to "exercise independent professional judgment and

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[hereinafter One Judge's Four-Decade Perspective]).

95. *Id.* at 295-96. Attorneys likewise do not, "leave behind their implicit biases when they walk through the courthouse doors." *Id.* at 282 (quoting *Implicit Bias in Jury Selection*, *supra* note 93, at 150).

96. *Id.* at 280.

97. MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2017); *see also For Men Only*, *supra* note 12, at 502.

98. *For Men Only*, *supra* note 13, at 502-03; *see generally* MODEL RULES OF PROF'L CONDUCT pmbl.

99. *See Navigating the Pitfalls of Implicit Bias*, *supra* note 62, at 294.

100. *Id.*

101. *See infra* note 303 and accompanying text.

102. *Navigating the Pitfalls of Implicit Bias*, *supra* note 62, at 298 (footnote omitted).

render candid advice.”<sup>103</sup> This requires more than an understanding of the relevant law; it also requires the ability to understand how the law applies to the client when considering the factors most important to the client. These factors include the client’s moral, social, or economic concerns.<sup>104</sup> Without the ability to establish a connection with the client, the attorney may act on his or her own assumptions about the client rather than the factors most important to the client. For example, the attorney may assume the most important goal of the client is economic, while “his client may be more concerned with repairing a relationship, obtaining an apology, or dealing with the emotions, such as guilt, embarrassment, or fear, triggered by the situation.”<sup>105</sup> In such situations, neither the attorney, nor the client, may even realize the role that implicit bias has played in the client’s ability to obtain a just outcome. While proving that an attorney’s explicit bias influenced his or her actions is difficult, it is likely that clients have little, if any, avenue on which to pursue a claim for attorney misconduct based on implicit bias.<sup>106</sup>

The ABA Model Rules of Professional Conduct defines attorney misconduct as acting in a manner that is “prejudicial to the administration of justice.”<sup>107</sup> The comment to the rule, however, is where the link is made to discriminatory actions. Actions that are prejudicial to the administration of justice exist when, a lawyer who, in the course of representing a client, *knowingly* manifests by words or conduct, bias or prejudice “on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation . . . or socioeconomic status . . . .”<sup>108</sup> Proving attorney misconduct through actions that knowingly exhibit bias or prejudice “implies [that] a finding of unlawful discrimination by an appropriate tribunal” is

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103. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2017); *see also Navigating the Pitfalls of Implicit Bias, supra* note 62, at 297.

104. *See Navigating the Pitfalls of Implicit Bias, supra* note 62, at 298.

105. *Id.* (footnote omitted).

106. *See id.* at 304.

107. MODEL RULES OF PROF’L CONDUCT r. 8.4(d) (AM. BAR ASS’N 2017); *see also Navigating the Pitfalls of Implicit Bias, supra* note 62, at 293; *For Men Only, supra* note 12, at 505.

108. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2017); *see also For Men Only, supra* note 12, at 505.

necessary.<sup>109</sup> It would therefore appear that actions that are based on unconscious bias would evade a finding of attorney misconduct.<sup>110</sup>

As demonstrated above, implicit bias is the subject of extensive social psychological and legal scholarship. Its effect on decision-making in the legal system has gained much attention from judges and courts across the country. It may, however, be just another form of stereotyping in disguise; cloaking biased behavior in validity.<sup>111</sup> Because behavior associated with the attitude is seen as the result of an unconscious thought, it can provide an excuse for discrimination.<sup>112</sup> For these reasons, traditional social psychological theories and methods can be used to further an understanding of why gender bias against women persists.

### III. Gender Bias Affects Every Day Life

Examining the everyday experiences of women in our society provides an understanding of the social norms on which implicit biases are based on. It also provides an understanding of the attitudes that affect the decision-making process by those involved in family matters.

Although women represent roughly half the world's population, existing research and analysis regarding explicit bias defines women as a disadvantaged social group.<sup>113</sup> As such, implicit social cognition theory explains that the automatic thinking process will unconsciously assign traits associated with this group and that it will prevent focusing on the actual experience with the individual.<sup>114</sup> As with any characterization by group, the traits assigned are often disassociated from one's

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109. *For Men Only*, *supra* note 12, at 506.

110. See *Navigating the Pitfalls of Implicit Bias*, *supra* note 62, at 304.

111. See Williams, *supra* note 28, at 222.

112. *Id.* at 228 (“In workplace trainings, minimizing the sense of responsibility for bias by describing it as unconscious can be used as means to increase acceptance of the material, thus reducing the likelihood that the training will increase bias rather than decrease it.”).

113. See generally Neomi Rao, *Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg's Equality Jurisprudence*, 70 OHIO ST. L.J. 1053 (2009).

114. Kang et al., *supra* note 29, at 1129; see also *infra* Part V(A).

stated beliefs.<sup>115</sup> These implicit beliefs are the result of experiencing the effects historical biases have passed down through generations.<sup>116</sup> The shift toward focusing on unconscious bias should therefore not ignore the important lessons learned in explicit stereotyping research and scholarship. While the IAT and other scientific means can be used to expose the existence of implicit bias against women, applying traditional social-psychological theories demonstrates the impact these attitudes have when assessing a woman's contributions to the family and her needs upon divorce. Social-psychological theories show that these attitudes are imposed on women both externally by others and internally by self-assessment on a daily basis.

#### A. Lessons Learned from Finding of Gender Bias in the Workplace

The impact of gender bias in the workplace has been the focus of much research. The findings of this research added to a rich and meaningful discussion regarding the impact of gender bias against women in the area of employment law. The findings of an empirical study by Joan C. Williams regarding the intersectionality of gender and race bias describes four patterns of gender bias.<sup>117</sup> Although these patterns are illustrated by their effects in the workplace, it is easy to see how these same stereotypical biases affect a woman's role in marriage and how her needs are assessed upon divorce.

Williams defines the first pattern of gender bias as "Prove-it-Again!"<sup>118</sup> The findings indicate that women need to be twice as competent as men in order to have their accomplishments viewed as equal.<sup>119</sup> This is a difficult task; studies have shown that women are judged more harshly than men both in the hiring process and in the employment review process.<sup>120</sup> For

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115. See BANAJI & GREENWALD, *supra* note 43, at 57-58; see also *supra* Part II(A).

116. See BANAJI & GREENWALD, *supra* note 43, at 96.

117. See Williams, *supra* note 28, at 189.

118. *Id.*

119. See *id.*

120. See *id.* at 190.

example, during the hiring process:

[F]or jobs requiring both education and experience, subjects will choose a man over a woman, citing experience as the reason, if he has more experience and she has more education. Conversely, subjects will also choose the man over the woman, citing education, if he has more education and she has more experience.<sup>121</sup>

Even when the perception of equality is attained, assumptions based on traits of the social group<sup>122</sup> are applied to match the experience with the assigned trait.<sup>123</sup> For example, the same accomplishment may be viewed as being the result of hard work for men while being viewed as the result of luck for women.<sup>124</sup>

Williams describes the second pattern of gender bias as “The Tightrope.”<sup>125</sup> Women in high-paying professional jobs are judged both on masculine traits, and assumptions of how women are expected to behave.<sup>126</sup> Because the positions are often based on masculine traits, women must exhibit these traits in order to be seen as competent.<sup>127</sup> Acting too masculine, however, can result in the woman being seen as aggressive rather than competent: “[W]omen have to ‘walk a tightrope’ between appearing too feminine (liked-but-not-respected) or seen as too masculine (respected-but-not-liked).”<sup>128</sup> These expectations inhibit the ability of women to attain parity in the workplace. For example, women are less likely to ask for more because for fear of being perceived as pushy.<sup>129</sup>

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121. *Id.* (footnote omitted).

122. *See* BANAJI & GREENWALD, *supra* note 43, at 16-17; *supra* Part II(A).

123. *See* Williams, *supra* note 28, at 190-91; BANAJI & GREENWALD, *supra* note 43, at 16-17; *supra* Part II(A).

124. *See* Williams, *supra* note 28, at 190.

125. *Id.* at 191.

126. *Id.*

127. *Id.*

128. *Id.* (footnote omitted).

129. Williams, *supra* note 28, at 232.

Williams states that mothers face an even more difficult challenge in the workplace: “The Maternal Wall.”<sup>130</sup> This is the third identified pattern of gender bias.<sup>131</sup> Mothers must overcome negative competency and commitment biases associated with motherhood, but if they fail to act in accordance with traits associated with the “typical mother,” they face backlash.<sup>132</sup> The evidence shows this is hard to accomplish: “When subjects were given identical resumes and one but not the other was a mother, the mother was 79% less likely to be hired, only half as likely to be promoted, offered an average of \$11,000 less in salary, and held to ‘harsher performance and punctuality standards.’”<sup>133</sup> These findings support that the notion of equality in the workplace is an illusion.<sup>134</sup>

Although the “Tug of War” pattern of gender bias would seem less applicable to situations outside of the workplace, it exposes that differences among women in their approach to success, both in the workplace and at home, can cause conflict among women.<sup>135</sup> These differences will affect how women relate to one another, or do not relate to one another, in all aspects of society including our judicial system.<sup>136</sup> Those who experience gender bias in the workplace early on are often not supportive of subordinates who enter the workplace after them. Rather than acting as mentors, they often distance themselves from their inexperienced colleagues<sup>137</sup>—possibly as a means of signaling survival. In addition, conflict exists between women trying to model the male traits upon which success in the work environment are based, and those who hold on to a more traditional gender roles; tomboys versus femininity.<sup>138</sup> Williams likens this to “‘mommy wars’ in which women often engage in conflict about the ‘right’ way to be a mother.”<sup>139</sup> These patterns

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130. *Id.* at 192.

131. *Id.* at 189.

132. *Id.* at 192.

133. *Id.* (quoting Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1316-17 (2007)).

134. *See infra* Part IV(A).

135. Williams, *supra* note 28, at 192.

136. *See infra* Part VI.

137. Williams, *supra* note 28, at 192-93.

138. *Id.* at 193.

139. *Id.*

of behavior in the workplace that are often the result of implicit bias are also exhibited in the legal system and in particular, the family court system.<sup>140</sup>

To further understand the impact gender bias has in the family court system, the internalization by women of these traits and expectations by women need to be explored.

#### B. The Role of Women's Own Internal Implicit Gender Bias

Unacknowledged or hidden bias against women allows unequal and unjust treatment in the judicial system to remain unchallenged. It is not just men whose implicit attitudes against women further inequality; women may also act in accordance with stereotypical gender notions or may internally distance themselves from the discourse. As Benaji and Greenwald explain, "self-applied" stereotypes can be particularly harmful, acting as "self-undermining and self-fulfilling prophecies."<sup>141</sup> While a woman may be able to recognize objectively biased behavior when it is happening to her, it is harder to recognize when the bias is subtle and comes from within.<sup>142</sup> This inability is explained through existing psycho-sociological techniques.

Psycho-sociological notions of justice often lead women to blame themselves for an inability to attain a desired result rather than seeing the role bias played in the important life outcome.<sup>143</sup> The notion that "people get what they deserve" is more consistent with our social fabric than blaming others for our difficulties: "When prejudices are subtle and circumstances ambiguous, adherence to 'just world' ideology is especially likely to lead members of stigmatized groups to favor internal explanations over bias as the reason for a poor outcome."<sup>144</sup> The likelihood of self-blame by women is increased because admitting the role bias plays in everyday life leads to women being seen as victims, a label women perceive to be consistent

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140. See Amy Barasch, *Gender Bias Analysis Version 2.0: Shifting the Focus to Outcomes & Legitimacy*, 36 N.Y.U. REV. L. & SOC. CHANGE 529, 530 (2012); see also *infra* Part IV.

141. BANAJI & GREENWALD, *supra* note 43, at 92.

142. See Brake, *supra* note 7, at 687.

143. See *id.* at 688.

144. *Id.* at 689 (footnote omitted).

with failure.<sup>145</sup> Such a conclusion is inconsistent with the fight for equality and control over one's life that women perceive they have, or should have, accomplished.<sup>146</sup>

In addition, even when women recognize discrimination when it is directed at other women, they are less likely to acknowledge it when it is directed at them.<sup>147</sup> Social psychologists attribute this to "blame avoidance;" it is easier to acknowledge generalized wrongful behavior than acknowledge that such actions can have a direct personal impact.<sup>148</sup>

The application of these traits to one's own self-assessment can have an undermining effect in the decision-making process when a male is involved. Because women view themselves as members of a lower status social group, they are likely to internalize the role of decision-making as being a male trait, as men are members of a higher status social group. They are therefore less likely to realize the impact of gender bias on outcomes.<sup>149</sup>

A woman who does not believe that she is entitled to better treatment will likewise believe that getting less than what she objectively deserves is consistent with what she subjectively believes she deserves.<sup>150</sup> This diminished expectation of entitlement is the result of both external and internal observations.<sup>151</sup> While men judge their level of entitlement based upon their observations of what men in society are usually entitled to, women's observations of what other women can usually expect in society puts them at a disadvantage.<sup>152</sup> Likewise, women's own personal experiences in being treated as less-valued than men form their expectations of entitlement.<sup>153</sup> With these external and internal expectations during decision-making, women may very well expect, and be satisfied with, less than men in similar situations.<sup>154</sup> Despite decades of efforts

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145. *See id.* at 690.

146. *See id.*

147. Brake, *supra* note 7, at 690-91.

148. *Id.* at 692.

149. *See id.* at 688.

150. *See id.* at 695.

151. *See id.* at 693.

152. *See* Brake, *supra* note 7, at 693-94.

153. *See id.* at 694.

154. *See id.* at 696.

challenging these external and internal expectations, women are still at a disadvantage when seeking to achieve a just outcome upon the dissolution of a marriage.

#### IV. Women Continue To Face Barriers to a “Just” Result in Family Courts

As women fought for equality in the workforce, the importance of the role of women as caregivers and their continued economic needs received little attention.<sup>155</sup> In fact, men used perceived gains women made toward economic equality to their advantage upon divorce.<sup>156</sup> As a result, widespread legislative changes occurred in family law statutes across the country to accomplish gender neutrality.<sup>157</sup> This, however, did not help women in the system, nor did it block bias from impacting outcomes for women in family court.<sup>158</sup>

##### A. The Fight for Equality Results in a Perception of Equal Justice and Legislative Change

The public perception that women have won the equality battle shields reality.<sup>159</sup> As a result of the feminist movement, federal and state anti-discrimination laws, and advances in reproductive autonomy, women are perceived to have accomplished the goal of economic and personal independence.<sup>160</sup> This perception justified the creation of a gender-neutral family law system.<sup>161</sup> The perception of increased employment

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155. See *infra* Part IV(A).

156. See *infra* Part IV(A).

157. See *infra* Part IV(B).

158. See *infra* Part IV(B).

159. See *For Men Only*, *supra* note 12, at 519 (citing June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1200 (2013)); see also Lynda Waddington, *Women's Equality, A Work in Progress*, GAZETTE: EXACT CHANGE (Aug. 6, 2017, 9:00 AM), <http://www.thegazette.com/subject/opinion/blogs/lynda-waddington/womens-equality-a-work-in-progress-20170806> (“Women across the nation will come together [during the month of August]. They’ll recognize each other . . . and resolve—as so many demonstration signs have bluntly stated—to continue the fight for equality.”).

160. See *For Men Only*, *supra* note 12, at 519.

161. See *id.* at 520.

opportunities for women outside the home supported men's claims that equality meant equality for all.<sup>162</sup> These societal expectations and attitudes supported the view that, post-separation, women and men should share parenting responsibilities and each should be responsible for their own financial security. This view impacted decisions regarding child support, alimony, and property distribution, thus limiting or eliminating the ability for women to obtain outcomes that met their post-separation financial needs.<sup>163</sup>

Legislative reform followed. Today, the language in childcare and parenting statutes is gender-neutral and void of any language expressing traditional views of parenting roles post-divorce.<sup>164</sup> The stated goal in these reforms was "to eliminate the perception that there is a 'winner' when custody issues are litigated . . ." <sup>165</sup> These efforts are based on the assumption that allowing parents equal parenting time and decision-making responsibilities would reduce animosity and litigation therefore furthering the best interest of the child post-divorce.<sup>166</sup> Unfortunately, this is often not the result, with some finding that 35% of litigants who enter a co-parenting arrangement remain "chronically conflicted" after divorce and lack the "problem-solving and decision-making skills" necessary to co-parent.<sup>167</sup>

The perception of economic independence also sparked the legislative reform of laws related to post-divorce financial obligations. Increased educational and occupational opportunities for women would logically lead to increased income opportunities and less need to rely on their husbands post-divorce.<sup>168</sup> Today, many states have either abolished permanent alimony awards or only allow for short-term or

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162. *See id.* at 519.

163. *See id.*

164. *See id.* at 519-20; *see also* Elena B. Langan, *The Elimination of Child "Custody" Litigation: Using Business Branding Techniques to Transform Social Behavior*, 36 PACE L. REV. 375, 408-09 (2016).

165. Langan, *supra* note 164 at 377.

166. *See id.* at 389-90.

167. *Id.* at 391 (quoting Matthew Sullivan, Feature, *Coparenting: A Lifelong Partnership*, 36 FAM. ADVOC. 18, 19 (2013)).

168. *See For Men Only*, *supra* note 12, at 519.

rehabilitative alimony.<sup>169</sup>

Marital property laws and those governing the division of marital property upon divorce likewise changed to reflect the perceptions of equality. Eliminating fault from consideration in divorce was consistent with views of increasing women's equality: "As women entered the workforce, obtaining expanded potential for economic independence, and as their equal status to men solidified, marriage was no longer critical as a source of social stability and financial sustenance."<sup>170</sup> This notion ignored the existence of unequal bargaining power in divorce.<sup>171</sup> While the opportunities for women in the workforce increase, women are still more likely than *men* to be the primary caretaker in the family.<sup>172</sup> As a result, women are more likely to forego income opportunities requiring long hours that would interfere with parenting responsibilities.<sup>173</sup> Despite notions of equality, it is often not the men who help balance parenting and work responsibilities; mothers often "outsource" these responsibilities.<sup>174</sup> Because of the importance of the caretaking role and the financial impact it has on the woman during the marriage, "women are . . . more likely to bargain against their own financial stability, and to give away more than they may be awarded through judicial determination, in order to preserve their parenting and childcare roles."<sup>175</sup> In addition, demands for childcare responsibilities under gender neutral statutes can be used as a bargaining tool to obtain better financial outcomes for men: "[A]lthough the number of men seeking joint custody has increased, so too has there been an increase in the number of men who conceded to reduced custody in return for reduced

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169. *See id.*

170. Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 226 (2010).

171. *See For Men Only*, *supra* note 12, at 522.

172. *See* Laufer-Ukeles, *supra* note 170, at 213; *For Men Only*, *supra* note 12, at 521.

173. *See* Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 143 (2016); *For Men Only*, *supra* note 12, at 521.

174. Laufer-Ukeles, *supra* note 170, at 10; *For Men Only*, *supra* note 12, at 521.

175. *For Men Only*, *supra* note 12, at 523 (citing Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J. L. & GENDER 1, 22 (2008)).

financial support obligations.”<sup>176</sup>

In addition to the caretaker disadvantage, no-fault divorce stripped women of the ability to raise fault as a factor to consider when determining property settlement.<sup>177</sup> Because no-fault jurisdictions often allow for a unilateral divorce, women also lost the power to contest the dissolution of the marriage.<sup>178</sup> Therefore, women lost the leverage to obtain orders to meet their financial needs.<sup>179</sup>

Even under equitable property distribution statutes that allow caretaking responsibilities to be considered as a factor, the result is often an equal distribution of marital property. This, along with the alimony reforms, leaves women at a financial disadvantage post-divorce.<sup>180</sup> While contributions of the caregiver during the marriage may be considered in property distribution, the financial security and future earning power of the non-caregiver may not factor into the distribution.<sup>181</sup> Most states do not consider “human capital” as a marital asset.<sup>182</sup> This is based on the “perception that degrees or other forms of enhanced earning power are the product of the individual talents and hard work of the earning spouse.”<sup>183</sup> Caretaking contributions during the marriage are seen as less meaningful when considering their effects on the ability of the earning spouse’s human capital.<sup>184</sup>

Studies support that women still earn less than men in the workforce and still face barriers to career advancement.<sup>185</sup> A

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176. *Id.*

177. See Laufer-Ukeles, *supra* note 170, at 221.

178. See *id.* at 220.

179. See *id.* at 210 (citing LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION; THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323 (The Free Press 1985)).

180. See Laufer-Ukeles, *supra* note 170, at 233.

181. See Mary Ziegler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259, 262, 283 (2013).

182. *Id.* at 290-91.

183. *Id.* at 290 (citing Alicia Brokars Kelly, *The Martial Partnership Pretense and Career Assets: The Ascendancy of Self Over the Martial Community*, 81 B.U. L. REV. 59, 102-03, 108, 121 (2001)).

184. See Ziegler, *supra* note 181, at 290.

185. See *For Men Only*, *supra* note 12, at 520-21; see also Jonathan Webb, *Women Are Still Paid Less Than Men - Even in the Same Job*, FORBES (Mar.

woman's standard of living most often decreases post-divorce.<sup>186</sup> The combination of not considering human capital as an asset, undervaluing a woman's caretaking contributions, and applying the perceptions of equal opportunities for women in the workforce can result in financial devastation for women.<sup>187</sup> When up to 40% of households headed by women are at the poverty level, this impact is significant and of broad concern.<sup>188</sup>

### B. The Backlash—The Fathers' Rights Movement

As women made progress towards equality in the workforce, men pounced, acting in accordance with expected traits of aggression and confidence. Beginning in the 1980s, the fathers' rights groups began to emerge.<sup>189</sup> These groups contributed to family law legislative reform discussed above and focused the discrimination discourse on men.<sup>190</sup> Using the gains women made toward equality, men focused on what they claimed to be inequality in the family law system.<sup>191</sup> These groups advocated for eliminating fault grounds for divorce and for limiting fault as a factor when considering financial issues.<sup>192</sup> In addition, because women had achieved equality in opportunities outside the home, men should be able to achieve equality in parenting responsibilities.<sup>193</sup> Men's groups advocated for shared parenting plans even in high conflict situations, ignoring the evidence of the harm caused to children

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31, 2016, 9:32 AM), <https://www.forbes.com/sites/jwebb/2016/03/31/women-are-still-paid-less-than-men-even-in-the-same-job/#147ab2714709> (“[R]esearch [] based on the responses of over 2,000 procurement professionals in different countries and industries . . . shows clear evidence that women earn lower wages than their male counterparts even when in the *same role*.”) (emphasis in original).

186. See *For Men Only*, *supra* note 12, at 523.

187. See *id.* at 519; Ziegler, *supra* note 181, at 290-91.

188. See *For Men Only*, *supra* note 12, at 523-24.

189. See Kelly Alison Behre, *Digging Beneath the Equality Language: The Influence of the Fathers' Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform*, 21 WM. & MARY J. WOMEN & L. 525, 529 (2015); Dinner, *supra* note 173, at 82.

190. See Behre, *supra* note 189, at 529.

191. See *id.* at 528; Dinner, *supra* note 173, at 82.

192. See Dinner, *supra* note 173, at 100.

193. See *id.* at 104.

when conflict between parents continued to exist post-divorce.<sup>194</sup>

Fathers' rights groups extended claims for equality to financial issues. If child support and alimony were available to women in divorce, they should likewise be available to men.<sup>195</sup> They asserted that as equal opportunity outside of the home increased and equal household responsibility lessened, or eliminated, a women's need for financial support from men decreased post-divorce.<sup>196</sup> Using women's own efforts to achieve equality, men were able to successfully advocate for formal gender neutrality in the family court system.<sup>197</sup> The result was devastating for women: "[S]ex neutrality in the law of marital dissolution failed to realize substantive gender equality, but rather exacerbated economic inequality between men and women."<sup>198</sup> By demanding gender equality in family court, men were able to obtain and maintain control over women.<sup>199</sup>

The demands of fathers' rights groups extended beyond parenting and financial equality arguments; these groups attacked women's character and motivations.<sup>200</sup> They portrayed women in divorce as liars and manipulators, frequently fabricating allegations of abuse in order to gain an advantage in the family court system.<sup>201</sup> They claimed these false allegations of violence were made to keep fathers away from their children, thus increasing the women's financial need for support.<sup>202</sup> Even where children expressed a preference to live primarily with the mother, fathers claimed this too was a result of the mother's efforts to alienate the children from their fathers.<sup>203</sup> Even where

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194. See Behre, *supra* note 189, at 538-39, 599.

195. See Dinner, *supra* note 173, at 111.

196. See *id.* at 142.

197. *Id.*

198. *Id.*

199. See *id.* at 143-44.

200. See Behre, *supra* note 189, at 525-26.

201. See *id.* at 537 n.56.

202. See *id.* at 537-38 (explaining how Fathers' Rights Groups continued to rely on Parental Alienation Syndrome ("PAS") as a means to counter abuse allegations despite there being no medical or psychological evidence to support its existence).

203. See *id.* at 538 ("Parental Alienation Syndrome . . . claimed that mothers accusing fathers of child sexual abuse were brainwashing and 'alienating' their children.") (quoting Nancy S. Erikson, *Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse*,

violence against women was evident, fathers' rights groups claimed it was often the result of women being the initial aggressor or the result of men's frustration caused by the discrimination they encountered in the family law system.<sup>204</sup>

By claiming to be the victims of discrimination in the family law system, men sought to shift the focus away from bias against women and to take advantage of express notions of equality. These efforts contributed toward creating a gender-neutral body of substantive law that is now used as a barrier to women obtaining a just result in family court. As explained below, their success may well be the result of implicit bias; those acting in accordance expectations based on social norms are often viewed as credible.

#### V. Implicit Gender Bias Further Inhibits the Availability of a Just Result

The impact of implicit gender bias in family matters is great regardless of who is making the decisions. It frames the expectations of the litigants from the start and extends to the advocates, judges, and even to the applicable substantive law.<sup>205</sup>

Before implicit gender bias became the focus of the discussion, systemic gender bias against women in the legal system was exposed. As early as the 1980s, the National Organization of Women ("NOW") urged courts to investigate the existence and impact of systemic gender bias against women in the court system.<sup>206</sup> Based upon a shared belief that justice could only be accomplished if women were treated fairly in the system, courts across the country formed committees to carry out this task.<sup>207</sup> The findings were astonishing. Structural

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6 FAM. & INTIMATE PARTNER VIOLENCE Q. 35, 41 (2013)).

204. *See id.* at 535.

205. *See* Barasch, *supra* note 140, at 544.

206. *See id.* at 530-31.

207. *See id.* at 530. The "New York State Task Force 'examine[s] the courts and identify[ies] gender bias and, if found, . . . make[s] recommendations for its alleviation.'" *Id.* (quoting Hon. Lawrence H. Cook, *Remarks at the Press Conference Announcing the Formation of the New York Task Force on Women in the Courts* (May 31, 1984), in UNIFIED CT. SYS. N.Y., REPORT OF THE NEW YORK TASK ON WOMEN IN THE COURTS (1986), reprinted in 15 FORDHAM URB. L.J. 11, 151 (1986)).

gender bias was found to affect all women involved in the system, including litigants, attorneys, administrative personnel, and judges.<sup>208</sup> The New York Task Force concluded that women involved in the court system were “often denied equal justice, equal treatment, and equal opportunity.”<sup>209</sup> The report found that complaints of unfair treatment in the system were seldom addressed because they “were routinely brushed aside . . . .”<sup>210</sup>

The credibility of women litigants was often questioned and this was found to be “the most insidious manifestation of gender bias against women” in the judicial system.<sup>211</sup> Viewed as a systemic problem, the task force recognized that bias against women affected the ability for all to obtain a just outcome: “[A] system that discriminates against some is unjust for all.”<sup>212</sup> Three decades later, partially as a result of the attention given to the existence and need to eliminate gender bias in courts across the country, instances of explicit bias have been greatly reduced.<sup>213</sup> The science of implicit social cognition, however, exposed a new basis for identifying and explaining the persistence of gender bias and its effect on outcomes in the legal system.<sup>214</sup>

Family court is fertile ground for implicit gender bias. Humans are more likely to act based on implicit attitudes and stereotypes while under time constraints and in stressful situations.<sup>215</sup> While all litigation involves some degree of stress and urgency, the high emotion, sensitive personal issues, and complex legal framework associated with family law cases creates an extremely stressful environment for all involved.<sup>216</sup>

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208. See Barasch, *supra* note 140, at 532-33.

209. *Id.* at 532 (quoting UNIFIED CT. SYS. N.Y., REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN COURTS (1986), *reprinted in* 15 FORDHAM URB. L.J. 11, 17 (1986)).

210. *Id.* at 534.

211. *Id.* (internal quotation marks omitted) (quoting UNIFIED CT. SYS. N.Y., REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN COURTS (1986), *reprinted in* 15 FORDHAM URB. L.J. 11, 113-114 (1986)).

212. *Id.* at 529.

213. See Barasch, *supra* note 140, at 547.

214. See *id.* at 547-48.

215. See *Navigating the Pitfalls of Implicit Bias*, *supra* note 62, at 281.

216. See Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS

The high volume of cases in family courts, coupled with a high rate of pro-se litigants, means that responses and decisions often need to be made quickly and need to be made based on new information.<sup>217</sup> This environment increases the likelihood that unconscious assumptions will be used to fill in the gaps by decision makers.

#### A. Assumptions Imposed by External Decision Makers

An equitable resolution in family court does not necessarily mean an equal result. In fact, perceptions of equality and resulting legislation, coupled with unconscious bias, can cloak inequitable results in legitimacy.<sup>218</sup> For example, ordering equal parenting time to the mother and father is not a fair result when the mother was the primary caretaker of the children and the father exercised little parenting responsibilities during the relationship.<sup>219</sup> Implicit gender bias may even prevent recognizing when men's claims for equal parenting time are a means to obtain a better financial result.<sup>220</sup>

If the extent of implicit gender bias exists in family matters to the same extent it has been found to exist in society through IAT results,<sup>221</sup> realizing how it affects outcomes is necessary. There is no reason to believe that implicit bias exists to any lesser degree in family matters than in others.<sup>222</sup> The characteristics of the family law system may even enhance the likelihood of a biased impact. The issues in family matters are typically decided by a judge, not juries.<sup>223</sup> The laws that apply frequently grant family court judges considerable decision-

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166, 169-71 (2012) [hereinafter *Taking Limited Representation to the Limits*].

217. See *Navigating the Pitfalls of Implicit Bias*, *supra* note 62, at 301-02; *Taking Limited Representation to the Limits*, *supra* note 216, at 196 n.113.

218. See Sara Israelsen-Hartley, *Reforming Divorce: Changing Laws to Preserve Families*, DESERET NEWS: UTAH, <http://www.deseretnews.com/article/765589896/Reforming-Divorce-Changing-laws-to-preserve-families.html> (last updated July 14, 2012, 7:30 PM); *supra* Part III(B).

219. See *For Men Only*, *supra* note 12, at 519.

220. See *supra* Part IV(A).

221. See Williams, *supra* note 28, at 186.

222. See Breger, *supra* note 26, at 568.

223. See *id.* at 571.

making discretion.<sup>224</sup> As discussed above, judges are not immune to the existence or effects of unconscious bias.<sup>225</sup> In addition, one of the litigants in a family court case is “almost always” a woman.<sup>226</sup> Allegations involved are frequently personal, emotional, and often lack independent and neutral corroboration from other sources.<sup>227</sup> Decisions are, therefore, often made based on the credibility of the assessment of the parties.<sup>228</sup>

Applying what is already known—that biases are frequently based on traditional gender norms—implicit assumptions about women will impact outcomes in family matters. Women enter the family law system with others unconsciously expecting them to be “passive, gentle, [and] nurturing,” while men are expected to be “assertive, strong, [and] competent.”<sup>229</sup> It is not difficult to see how these assumptions can influence assessing and determining issues in family law matters.<sup>230</sup> The science of implicit bias shows that these associations affect how information is “perceived . . . attributed . . . remembered . . . [and] used” in the decision-making process.<sup>231</sup> The danger is that these schemas will form the basis of decisions about women more than the individual experiences and needs of the litigant.<sup>232</sup>

In a system in which the sole decision-maker has great discretion when deciding “he said, she said” allegations, credibility of the parties is almost always at issue. Implicit bias studies have found that judges give more credence to the party’s action that is more consistent with assumed traits.<sup>233</sup> As seen in employment law, women must walk the “tightrope” to be considered competent—viewed through the expectations of

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224. See *Taking Limited Representation to the Limits*, *supra* note 216, at 177 n.26.

225. See *One Judge’s Four-Decade Perspective*, *supra* note 94, at 706.

226. Breger, *supra* note 26, at 556, 574.

227. See *id.* at 572.

228. See *id.*

229. *Id.* at 563.

230. See *id.*

231. Breger, *supra* note 26, at 563.

232. See *id.* at 556.

233. See *id.* at 575.

displaying feminine traits and not being too aggressive.<sup>234</sup> Aggressive behavior by men is more likely to be considered acceptable than the same behaviors by women.<sup>235</sup> A woman who assertively pursues her claims may, therefore, be viewed as less credible than a man exhibiting the same passion.<sup>236</sup> The fear of appearing too pushy also affects what objectives a woman may seek in divorce, or the means she employs to obtain these goals.<sup>237</sup>

Alternatively, even when there are claims of abuse by the male partner, the male may be seen as more credible because his actions are more consistent with implicit behavioral expectations.<sup>238</sup> This dichotomy explains why men are often granted joint parenting responsibilities—even when allegations of abuse exist.<sup>239</sup>

The economic and caretaking contributions of the parties are often factors to be considered in divorce, but as explained earlier, are often not given comparable weight. The assessment of these contributions are key to property distribution, support, and parenting determinations.<sup>240</sup> Consistent with the findings of one IAT, women are more likely to be associated with family, while men are more likely associated with career.<sup>241</sup> The impact in family matters is similar to the “Prove it Again” pattern identified in the workplace.<sup>242</sup> Because women are assumed to be primarily responsible for the home and the family, these contributions may not be given special consideration.<sup>243</sup>

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234. Williams, *supra* note 28, at 191; *see supra* Part III(A).

235. *See* Williams, *supra* note 28, at 191.

236. *See id.* at 191-92; *supra* Part II(C).

237. *See supra* Part II(A).

238. *See* Breger, *supra* note 26, at 575.

239. *See id.*

240. *See* Michele N. Struffolino, *Limited Scope Not Limited Competence: Skills Needed to Provide Increased Access to Justice Through Unbundled Legal Services in Domestic-Relations Matters*, 56 S. TEX. L. REV. 159, 164 (2014).

241. *See The IAT, supra* note 77; *see supra* Part II(B).

242. *See* Williams, *supra* note 28, at 189-91; *supra* Part II(A).

243. *See* Breger, *supra* note 26, at 564. The Committee Report of the New York Task Force noted that:

[C]ourts need to be continually cognizant of biases against mothers such as “the ways that dual responsibilities for caring for minor children and for earning a living often place special burdens on women” and of “the ways that sex-based

While a woman's contributions inside the home are undervalued, a woman's contributions outside the home, through income-generating employment, are compared with their male counterpart.<sup>244</sup> This requires a woman to prove that she has gone over and above expectations as a homemaker,<sup>245</sup> based on implicit norms, and that she has successfully challenged the realities of inequality in the workplace.<sup>246</sup> Only then will she be perceived as being on equal footing with her male partner. It is even more difficult for a woman to prove the value of her contributions when her male partner alleges that he contributed to the day-to-day household tasks. The male's contributions may unconsciously be assigned more weight and may even minimize the effect of the woman's household contributions because "[he is] doing her work."<sup>247</sup>

Women who are mothers must overcome additional challenges. Family court judges deal with mothers in almost every case where children are involved.<sup>248</sup> It is, therefore, convenient and efficient to assign traits and attitudes to mothers in general rather than to consciously assess the litigant's individual circumstance and needs. As one author states, "[m]others in [f]amily [c]ourt are so ubiquitous that they essentially become invisible."<sup>249</sup>

The schema that makes "reasonable sense"<sup>250</sup> for mothers is that they are "perfect."<sup>251</sup> As with any standard that requires perfection, expecting women to be perfect mothers sets an impossible standard to meet.<sup>252</sup> Included in the expectation of perfection is the assumption that mothers are selfless and that they will put aside their own needs for the sake of their

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stereotypes lead to the application of higher standards of parenting to mothers than to fathers."

*Id.* (quoting N.Y. STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, WOMEN IN THE COURTS: A WORK IN PROGRESS 1, 3 (2002)).

244. *See* Breger, *supra* note 26, at 572 n.62.

245. *See id.* at 566-67.

246. *See id.* at 572 n.62.

247. *Id.* at 573.

248. *See id.* at 556.

249. *Id.* at 556.

250. *See supra* Part II(A).

251. Breger, *supra* note 26, at 566.

252. *Id.*

children.<sup>253</sup> A woman who becomes involved with another partner or who seeks career advances that require extended time, or a weekend schedule, may be viewed as a bad mother; whereas these same facts would not trigger an automatic assumption of a bad father.<sup>254</sup> The expectation of perfection and selflessness is systemic, shared by all in the family law system, including women themselves.<sup>255</sup> Its impact on decision-making is, therefore, great and its harm extends beyond the particular family into society.<sup>256</sup>

These expectations based on gender norms can be further reinforced by a family law attorney's own implicit bias.<sup>257</sup> The impact can be subtle, such as exhibiting body language that impedes establishing meaningful communication.<sup>258</sup> The impact can also be substantial, leading to a misunderstanding and misrepresentation the women's individual story and individual needs.<sup>259</sup> Whether presented to an attorney or a judge, assessing a woman's needs in family matters requires an acknowledgement that women, themselves often operate in accordance with self-assigned implicitly biased traits and expectations.

#### B. Self-Imposed Assumptions

The characteristics of passivity, gentleness, natural caregiving, and selflessness that others assign to women in family court can also be self-assigned traits that further impact outcomes.<sup>260</sup> These self-assigned expectations, along with the life experience of being less valued than men, can trigger self-undermining behavior.<sup>261</sup> For a woman, justice occurs when she

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253. See *id.* at 565, 567 (stating that this may be one reason why it is easier for a man who abuses the mother to obtain joint legal custody; the mother is assumed to be able to put her own fears aside).

254. See *id.* at 565-68.

255. See Brake, *supra* note 7, at 694; Breger, *supra* note 26, at 573.

256. See Brake, *supra* note 7, at 723; Breger, *supra* note 26, at 566.

257. See *supra* Part II(C).

258. See *supra* Part II(C).

259. See *supra* Part II(C).

260. See BANAJI & GREENWALD, *supra* note 43, at 92.

261. See *id.* at 92; see *supra* Part III(B).

gets what she deserves.<sup>262</sup> She may therefore undervalue her own contributions to the home and the assets and overvalue the same contributions of her male partner.<sup>263</sup> A woman may view her difficulty with career and economic advancement as being her own fault rather than recognizing that external barriers still exist in the workplace.<sup>264</sup> A woman who has been emotionally or financially abused may be reluctant to raise these issues for fear of being viewed as a victim rather than one who is capable of controlling her own future without assistance from her male partner.<sup>265</sup> The facts presented in family court upon which decisions are made regarding financial need, property division, and parenting are skewed in favor of the male partner. Important information is missing; even judges who are free of any of their own implicit bias cannot make decisions based on what they do not know.

The impact of internal implicit bias may be greater in matters that are resolved pre-trial. Only a small percentage of family law cases actually go to trial.<sup>266</sup> Most family law matters are resolved through private mediation or some form of court-ordered mediation.<sup>267</sup> Women enter the mediation process expecting less than they may have been entitled to and are, therefore, basing their view of a *just* result on her own internal biases.<sup>268</sup> It is even more difficult to avoid these automatic self-assumptions when faced with the unknown.<sup>269</sup> This, combined with the fear that these same traits will be assigned to her and her male partner in court, may lead her to “distrust [the] system.”<sup>270</sup> This mistrust makes pre-trial settlement an attractive objective. For example, the fear of being seen as a bad

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262. See *supra* Part II(B).

263. See *supra* Part IV(A).

264. See Brake, *supra* note 7, at 687; see *supra* Part II(B).

265. See Brake, *supra* note 7, at 690; see *supra* Part II(B).

266. See FLA. OFFICE OF THE STATE COURT ADM’R, FLA. COURTS, FAMILY COURT STATISTICAL REFERENCE GUIDE: FY 2015–16 5-18 (2016), [http://www.flcourts.org/core/fileparse.php/541/urlt/Chapter-5\\_-Family-Court.pdf](http://www.flcourts.org/core/fileparse.php/541/urlt/Chapter-5_-Family-Court.pdf). In 2015-16, there were 81,694 dissolutions of marriage in the state of Florida; less than 7% went to trial. *Id.*

267. See *id.* In 2015-16, approximately 75% of divorces in Florida were disposed of by a Judge requiring no trial. *Id.*

268. See *supra* Part III(B).

269. See BANAJI & GREENWALD, *supra* note 43, at 18.

270. Barasch, *supra* note 140, at 552.

mother and the father being seen as going above and beyond caretaking expectations makes settlement outside of court a means to establish some control over decision-making and outcomes.<sup>271</sup>

These self-imposed beliefs and fears may explain why women are likely to bargain against their own self-interest, settling for less monetarily in order to continue their caretaking role.<sup>272</sup> Although final settlements need to be approved by a family court judge, great deference is given to the parties' own decisions as they are expected to be acting in their own self-interest.<sup>273</sup> Inequities are therefore unlikely to be recognized.<sup>274</sup>

Implicit bias blocks all from making decisions based on a woman's individual story and needs.<sup>275</sup> This is particularly harmful in family matters where the failure to get it right can have a devastating future impact on the individual, the family, the legal system, and society.

## VI. Knowledge and Self-Awareness Solutions are Not Enough

The discovery of implicit bias and its impact on daily perceptions and decisions provides a scientific explanation for the perpetuation of biased results despite decades of anti-discrimination efforts.<sup>276</sup> It also provides an explanation as to why women in the family court system remain at a disadvantage. These realizations, however, are not enough.

As with other environments, such as the workplace, and as with other stigmatized groups, such as those related to race or religion, efforts must be made to prevent automatic responses from affecting outcomes for women in the family court environment.<sup>277</sup> Although there is no proven strategy for eliminating or limiting implicit bias long term, suggestions and strategies for limiting the impact of implicit bias on decision-

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271. See Breger, *supra* note 26, at 565, 567 and accompanying text; *supra* Part IV(A).

272. See *supra* Part IV(A).

273. See *supra* Part IV(A).

274. See *supra* note Part V(A).

275. See *supra* Part II(C).

276. See *supra* Part II(A).

277. See *supra* Part III(B).

making in other areas can offer guidance for those involved in the family law system.

Suggestions on how to limit the impact of implicit bias mimic those needed to “break[ a] bad habit.”<sup>278</sup> An awareness of the existence of implicit attitudes is the first step.<sup>279</sup> The gender-career/home IAT can accomplish this task.<sup>280</sup> Implicit bias training can also expose hidden bias.<sup>281</sup> Next, a desire to reduce the impact of bias is needed.<sup>282</sup> The common goal of all in the system to reach a just result should provide the motivation.<sup>283</sup> Most importantly, methods or strategies to replace automatic responses with conscious reflective behaviors are necessary.<sup>284</sup>

Each woman in the family law system has her own individual story and needs. Both she, alone or with the assistance of a family law attorney, and the family law court judge act as decision-makers and desire a just result.<sup>285</sup> To accomplish this, techniques are needed to assist her in blocking expectations based on her own self-undermining stereotypical traits that affect how she articulates her story and needs.<sup>286</sup> Techniques are also needed to block others from automatically assigning traits associated with an entire gender when perceiving her story and assessing her needs. Although identifying specific strategies that would be successful in limiting the impact of implicit bias against women in family court is beyond the scope of this article, a discussion of what has already been tested and suggested in existing implicit bias research, and more traditional social psychological research regarding bias, can provide some guidance for the future.

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278. Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 303 (2015); see BANAJI & GREENWALD, *supra* note 43, at 4 (“[H]abits of thought . . . lead to errors in how we perceive, remember, reason, and make decisions.”).

279. See Smith, *supra* note 278; BANAJI & GREENWALD, *supra* note 43, at 147.

280. See *supra* Part II(B).

281. See Smith, *supra* note 278, at 296.

282. See *id.* at 303; BANAJI & GREENWALD, *supra* note 43, at 147.

283. See *supra* Part V.

284. See Smith, *supra* note 278, at 302-03; BANAJI & GREENWALD, *supra* note 43, at 149.

285. See *supra* Part V.

286. See BANAJI & GREENWALD, *supra* note 43, at 20.

Researchers have found that the most obvious and easiest way to block the impact of implicit bias in decision-making is to actually eliminate the triggering trait from consideration.<sup>287</sup> If the decision-maker cannot see the subject, implicit race association will likely not be triggered.<sup>288</sup> Combining the visual barrier with no exposure to the subject's voice can eliminate the gender bias trigger.<sup>289</sup> Even when the use of this easy method is possible however, its impact is short term: This simple method, "modified in these experiments, [will] likely soon return to their earlier configuration."<sup>290</sup>

What is needed in the family court system are methods that will have a long-term effect on the decision-maker.<sup>291</sup> For women litigants, eliminating a lifelong experience in which society views them in accordance with traditional gender norms would prevent them from acting on self-undermining expectations.<sup>292</sup> This is a lofty and unrealistic goal for the present, but is a goal for future generations of women, the importance of which should not be minimized.

It may be that—just as Williams used findings from decades of social science, pen-to-paper studies, and individual interviews to develop four patterns of gender bias that women face in the workplace in everyday life—these more traditional studies can be used to identify how these patterns affect women in everyday life and how they should be considered in the family law system.<sup>293</sup>

Within the family law system itself, an environment that exemplifies counter-stereotypical perceptions about women, such as having strong, confident, and articulate women judges, attorneys, and staff, may provide at least a short-term effect on a woman's self-perception.<sup>294</sup> This will provide little improvement, however, unless these professional women are

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287. *See id.* at 146-47.

288. *See id.*

289. *Id.*

290. *Id.* at 152.

291. *See* Smith, *supra* note 278, at 305-06 (suggesting that reducing implicit bias need not be the goal if actual behavior can be changed).

292. *See supra* Part III(B).

293. *See* Williams, *supra* note 28, at 189-94.

294. *See* Barasch, *supra* note 140, at 542. *See supra* Part III(B).

aware of their own implicit bias and are provided with strategies to avoid its effect in their interaction with women litigants.<sup>295</sup>

Creating an atmosphere where decisions based on individual experiences are the norm will encourage trust in the system, making it comfortable for women to share their stories and articulate their needs.<sup>296</sup> In addition, creating a perception that women are expected to ask for what they need can operate as a counter-stereotypical trigger that provides the courage and confidence to ask for what is fair.<sup>297</sup> As one study found, a woman's reluctance to ask or negotiate for more goes away when both parties are told they are expected to negotiate: Because "women who negotiate are not seen as pushy and inappropriate[, t]hey are good girls, just following the rules."<sup>298</sup>

In order to create this atmosphere, the expectation must be that every situation is unique. The automatic responses by others that are associated with implicit bias based on schemas need to be blocked. To accomplish this, judges and attorneys can be trained to doubt their own objectivity and to value the need for reflective and deliberative decision-making.<sup>299</sup> The conscious dedication to fairness and justice can provide the motivation to evaluate their own decision-making process to expose the impact of implicit bias. At this point, a method is needed to replace the automatic responses with actions or decisions based on reflective thinking.<sup>300</sup>

Banaji and Greenwald suggest that empathy provides a method to accomplish this task.<sup>301</sup> Empathy requires decision-makers to engage in a more deliberate and reflective process.<sup>302</sup> As discussed earlier, empathy is an essential ingredient to a meaningful and successful attorney-client relationship.<sup>303</sup> Because empathy requires the decision-maker to view things

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295. *See supra* Part III(B).

296. *See supra* Part III(B).

297. *See* Williams, *supra* note 28, at 216.

298. *Id.* at 232.

299. *See* Smith, *supra* note 279, at 300.

300. *See id.* at 302.

301. *See generally* BANAJI & GREENWALD, *supra* note 43.

302. *See* Elayne E. Greenberg, Bridging Our Justice Gap with Empathic Processes that Change Hearts, Expand Minds About Implicit Discrimination, 32 OHIO ST. J. DISP. RESOL. 441, 453 (2017).

303. *See supra* Part II(C).

through the individual experience of the women litigant,<sup>304</sup> the responses the woman receives from an empathetic judge are more likely to be free from bias.<sup>305</sup> The benefits here are reciprocal. The woman experiences a meaningful interaction within the system, thus challenging her self-assessed expectations, and the judge, having made a connection with the litigant through her own experiences, realizes how this decision-making method fits best with the judge's self-perception of being fair and just.<sup>306</sup>

The mere suggestions of instituting any method into the family court system that requires reflective decision-making requires acknowledging the daily challenges family court judges experience. These challenges often reinforce the need for automatic thinking as a means to efficiency.<sup>307</sup> Family court judges are required to efficiently manage crowded dockets filled with cases involving high emotion.<sup>308</sup> The current environment is that it is impossible for family court judges to engage in a deliberative decision-making process in each case.<sup>309</sup> States should explore how conditions in family court can be improved to allow for a more deliberative process.

In order to limit the effect of past decisions, which may have been influenced by implicit bias, in future cases, a form of systemic self-reflection can occur.<sup>310</sup> When decisions are made that can be used as precedent for future cases, tracking outcomes and comparing cases with similar outcomes may offer the reflective and deliberate action necessary to expose implicit bias and avoid its persistence.<sup>311</sup> One author, who advocates for an extensive analysis of how implicit bias has created distortions in outcomes in family matters asks, “[w]hat do we do with a body of [f]amily [c]ourt case law that is built on decisions that view

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304. See Greenberg, *supra* note 301, at 454 (footnote omitted) (“Empathy is the ‘art of stepping into the shoes of the other person and looking at the world through their eyes.’”).

305. *Id.* at 453.

306. *Id.*

307. See *supra* Part II(B)-(C).

308. See *supra* Part II(B)-(C).

309. See *supra* Part II(B)-(C).

310. See Smith, *supra* note 278, at 300.

311. See *id.* at 304.

female[s] . . . with skepticism?”<sup>312</sup> No answer to this question is attempted; however, the theory driving the science of impact bias offers a starting point: “People cannot change behavior of which they are not . . . aware.”<sup>313</sup>

## VII. Conclusion

Examining the impact implicit bias has on outcomes in family court assists in understanding why, despite decades of efforts toward gender equality and efforts to eliminate explicit gender bias, women are still at disadvantage upon dissolution of the male/female relationship. This understanding is furthered when its existence is considered as an aftereffect of those exact same efforts. Such a realization offers only an initial step to finding a solution. Identifying methods that provide long-term barriers to the automatic assignment of schemas based on traditional gender norms is necessary. Effective techniques are needed on every level: on the individual level to block the self-assignment of these traits, on the judicial level to encourage more reflective and deliberative decision-making, and on the systemic level to prevent these biased assumptions from perpetuating in the law that governs outcomes in family court.

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312. See Barasch, *supra* note 140, at 541.

313. See Williams, *supra* note 28, at 187.