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An Intelligent Path for Improving Diversity at Law Firms (Un)Artificially

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ABSTRACT

Most law firms are struggling when it comes to diversity and inclusion. There are fewer women in law firms compared to men.[1] The majority of lawyers—81%—are White, despite White people making up only about 65% of the law school population.[2] Lawyers of color remain underrepresented with the historic high being only 28.32%.[3] By comparison, 13.4% of the United States population is Black and 5.9% is Asian.[4] The biases that perpetuate this lack of diversity in law firms begin during the hiring process and extend to associate retainment. For example, an applicant's resume reveals a lot, including the prestige of the law school they attend (which can create inferences about their socioeconomic status); their class status, depending on extracurricular activities (i.e., playing polo v. interning with a dentist); or their gender, based on their name or other details.[5] Continuing to depend on these

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1. A.B.A., ABA NATIONAL POPULATION SURVEY BY STATE 4 (2006), https://www.americanbar.org/content/dam/aba/administrative/market_research/2022-national-lawyer-population-survey.pdf.

2. *Id.* Susan L. Krinsky, *The Incoming Class of 2021 – The Most Diverse Law School Class in History*, LAW SCH. ADMISSION COUNCIL (Dec. 15, 2021), https://www.lsac.org/blog/incoming-class-2021-most-diverse-law-school-class-history.

3. National Association for Law Placement (NALP), 2022 REPORT ON DIVERSITY IN U.S. LAW FIRMS 2 (2023), https://www.nalp.org/uploads/Research/2022NALPReportonDiversity_Final.pdf.

4. MSBA, *How to Develop Black Attorneys at Law Firms*, MD. STATE BAR ASS'N (Jun. 20, 2022), https://www.msba.org/how-to-develop-black-attorneys-at-law-firms-2; A.B.A., Lawyers by Race & Ethnicity 33 (2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf.

5. *See* Joan C. Williams, *Systemic Bias in Legal Profession Confirmed by New Report*, A.B.A. (Sept. 6, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/09/new-study-finds-gender-and-racial-bias-endemic-in-legal-professi1; *see* Richard B. Cohen, *Why 'Higher-Class' Women Won't Get That Biglaw Job: Hiring Biases That You Won't Believe!*, ABOVE THE LAW (Mar. 30, 2017), https://abovethelaw.com/2017/03/why-higher-class-

biases is detrimental to law firms for various reasons. They lead to the same demographics of hired candidates, to the exclusion of other diverse candidates. Clients also have been demanding their outside counsel to be diverse, or risk losing their business.[6]

This paper recommends law firms seeking to address diversity and inclusion issues adopt artificial intelligence ("AI") in the hiring and retention of lawyers. AI is a term that refers to computers that accomplish tasks that would ordinarily require human intelligence.[7] While AI is being used in other legal tasks successfully to automate routine work and cut costs,[8] there is an added benefit to using AI in hiring and recruiting: firms can remove human biases. This Note begins by first identifying the current lack of diversity in law firms and discussing how bias is a major contributing factor. Second, it will explain how clients are influencing outside counsel to have an increasingly diverse workforce. It will then propose AI as a beneficial solution that can help firms increase diversity and inclusion in both the hiring processes and retention efforts of attorneys while mitigating human biases. Specifically, this paper will discuss the advantages of AI as applied to resume screening, structured interviewing, fair performance management, and equal compensation systems. Finally, it will outline challenges to using AI and how firms can overcome them to use AI fairly and efficiently.

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women-wont-get-that-biglaw-job-hiring-biases-that-you-wont-believe/; *see also* Gina Gerdeman, *Minorities Who 'Whiten' Job Resumes Get More Interviews*, HARVARD BUSINESS SCHOOL (May 17, 2017), https://hbswk.hbs.edu/item/minorities-who-whiten-job-resumes-get-more-interviews.

6.   *See* Virgillo Hermann, *Clients Push for Diversity—Diversity Lab (2022)*, UNBATE (Jan. 24, 2023), https://unbate.ngontinh24.com/article/clients-push-for-diversity-diversity-lab.

7.   *See What is Artificial Intelligence (AI)?*, IBM, https://www.ibm.com/cloud/learn /what-is-artificial-intelligence.

8.   *See, e.g.*, Holly Urban, *Using Artificial Intelligence to Improve Law Firm Performance*, LAW TECH. TODAY (Geb. 16, 2021), https://www.lawtechnologytoday.org/2021/02/using-artificial-intelligence-to-improve-law-firm-performance/.

I. THE PROBLEM: CURRENT LAW FIRM DIVERSITY DEFINED

Nine out of ten top leaders at law firms are White and 81% of top leaders are men, despite women making up at least 40% of U.S. law students for years.[9] Only about 10% of partners at law firms are people of color, although law students of color comprised 41% of the 2021 summer associate class.[10] Additional research finds that women attorneys represent about 23% of the firm's partners and 45% of associates, with the representation of women of color being even lower.[11] Black women and Latinx women each represent less than one percent of all partners in U.S. law firms and just over 4% of all partners are women of color.[12] Furthermore, female attorneys encounter the maternal wall, which occurs when colleagues stereotype women as less competent and less committed to their jobs because they are mothers or pregnant.[13] Because the legal profession has been historically shaped around masculine norms, it fails to take into account gendered perspectives and the

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9.   Molly Huie, *Analysis: Law Firm Diversity—How It's Going, and a Way Forward*, BL (Nov. 1, 2021), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-law-firm-diversity-how-its-going-and-a-way-forward; Debra Cassens Weiss, *Female Lawyers Still Underrepresented, Especially in Partnership Tracks; Which Law Firms Do Best?*, A.B.A. (Sept. 16, 2021), https://www.abajournal.com/news/article/female-lawyers-still-underrepresented-especially-in-partnership-ranks-which-law-firms-do-best.

10.   Ellen Milligan & Todd Gillespie, *Big Law Has a Diversity Problem, and Corporate Clients Are Stepping In*, BLOOMBERG (Oct. 5, 2021), https://www.bloomberg.com/news/articles/2021-10-05/big-law-has-a-diversity-problem-and-corporate-clients-are-stepping-in; Karen Sloan, *Law Firm Summer Associates Were More Diverse Than Ever in 2021, Report Says*, REUTERS (Jan. 12, 2022), https://www.reuters.com/legal/legalindustry/law-firm-summer-associates-were-more-diverse-than-ever-2021-report-says-2022-01-12/.

11.   Shari Davidson, *Diversity & Inclusion: Law Firm's Stand in a Post Pandemic World*, JDSUPRA (Nov. 10, 2021), https://www.jdsupra.com/legalnews/diversity-inclusion-law-firm-s-stand-in-5103261.

12.   NALP, *supra* footnote 3 at 7.

13.   Lesley Evans Ogden, *Working Mothers Face a 'Wall' of Bias–But There Are Ways to Push Back*, AAAS (Apr. 10, 2019), https://www.science.org/content/article/working-mothers-face-wall-bias-there-are-ways-push-back.

experiences of women.[14] While people of color comprise a higher number of associate positions in law firms, it has yet to be seen whether this slow growth will succeed in retaining these associates—or whether they will even reach the partnership track. [15] In describing the low number of partners that are women of color, a NALP report says the figure remains "abysmally low" and is "part of a pattern that holds true across all firm sizes and most jurisdictions."[16]

A. *The Problems of Unconscious Bias*

One of the biggest barriers to diversity and inclusion in law firms is bias.[17] Bias remains present in hiring and retention, despite many firms pledging to diversity initiatives and offering special diversity scholarships.[18] Bias can be both explicit (conscious bias) and implicit (unconscious bias).[19] Implicit bias has been identified as the "number one roadblock" to meeting diversity initiatives.[20] Implicit bias occurs when people unintentionally establish societal preconceptions about particular groups of individuals and make judgments or decisions about them based on our deep-seated thinking patterns, assumptions, or interpretations.[21] These biases do not come with automatic turn-off switches in a professional setting, and thus the impact of bias in the legal sector is wide-reaching.

1. Implicit Bias in Attorney Recruitment and Hiring

Francesca Gino, a professor at Harvard Business School, describes hiring bias as something that causes "us to make decisions in favor of one person or

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14.   Lauren T. Katz, *Tearing Down the Maternal Wall in the Legal Profession: A Perspective Inspired by Difference Feminism*, 22 GEORGETOWN J. GENDER AND L. 213 (2021), https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2021/08/Tearing-Down-the-Maternal-Wall.pdf.

15.   NAT'L ASS'N FOR L. PLACEMENT, 2021 REPORT ON DIVERSITY IN U.S. LAW FIRMS, 2 (2019), https://www.nalp.org/uploads/2021NALPReportonDiversity.pdf.

16.   *Id.* at 7.

17.   *See* A.B.A., *supra* note 4.

18.   *See* Arin N. Reeves, *Colored by Race: Bias in the Evaluation of Candidates of Color by Law Firm Hiring Committees*, MINORITY CORP. COUNS. ASS'N (2006), https://mcca.com/mcca-article/colored-by-race; s*ee also, e.g.,* MINORITY CORP. COUNS. ASS'N, *Diversity Scholarships, Fellowships, and Internships*, https://mcca.com/pipeline/scholarship-program/related-scholarship-links (listing firms that offer scholarships and fellowships to diverse students).

19.   *See* Conner & Winters, LLP, *Recap: "The Ethical Pitfalls of Unconscious Bias in the Legal Profession: An Explicit Case for Addressing Implicit Biases,"* (Jan. 4, 2021), https://www.cwlaw.com/newsroom-publications-135.

20.   *Id.*

21.   Sterne Kessler Goldstein & Fox, *Hidden Depths: The Problem of Unconscious Bias* (Nov. 4, 2020), https://www.sternekessler.com/news-insights/news/hidden-depths-problem-unconscious-bias.

group to the detriment of others."[22] Implicit bias manifests itself in the forms of racism, ageism, and sexism in hiring processes.[23] Even a person's name can provoke unconscious biases. Several studies found that even if everything else on a resume is identical, those resumes with white-sounding names received twice as many callbacks than those with non-white-sounding names.[24]

Traditional interview schedules with law firms follow the same format—law school students meet a series of current firm attorneys in one-on-one unstructured interviews.[25] Interviewers are typically tasked with assessing whether the candidate is a "good fit" for the firm.[26] According to Thomson Reuters, this method is highly ineffective at selecting the right candidate because it creates a system where results are both biased, and random, based on which candidate has the closest "connection" to the interviewer.[27] Both recruiters and interviewers are exposed to unconscious biases by a student's cultural background, the prestige of the law school they attend, the grades that they have earned, and whether they related to the interviewer. For example, an interviewer may recommend a student as a viable candidate if they share the same alma mater. Youngme Moon, Professor of Business Administration at Harvard Business School, notes that relying on such preferences is a "euphemism in many cases for bias. For people being able to use their discretion to hire people who are just like them, that they are comfortable with, that look like them, that act like them, that talk like them."[28]

Women in particular face invisible barriers during the hiring process because of implicit bias.[29] For example, a pregnant woman may be considered

22.   Rebecca Knight, *7 Practical Ways to Reduce Bias in Your Hiring Process*, SOC'Y FOR HUM. RES. MGMT. (Apr. 19, 2018), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/7-practical-ways-to-reduce-bias-in-your-hiring-process.aspx.

23.   *Id.*

24.   Kylie Ora Lobell, *How to Tackle Unconscious Biases*, LEGAL MGMT, https://www.legalmanagement.org/2021/july-august/features/how-tot-tackle-unconscious-bias.

25.   *See* Samantha Weller, *Law School Lingo: What is OCI?*, BARBRI L. PREVIEW (June 2, 2020), https://lawpreview.barbri.com/what-is-oci/.

26.   *See* Chambers Associate, *OCI Advice From the Interviewers*, https://www.chambers-associate.com/where-to-start/commercial-awareness/oci-advice-from-the-interviewers ("we like to know people are looking at us because of who we are, not just as another prestigious BigLaw firm"; "*[w]e ask questions to confirm what we know based on resumes, but to try and find out to what extent a candidate's interests and work experience align with the firm's culture, strategy, and philosophy on how to best serve clients."*) (emphasis added).

27.   Brian P. Seaman, *Is Your Hiring Process Hindering Your Inclusion Efforts? Three Redesigns to Reduce Bias*, REUTERS (Nov. 10, 2021), https://www.reuters.com/legal/legalindustry/is-your-hiring-process-hindering-your-inclusion-efforts-three-redesigns-reduce-2021-11-10.

28.   Becca Carnahan & Christopher Moore, *Actively Addressing Unconscious Bias in Recruiting*, HARV. BUS. SCH. (July 7, 2020), https://www.hbs.edu/recruiting/insights-and-advice/blog/post/actively-addressing-unconscious-bias-in-recruiting.

29.   *See* Kim Elsesser, *Female Lawyers Face Widespread Gender Bias, According to New Study*, FORBES (Oct. 1, 2018), https://www.forbes.com/sites/kimelsesser/2018/10/01/female-lawyers-face-widespread-gender-bias-according-to-new-study/?sh=1614e4014b55.

too close to maternity leave and excluded from many firm activities.[30] Women bear the burden of housework and childcare more often than men, and therefore are less likely to be perceived to be committed to their careers.[31] Big Law is susceptible to bias against women because of the perception that they will be less passionate about their work due to childcare responsibilities.[32] Women and people of color do not have the same privilege as White men who are "presumed to be competent, their mistakes understandable, and their work ethic unquestioned."[33] To combat gender bias in the hiring process, many firms have adopted diversity and inclusion scholarships and programs geared towards increasing minority representation.[34] Although firms have made advancements in diversity and inclusion efforts, there is still room for considerable improvement.[35]

After protests against racism swept across the country, many law firms invested in hiring Chief Diversity Officers in management roles.[36] As of 2021, more than one-fifth of the 100 highest grossing U.S. law firms had a

30.   *See Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 671 (S.D.N.Y. 1995) (defendant's motion for summary judgment denied where plaintiff alleged discrimination as soon as she announced her pregnancy to her law firm, including being excluded from several firm activities).

31.   *See* Diana Kotler, *Gender Bias in Legal Recruitment: What We're Doing Differently*, LUCAS GROUP (Mar. 23, 2021), https://www.lucasgroup.com/your-career-intel/gender-bias-legal-recruitment/ ("regardless of whether they have children, women are more likely to shoulder the 'mental load' in a household").

32.   *See* Ogden, *supra* footnote 13; Jenna Spinelle, *How Bias Against Working Mothers Impacts Your Hiring*, RECRUITING NEWS NETWORK (July 27, 2021), https://www.recruiting newsnetwork.com/posts/how-bias-against-working-mothers-impacts-your-hiring.

33.   Eli Wald, *Biglaw Identity Capital: Pink and Blue, Black and* White, 83 FORDHAM L. REV. 2509, 2517 (2015), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5096&context=flr; Joan C. Williams, et. al., *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*, A.B.A.'S COMM'N ON WOMEN PRO., MINORITY CORP. COUNS. ASS'N (2018), https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf.

34.   *See Law School Diversity Scholarships*, BIGLAW INVESTOR (Jan. 19, 2022), https://www.biglawinvestor.com/law-diversity-scholarship/; Amber Keister, *Great DEIdeas: Innovative Diversity Programs from Four Top Law Firms*, THE DIVERSITY MOVEMENT (Sept. 12, 2022), https://thediversitymovement.com/great-deideas-innovative-diversity-programs-top-law-firms/ ("[d]iversity fellowships are a common way to support promising first year law students with scholarships and professional development"); MINORITY CORP. COUNS. ASS'N, *Diversity Scholarships, Fellowships, and Internships*, https://mcca.com/pipeline/scholarship-program/related-scholarship-links/ (providing a list of law firms that offer diversity scholarships).

35.   *See* PRACTICEPANTHER, *2022 Outlook on Law Firm Diversity and Inclusion* (Dec. 28, 2021), https://www.practicepanther.com/blog/2022-outlook-on-law-firm-diversity-and-inclusion/ ("[t]hough progress is trending upward, law firms need to set goals and look for opportunities to invest in diversity and inclusion at every level, especially the leadership and management aspects.").

36.   Arriana McLymore & Caroline Spiezio, *Law Firm Diversity Chiefs Gain Numbers – and Influence*, REUTERS (July 7, 2021 10:55 AM), https://www.reuters.com/legal/legalindustry/law-firm-diversity-chiefs-gain-numbers-influence-2021-07-07.

diversity-focused professional with "chief" in their title.[37] However, the mere hiring of a chief diversity officer cannot accelerate enough change in an industry that has been historically white-male-centric.[38] Many Chief Diversity Officers do not have enough staff or resources to make a meaningful difference, suggesting some law firms are more interested in "ticking a box" than making actual change.[39] Consequently, many chief diversity officers could not make a meaningful difference.[40] Research suggests that many Chief Diversity Officers seem to have little political or decision-making power within law firms, suggesting many firms' diversity programs are "marketing initiatives or window dressing with little meaningful results."[41] Diversity programs also risk reinforcing stereotypes; law firm partners have expressed confidence that they have diversity initiatives under control because they hired a Chief Diversity Officer and offer women flexible and part-time work schedules, even though multiple studies show that many women are more concerned with the belief of their superiors that they aren't dedicated to their work .[42]

Diversity programs cannot be effective if they also foster bias. Attorneys have hiring biases even when interviewing candidates for diversity positions.[43] A partner described the process as "regular candidates" being in one pile and diversity candidates sitting in another pile.[44] A research study conducted of 114 partners representing 83 law firms found that a significant majority of partners attributed minority attorneys' success – for example, admission at Harvard or Yale – to affirmative action.[45] While the firms want to avoid their diversity programs resembling affirmative action, many admitted that the "taint" of affirmative action colors the perception of a minority candidate before they have even been interviewed.[46] Data cited in the Harvard Business Review is consistent: diversity programs, the most commonly used

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37.   *Id.*

38.   *Id.*

39.   *See id.* ("Nearly 30% of respondents said their firm has just two dedicated DEI professionals, compared to hundreds of lawyers. Eleven firms had teams smaller than that. One firm had eight people total; another had 11"; "One of the things that I see that is concerning . . . is that this person is just being hired in name only.").

40.   *Id.*

41.   *We Need to Talk About Your Law Firm's Diversity Program*, HIRE AN ESQUIRE (July 8, 2020), https://hireanesquire.com/blog/why-your-law-firm-diversity-program-is-ineffective.

42.   *Id.*

43.   Arin N. Reeves, *Colored by Race: Bias in the Evaluation of Candidates of Color by Law Firm Hiring Committees*, MINORITY CORP. COUNS. ASS'N (2006), https://mcca.com /mcca-article/colored-by-race.

44.   *Id.* ("As one partner in the study explains, "You've got the regular candidates in one pile, and you have the diversity candidates in another pile. We have different conversations about the diversity pile. We have different standards for the diversity pile. We have different expectations for the diversity pile.").

45.   *Id.*

46.   *Id.*

method to increase diversity, do not necessarily increase the meaningful representation of minorities and women.[47]

2. Implicit Bias in Attorney Retention

The effects of bias on diversity extend beyond hiring. Retention refers to the ability to keep qualified and experienced lawyers over the long term.[48] Initial bias in recruiting talent leaves lingering effects on minorities' career development, including performance appraisals, compensation, and specific work experiences. Research by notable organizations consistently shows that minority attorneys have greater attrition rates than their white male counterparts.[49] In 2020, African-American and Asian attorneys experienced the greatest attrition rates while White attorneys reported the lowest attrition rates.[50] 71% of lawyers in the top 10% highest compensation group were white men.[51] Consistent with previous years, White men continued to dominate the majority of equity partner roles.[52] Attrition was higher among female attorneys than their male counterparts.[53]

Biases prevalent in the workplace contribute to high attrition numbers of people of color. Repeatedly, women—and in particular, women of color—report experiencing bias and stereotyping in the legal profession, and how it affects their career.[54] According to an ABA study, women of color reported that they were mistaken for administrative staff, court personnel, or janitorial staff twice as often as White men.[55] Studies found that women felt pressured to prove that they deserved a seat at the table.[56] Many women also described a "lack of institutional awareness" or support for women of color, specifically in regard to the distribution of assignments and mentorship.[57] Similar to hiring biases, partners often assign work to associates they feel connected to.

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47.   *See* HIRE AN ESQUIRE, *supra* note 41.

48.   Vernā Myers, *Why Effective Retention Requires Attention on Our Implicit Biases*, A.B.A. (June 12, 2014), https://www.americanbar.org/groups/litigation/committees/jiop/articles /2014/why-effective-retention-requires-attention-to-implicit-biases.

49.   Arin N. Reeves, *supra* note 43.

50.   *2021 ABA Model Diversity Survey*, A.B.A. (2021), 16 https://www.americanbar.org /content/dam/aba/administrative/diversity-inclusion-center/2021-md-survey-2nd-edition.pdf.

51.   *Id.* at 10-11.

52.   *Id.* at 16, 21.

53.   *Id.* at 60.

54.   *See, e.g.,* Reba Letsa, *The Double-glazed Glass Ceiling: Why Women of Color Consider Leaving the Legal Profession and What Can be Done to Keep Them*, BAKER DONELSON (2021), https://www.bakerdonelson.com/the-double-glazed-glass-ceiling-why-women-of-color-consider-leaving-the-legal-profession-and-what-can-be-done-to-keep-them.

55.   Zoe Rydzewski, *"This is a Man's World": How Female Attorneys Face Implicit Bias in the Legal Profession and How Law Firms Can Change the Culture,* 2 MD. BAR J. 2, 41 (2020).

56.   Letsa*, supra* note *54.*

57.   *Id.*

Historically, the legal profession was an "Old Boys Club."[58] White men often chose other White men to assign projects to and mentor, thereby leaving women attorneys without the same level of support.[59]

Unlike men, women are perceived to be the primary caretakers of the home and children. They are presumed to be stuck between choosing a career and family, and any interruption to the traditional path to partnership or leadership positions becomes a barrier to success.[60] There is a wage gap—not only between men and women—but also between working mothers and women without children, commonly known as the "motherhood penalty."[61] Mothers of three or more children earned eighteen percent less than childless women, and mothers of one to two children earned nearly fourteen percent less.[62] To help retain women attorneys, many firms have begun to offer reduced or flexible work schedules, part-time hours, and extended maternity leave.[63] However, research suggests that although useful, these efforts have their flaws as well—with "bias impeding usage."[64] For example, where firms offered reduced work schedules or extended maternity leave, 75% of women worried that participating in these programs would negatively impact their careers.[65] The majority of women cited the lack of generating billable hours as the number one problem, followed by perception by others at the firm.[66] Flexible work schedules are also more common in non-partnership track lawyers and used less frequently by lawyers of color and LGBTQ lawyers.[67] Concerns relative to flexibility programs suggest that while offering reduced work schedules to working lawyers is a viable approach, law firms must also de-stigmatize these programs and integrate them into the cultural norms of the firm.[68] If law firms

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58.   *See id.*

59.   *Id.*

60.   *See, e.g.,* James E. Meadows, *Mentorship is Essential to Fixing the 'Women's Recession'*, BL (Oct. 27, 2020) https://news.bloomberglaw.com/us-law-week/mentorship-is-essential-to-fixing-the-womens-recession.

61.   Alise Henry, *The Motherhood Penalty—Alive and "Well" or on Its Way Out?*, A.B.A. (June 29, 2018), https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2018/motherhood-penalty.

62.   *Id.*

63.   *See generally*, *One Size Does Not Fit All: Contemplating and Evaluating Flexible Work Arrangements*, NCBA PRO. VITALITY COMM., https://www.ncbar.org/wp-content/uploads/2020/06/one-size-does-not-fit-all-contemplating-and-evaluating-flexible-work-arrangements-final-1.pdf.

64.   *Positive Trends in Law Firm Flexibility, But Bias Impedes Usage*, GLOB. LEGAL POST (Mar. 24, 2017) https://www.globallegalpost.com/news/positive-trends-in-law-firm-flexibility-but-bias-impedes-usage-47035494.

65.   Marc Brodherson, Laura McGee & Mariana Pires dos Reis, *Women in Law Firms* 9-10, MCKINSEY & CO., (Oct. 31, 2017), https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Gender%20Equality/Women%20in%20law%20firms/Women-in-law-firms-final-103017.pdf.

66.   *Id.*

67.   THE GLOBAL LEGAL POST, *supra* note 64.

68.   *Id.* at 11.

are unable to mitigate these biases or progress remains slow, the legal profession will continue to fail minority law students and lawyers.

B. *Outside Council Management and the Call for Diversity*

Clients have been demanding diversity for years. In 2019, 170 companies, including big names like Google and Etsy, sent an open letter to law firms criticizing their lack of diversity.[69] Clients and law firms benefit from a more diverse legal staff because it creates stronger teams, different perspectives, and better outcomes.[70] Surveys find that clients attribute the quality of work products and services received to diversity.[71] For example, a client responded to a survey that "a lack of diversity correlates with a lack of collaboration[,] and that consistently leads to a lack of flexibility and an inability to adapt to and foresee new developments."[72] More recently, the civil unrest after the death of George Floyd and the economic tailspin caused by the COVID-19 pandemic has pushed corporate legal departments to demand more diversity and inclusion from their law firms and vendors.[73]

Hewlett Packard Inc. ("HP") is one of the first companies to impose penalties on law firms that do not meet certain diversity benchmarks. In 2017, the company announced it would temporarily withhold a portion of fees from firms that did not have "at least one racially diverse attorney either managing or performing 10% of the work."[74] Others have followed HP's lead. UK-based Vodafone Group Plc. said that a firm would fail to meet one of their criteria if they have a team of only men working on their matters.[75] Facebook requires that women and ethnic minorities account for at least 33% of law firm teams working on its matters.[76] Companies also pay special attention to those law firms that make outstanding diversity efforts. For example, in June

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69.   *IILP's "Diverse Outside Counsel Survey" Measured the Use of Diverse Outside Counsel by Corporate Clients*, INST. FOR INCLUSION LEGAL PRO., https://www.theiilp.com /GCs-for-Law-Firm-Diversity.

70.   *See* Angelica Cesario, *The Benefits of Diversity in the Legal Profession*, LAWLINE (June 23, 2020), https://blog.lawline.com/the-benefits-of-diversity-in-the-legal-profession.

71.   Nat Slavin, *Diversity in 2021: A Snapshot of What Legal Indus. Clients Are Saying*, ALM INTEL. FELLOWS (2021) https://images.law.com/contrib/content/uploads/documents/1 /Diversity_in_2021_A_Snapshot_of_What_Legal_Industry_Clients_Are_Saying.pdf.

72.   *Id.*

73.   Dylan Jackson, *George Floyd's Death Ushered in a New Era of Law Firm Activism and There's No Going Back*, LAW.COM (May 25, 2021), https://www.law.com/americanlawyer /2021/05/25/george-floyds-death-ushered-in-a-new-era-of-law-firm-activism-and-theres-no-going-back-405-84104.

74.   Milligan, *supra* note 10.

75.   *Id.*

76.   Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse,* THE N.Y. TIMES (Apr. 2, 2017), https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html.

2022, Accenture awarded five law firms with its annual Outside Counsel Diversity Award.[77]

The demand for diversity is not only about winning the business; clients expect to see diversity efforts continue even when they have signed on with a firm. Every year, clients hold firms accountable by requesting data regarding diversity and inclusion efforts and successes. For example, Accenture also sends annual surveys and requests quarterly updates from its firms to track the diversity of the firm.[78] Most recent research reveals that the metrics of success have shifted.[79] Clients are not only looking to see a female face on the team; they want to see the hours billed on each engagement and a detailed description of what the attorney contributed to each.[80] For example, Uber's Preferred Counsel Program vets outside counsel by asking questions such as what percentage of firm leadership is diverse and whether women and individuals from underrepresented groups are among the top law firm earners.[81] Additionally, it is not enough to have a high number of diverse attorneys in the firm overall; clients want to see diversity on each legal team.[82] According to William Whitner, a partner at Paul Hastings, "[y]ou have to show that your firm really is a place where talented people from all backgrounds can express themselves and bring their unique talents and experiences to the table."[83] In a survey conducted by the Wicker Park Group, a client commented that "we need more diverse teams working on matters. We have had the same people working on our matters for years—which some of that is for historical knowledge and is warranted, but we don't see a lot of diverse associates

77.   *Accenture Recognizes Five Law Firms With Outside Counsel Diversity Award*, ACCENTURE (Jun. 14, 2022), https://newsroom.accenture.com/news/accenture-recognizes-five-law-firms-with-outside-counsel-diversity-award.htm (The five law firms are Baker McKenzie; Allen & Overy; McDermott Will & Emery; Osler, Hoskin & Harcourt LLP; and Lewis Silkin).

78.   *Clients Push for Diversity – Diversity Lab* (2022), https://unbate.ngontinh24.com/article/clients-push-for-diversity-diversity-lab.

79.   Brian P. Seaman, *How Client Surveys are Moving the DEI Needle at Law Firms*, REUTERS (Feb. 23, 2022, 12:44 PM), https://www.reuters.com/legal/legalindustry/how-client-surveys-are-moving-dei-needle-law-firms-2022-02-23.

80.   *Id.*; *See Clients Push for Diversity – Diversity Lab, supra* note 78 ("For over 10 years, Bank of America's legal department has measured how women and minorities are staffed on its matters. […] [I]t now obtains granular data on staffing, work allocation, and fee distribution. The analysis is multidimensional, looking at number of timekeepers, dollar amounts spent, seniority, and distribution by gender, ethnicity, sexual orientation, and disability. Bank of America's legal department not only captures what percentage of their work is being handled by diverse attorneys but also tracks the attorney level to determine whether there are retention or advancement issues for diverse or women lawyers.").

81.   Stephen Embry, *Want Diversity in Law Firms? Clients Have to Demand It*, TECHLAW CROSSROADS (Jun. 8, 2021), https://www.techlawcrossroads.com/2021/06/want-diversity-in-law-firms-clients-have-to-demand-it.

82.   Seaman, *supra* note 79.

83.   GC Diversity and Inclusion Editorial, *Shaping Diversity: Part Three*, THE LEGAL 500: GC MAG., https://www.legal500.com/gc-magazine/feature/shaping-diversity-part-three/.

working on our matters and we need to address that."[84] The survey also found a trend towards greater accountability around diversity goals. For example, clients reported that they want diversity to be "real" and be reflected in billing records, and for practice groups to also be diverse, as opposed to only having diversity within the firm as a whole.[85]

In today's landscape, clients are likely to continue demanding diversity even if they do not set rigid quotas for the number of minority attorneys they expect to see on a team.[86] In early 2021, Coca-Cola published a new policy committed to diversity that sought to have Black lawyers handle at least half of the billable time on the 30% of new matters that the company's outside counsel would be required to reserve for diverse attorneys.[87] In addition, the policy would have docked fees by 30% for U.S. firms that failed to meet these requirements.[88] However, Coca-Cola officially scrapped its policy the following year, followed by the departure of the former general counsel, Bradley Gayton.[89] The withdrawal of the policy came after shareholders called the policy "illegal[ly] discriminatory" and threatened the company with litigation.[90] Although the policy was controversial to begin with,[91] the company's decision to withdraw it sparked concern among the legal industry about whether other corporations can follow suit.[92] However, it is unlikely that simply because one large corporation took a step back, others will follow suit and not demand diverse outside counsel.[93] First, despite the withdrawal of the policy, Coca-Cola has said publicly that it remains committed to diversity and inclusion efforts.[94] Second, and more notably, the push for diversity has ingrained itself into society given the concerns around civil rights post-George

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84.   Slavin, *supra* note 71.

85.   *Id.*

86.   Seaman, *supra* note 79 (describing that "accountability measures are here to stay").

87.   Bradley M. Gayton, *Commitment to Diversity, Belonging, and Outside Counsel Diversity*, ABOUT B LAW (Jan. 28, 2021), https://aboutblaw.com/2nF.

88.   *Id.*

89.   Brian Baxter, *Coca-Cola Scraps Diversity Policy for Outside Law Firms (1)*, BL (Mar. 28, 2022, 12:52 PM), https://news.bloomberglaw.com/business-and-practice/coca-cola-scraps-diversity-requirements-for-outside-law-firms.

90.   *Id.*

91.   *See, e.g.*, Dan Morenoff, *Update: Coca-Cola's Widely Disseminated Outside Counsel "Guidelines" "Have Not Been and Are Not Policy of the Company"*, AM. CIV. RTS. PROJECT (Mar. 25, 2022), https://www.americancivilrightsproject.org/blog/update-coca-colas-widely-disseminated-outside-counsel-guidelines-have-not-been-and-are-not-policy-of-the-company.

92.   Brian Baxter & Meghan Tribe, *Coke's 'Rigid' Legal Diversity Drive Pushed Corporate Limits*, BL (Apr. 1, 2022, 8:59 AM), https://news.bloomberglaw.com/business-and-practice/cokes-rigid-legal-diversity-drive-pushed-corporate-limits.

93.   *Id.* (discussing the "chilling effect" of Coca-Cola's withdrawal and suggesting that diversity is still an important discussion beyond Coca-Cola's 30% carve-out of work for diverse lawyers).

94.   *Id.*

Floyd's death.[95] Zakiyyah Salim-Williams, chief diversity officer at Gibson, Dunn & Crutcher, believes Coca-Cola's withdrawal of its policy will not have the chilling effect that some have predicted because of the "trajectory that the legal profession is already on." [96] Diversity is important to clients and presents firms an opportunity to align with them.[97] This assertion is supported by the fact that in May 2022, the ABA published its Model Diversity Survey that allows companies to compare law firms on diversity hiring, promotions, and attrition.[98] Through this survey, the ABA encourages corporate clients to use survey results when evaluating outside counsel. Considering client expectations and accountability measures in regard to diversity efforts, it is best for law firms to be prepared to make meaningful efforts to diversify.

II. The Solution: Artificial Intelligence to Identify and Reduce Bias

What if intelligent machines could help law firms recognize worthy candidates by preventing the biases and prejudices inherent in the current hiring processes and retaining methods? Hiding the attributes that can lead to biased assumptions, such as gender or race, removes the possibility of discrimination on that basis.[99] Artificial intelligence ("AI") can help law firms overcome the biases built into humans and identify valuable candidates.[100] Software can achieve what human beings cannot—it can ignore race, gender, sexual orientation, and other characteristics that are irrelevant to how the candidate will perform as a lawyer. With guidance from human experts, AI-powered tools can mitigate biases in hiring and design a better diversity and inclusion strategy.[101]

A. *Artificial Intelligence in the Law: What it is and What Are its Current Uses?*

To implement AI in law firms, it is important to understand what AI is and how it is currently being used. AI is the ability of computer programs to

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95.   Ronald C. Machen & Cadene Russell Brooks, *Establishing a Strategic Plan to Advance Law Firm Diversity and Inclusion Efforts*, Savoy (Feb. 20, 2022), http://savoynetwork.com/establishing-a-strategic-plan-to-advance-law-firm-diversity-and-inclusion-efforts.

96.   Baxter & Tribe, *supra* note 92.

97.   *Id.* ("there's no stopping where this train is going").

98.   *ABA Survey Lets Companies Compare Law Firms on Diversity Hiring, Promotions, and Attrition*, A.B.A. (May 23, 2022), https://www.americanbar.org/news/abanews/aba-news-archives/2022/05/aba-survey-lets-companies-compare-law-firms.

99.   Kimberly A. Houser, *Can AI Solve the Diversity Problem in the Tech Industry? Mitigating Noise and Bias in Employment Decision-Making*, 22 Stan. Tech. L. Rev. 290, 326 (2019).

100.   *See* Ilit Raz, *How AI Can Reduce Bias in Hiring*, Recruiting News Network (May 10, 2022), https://www.recruitingnewsnetwork.com/posts/how-ai-can-reduce-bias-in-hiring.

101.   *Id.*

sense, reason, adapt and perform tasks.[102] Through AI, human intelligence is replicated in machine programs more accurately and at a quicker pace. Machine learning is an application of AI that can autonomously learn from experience without explicit programming.[103] It accomplishes this by learning from information, such as text, numbers, or images.[104] Machine learning searches for patterns in data to help improve future decisions.[105] Training data is inputted into the model to enable the machine to identify patterns.[106] Once the model trains itself to detect patterns, the developer may fine-tune the model over time by altering parameters with new training data.[107] Although the terms "AI" and "machine learning" are used interchangeably, machine learning is the "training process that helps recruiters be more effective by computing, recognizing patterns and detective deviations."[108] AI is the science and engineering of applications and innovations made possible by machine learning.[109] Currently, AI is already being used to fulfill a variety of tasks in the legal profession. Some prominent examples include:

- *E-Discovery.* The first use of AI, E-Discovery software enables numerous documents to be surveyed to locate those relevant to the search criteria. E-discovery saves time, cost, and ensures accuracy.[110]

- *Legal Research.* AI-powered software can review documents and flag the relevant ones in response to search criteria or a particular case.[111]

- *Contract Review and Management.* AI can analyze contracts in bulk as well as individually. Rather than lawyers parsing through contracts and redlining items to help a client know whether to sign or not, AI sorts through the contracts

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102.   *Artificial Intelligence*, SAS, https://www.sas.com/en_us/insights/analytics/what-is-artificial-intelligence.html.

103.   For a visual representation of machine learning, *see A Visual Representation to Machine Learning*, R2D3, http://www.r2d3.us/visual-intro-to-machine-learning-part-1.

104.   Yuma Heymans, *Machine Learning in Recruitment: A Deep Dive*, HEROHUNT.AI (Oct. 29, 2021), https://www.herohunt.ai/blog/machine-learning-in-recruitment-a-deep-dive.

105.   *See id.*

106.   *See id.*

107.   *Id.*

108.   Monica Montesa, *AI Recruiting in 2022: The Definitive Guide*, PHENOM (Apr. 11, 2022), https://www.phenom.com/blog/recruiting-ai-guide.

109.   *Id.*

110.   Anthony E. Davis, *The Future of Law Firms (and Lawyers) in the Age of Artificial Intelligence*, A.B.A. (Oct. 2, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/the-future-law-firms-and-lawyers-the-age-artificial-intelligence.

111.   *See id.*

quicker—searching for key clauses and identifying core concepts—and with fewer errors than humans.[112]

- *Predict legal outcomes.* Lawyers are often confronted with the question, "how likely am I to win?" AI can analyze years of trial data to help predict a likely outcome.[113]

If AI is so helpful, why are lawyers hesitant to use it? There may be multiple reasons. Lawyers may not want to reduce their billable hours, which is how compensation is historically structured at a law firm.[114] Lawyers may also be reluctant to introduce any new technology for fear of compromising client confidentiality.[115] Technology is often viewed as a threat to the old legal order.[116] There is a generational divide between those that grew up using technology and those that are learning to adapt to it.[117] Often, the adapters happen to be those in leadership positions.[118] However, AI is not out for the lawyer's job; it is here to supplement it.[119]

B. *How Can AI Help Mitigate Biases in Law Firm Recruitment to Promote Diversity?*

Law firms should consider using AI to mitigate unconscious bias in recruitment. Removing the human element from the hiring process can control bias because unlike human minds, AI can be audited and programmed. "A computer doesn't have a hometown, didn't go to college and doesn't have

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112.   *See id.*; *How AI Streamlines and Improves Contract Review*, EPIQ, https://www.epiqg lobal.com/en-us/resource-center/articles/how-ai-streamlines-and-improves-contract-review; *See, e.g.*, LAWGEEX, https://www.lawgeex.com/; *See, e.g.*, *eBrevia by DFIN*, DFIN, https://www.dfinsolutions.com/products/ebrevia.

113.   Davis, *supra* note 110, at 4-5.

114.   *See* Gary E. Merchant, *Artificial Intelligence and The Future Of Legal Practice*, DOCUMENT CRUNCH, https://www.documentcrunch.com/ai-news-artificial-intelligence-and-the-future-of-legal-practice.php.

115.   *See* Daniel W. Linna Jr. & Wendy J. Muchman, *Ethical Obligations to Protect Client Data When Building Artificial Intelligence Tools: Wigmore Meets AI*, A.B.A. (Oct. 2, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional _lawyer/27/1/ethical-obligations-protect-client-data-when-building-artificial-intelligence-tools-wigmore-meets-ai.

116.   Mark A. Cohen, *Why the Legal Industry Must Embrace Diversity, Technology, and Collaboration*, FORBES (Aug. 21, 2017, 6:23 AM), https://www.forbes.com/sites/markcohen1 /2017/08/21/why-the-legal-industry-must-embrace-diversity-technology-and-collaboration /?sh=4b817175a95f.

117.   *Id.*

118.   *Id.*

119.   For a closer debunking of AI-related myths, *see* Onit, *Will AI Replace Lawyers & Other Myths: Legal AI Mythbusters*, JDSUPRA (Mar. 5, 2021), https://www.jdsupra.com/legal-news/will-ai-replace-lawyers-other-myths-1763878/.

hobbies, so won't unconsciously warm to a friendly candidate the way a real recruiter might."[120]

1. Resume Screening and Structured Interviewing

AI can and should screen resumes, rather than human lawyers, even if resumes are in the thousands. This is done by AI-enabled software using machine learning to understand what the qualifications of a job are.[121] The software analyzes resume data instead of humans and can be programmed to ignore demographic information such as gender, race, age, or socioeconomic status (including which law school the applicant went to).[122] It combines collected data points using algorithms to make predictions about who will be good matches with the firm.[123] Rather than reviewing resumes, the firm's recruiting team will receive AI-generated reports summarizing applicants' skillsets and backgrounds. A key advantage of AI is that it can create an ideal candidate profile based on the qualifications of existing successful employees. From here, firms can test what is working well for them and which traits or skills they would like to improve on. There are also limitations to this, which I will address more fully below.

AI can also assist in structured interviewing. Structured interviews are a proven method to eliminate or reduce bias.[124] During structured interviews, candidates answer identical questions, thus reducing the risk of subjectivity.[125] Then, AI is used to analyze and compare thousands of samples with one another.[126] AI recommends job-specific interview questions, which increases fairness and consistency.[127] Whether an interview is conducted over the phone, in-person, or on video, asking consistent questions that are directly related to the job allow for a fairer assessment of a candidate than the

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120.   Richard Vanderford, *AI Could Cut Hiring Biases as Companies Make Push to Find Workers, Proponents Say*, WALL ST. J. (Feb. 2, 2022, 5:30 AM), https://www.wsj.com/articles/ai-could-cut-hiring-biases-as-companies-make-push-to-find-workers-proponents-say-116437 97804.

121.   *See* Sejuti Das, *Top AI Tools for Resume Screening*, ANALYTICS INDIA MAG. (Jan. 15, 2021), https://analyticsindiamag.com/top-ai-tools-for-resume-screening.

122.   Diego Gomez, *How AI Can Reduce Unconscious Bias in Recruiting*, IDEAL (Jun. 18, 2020), https://ideal.com/unconscious-bias.

123.   *Id.*

124.   Houser, *supra* note 99.

125.   *See* Iris Bohnet, *How to Take the Bias Out of Interviews*, HARV. BUS. REV. (Apr. 18, 2016), https://hbr.org/2016/04/how-to-take-the-bias-out-of-interviews; Sunny Saurabh, *Benefits of Structured Interviews for Your Hiring Process*, INTERVIEWER.AI (June 23, 2022), https://interviewer.ai/structured_interview.

126.   *See* Rebecca Heilweil, *Artificial Intelligence Will Help Determine if You Get Your Next Job*, VOX (Dec. 12, 2019, 8:00 AM), https://www.vox.com/recode/2019/12/12/20993665/artificial-intelligence-ai-job-screen.

127.   *Id.*

"cultural-fit" interviews law firms tend to currently conduct.[128] Because it is AI that quantifies the data and objectively scores it against other candidates, versus a human being, it leads to better bias control. For example, Mya Systems created a chatbot that interviews and evaluates job candidates using performance-based questions, compares the answers with the job requirements, and answers the candidates' questions about the company. The benefit of such a chatbot is that human interviewee bias cannot creep in. This is especially relevant to law firm hiring culture (such as on-campus interviews), where even the prestige of the law school may place one candidate above another.[129]

2. Law Firms Currently Using AI for Hiring Purposes

Many law firms have already turned to AI for hiring purposes.[130] Cadwalader, Wickersham & Taft, a law firm in New York, passed over a law student for a summer job until AI identified her as a good match.[131] Cadwalader has adopted the technology developed by Suited AI ("Suited"). Other law firms using Suited include Skadden, Arps, Slate, Meagher & Flom; Sullivan & Cromwell; Willkie Farr & Gallagher; Fried, Frank, Harris, Shriver & Jacobson; Wilson Sonsini Goodrich & Rosati; and Haynes and Boone.[132]

Suited identifies applicants that match a firm's existing top performers.[133] Applicants and attorneys at the firm complete identical questionnaires, which are described to be a cross between a personality test and the logical reasoning portion of the Law School Admission Test.[134] Firms use the questionnaire at various stages in the hiring process, including as the first step after an application or after a round of interviews. Suited's assessment tool, designed specifically for the legal industry, gathers data on "candidate's personality,

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128.   *See* Monica Torres, *Why 'Culture Fit' Is a Failed Idea in American Hiring*, HUFFPOST (Aug. 21, 2020), https://huffpost.netblogpro.com/entry/culture-fit-failed-idea-in-hiring_1_5f1f2319c5b69fd47310363e.

129.   Law school rankings help prospective law students decide which law school to attend—the higher the school's ranking, the more likely chance that it will provide a more qualified education. However, for an argument that rankings trigger bias and are unfair to many qualified applicants, *see* Tony Varona, *Diversity and Disgrace – How the U.S. News Law School Rankings Hurt Everyone*, 38 N.Y.U. REV. OF L. & SOC. CHANGE, https://socialchangenyu.com/harbinger/diversity-and-disgrace-how-the-u-s-news-law-school-rankings-hurt-everyone. *See also*, Ilana Kowarski, *Why Big Law Firms Care About Which Law School You Attend*, U.S. NEWS (Aug. 1, 2018), https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-08-01/why-big-law-firms-care-about-which-law-school-you-attend (discussing that many Big Law firms want law students from top-ranked law schools to either impress corporate clients, or because they believe some of these students come with existing personal connections to influential business executives who can become clients).

130.   Erin Mulvaney and Chris Opfer, *Law Firms Turn to AI to Vet Recruits, Despite Bias Concerns*, BL (Feb. 24, 2022, 3:00 am), https://news.bloomberglaw.com/business-and-practice/law-firms-turn-to-ai-to-vet-recruits-despite-bias-concerns.

131.   *Id.*

132.   *Id.*

133.   *Id.*

134.   *Id.*

values, stress response style, and other essential competencies, in addition to traditional information such as academic background." [135] Law firms collaborate with Suited to develop custom AI models that identify the key characteristics that lead to excellent performance and good cultural fit.[136]

Another platform that law firms use is Thine.[137] Cooley, Hogan Lovells, and Holland & Hart are just some of the names that are currently using Thine.[138] Thine works with law firms to create custom hiring algorithms that are future-focused, which means that law firms can share the characteristics they *want* to see in potential applicants, compared to matching with only the ones that exist in their current attorneys.[139] Thine's assessments also use Industrial and Organizational Psychology (IO), which is the scientific study of human behavior in organizations and the workplace.[140] The company offers separate assessments for entry-level applicants and laterals to account for different skillsets earned from experience. Its assessments provide an objective framework for law firms to evaluate students based on skillsets and competencies, rather than relying on personal biases.

Other platforms also use similar AI-empowered software to conduct applicant assessments.[141] Every year, law schools churn out law graduates in high numbers. As of 2021, 35,287 students graduated from law school in the United States.[142] Law firms receive thousands of applications from law students and must distinguish between many similarly situated applicants.[143] AI-powered applicant assessments help showcase applicants' skills that may be passed over because of implicit bias. Assessments typically target the skills that are essential for a role. O'Melveny, for example, works with Pymetrics, a game-based recruiting tool that helps assess a "candidate's social, cognitive, and behavioral features, such as attention, planning, flexibility, and memory."[144] O'Melveny has an associate success model against which

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135.   Suited Newsroom, *Suited Launches A.I. Powered Recruiting Platform for Legal Industry to Support Diversity in Hiring*, SUITED (Dec. 15, 2020), https://www.wellsuited.com /news/suited-launches-a-i-powered-recruiting-platform-for-legal-industry-to-support-diversity-in-hiring.

136.   *Id.*

137.   *See* THINE, https://www.thine.co.

138.   *Assessments*, THINE, https://www.thine.co/assessments.

139.   THINE, *supra* note 137.

140.   *Industrial and Organizational Psychology*, AMERICAN PSYCHOLOGICAL ASSOCIATION (May 2022), https://www.apa.org/ed/graduate/specialize/industrial.

141.   For a list of top AI hiring platforms, *see* Emily Heaslip, *The Top 14 AI Assessment Tools to Test for Job-Related Skills*, VERVOE (May 4, 2022), https://vervoe.com/ai-assessment-tools.

142.   Statista Research Department, *Number of Law Graduates in the United States from 2013 to 2021*, STATISTA (Jul. 6, 2022), https://www.statista.com/statistics/428985/number-of-law-graduates-us.

143.   *See* Michael Bird, *How Competitive is the Law?*, CHAMBERS STUDENT (Jan. 2020), https://www.chambersstudent.co.uk/where-to-start/commercial-awareness-info/our-newsletter /how-competitive-is-the-law.

144.   *Pymetrics*, O'MELVENY, https://www.omm.com/careers/pymetrics.

applicants' results are compared to evaluate future success.[145] Results are generated without considering race, ethnicity, or gender.[146]

C. *AI Can Also Be Used to Promote Retention of Diverse Employees*

Law firms that are vulnerable to bias in recruitment methods may also expose associates to bias throughout their careers at the firm. Chambers Associate's 2021 Associate Satisfaction Survey found that Black and African American respondents were less satisfied with career development, diversity initiatives, mental health, and quality of life.[147] They also reported longer work hours, lower partner contact, and lower intentions to make partners.[148] With grim statistics like these, it is no surprise that law firms have high turnover rates.[149] Although firms have been using AI in recruitment, it is now also gaining traction in retention efforts.[150]

Many firms want to leverage AI and data analytics to retain top hires.[151] The legal market has been influenced by the COVID-19 pandemic, and current trends show that the law firm lateral hiring market has fierce competition.[152] Firms invest in a lot of people that leave rather quickly—AI can help firms assess their data to identify problem areas.[153] AI can analyze which factors contributed to an employee's departure, such as salary, promotions, evaluations, etc. Artificial intelligence can deep dive into these analytics and offer predictions for the future that can help the firm's turnover rates.[154] For

145.   *Id.*

146.   *Id.*

147.   Paul Rance, *Trends in Diversity, Equity & Inclusion*, CHAMBERS ASSOCIATE (June 11, 2021), https://www.chambers-associate.com/law-firms/diversity/trends-in-diversity-equity-inclusion-2021.

148.   *Id.*

149.   *See* Debra Cassens Weiss, *Law Firms Came 'Dangerously Close' to Losing Almost a Quarter of Their Associates in 2021, New Report Says*, ABA JOURNAL (Jan. 11, 2022, 11:49 AM), https://www.abajournal.com/news/article/law-firms-came-dangerously-close-to-losing-a-quarter-of-their-associates-in-2021.

150.   *Artificial Intelligence is Gaining Traction in Human Resources*, IMPRIMIS GROUP (June 7, 2021), https://imprimis.com/artificial-intelligence-is-gaining-traction-in-human-resources.

151.   Ari Kaplan, *New Research Tracks the Rise of Innovation in a Hyper-Competitive Market for Legal Talent*, CISION PRWEB (Jan. 26, 2022), https://www.prweb.com/releases/new_research_tracks_the_rise_of_innovation_in_a_hyper_competitive_market_for_legal_talent/prweb18454239.htm.

152.   Zack Needles, *Law.com Trendspotter: Even in a Relationship Business, Data-Driven Lateral Hiring Can Give Law Firms a Leg Up*, LAW.COM (Feb. 17, 2022, 11:00 PM), https://www.law.com/2022/02/17/law-com-trendspotter-even-in-a-relationship-business-data-driven-lateral-hiring-can-give-law-firms-a-leg-up/?slreturn=20230024200059.

153.   *See Leveraging Data Analytics Will be Key to Smarter Law Firm Hiring*, THINE, https://www.thine.co/blog-posts/leveraging-data-analytics-will-be-key-to-smarter-law-firm-hiring.

154.   *Artificial Intelligence is Gaining Traction in Human Resources*, *supra* note 150.

example, machine learning algorithms can predict resignation risk by considering several factors, including employment tenure, location, compensation changes, teams, and the amount of time a person has been in a specific role.[155]

1. AI in Performance Management

The application of AI to performance management reduces bias in key personnel decisions, including promotions. Partner evaluations review associate performance, help determine compensation and make promotion decisions. An audit of bias in performance reviews at a midsized law firm found that only 9.5% of people of color received mentions of leadership in their performance evaluations.[156] Performance evaluations may trigger bias for various reasons. Traditional performance reviews require time and resources and may become a low priority in a high-volume workplace.[157] However, the assessment of the midsized law firm's evaluations identified four basic patterns of racial and gender bias:

- **"Prove it Again"** [158]: Several minority groups, including but not limited to, people of color, women, and LGBTQ+ persons, have to consistently prove themselves over and over again. In performance evaluations, the "prove-it-again group" is evaluated under a more judgmental standard than the white majority, with their mistakes noticed more and remembered longer. This finding is supported by studies that find that Black attorneys are "consistently subject to higher scrutiny."[159]

- **"The Tightrope"**[160]: Expectations are different for women and people of color in comparison to White men. While White men are more likely to be perceived as authoritative

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155.   *See e.g.*, VISIER, https://www.visier.com/solutions/retention-focus (offering a people analytics and software service that can "find out where your anti-turnover actions will be most effective").

156.   Joan C. Williams, Denise Lewin Loyd, Mikayla Boginsky & Frances Armas-Edwards, *How One Company Worked to Root Out Bias from Performance Reviews*, HARV. BUS. REV. (Apr. 21, 2021), https://hbr.org/2021/04/how-one-company-worked-to-root-out-bias-from-performance-reviews?registration=success.

157.   *See* Seyfarth Shaw LLP, *Is AI Above the Curve in Evaluating Employee Performance?*, LEXOLOGY (June 27, 2018), https://www.lexology.com/library/detail.aspx?g=935e7736-dc4e-422c-b91d-7396b1a34004.

158.   Williams, et al., *supra* note 156.

159.   *See* Lisa Wade, PhD, *Black Lawyers Are Likely to Face Harsher Scrutiny than Their White Counterparts*, THE SOCIETY PAGES (May 11, 2016), https://thesocietypages.org/socimages/2016/05/11/black-lawyers-are-likely-to-face-harsher-scrutiny-than-their-white-counterparts.

160.   Williams, et al., *supra* note 156.

and ambitious to succeed, women with similar qualities are perceived as "difficult" and "aggressive."[161]

- **"The Maternal Wall"**[162]: As discussed above, women are perceived to be less committed to their work when they become mothers or are pregnant. For example, the assessment reported that in the midsized firm, almost 20% of white women received comments on their performance evaluations to the effect that they did not want to make partner, and the firm predicted that the reason must be that managers were just making assumptions about their reduced commitment to their work after having children.[163]

- **"Racial Stereotypes"**[164]: Racial stereotypes suggest that some races, such as Asian Americans, lack leadership qualities.[165]

AI can assist performance management by mitigating biases that surface in performance evaluations. Most clearly, it takes away a partner's subjective prejudices. AI collects data on employee performance and quantifies how well an employee is doing based on "historical performance data and achievements of current performance metrics."[166] These AI-assisted ratings can be used to prepare a more objective evaluation.[167] One of the biggest advantages of using AI in performance evaluations is that it offers prescriptive recommendations.[168] Prescriptive analytics recommend what steps should be taken to reach the desired outcome.[169] For example, prescriptive analytics can be beneficial in investment decisions by weighing risks and recommending whether to invest.[170] Combined with AI, such prescriptive analytics enable real-time decision-making that can help partners take essential steps to help

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161.   Wade, *supra* note 159.
162.   Williams, et al., *supra* note 156.
163.   Wade, *supra* note 159.
164.   Williams, et al., *supra* note 156.
165.   Wade, *supra* note 159.
166.   Chiradeep BasuMallick, *How AI-driven Performance Feedback Can Make You a Better Manager*, Spiceworks (Dec. 16, 2021), https://www.spiceworks.com/hr/human-capital-management/articles/ai-driven-performance-feedback.
167.   Jennifer C. Loftus, *In the New Normal, AI and Data Analytics May Play an Even Bigger Role in Performance Management*, Recruiter.com, https://www.recruiter.com/recruiting/how-data-analytics-ai-impact-performance-management-tools.
168.   *Id.*
169.   For a detailed description of predictive analytics, *see* Kristian Mihali, *Prescriptive Analytics vs. Artificial Intelligence*, Spiceworks (Dec. 16, 2021), https://www.spiceworks.com/marketing/ai-in-marketing/articles/prescriptiveanalyticsvs-artificial-intelligence.
170.   Catherine Cote, *What is Prescriptive Analytics? 6 Examples*, Harvard Business School Online (Nov. 2, 2021), https://online.hbs.edu/blog/post/prescriptive-analytics.

an associate either remain with the firm or improve on their performance.[171] For example, AI can conduct intelligence surveys and gather feedback in real-time, then share personalized insights to the employees based on survey results.[172] If an associate is doing better than predicted, AI can recommend rewards. If an associate needs improvement, AI can identify the areas that need improvement and can suggest topics for learning and productivity. Not every important lawyering skill can be reflected in a dataset, thus AI's use may be limited. However, AI can still supplement existing methods—AI analyzes employee career progression from past performance, interests, and skill sets, which may be more useful than once-a-year traditional performance reviews.[173] Traditional methods can be influenced by "recency bias," in which managers view what the employee has done in recent times, compared to assessing the entire evaluation period.[174] Companies that are currently using AI in this space are instructive examples; for example, "IBM's AI-based performance feedback solution told managers that giving certain employees a 10% raise would decrease their flight risk by 90%."[175]

Ballard Spahr, a well-known law firm, is working on a pilot project to use AI in performance evaluations.[176] Ballard recognizes that partners may believe they have good intentions, but AI can help them monitor progress and identify blind spots.[177] Jointly with Relativity, Ballard is building an Unconscious Bias Detector, which utilizes AI to identify instances of bias related to ethnicity, gender, sexual orientation, etc. in performance reviews.[178] It is yet to be seen whether other law firms will follow Ballard's example and implement AI in performance reviews to weed out bias.

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171.   *See id.*
172*.*   *Use of Artificial Intelligence in Performance Reviews*, PROFIT.CO, https://www.profit.co/blog/performance-management/use-of-artificial-intelligence-in-performance-reviews.
173.   *Id.*
174.   *See* Seyfarth Shaw LLP, *supra* note 157.
175.   BasuMallick, *supra* note 166.
176*.*   *Relativity Celebrates AI Visionaries and Announces New Data Transfer and Security Product Capabilities at Legalweek 2022*, ASSOCIATION OF CERTIFIED E-DISCOVERY SPECIALISTS (Mar. 9, 2022), https://aceds.org/relativity-celebrates-ai-visionaries-and-announces-new-data-transfer-and-security-product-capabilities-at-legalweek-2022.
177.   *See* JC Steinbrunner, *Building a Better Ballard Through Diversity, Equity, and Inclusion, and AI*, RELATIVITY BLOG (Mar. 1, 2022), https://www.relativity.com/blog/building-a-better-ballard-through-diversity-equity-and-inclusion-and-ai (interviewing Ballard's Chief Diversity, Equity, and Inclusion officer who shares that while partners conduct performance evaluations with thoughtfulness and intentionality, they write thousands of comments as part of performance reviews).
178*.*   *Relativity Celebrates AI Visionaries and Announces New Data Transfer and Security Product Capabilities at Legalweek 2022, supra* note 176.

2. Using AI to Help Bridge the Pay Gap

A large gender pay gap exists in law firms.[179] In Big Law, the gender pay gap widens as associates climb the ranks to partner.[180] Law students entering Big Law generally start at the same salary scale because most associates are paid a fixed amount based on their class year.[181] However, as associates climb to the partnership track, inequities in salaries begin to show.[182] For example, Brenda Feis, a former Seyfarth Shaw partner, said while sharing her experience, "I was a star associate, star partner. But once I had kids—even though I was winning cases for clients—when it came time to pass those clients on because the senior partner was retiring, they went to a male. They didn't go to me."[183] Brenda's experience is one of many; according to a survey by the National Association of Women Lawyers, women make up only 22% of equity partners and earn only 78% of what men earn in those roles.[184] This result of an imbalance in leadership positions adversely affects compensation systems, because it is those leaders that decide compensation.[185] Having the majority of leadership positions filled by male partners results in an in-group bias that continues the cycle of an unjust pay gap.[186]

Ethical law firms are likely examining pay equity—the question is how are they doing so?[187] Advances in AI can help law firms hardwire equity into their compensation systems. AI can identify associates, regardless of their gender, race, or other such demographics, that deserve to be promoted to leadership positions based on their merit. AI can also lend its expertise in identifying existing pay discrepancies based on certain demographics; analyzing data to understand why these discrepancies exist and offering data-driven solutions to help close the pay gap.

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179.   Christine Hendrickson, *Huge Pay Gap for Women Lawyers: What Firms Can Do*, BLOOMBERG LAW (June 16, 2022, 4:00 AM), https://news.bloomberglaw.com/business-and-practice/huge-pay-gap-for-women-lawyers-what-firms-can-do ("Female lawyers' median weekly pay is 26.5% less than male lawyers, and the gap is larger for partners.").

180.   Meghan Tribe, *Women Law Partners Weigh in on How to Close the Pay Equity Gap*, BLOOMBERG LAW (June 14, 2022, 4:45 AM), https://news.bloomberglaw.com/business-and-practice/women-law-partners-weigh-in-on-how-to-close-the-pay-equity-gap.

181.   *Id.*

182.   *Id.*

183.   *Id.*

184.   *Id.*; *National Association of Women Lawyers Survey on the Promotion and Retention of Women in Law Firms*, NATIONAL ASSOCIATION OF WOMEN LAWYERS (2021), https://aboutblaw.com/3gm.

185.   Tribe, *supra* note 180 (suggesting that if women are not the ones making final decisions or the ones on the compensation committee, then there is an in-group bias and significant change is unlikely).

186.   *See id.*

187.   *Id.*

Data-driven solutions to closing pay gaps are important because they uncover biases in the pay structure.[188] Such numbers can be defined as "outcome metrics."[189] However, recent research suggests that outcome metrics only reveal the existence of a problem; not how to solve it.[190] To do better, the authors of the research suggest using "process metrics" that can "pinpoint problems" and tell human resources where to focus to create meaningful change.[191] For example, Gapsquare, a U.K startup that was recently acquired by XpertHR, is a software service that uses machine learning to provide companies with actionable insights into their pay disparities.[192] Gapsquare's analytics software analyzes and tracks pay disparity, pay equality, and pay gap data.[193] It uses a company's HR and payroll data to deliver detailed and visual insights into the company's gender pay gap.[194] "It can do this across demographics, departments, and locations (and more)."[195] Gapsquare offers self-use software, FairPay, to help human resources understand the visuals and what the numbers mean.[196] The Gapsquare team states, "The software helps make sense of data, so that HR teams can join up the complex data analysis with our embedded equality and diversity expertise."[197] Using Fair-Pay, companies can identify and remove any biases they may have in their pay and reward structures.[198]

If data on diversity is ignored, the cycle of biases leading to harmful disparities is likely to continue.[199] The application of AI in the legal profession need not be limited to document review or contract analysis. Used correctly, it can be a powerful tool to mitigate or eliminate biases in hiring and retention

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188.   Dr. Margrét Vilborg Bjarnadóttir, *Addressing Demographic Pay Gaps With Data-Driven Solutions*, INSIDE BIG DATA (June 26, 2019), https://insidebigdata.com/2019/06/26/addressing-demographic-pay-gaps-with-data-driven-solutions.

189.   Joan C. Williams & Jamie Dolkas, *Data-Driven Diversity*, HARV. BUS. REV. (Mar.-Apr. 2022), https://hbr.org/2022/03/data-driven-diversity.

190.   *See id.*

191.   *Id.*

192.   Mike Butcher, *Gapsquare, a Pioneer of Machine Learning into Gender Pay Disparity, Is Acquired by XpertHR*, TECH CRUNCH (Aug. 3, 2021, 4:00 AM), https://techcrunch.com/2021/08/03/gapsquare-a-pioneer-of-machine-learning-into-gender-pay-disparity-is-acquired-by-xperthr.

193.   *Id.*; *Gapsquare's Easy to Use Software Which Allows Your Business to Analyze and Track Pay Disparity Statistics*, CIO BULLETIN, https://www.ciobulletin.com/magazine/gapsquares-easy-to-use-software-which-allows-your-business-to-analyze-and-track-pay-disparity-statistics.

194.   *Gapsquare's Easy to Use Software Which Allows Your Business to Analyze and Track Pay Disparity Statistics*, *supra* note 192.

195.   *Id.*

196.   *Id.*

197.   *Id.*

198.   *Id.*

199.   *See* Laura Morgan Roberts & Melissa Thomas-Hunt, *Data-Driven Approaches to Diversity, Equity and Inclusion*, SHRM EXECUTIVE NETWORK (Winter 2022), https://www.shrm.org/executive/resources/people-strategy-journal/winter2022/pages/feature-approach-dei-data-morgan-roberts.aspx.

processes. But every recommendation made in this paper is contingent on the fact that AI requires *human collaboration*, and thus to eliminate bias it must be assured that the algorithm is not biased, to begin with.

III. THE BEST WAY TO USE AI IS TO ENSURE IT DOES NOT REPLICATE BIAS

AI is an extremely valuable tool but only when used correctly. The intelligence of a software or machine does not replicate a human brain on its own; intelligent behaviors must be programmed into the machine. Data scientists and programmers must feed AI algorithms large data sets so that it can break them down and identify patterns.[200] If AI can learn patterns from human behavior, it can learn biases too.[201] For example, in 2018 Amazon scrapped its recruiting tool that was trained to observe patterns in resumes submitted to the company over ten years.[202] Most of those resumes belonged to men, which is a reflection of male dominance in the tech industry.[203] As a result, Amazon's AI taught itself to prefer male candidates over female candidates, thus discriminating against women.[204] Amazon's mishap serves as a warning that AI is as successful as the data that is fed into it. Many data experts warn that predictive AI enables a status quo since it is based on biased data sets.[205]

The first step to eliminating bias through the application of AI is to make sure that the data being used to train the algorithm is itself free of bias.[206] O'Neil notes that the more data an organization analyzes, the more likely it is that it will deal with stereotypes.[207] Law firms seeking to hire new associates, for example, will yield imperfect results if they load their algorithm with only qualities of current white male attorneys since there will be fewer women of color attorneys present in the algorithm. AI must be trained to "prioritize the criterion" the organization is seeking to increase.[208]

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200.   *See Artificial Intelligence*, *supra* note 102.

201.   *See* James Manyika, Jake Silberg & Brittany Presten, *What Do We Do About the Biases in AI?*, HARV. BUS. REV. (Oct. 25, 2019), https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-ai.

202.   Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women*, REUTERS (Oct. 10, 2018, 7:04 PM), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G.

203.   *Id.*

204.   *Id.*

205.   Nish Parikh, *Understanding Bias in AI-Enabled Hiring*, FORBES (Oct. 14, 2021, 7:15 AM), https://www.forbes.com/sites/forbeshumanresourcescouncil/2021/10/14/understanding-bias-in-ai-enabled-hiring/?sh=2d02a8527b96.

206.   Fawn Fitter & Steven T. Hunt, *How AI Can End Bias*, SAP INSIGHTS, https://insights.sap.com/how-ai-can-end-bias.

207.   *Id.*

208.   *Id.*

Lawmakers and federal regulators are placing increased scrutiny on AI tools to combat bias concerns.[209] According to former Equal Employment Opportunity Commission ("EEOC") Chair Jennifer R. Yang, Big Data can potentially lead to innovations that reduce bias in hiring decisions, performance reviews, and promotions; however, such tools call for control to promote fairness.[210] Otherwise, these new data sources can become barriers to opportunity in themselves.[211] As organizations become more technology-dependent after the pandemic, the year 2021 brought governing bodies from around the world to regulate how AI and machine learning are being used.[212] For example, Europe and the UK are working towards comprehensive legislation regulating how AI can be used.[213] In April 2021, the European Commission announced a regulatory framework proposal for AI that follows a risk-based approach and helps organizations monitor their AI systems to reduce risks.[214]

The national landscape of laws in the United States does not regulate AI in employment practices. Very few courts have addressed bias in hiring algorithms, but it is rumored that AI and hiring biases may more commonly become the subject of EEOC discrimination charges.[215] In 2021, the EEOC announced a new initiative targeted at ensuring that AI and similar emerging tools used in employment decisions comply with federal anti-discrimination laws.[216] This followed the Trump Administration's 2020 Executive Order 13960, which "directs federal agencies to "design, develop, acquire, and use AI in a manner that fosters public trust and confidence while protecting privacy, civil rights, civil liberties, and American values."[217] The Biden Administration appeared to support the executive order by expressing interest in "researching, monitoring, and regulating the use of AI further."[218] In 2021, the Biden Administration launched the National Artificial Intelligence Research

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209.   Erin Mulvaney, *Artificial Intelligence Hiring Bias Spurs Scrutiny and New Regs*, BLOOMBERG LAW (Dec. 29, 2021, 5:30 AM), https://news.bloomberglaw.com/daily-labor-report/artificial-intelligence-hiring-bias-spurs-scrutiny-and-new-regs.

210.   Mitchell Boyarsky & Shaniqua Singleton, *Avoiding Bias in Hiring When Using AI To Recruit*, 266 N.Y.L.J. 87 (2021), https://www.nelsonmullins.com/storage/OYZCMI7O7 VeT3s8AeqA8qtcfK5Mw8buFAL38aUFC.pdf.

211.   *Id.*

212.   Chris J. Preimesberger & Anthony Habayeb, *Why 2022 Is Only the Beginning for AI Regulation*, VENTUREBEAT (Mar. 21, 2022, 1:20 PM), https://venturebeat.com/2022/03/21 /why-2022-is-only-the-beginning-for-ai-regulation.

213.   *Id.*

214.   *Regulatory Framework Proposal on Artificial Intelligence*, EUROPEAN COMMISSION (Sept. 29, 2022), https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai.

215.   Boyarsky & Singleton, *supra* note 210.

216.   *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Oct. 28, 2021), https://www.eeoc.gov /newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness.

217.   Boyarsky & Singleton, *supra* note 210; Exec. Order No. 13,960, 85 Fed. Reg. 236 (Dec. 8, 2020).

218.   *Id.*

Resource Task Force to assist in AI research and governance.[219] In the same year, the Federal Trade Commission (FTC) warned businesses that using biased algorithms could violate consumer protection laws such as the Fair Credit Reporting Act (FCRA).[220] According to the FTC, FCRA is triggered when an algorithm is used to deny people employment or other benefits. Members of Congress have also introduced the US Algorithmic Accountability Act in 2019 and then again 2022.[221] The proposed law is the first federal law aimed at regulating the use of algorithms by private companies[222] and would charge the FTC to develop regulations that require major employers to assess their AI tools for fairness and bias, among other criteria.[223]

Some state legislatures are also beginning to regulate AI.[224] A law taking effect on January 1, 2023, in New York City limits the ways employers can use AI tools in hiring and promotion decisions.[225] Employers are prohibited from using any such AI tool to screen an applicant or employee unless it has been the subject of a "bias audit" within the past year and must make publicly available on its website the most recent summary of the tool's bias audit and the distribution date of the tool.[226] Previously, effective January 2020, Illinois enacted a new statute that addressed the use and disclosure of AI video interviews.[227] Among other requirements for employers, the AI Video Interview Act requires employers who request an applicant to record a video interview

219.   *See* Press Release, White House, The Biden Administration Launches the National Artificial Intelligence Research Resource Task Force (June 10, 2021), https://www.white house.gov/ostp/news-updates/2021/06/10/the-biden-administration-launches-the-national-artificial-intelligence-research-resource-task-force.

220.   Elisa Jillson, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI*, FTC (Apr. 19, 2021), https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fair-ness-equity-your-companys-use-ai.

221.   Stephanie Wilson, Jennifer Driscoll, Xiaoyan Zhang & Jim Barbuto, *Algorithmic Accountability Act Proposed by U.S. Lawmakers*, REEDSMITH (Apr. 25, 2019), https://www.tech-nologylawdispatch.com/2019/04/privacy-data-protection/algorithmic-accountability-act-pro-posed-by-u-s-lawmakers; *Wyden, Booker and Clarke Introduce Algorithmic Accountability Act of 2022 to Require New Transparency and Accountability for Automated Decision Systems*, OFFICE OF U.S. SENATOR RON WYDEN (Feb. 3, 2022), https://www.wyden.senate.gov/news /press-releases/wyden-booker-and-clarke-introduce-algorithmic-accountability-act-of-2022-to-require-new-transparency-and-accountability-for-automated-decision-systems.

222.   Gary D. Friedman & Thomas McCarthy, *Employment Law Red Flags in the Use of Artificial Intelligence in Hiring*, ABA (Oct. 1, 2020), https://www.americanbar.org/groups /business_law/publications/blt/2020/10/ai-in-hiring.

223.   *Wyden, Booker and Clarke Introduce Algorithmic Accountability Act of 2022 to Require New Transparency and Accountability for Automated Decision Systems*, *supra* note 221.

224.   *See* Sharon Goldman, *AI Regulation: A State-by-State Roundup of AI Bills*, VENTUREBEAT (Aug 8., 2022, 1:49 PM), https://venturebeat.com/ai/ai-regulation-a-state-by-state-roundup-of-ai-bills.

225.   *New York City Enacts Law Restricting Use of Artificial Intelligence in Employment Decisions*, GIBSON DUNN (Dec. 27, 2021), https://www.gibsondunn.com/new-york-city-en-acts-law-restricting-use-of-artificial-intelligence-in-employment-decisions.

226.   *Id.*

227.   Ill. A.I. Video Interview Act, 820 ILL. COMP. STAT. 42 (2020).

and uses AI to analyze those videos to take certain steps.[228] This includes (1) notifying each applicant prior to the interview that AI may be used to analyze the video and to evaluate the applicant for the position; (2) offering an explanation to each applicant before the interview about how AI works and what general characteristics it uses for evaluation; and (3) obtaining applicant consent.[229] Illinois amended its law in relation to those employers who rely solely on AI analysis to determine whether they want to conduct an in-person interview with the applicant.[230] The amendment requires these employers to annually collect and report data on the race and ethnicity of applicants who are hired and candidates who are not offered in-person interviews following AI video analysis.[231] Similarly, under a Maryland statute, employers must receive applicant consent before using a facial recognition service to create a facial template during an applicant's interview.[232] While New York, Illinois, and Maryland are among the first few states that have shown an interest in regulating AI, they are certainly not the only ones.[233] Other AI regulations are likely to be forthcoming.

Law firms should not be skeptical of using AI simply because there is increased scrutiny around it. As addressed earlier, traditional hiring tools are already marred by conscious and unconscious bias. Applicants that could be worthy candidates are ignored as a result. Every summer, law firms proudly announce the number of thousands of resumes received. It is not possible to correct bias in every member of the recruiting team, but it is possible to find and correct bias in AI. Humans are naturally wired to categorize others quickly and make snap judgments.[234] It is common for human beings to search for homogeneity and feel safe when surrounded by people who look and feel similar.[235] By contrast, AI training data can be viewed and changed multiple times.[236] It can also be monitored for transparency and awareness.[237]

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228.   *Id.*

229.   *Id.*; Lisa A. Larkin, *New Illinois Statute Among the First to Address AI-Aided Job Recruiting*, BAKER STERCHI COWDEN & RICE (Jan. 14, 2020), https://www.bakersterchi.com /new-illinois-statute-among-the-first-to-address-aiaided-job-recruiting.

230.   Ill. A.I. Video Interview Act, *supra* note 227.

231.   *Id.*

232.   Md. Facial Recognition Services Law, MD. CODE LAB. & EMPL. § 3-717 (2020).

233.   *See* Goldman, *supra* note 224.

234.   Jennifer Kim, *Part 5: Reducing Unconscious Hiring Bias in Recruiting*, LEVER (July 13, 2021, 10:37 AM), https://www.lever.co/blog/a-step-by-step-guide-to-cultivating-di-versity-and-inclusion-part-4-reducing-hiring-bias.

235.   *Id.*

236.   *See* Phil Brit, *4 Tips for Taming the Bias in Artificial Intelligence*, CMSWIRE (Dec. 13, 2021), https://www.cmswire.com/customer-experience/4-tips-for-taming-the-bias-in-ar-tificial-intelligence.

237.   *Id.*

Additionally, it is important to "demystify" the term "artificial intelligence."[238] From movies to the real world, AI is often associated with robots and machines that replace human brains.[239] Today, however, the real scientific concept of AI is to supplement humans with a range of techniques to help them.[240] For example, Modern Hire's Automated Interview Scoring (AIS) scores interview responses based on the words that a candidate speaks during a virtual interview.[241] Modern Hire's data shows that AIS-generated scores are almost four times lower in bias than the scores from their trained subject matter experts.[242] Thus, firms must recognize that bias exists, and it exists *everywhere*. The important thing is to control it in an effectively and efficiently, and ongoing research is showing that AI is doing a better job of it than human beings.[243]

So, what does this flurry of lawmaking activity mean for law firms? It is a signal to be competent in AI before adopting it.[244] AI is underpinned by computer science and complex statistics, methods not taught in law schools. Thus, the creators of AI must develop software with transparency and specify the skills and knowledge required in using it correctly. However, this does not diminish responsibility on behalf of law firms. The ABA recommends employers know the factors being considered by the program or algorithm and use appropriate contract language when working with AI developers to ensure the developer complies with all existing laws concerning the screening and hiring of applicants.[245] The ABA also recommends auditing AI tools regularly to identify and correct biases.[246] This recommendation aligns with New York City's new law and can also encourage developers to design tools that

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238. Eric Sydell, *Why You Should Be Using AI For Hiring*, VENTUREBEAT (Apr. 27, 2022, 4:10 PM), https://venturebeat.com/ai/why-you-should-be-using-ai-for-hiring.

239. *See* David Shultz, *Which Movies Get Artificial Intelligence Right?*, SCIENCE (Jul. 17, 2015), https://www.science.org/content/article/which-movies-get-artificial-intelligence-right; *see also* Tara Yarlagadda, *The Most Epic Sci-Fi Trilogy on HBO Max Reveals a Disturbing Robotics Debate*, INVERSE (Dec. 17, 2021), https://www.inverse.com/entertainment/the-matrix-robots-ai-real-science (discussing how in the popular movie *The Matrix*, machines behave much like humans).

240. *See id.*

241. *Id.*

242. *Id.*

243. *See e.g.,* Ryan Morrison, *AI is Better at Recruitment Than Humans, But Still Lacks the Personal Touch*, TECHMONITOR (June 28, 2022, 6:56 AM), https://techmonitor.ai/technology/ai-and-automation/ai-recruitment-bias-humans ("[A] new study from the London School of Economics (LSE) has found AI shows less bias when it comes to recruitment and is more efficient than humans on many tasks."); Will Paris, Dario Krpan & Grace Lordan, *People Versus Machines: Introducing the HIRE Framework*, A.I. REV. (2022), https://link.springer.com/article/10.1007/s10462-022-10193-6#citeas.

244. The ABA Model Rules of Professional Conduct also include the duty of technology competence in Rule 1.1, Comment 8. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. (AM. BAR ASS'N 1983).

245. Friedman & McCarthy, *supra* note 222.

246. *Id.*

can be easily audited. In the absence of clear guidance from the EEOC and other state or federal agencies, it is unclear what a perfectly compliant bias audit should look like. Under New York's AI law, the bias audit must include an assessment of the tool's disparate impact based on race, ethnicity, and sex.[247] Even though it is the developers that are creating many AI-related tools, laws such as those enacted by Illinois and Maryland, which require *employers* to seek applicant consent, reveal that regulators expect employers to be engaged responsibly in the use of their AI tools.[248]

Becoming AI competent is important for law firms not only because of legal scrutiny around AI, but also because of the duty on technology competence.[249] Lawyers are not only expected to be competent in advising clients on their use of AI, but to also evaluate their own use.[250] For example, if an AI hiring algorithm produces biased results, a firm may run the risk of discrimination and come up against Rule 8.4(g) (Misconduct).[251] Does this mean that lawyers must become experts in AI? No, but it means they must work alongside scientifically trained experts to achieve the intended objective of unbiased AI.[252] In fact, learning their limits and understanding when lawyers need technical help is part of being competent.[253] Lawyers should also remain abreast data privacy principles and changes in technology that impact the ethical use of AI.[254]

Working together with the developers, law firms can become AI competent and use tools effectively to mitigate biases. IBM Researcher Francesca Rossi correctly notes that "in the process of recognizing our bias and teaching machines about our common values, we may improve more than AI. We might just improve ourselves."[255] Experts recommend that developers of AI and companies that use the tools should think beyond the minimum legal compliance requirement, and assess whether the algorithm is actually

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247.   Council of City of NY Intro No. 1894-2020 [A], enacting a law restricting use of artificial intelligence in employment decisions [Dec. 11, 2021].

248.   Ill. A.I. Video Interview Act, *supra* note 227; Md. Facial Recognition Services Law, *supra* note 232.

249.   *See* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt., *supra* note 244 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.").

250.   Jason Tashea & Nicolas Economou, *Be Competent in AI Before Adopting, Integrating it Into Your Practice*, ABAJOURNAL (Apr. 23, 2019, 6:30 AM), https://www.abajournal.com /lawscribbler/article/before-lawyers-can-ethically-adopt-and-integrate-ai-into-their-practices-they-must-first-be-competent.

251.   *Id.*; MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N, Discussion Draft 1983).

252.   Tashea & Economou, *supra* note 250.

253.   *Id.*

254.   *Id.*

255.   Hannah Herman, *AI is Biased. Here's How We Can Fix That*, WORKATO, https://blog .workato.com/2018/11/artificial-intelligence-bias/#.Xc8fXFdKgdU.

providing a more desirable and equitable outcome.[256] Many current developers are aware of the need to eliminate bias to negate the adverse impact on their AI tools.[257] Suited, for example, generates a set of synthetic candidates like the existing set of female candidates to achieve a 1:1 dataset ratio with the men in a firm.[258] They also use visualization to identify any attributes that are causing an adverse impact and train their model to either ignore or weigh the particular trait as less important.[259] Suited incorporates industry-wide standards to combat a specific firm's specific biases, creating layers of models with the aggregated data, and tests each model against the EEOC technical guidelines.[260] Furthermore, AI practitioners like OpenAI and Future of Life Institute are designing a set of design principles to make AI ethical and fair in a way that benefits everyone.[261]

IV. CONCLUSION

AI offers law firms a valuable way to mitigate biases and increase the firm's diversity and inclusivity, improving services to their clients and internal operations. The advancement of AI can contribute to a firm's efforts in creating an unbiased process to recruit and retain a diverse workforce. Firms should ensure that the "human" in "human resources" remains, so that AI is effectively supporting the firm's diversity strategy without replacing the human mind. With proper guidance from human experts, AI's efficiency and accuracy can raise the lagging diversity numbers for law firms and help transform the legal industry.

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256.   Parikh, *supra* note 205.
257.   *See e.g., How Suited Removes Bias & Negates Adverse Impact in Our AI*, SUITED, https://www.wellsuited.com/blog/how-suited-removes-bias-negates-adverse-impact-in-our-a-i.
258.   For a complete description of Suited's processes, *see id.*
259.   *Id.*
260.   *Id.*
261.   *AI Principles*, FUTURE OF LIFE INSTITUTE (Aug. 11, 2017), https://futureoflife.org /2017/08/11/ai-principles/?submitted=1#confirmation.