The Feerick Center for Social Justice and Stein Center for Law and Ethics at Fordham University School of Law present the first annual

Women’s Leadership Institute

CLE Course Materials

Friday, February 9, 2018
Fordham Law School
Skadden Conference Center
150 West 62nd Street

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# Table of Contents

**CLE Materials**

**Panel 1**  
Using Grit and a Growth Mindset to Overcome Challenges in the Practice of Law

**Panel 2**  
Effective Negotiation Strategies for Women

**Panel 3**  
Understanding the impact of Implicit Bias and Stereotype Threat on Women

**Panel 4**  
Women Leaders in the Law: Habits and Advice for Success
Using Grit and a Growth Mindset to Overcome Challenges in the Practice of Law

Women’s Leadership Institute
Fordham Law School
February 9, 2018
1. The Science of Success
2. The Role of Grit & Growth Mindset
3. Findings re: Women Lawyers
4. Breakout Session
5. Wrap Up & Q&A
Do You Have to Be Talented to Be Successful?
Success Is About More Than Just Talent

• Talent has traditionally been understood to be about inheritance

• Recent studies suggest it is also about:
  • Family, culture, and friendship
  • Environment and circumstance
  • Deliberate practice fueled by intrinsic motivation
The 10,000 Hour Rule

Those identified as most gifted were also most practiced
• Talent is only part of the story

• People of average intelligence/skill can become world class experts and performers

• In most cases, you have to work hard (really hard) to achieve mastery

• The path to success is not linear
  • You will make mistakes (sometimes huge mistakes)
  • You will try your very best and sometimes it still won’t be good enough
What is Mindset?

- Mindsets are beliefs about yourself and your most basic qualities
  - Am I good at math?
  - Am I good at public speaking?
  - Am I a good athlete?
- Fixed mindset vs. growth mindset
The Mindset Spectrum

Strong Fixed Mindset

Fixed Mindset, Some Growth Ideas

Growth Mindset, Some Fixed Ideas

Strong Growth Mindset

Women Lawyers
What is Grit?

What does it mean to be gritty?

- *Behavioral persistence* in the face of adversity
- *Sustained, passionate* pursuit of goals

Grit should *not* be confused with:

- Self-discipline
- Self-control
- Hard work
“Working hard for something we don’t care about is called stress; working hard for something we love is called passion.”

- Simon Sinek
2016 Grit Study

- How Do Grit & Growth Mindset Impact Female Success in the Practice of Law?
  - Mixed methods approach
  - Survey sent to *all* lawyers, including:
    - Solo practitioners
    - Lawyers practicing in-house
    - Lawyers in government
    - Judges
    - Lawyers in firms of all sizes
  - Different success measures for each subset
What We Learned

• There is a *statistically significant* relationship between grit, mindset and various measures of success for lawyers in all practices

• Lawyers are pretty gritty (grit is monotonic)

• Many highly successful lawyers display growth mindset characteristics when dealing with challenging situations, but *there is significant room for improvement*

• Women lawyers believe—almost to a person—that grit and growth mindset are important contributors to success
# Grit & Mindset Scores

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<tr>
<th>Area of Practice</th>
<th>Mindset Score</th>
<th>Grit Score</th>
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<tr>
<td>Law Firms</td>
<td>42.77</td>
<td>3.97</td>
</tr>
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Some Key Findings

• Grit is closely related to the overall quality of the work that law firm lawyers and solo practitioners receive

• Grit is strongly related to the messages in-house and law firm lawyers receive on formal performance evaluations

• Grit influences the point at which in-house lawyers are brought into the decision-making process

• Grit is a reliable indicator of how well a woman performs in a government or non-profit role

• Grit influences tenure within an organization

• Mindset predicts seniority within the organization
1. Break into smaller groups
2. Read the relevant scenario
3. Discuss, with your group, the questions that follow the scenario
4. Designate a reporter who is willing to share some of what you discussed with the larger group
You are a second year law student at National University College of Law. After completing an internship at a local family law firm during your first summer, you are extremely excited to begin working as a student clinician in the Family Law Clinic. You are looking forward to the opportunity of directly advocating for families in need.

At the beginning of the semester, you decide to hit the ground running and made it a point to volunteer all of your free time to assist in the clinic. You achieved high markings on all of your assignments and consistently receive positive feedback from your supervising professor.

During your fourth week in the program, the clinic retains an extremely challenging family law case. It is up to your professor to decide which two clinicians will take the lead on the case. Based on your academic performance and your professor’s satisfaction with your work, you are confident that you will be one of the students chosen to help.

Sadly, you learn the next day that your professor chose two of your classmates. You are shocked! You know for a fact that those two students did not spend nearly as much time at the clinic as you did. They also did not participate as much in class, leading you to assume that they were not performing as strongly as you were. You are not sure what more you could have done and feel upset with your professor. You have not decided whether or not you should say something.
Discussion Questions

• Have you ever faced a situation like this? If so how did you handle it?

• Should you try reaching out to your Professor to discuss your frustration?

• How might your reaction to the situation differ if you approached the situation with a fixed mindset versus a growth mindset?

• How might grit be helpful in this situation?
Dee just started her 2L year at XYZ Law and is busier than ever. She didn't think 2L could be more stressful than 1L, but one month in and she's starting to think differently. Dee is taking a full course load, including two seminars with professors whom she admires and hopes to get to know better in office hours. She is also involved on the board of a student group that organizes multiple events per month, and is a journal staffer, which requires her to complete articles edits on a weekly basis. On top of all of that, she is doing an internship with the US Attorney's office.

Dee loves all of the work she is doing, but is having trouble juggling it all. She has been late with two journal assignments so far. She knows that the outgoing journal board takes staffer performance into consideration when selecting the next board, and she hopes to have an executive position next year. She has managed to turn in her course assignments for the seminars, but has fallen behind in her two lecture classes. She wants to put in her full effort in all of her activities, but knows that she can't manage like this any longer.
Discussion Questions

- How can Dee manage her 2L year without sacrificing quality of work and her personal life?

- What should she do to meet her responsibilities without burning out?

- Have you ever faced a situation like this? If so how did you handle it?

- How might your reaction to the situation differ if you approached the situation with a fixed mindset versus a growth mindset?

- How might grit be helpful in this situation?
Scenario #3

You are a recent law school graduate beginning work at a law-related not-for-profit organization. While you earned high grades in law school and college and have always excelled at work, this is your first time engaging in development work of any kind. You’ve never written or submitted a successful grant proposal, and you have no experience soliciting funds from anyone – let alone high-net-worth individuals.

You’re passionate about the work the non-profit is engaged in, and feel confident that you can quickly learn how to successfully fund and implement a number of worthwhile projects for the organization. You’ve spent your first month at the non-profit crafting a proposal for a new legal program, which you believe will address a major issue currently facing the legal profession.

One afternoon, the non-profit’s executive director, who you have built a good rapport with, calls you in to her office. You’re prepared to present your proposal, which you are rightly proud of, but she begins the meeting by telling you that the non-profit’s finances have suffered during the economic downturn, and despite assurances at the time of hiring, you will need to raise money in order to secure funding for your position after your first year of work (which is being financed by your law school’s post-graduation public interest fellowship program).

During the same meeting, the executive director shares with you that she will need your assistance planning and executing the organization’s largest fundraising dinner of the year. Each year, the non-profit hosts an award’s dinner, honoring outstanding members of the legal profession. This year’s awardee is the General Counsel and Executive Vice President of a major U.S. Corporation.
Discussion Questions

• Have you ever faced a situation like this? If so, how did you handle it and what was the outcome?

• How would you address each of the fundraising/development needs raised in this scenario?

• Would you still try to present your program proposal during your meeting with the executive director or hold off until a “better time”?

• How might grit be helpful in this scenario?
What Can You Do to Build These Traits?

• Learn how to handle and learn from failure
• Learn how to receive (and even inspire) criticism
• Reward yourself for effort, not outcomes
• Be (realistically) optimistic
• Identify what you are passionate about—and then pursue it with zeal
What Can You Do to Build These Traits?

- Seek out meaning and context
- Become an expert
- Don’t assume that you can’t do it
- Try on a growth mindset
  - “fake it until you make it”
- Spread the word!
Questions?

- More information is available at www.ambar.org/grit
- Feel free to reach out to any of us with additional questions anytime!
Negotiation for Litigators and Transactional Lawyers

Kathleen A. Walsh
Andrea J. Schwartzman
Lilia B. Vazova
Elizabeth Marks
Why Negotiation Skills Are Important To You and Your Clients

- Negotiated results:
  - Facilitate desired outcomes for client
  - Mitigate and allocate risk in transactions and litigations
  - Give the client and counsel increased control over the outcome

- Importance for Litigators:
  - Decrease litigation costs by narrowing dispute to true areas of contention
  - Build credibility with the judge
  - Can be less damaging to long-term business relationships and reputation than litigated results
Why Negotiation Skills Are Important To You and Your Clients (cont’d)

• Importance for Transactional Attorneys:
  • Achieve mutually beneficial results for parties that want to enter into a business deal
  • Help “close” the deal in a timely, efficient manner
  • Identify and allocate business and legal risks to parties
Skilled Litigators are Constantly Negotiating

- Pre-litigation: navigating potential disputes
- Litigation & Government Investigations
  - Scheduling
  - Scope of Discovery
    - Document production
    - Depositions/ interviews
- Settlement
  - Private counterparties vs. government entities
  - Mediation
Skilled Transactional Lawyers are Constantly Negotiating

- Terms of engagement with clients
- Deal terms in LOIs, term sheets, acquisition agreements, ordinary course business contracts (from employment agreements, leases, to license agreements)
- Negotiating with clients to determine approach and strategy
- Negotiating capital markets disclosure documents
- With regulators that impact client transactions and businesses (i.e., SEC)
First Things First...

- Develop a trusting and frank relationship with your clients; never oversell your case or position to the client

- **Find Out:**
  - What are the client’s goals/needs?
  - What various potential outcomes could work out?
  - How important are the smaller points of the deal?
  - How is success defined? (speed, certainty, price, etc.)

- What is the client absolutely not willing to give, and what is the client willing to give if absolutely necessary to get something it needs?
- What does the client have to give that is not a real sacrifice?
- Under what circumstances is the client prepared to walk away?
Negotiation Styles (sizing up your adversary or opposing counsel)

1. **The Intimidator**
   - Style: aggressive and intimidating
   - A real trap for young attorneys; use this style yourself only sparingly and strategically

2. **The Terminator**
   - Style: risk-averse, sees problems everywhere, always killing the deal over every small potentiality
   - Have patience when dealing with this type of negotiator

3. **The White Shoe**
   - Style: unfailingly polite but insistent on using the firm’s forms and approach
   - Can be a great opportunity to concede small drafting points in exchange for obtaining real business objectives

4. **The Real Professional**
   - Style: collegial and smooth, well informed, doesn’t get bogged down in trivialities
   - Concentrate on winning key points but recognize there may be significant concessions
Negotiation Styles – What style works for you?

- Observe and learn from mentors
- One size does not fit all; be yourself
- Put yourself in the position of opposing counsel and regulators
- Adapt your style to the counterparty (client vs. opposing counsel; business person vs. lawyer)
- Observe and learn from mentors
Essential Negotiation Skills

• **Flexibility**
  - Negotiation style and strategy shouldn’t be personal but situational
  - Calibrate for the particular circumstances; negotiations happen at in person meetings, on conference calls and even by email
  - Deal lawyers are typically working towards a friendly business deal vs. litigators who are involved in an adversarial process

• **Perceptiveness**
  - Listen; do not interrupt
  - Information is power in a negotiation setting; the more you can glean from subtle clues and general diligence, the more your leverage
  - In particular, no matter how out-leveraged you feel, keep your eyes open for how much exposure the other side can have
  - Deduce and assess all players’ incentives
  - Be creative – oftentimes the best solutions aren’t obvious
  - Where appropriate, convey what your clients’ priorities are
Essential Negotiation Skills (cont’d)

- **Confidence**
  - Convey absolute confidence in your position but not arrogance
  - Insecurity can undercut your credibility and give your adversary leverage
  - Don’t be afraid to ask for what you need
  - Don’t be afraid to not respond and pause to confer with your client
  - Be respectful; you are your clients’ spokesperson
  - Being prepared will help you be confident; do not fall back on argument that your request “is market”
Negotiation Don’ts

• **Never make idle threats**
  - If you threaten to file the motion if the other side doesn’t comply, and they don’t comply, file it
  - Reduces credibility and diminishes leverage
  - Litigators do it all the time
  - *Note: Leverage is often most before you’ve followed through on a threat; afterward, your adversary may realize fears were unsubstantiated
  - Don’t threaten to walk away from deal unless your client is prepared to do so
  - Don’t state that terms are “unacceptable” unless they truly are

• **Don’t lose your cool**
  - Unprofessional, counter-productive, and diminishes your reputation and the reputation of the firm and your client
  - Indicates weakness or fear
  - If your adversary loses cool, pay attention for clues as to the source of weakness or fear
Wrap Up: Guidance for Negotiation Success

- Keep on lookout for your adversary’s weaknesses, even if you’ve been put on the defensive, especially when you’ve been put on the defensive.
- Listen more than you talk.
- Keep a bird’s eye view; understand all of the incentives at play for all of the players (parties and counsel).
- Project absolute confidence in your position all the time.
- Never make idle threats.
- Advocate for your client but don’t advocate to your client; don’t oversell to your client.
- Negotiation is a give and take – figure out what your client can give that doesn’t really hurt but makes the other side feel like they’ve gained something in the negotiation.
- Stay cool, logical and focused – clients will be emotionally involved; you should not be.
- Be efficient with the time you have; protracted negotiations leave all parties weary.
Implicit Bias in the Courtroom

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Devon Carbado
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David Faigman
Rachel Godsil
Anthony G. Greenwald
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ABSTRACT

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: What, if anything, should we do about implicit bias in the courtroom? The author team comprises legal academics, scientists, researchers, and even a sitting federal judge who seek to answer this question in accordance with behavioral realism. The Article first provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications that distinguish between explicit, implicit, and structural forms of bias. Next, the Article applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. This application involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed. Finally, the Article examines various concrete intervention strategies to counter implicit biases for key players in the justice system, such as the judge and jury.

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TABLE OF CONTENTS

INTRODUCTION .................................................................1126

I. IMPLICIT BIASES ..............................................................1128
   A. Empirical Introduction ..............................................1128
   B. Theoretical Clarification ...........................................1132

II. TWO TRAJECTORIES .....................................................1135
   A. The Criminal Path ................................................1135
      1. Police Encounter ..............................................1135
      2. Charge and Plea Bargain ....................................1139
      3. Trial ......................................................................1142
         a. Jury .............................................................1142
         b. Judge ...........................................................1146
      4. Sentencing ........................................................1148
   B. The Civil Path ..........................................................1152
      1. Employer Discrimination .....................................1153
      2. Pretrial Adjudication: 12(b)(6) .............................1159
      3. Jury Verdict .......................................................1164
         a. Motivation to Shift Standards .........................1164
         b. Performer Preference .....................................1166

III. INTERVENTIONS ..........................................................1169
   A. Decrease the Implicit Bias ........................................1169
   B. Break the Link Between Bias and Behavior ..............1172
      1. Judges ..............................................................1172
         a. Doubt One’s Objectivity ...................................1172
         b. Increase Motivation .........................................1174
         c. Improve Conditions of Decisionmaking .............1177
         d. Count ...........................................................1178
      2. Jurors ...............................................................1179
         a. Jury Selection and Composition .......................1179
         b. Jury Education About Implicit Bias .................1181
         c. Encourage Category-Conscious Strategies ..........1184

CONCLUSION .................................................................1186
INTRODUCTION

The problems of overt discrimination have received enormous attention from lawyers, judges, academics, and policymakers. While explicit sexism, racism, and other forms of bias persist, they have become less prominent and public over the past century. But explicit bias and overt discrimination are only part of the problem. Also important, and likely more pervasive, are questions surrounding implicit bias—attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.

How prevalent and significant are these implicit, unintentional biases? To answer these questions, people have historically relied on their gut instincts and personal experiences, which did not produce much consensus. Over the past two decades, however, social cognitive psychologists have discovered novel ways to measure the existence and impact of implicit biases—without relying on mere common sense. Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects. These fascinating discoveries, which have migrated from the science journals into the law reviews and even popular discourse, are now reshaping the law’s fundamental understandings of discrimination and fairness.

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: What, if anything, should we do about implicit bias in the courtroom? In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls? In what circumstances are these risks most acute? Are there practical ways to reduce the effects of implicit biases? To what extent can awareness of these biases mitigate their impact? What other debiasing strategies might work? In other words, in what way—if at all—should the courts respond to a better model of human decisionmaking that the mind sciences are providing?

We are a team of legal academics, scientists, researchers, and a sitting federal judge who seek to answer these difficult questions in accordance with behavioral realism. Our general goal is to educate those in the legal profession who are

1. Judge Mark W. Bennett, a coauthor of this article, is a United States District Court Judge in the Northern District of Iowa.
2. Behavioral realism is a school of thought that asks the law to account for more accurate models of human cognition and behavior. See, e.g., Jerry Kang & Kristin Lane, Seeing Through Colorblindness: Implicit
unfamiliar with implicit bias and its consequences. To do so, we provide a current summary of the underlying science, contextualized to criminal and civil litigation processes that lead up to and crescendo in the courtroom. This involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed, followed by suggestions designed to address the harms. We seek to be useful to legal practitioners of good faith, including judges, who conclude that implicit bias is a problem (one among many) but do not know quite what to do about it. While we aim to provide useful and realistic strategies for those judges already persuaded that implicit bias is a legitimate concern, we also hope to provoke those who know less about it, or are more skeptical of its relevance, to consider these issues thoughtfully.

We are obviously not a random sample of researchers and practitioners; thus, we cannot claim any representative status. That said, the author team represents a broad array of experience, expertise, methodology, and viewpoints. In authoring this paper, the team engaged in careful deliberations across topics of both consensus and dissensus. We did not entirely agree on how to frame questions in this field or how to answer them. That said, we stand collectively behind what we have written. We also believe the final work product reveals the benefits of such cross-disciplinary and cross-professional collaboration.

Part I provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications. Often the science can seem too abstract, especially to nonprofessional scientists. As a corrective, Part II applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. Part III

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3. This paper arose out of the second symposium of PULSE: Program on Understanding Law, Science, and Evidence at UCLA School of Law, on March 3–4, 2011. We brought together leading scientists (including Anthony Greenwald, the inventor of the Implicit Association Test), federal and state judges, applied researchers, and legal academics to explore the state of the science regarding implicit bias research and to examine the various institutional responses to date. The Symposium also raised possibilities and complications, ranging from the theoretical to practical, from the legal to the scientific. After a day of public presentations, the author team met in a full-day closed session to craft the outlines of this paper. Judge Michael Linfield of the Los Angeles Superior Court and Jeff Rachlinski, Professor of Law at Cornell Law School, participated in the symposium but could not join the author team. Their absence should not be viewed as either agreement or disagreement with the contents of the Article.
examine different intervention strategies to counter the implicit biases of key players in the justice system, such as the judge and jury.

I. IMPLICIT BIASES

A. Empirical Introduction

Over the past thirty years, cognitive and social psychologists have demonstrated that human beings think and act in ways that are often not rational. We suffer from a long litany of biases, most of them having nothing to do with gender, ethnicity, or race. For example, we have an oddly stubborn tendency to anchor to numbers, judgments, or assessments to which we have been exposed and to use them as a starting point for future judgments—even if those anchors are objectively wrong.4 We exhibit an endowment effect, with irrational attachments to arbitrary initial distributions of property, rights, and grants of other entitlements.5 We suffer from hindsight bias and believe that what turns out to be the case today should have been easily foreseen yesterday.6 The list of empirically revealed biases goes on and on. Indeed, many legal academics have become so familiar with such heuristics and biases that they refer to them in their analyses as casually as they refer to economic concepts such as transaction costs.7

One type of bias is driven by attitudes and stereotypes that we have about social categories, such as genders and races. An attitude is an association between some concept (in this case a social group) and an evaluative valence, either positive or negative.8 A stereotype is an association between a concept (again, in this case a social group) and a trait.9 Although interconnected, attitudes and stereotypes

8. In both common and expert usage, sometimes the word “prejudice” is used to describe a negative attitude, especially when it is strong in magnitude.
9. If the association is nearly perfect, in that almost every member of the social group has that trait, then we think of the trait less as a stereotype and more as a defining attribute. Typically, when we use the word “stereotype,” the correlation between social group and trait is far from perfect. See Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 CALIF. L. REV. 945, 949 (2006).
should be distinguished because a positive attitude does not foreclose negative stereotypes and vice versa. For instance, one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them.

The conventional wisdom has been that these social cognitions—attitudes and stereotypes about social groups—are explicit, in the sense that they are both consciously accessible through introspection and endorsed as appropriate by the person who possesses them. Indeed, this understanding has shaped much of current antidiscrimination law. The conventional wisdom is also that the social cognitions that individuals hold are relatively stable, in the sense that they operate in the same way over time and across different situations.

However, recent findings in the mind sciences, especially implicit social cognition (ISC),\(^\text{10}\) have undermined these conventional beliefs. As detailed below, attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.

How have mind scientists discovered such findings on matters so latent or implicit? They have done so by innovating new techniques that measure implicit attitudes and stereotypes that by definition cannot be reliably self-reported. Some of these measures involve subliminal priming and other treatments that are not consciously detected within an experimental setting. Other instruments use reaction time differences between two types of tasks—one that seems consistent with some bias, the other inconsistent—as in the Implicit Association Test (IAT).\(^\text{11}\)

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The well-known IAT is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures. For example, suppose we want to test whether there is an implicit stereotype associating African Americans with weapons. In a schema-consistent run, the participant is instructed to hit one response key when she sees a White face or a harmless object, and another response key when she sees an African American face or a weapon. Notice that the same key is used for both White and harmless item; a different key is used for both African American and weapon. Most people perform this task quickly.

In a schema-inconsistent run, we reverse the pairings. In this iteration, the same key is used for both White and weapon; a different key is used for both African American and harmless item. Most people perform this task more slowly. Of course, the order in which these tasks are presented is always systematically varied to ensure that the speed of people’s responses is not affected by practice. The time differential between these runs is defined as the implicit association effect and is statistically processed into standard units called an IAT D score.

Through the IAT, social psychologists from hundreds of laboratories have collected enormous amounts of data on reaction-time measures of “implicit biases,” a term we use to denote implicit attitudes and implicit stereotypes. According to these measures, implicit bias is pervasive (widely held), large in magnitude (as compared to standardized measures of explicit bias), dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are

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13. This D score, which ranges from –2.0 to 2.0, is a standardized score, which is computed by dividing the IAT effect as measured in milliseconds by the standard deviations of the participants’ latencies pooled across schema-consistent and -inconsistent conditions. See, e.g., Anthony Greenwald et al., Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003). If an individual’s IAT D score is divided by its standard deviation of the population that has taken the test, the result is interpretable as the commonly used effect size measure, Cohen’s d.
15. Lane, Kang & Banaji, supra note 10, at 437.
16. Cohen’s d is a standardized unit of the size of a statistical effect. By convention, social scientists mark 0.20, 0.50, and 0.80 as small, medium, and large effect sizes. The IAT effect, as measured in Cohen’s d, on various stereotypes and attitudes range from medium to large. See Kang & Lane, supra note 2, at 474 n.35 (discussing data from Project Implicit). Moreover, the effect sizes of implicit bias against social groups are frequently larger than the effect sizes produced by explicit bias measures. See id. at 474–75 tbl.1.
Implicit Bias in the Courtroom

separate mental constructs), and predicts certain kinds of real-world behavior. What policymakers are now keen to understand are the size and scope of these behavioral effects and how to counter them—by altering the implicit biases themselves and by implementing strategies to attenuate their effects.

Useful and current summaries of the scientific evidence can be found in both the legal and psychological literatures. For example, in the last volume of this law review, Jerry Kang and Kristin Lane provided a summary of the evidence demonstrating that we are not perceptually, cognitively, or behaviorally colorblind. Justin Levinson and Danielle Young have summarized studies focusing on jury decisionmaking. In the psychology journals, John Jost and colleagues responded to sharp criticism that the IAT studies lacked real-world consequences by providing a qualitative review of the literature, including ten studies that no manager should ignore. Further, they explained how the findings are entirely consistent with the major tenets of twentieth century social cognitive psychology.

In a quantitative review, Anthony Greenwald conducted a meta-analysis of IAT studies—which synthesizes all the relevant scientific findings—and found that implicit attitudes as measured by the IAT predicted certain types of behavior, such as anti-Black discrimination or intergroup discrimination, substantially better than explicit bias measures.

Instead of duplicating these summaries, we offer research findings that are specific to implicit bias leading up to and in the courtroom. To do so, we chart

18. See Kang & Lane, supra note 2, at 481–90 (discussing evidence of biased behavior in perceiving smiles, responding to threats, screening resumes, and body language).
23. See id.
24. See Anthony G. Greenwald et al., Understanding and Using the Implicit Association Test III. Meta-Analysis of Predictive Validity, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19–20 (2009). Implicit attitude scores predicted behavior in this domain at an average correlation of r=0.24, whereas explicit attitude scores had correlations at an average of r=0.12. See id. at 24 tbl.3.
out two case trajectories—one criminal, the other civil. That synthesis appears in Part II.

B. Theoretical Clarification

But before we leave our introduction to implicit bias, we seek to make some theoretical clarifications on the relationships between explicit biases, implicit biases, and structural processes that are all involved in producing unfairness in the courtroom. We do so because the legal literature has flagged this as an important issue. In addition, a competent diagnosis of unfairness in the courtroom requires disentangling these various processes. For instance, if the end is to counter discrimination caused by, say, explicit bias, it may be ineffective to adopt means that are better tailored to respond to implicit bias, and vice versa.

We start by clarifying terms. To repeat, explicit biases are attitudes and stereotypes that are consciously accessible through introspection and endorsed as appropriate. If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection. If we find out that we have them, we may indeed reject them as inappropriate.

Above, we used the labels "explicit" and "implicit" as adjectives to describe mental constructs—attitudes and stereotypes. Readers should recognize that these adjectives can also apply to research procedures or instruments. An explicit instrument asks the respondent for a direct self-report with no attempt by researchers to disguise the mental construct that they are measuring. An example is a straightforward survey question. No instrument perfectly measures a mental construct. In fact, one can often easily conceal one’s explicit bias as measured through an explicit instrument. In this way, an explicit instrument can poorly measure an explicit bias, as the test subject may choose not to be candid about the beliefs or attitudes at issue.

By contrast, an implicit instrument does not depend on the respondent’s conscious knowledge of the mental constructs that the researcher is inferring from the measure. An example is a reaction-time measure, such as the IAT. This does not necessarily mean that the respondent is unaware that the IAT is measuring bias.

It also does not mean that the respondent is actually unaware that he or she has implicit biases, for example because she has taken an IAT before or is generally aware of the research literature. To repeat, no instrument perfectly measures any mental construct, and this remains true for implicit instruments. One might, for instance, try to conceal implicit bias measured through an implicit instrument, but such faking is often much harder than faking explicit bias measured by an explicit instrument.26

Finally, besides explicit and implicit biases, another set of processes that produce unfairness in the courtroom can be called “structural.” Other names include “institutional” or “societal.” These processes can lock in past inequalities, reproduce them, and indeed exacerbate them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong.27 In other words, structural bias can produce unfairness even though no single individual is being treated worse right now because of his or her membership in a particular social category.

Because thinking through biases with respect to human beings evokes so much potential emotional resistance, sometimes it is easier to apply them to something less fraught than gender, race, religion, and the like. So, consider a vegetarian’s biases against meat. He has a negative attitude (that is, prejudice) toward meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief. These are explicit biases.

Now, if this vegetarian is running for political office and campaigning in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of concealed bias (explicit bias that is hidden to manage impressions).


Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude toward meat. But it may well be that she has an implicit attitude that is still slightly positive. Suppose that she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude toward meat. This is an *implicit* bias.

Finally, consider some eating decision that she has to make at a local strip mall. She can buy a salad for $10 or a cheeseburger for $3. Unfortunately, she has only $5 to spare and must eat. Neither explicit nor implicit biases much explain her decision to buy the cheeseburger. She simply lacks the funds to buy the salad, and her need to eat trumps her desire to avoid meat. The decision was not driven principally by an attitude or stereotype, explicit or implicit, but by the price. But what if a careful historical, economic, political, and cultural analysis revealed multifarious subsidies, political kickbacks, historical contingencies, and economies of scale that accumulated in mutually reinforcing ways to price the salad much higher than the cheeseburger? These various forces could make it more instrumentally rational for consumers to eat cheeseburgers. This would be an example of *structural* bias in favor of meat.

We disentangle these various mechanisms—explicit attitudes and stereotypes (sometimes concealed, sometimes revealed), implicit attitudes and stereotypes, and structural forces—because they pose different threats to fairness everywhere, including the courtroom. For instance, the threat to fairness posed by jurors with explicit negative attitudes toward Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as nonbiased but who nevertheless hold negative implicit stereotypes about Muslims. Where appropriate, we explain how certain studies provide evidence of one type of bias or the other. In addition, we want to underscore that these various mechanisms—explicit bias, implicit bias, and structural forces—are not mutually exclusive. To the contrary, they may often be mutually reinforcing. In focusing on implicit bias in the courtroom, we do not mean to suggest

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that implicit bias is the only or most important problem, or that explicit bias (revealed or concealed) and structural forces are unimportant or insignificant.29

II. TWO TRAJECTORIES

A. The Criminal Path

Consider, for example, some of the crucial milestones in a criminal case flowing to trial. First, on the basis of a crime report, the police investigate particular neighborhoods and persons of interest and ultimately arrest a suspect. Second, the prosecutor decides to charge the suspect with a particular crime. Third, the judge makes decisions about bail and pretrial detention. Fourth, the defendant decides whether to accept a plea bargain after consulting his defense attorney, often a public defender or court-appointed private counsel. Fifth, if the case goes to trial, the judge manages the proceedings while the jury decides whether the defendant is guilty. Finally, if convicted, the defendant must be sentenced. At each of these stages,30 implicit biases can have an important impact. To maintain a manageable scope of analysis, we focus on the police encounter, charge and plea bargain, trial, and sentencing.

1. Police Encounter

Blackness and criminality. If we implicitly associate certain groups, such as African Americans, with certain attributes, such as criminality, then it should not be surprising that police may behave in a manner consistent with those implicit stereotypes. In other words, biases could shape whether an officer decides to stop an individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk the individual, and concludes the encounter with an arrest versus a warning.31 These biases could contribute to the substantial racial disparities that have been widely documented in policing.32


30. The number of stages is somewhat arbitrary. We could have listed more stages in a finer-grained timeline or vice versa.


32. See, e.g., Dianna Hunt, Ticket to Trouble/Wheels of Injustice/Certain Areas Are Ticket Traps for Minorities, HOUS. CHRON., May 14, 1995, at A1 (analyzing sixteen million Texas driving records and finding that minority drivers straying into White neighborhoods in Texas’s major urban areas were twice as likely as Whites to get traffic violations); Sam Vincent Meddis & Mike Snider, Drug War Focused on Blacks, USA TODAY, Dec. 20, 1990, at 1A (reporting findings from a 1989 USA
Since the mid–twentieth century, social scientists have uncovered empirical evidence of negative attitudes toward African Americans as well as stereotypes about their being violent and criminal.33 These biases persist today, as measured by not only explicit but also implicit instruments.34

For example, Jennifer Eberhardt, Philip Goff, Valerie Purdie, and Paul Davies have demonstrated a bidirectional activation between Blackness and criminality.35 When participants are subliminally primed36 with a Black male face (as opposed to a White male face, or no prime at all), they are quicker to distinguish the faint outline of a weapon that slowly emerges out of visual static.37 In other words, by implicitly thinking Black, they more quickly saw a weapon. Interestingly, the phenomenon also happens in reverse. When subliminally primed with drawings of weapons, participants visually attended to Black male faces more than comparable White male faces.38 Researchers found this result not only in a student population, which is often criticized for being unrepresentative of the real world, but also among police officers.39 The research suggests both that

34. In a seminal paper, Patricia Devine demonstrated that being subliminally primed with stereotypically “Black” words prompted participants to evaluate ambiguous behavior as more hostile. See Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). The priming words included “Negroes, lazy, Blacks, blues, rhythm, Africa, stereotype, ghetto, welfare, basketball, unemployed, and plantation.” Id. at 10. Those who received a heavy dose of priming (80 percent stereotypical words) interpreted a person’s actions as more hostile than those who received a milder dose (20 percent). Id. at 11–12; see also John A. Bargh et al., Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996).
36. The photograph flashed for only thirty milliseconds. Id. at 879.
37. See id. at 879–80. There was a 21 percent drop in perceptual threshold between White face primes and Black face primes. This was measured by counting the number of frames (out of a total of 41) that were required before the participant recognized the outlines of the weapon in both conditions. There was a 8.8 frame difference between the two conditions. Id. at 881.
38. Visual attendance was measured via a dot-probe paradigm, which requires participants to indicate on which side of the screen a dot flashes. The idea is that if a respondent is already looking at one face (for example, the Black photograph), he or she will see a dot flash near the Black photograph faster. See id. at 881 (describing dot-paradigm as the gold standard in visual attention measures).
39. See id. at 885–87 (describing methods, procedures, and results of Study 4, which involved sixty-one police officers who were 76 percent White, 86 percent male, and who had an average age of forty-two).
the idea of Blackness triggers weapons and makes them easier to see, and, simultaneously, that the idea of weapons triggers visual attention to Blackness. How these findings translate into actual police work is, of course, still speculative. At a minimum, however, they suggest the possibility that officers have an implicit association between Blackness and weapons that could affect both their hunches and their visual attention.

Even if this is the case, one might respond that extra visual attention by the police is not too burdensome. But who among us enjoys driving with a police cruiser on his or her tail?\(^40\) Moreover, the increased visual attention did not promote accuracy; instead, it warped the officers’ perceptual memories. The subliminal prime of weapons led police officers not only to look more at Black faces but also to remember them in a biased way, as having more stereotypically African American features. Thus, they “were more likely to falsely identify a face that was more stereotypically Black than the target when they were primed with crime than when they were not primed.”\(^41\)

We underscore a point that is so obvious that it is easy to miss. The primes in these studies were all flashed subliminally. Thus, the behavioral differences in visually attending to Black faces and in remembering them more stereotypically were all triggered implicitly, without the participants’ conscious awareness.

**Shooter bias.** The implicit association between Blackness and weapons has also been found through other instruments, including other priming tasks\(^42\) and the IAT. One of the tests available on Project Implicit specifically examines the implicit stereotype between African Americans (as compared to European Americans) and weapons (as compared to harmless items). That association has been found to be strong, widespread, and dissociated from explicit self-reports.\(^43\)

Skeptics can reasonably ask why we should care about minor differentials between schema-consistent and -inconsistent pairings that are often no more than a half second. But it is worth remembering that a half second may be all

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\(^40\) See Carbado, supra note 31, at 966–67 (describing existential burdens of heightened police surveillance).

\(^41\) Eberhardt et al., supra note 35, at 887.

\(^42\) See B. Keith Payne, Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185–86 (2001). The study deployed a priming paradigm, in which a photograph of a Black or White face was flashed to participants for two hundred milliseconds. Immediately thereafter, participants were shown pictures of guns or tools. Id. at 184. When primed by the Black face, participants identified guns faster. Id. at 185.

\(^43\) For N=85,742 participants, the average IAT D score was 0.37; Cohen’s d=1.00. By contrast, the self-reported association (that is, the explicit stereotype measure) was Cohen’s d=0.31. See Nosek et al., supra note 12, at 11 tbl.2.
the time a police officer has to decide whether to shoot. In the policing context, that half second might mean the difference between life and death.

Joshua Correll developed a shooter paradigm video game in which participants are confronted with photographs of individuals (targets) holding an object, superimposed on various city landscapes. If the object is a weapon, the participant is instructed to press a key to shoot. If the object is harmless (for example, a wallet), the participant must press a different key to holster the weapon. Correll found that participants were quicker to shoot when the target was Black as compared to White. Also, under time pressure, participants made more mistakes (false alarms) and shot more unarmed Black targets than unarmed White targets, and failed to shoot more armed White targets (misses) than armed Black targets. Interestingly, the shooter bias effect was not correlated with measures of explicit personal stereotypes. Correll also found comparable amounts of shooter bias in African American participants. This suggests that negative attitudes toward African Americans are not what drive the phenomenon.

The shooter bias experiments have also been run on actual police officers, with mixed results. In one study, police officers showed the same bias in favor of shooting unarmed Blacks more often than unarmed Whites that student and civilian populations demonstrated. In another study, however, although police officers showed a similar speed bias, they did not show any racial bias in the

45. Id. at 1317.
46. Id. at 1319. For qualifications about how the researchers discarded outliers, see Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1493 n.16 (2005). Subsequent studies have confirmed Correll’s general findings. See, e.g., Anthony G. Greenwald et al., Targets of Discrimination: Effects of Race on Responses to Weapons Holders, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (finding similar results).
47. Correll et al., supra note 44, at 1323. The scales used were the Modern Racism Scale, the Discrimination and Diversity Scale, the Motivation to Control Prejudiced Responding Scale, and some questions from the Right-Wing Authoritarianism Scale and the Personal Need for Structure Scale for good measure. Id. at 1321. These are survey instruments that are commonly used in social psychological research. Shooter bias was, however, correlated with measures of societal stereotypes—the stereotypes that other people supposedly hold. Id. at 1323.
48. See id. at 1324.
49. On explicit attitude instruments, African Americans show on average substantial in-group preference (over Whites). On implicit attitude instruments, such as the IAT, African Americans bell curve around zero, which means that they show no preference on average. See Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site, 6 GROUP DYNAMICS: THEORY RES. & PRACTICE 101, 105–06 (2002).
most important criterion of accuracy. In other words, there was no higher error rate of shooting unarmed Blacks as compared to Whites.51

Finally, in a study that directly linked implicit stereotypes (with weapons) as measured by the IAT and shooter bias, Jack Glaser and Eric Knowles found that “[i]ndividuals possessing a relatively strong stereotype linking Blacks and weapons [one standard deviation above the mean IAT] clearly show the Shooter Bias.”52 By contrast, recall that Correll found no such correlation with explicit stereotypes. These findings are consistent with the implicit stereotype story. Of course, it may also be true that participants were simply downplaying or concealing their explicit bias, which could help explain why no correlation was found.

In sum, we have evidence that suggests that implicit biases could well influence various aspects of policing. A fairly broad set of research findings shows that implicit biases (as measured by implicit instruments) alter and affect numerous behaviors that police regularly engage in—visual surveillance, recall, and even armed response.53 It should go without saying that explicit biases, which often undergird unspoken policies of racial profiling, also play an enormous role in the differential policing of people of color. It also should go without saying that various structural forces that produce racially segregated, predominantly minority neighborhoods that have higher poverty and crime rates also have a huge impact on racialized policing. Nevertheless, we repeat these points so that readers internalize the idea that implicit, explicit, and structural processes should not be deemed mutually exclusive.

2. Charge and Plea Bargain

Journalistic investigations have uncovered some statistical evidence that racial minorities are treated worse than Whites in prosecutors’ charging decisions.54

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53. For discussions in the law reviews, with some treatment of implicit biases, see Alex Geisinger, Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications, 86 OR. L. REV. 657, 667–73 (2007) (providing a cognitive model based on automatic categorization in accordance with behavioral realism).

54. For example, in San Jose, a newspaper investigation concluded that out of the almost seven hundred thousand criminal cases reported, “at virtually every stage of pre-trial negotiation, whites are more successful than non-whites.” Ruth Marcus, Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions, WASH. POST, May 12, 1992, at A4. San Francisco Public Defender Jeff Brown commented on racial stereotyping: “It’s a feeling, You’ve got a nice
Of course, there might be some legitimate reason for those disparities if, for example, minorities and Whites are not similarly situated on average. One way to examine whether the merits drive the disparate results is to control for everything except some irrelevant attribute, such as race. In several studies, researchers used regression analyses to conclude that race was indeed independently correlated with the severity of the prosecutor's charge.

For example, in a 1985 study of charging decisions by prosecutors in Los Angeles, researchers found prosecutors more likely to press charges against Black than White defendants, and determined that these charging disparities could not be accounted for by race-neutral factors, such as prior record, seriousness of charge, or use of a weapon.55 Two studies also in the late 1980s, one in Florida and the other in Indiana, found charging discrepancies based on the race of the victim.56 At the federal level, a U.S. Sentencing Commission report found that prosecutors were more apt to offer White defendants generous plea bargains with sentences below the prescribed guidelines than to offer them to Black or Latino defendants.57

While these studies are suggestive, other studies find no disparate treatment.58 Moreover, this kind of statistical evidence does not definitively tell us that biases...
implicitly or implicit biases specifically produce discriminatory charging decisions or plea offers by prosecutors, or a discriminatory willingness to accept worse plea bargains on the part of defense attorneys. The best way to get evidence on such hypotheses would be to measure the implicit biases of prosecutors and defense attorneys and investigate the extent to which those biases predict different treatment of cases otherwise identical on the merits.

Unfortunately, we have very little data on this front. Indeed, we have no studies, as of yet, that look at prosecutors’ and defense attorneys’ implicit biases and attempt to correlate them with those individuals’ charging practices or plea bargains. Nor do we know as much as we would like about their implicit biases more generally. But on that score, we do know something. Start with defense attorneys. One might think that defense attorneys, repeatedly put into the role of interacting with what is often a disproportionately minority clientele, and often ideologically committed to racial equality, might have materially different implicit biases from the general population. But Ted Eisenberg and Sheri Lynn Johnson found evidence to the contrary: Even capital punishment defense attorneys show negative implicit attitudes toward African Americans. Their implicit attitudes toward Blacks roughly mirrored those of the population at large.

What about prosecutors? To our knowledge, no one has measured specifically the implicit biases held by prosecutors. That said, there is no reason to


60. See Theodore Eisenberg & Sheri Lynn Johnson, Implicit Racial Attitudes of Death Penalty Lawyers, 53 DEPAUL L. REV. 1539, 1545–55 (2004). The researchers used a paper-pencil IAT that measured attitudes about Blacks and Whites. Id. at 1543–45. The defense attorneys displayed biases that were comparable to the rest of the population. Id. at 1553. The findings by Moskowitz and colleagues, supra note 59, sit in some tension with findings by Eisenberg and Johnson. It is possible that defense attorneys are not chronic egalitarians and/or that the specific practice of criminal defense work exacerbates implicit biases even among chronic egalitarians.

61. In some contexts, prosecutors have resisted revealing information potentially related to their biases. For example, in United States v. Armstrong, 517 U.S. 456 (1996), defendants filed a motion to dismiss the indictment for selective prosecution, arguing that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court but left all White crack defendants to be prosecuted in state court, resulting in much longer sentences for identical offenses. Id. at 460–61. The claim foundered when the U.S. Attorney’s Office resisted the defendants’ discovery motion concerning criteria for prosecutorial decisions and the U.S. Supreme Court upheld the U.S. Attorney’s Office’s refusal to provide discovery. Id. at 459–62. The Court held that, prior to being entitled even to discovery, defendants claiming selective prosecution cases based on race must produce credible evidence that “similarly situated individuals of a different race were not prosecuted.” Id. at 465.
presume attorney exceptionalism in terms of implicit biases.62 And if defense attorneys, who might be expected to be less biased than the population, show typical amounts of implicit bias, it would seem odd to presume that prosecutors would somehow be immune. If this is right, there is plenty of reason to be concerned about how these biases might play out in practice.

As we explain in greater detail below, the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments.63 They exercise tremendous discretion to decide whether, against whom, and at what level of severity to charge a particular crime; they also influence the terms and likelihood of a plea bargain and the length of the prison sentence—all with little judicial oversight. Other psychological theories—such as confirmation bias, social judgeability theory, and shifting standards, which we discuss below64—reinforce our hypothesis that prosecutorial decisionmaking indeed risks being influenced by implicit bias.

3. Trial

a. Jury

If the case goes to the jury, what do we know about how implicit biases might influence the factfinder’s decisionmaking? There is a long line of research on racial discrimination by jurors, mostly in the criminal context. Notwithstanding some mixed findings, the general research consensus is that jurors of one race tend to show bias against defendants who belong to another race (“racial outgroups”). For example, White jurors will treat Black defendants worse than they treat comparable White defendants. The best and most recent meta-analysis of laboratory juror studies was performed by Tara Mitchell and colleagues, who found that the fact that a juror was of a different race than the defendant influenced

62. Several of the authors have conducted training sessions with attorneys in which we run the IAT in the days leading up to the training. The results of these IATs have shown that attorneys harbor biases that are similar to those harbored by the rest of the population. One recent study of a related population, law students, confirmed that they too harbor implicit gender biases. See Justin D. Levinson & Danielle Young, Implicit Gender Bias in the Legal Profession: An Empirical Study, 18 DUKE J. GENDER L. & POL’Y 1, 28–31 (2010).


64. See infra Part II.B.
both verdicts and sentencing. The magnitude of the effect sizes were measured conservatively and found to be small (Cohen’s d=0.092 for verdicts, d=0.185 for sentencing).

But effects deemed “small” by social scientists may nonetheless have huge consequences for the individual, the social category he belongs to, and the entire society. For example, if White juries rendered guilty verdicts in exactly 80 percent of their decisions, then an effect size of Cohen’s d=0.095 would mean that the rate of conviction for Black defendants will be 83.8 percent, compared to 76.2 percent for White defendants. Put another way, in one hundred otherwise identical trials, eight more Black than White defendants would be found guilty.

One might assume that juror bias against racial outgroups would be greater when the case is somehow racially charged or inflamed, as opposed to those instances when race does not explicitly figure in the crime. Interestingly, many experiments have demonstrated just the opposite. Sam Sommers and Phoebe Ellsworth explain the counterintuitive phenomenon in this way: When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes. By contrast, when the case is not racially charged, even though there is a Black defendant and a White victim, jurors are not especially vigilant about the possibility of racial bias influencing their

65. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 627–28 (2005). The meta-analysis processed thirty-four juror verdict studies (with 7397 participants) and sixteen juror sentencing studies (with 3141 participants). Id. at 625. All studies involved experimental manipulation of the defendant’s race. Multirace participant samples were separated out in order to maintain the study’s definition of racial bias as a juror’s differential treatment of a defendant who belonged to a racial outgroup. See id.

66. Studies that reported nonsignificant results (p>0.05) for which effect sizes could not be calculated were given effect sizes of 0.00. Id.

67. Id. at 629.

68. See TRACY KYCKELHAHN & THOMAS H. COHEN, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 221152, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 1, 3 (2008), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf (“Seventy-nine percent of trials resulted in a guilty verdict or judgment, including 82% of bench trials and 76% of jury trials.”); see also THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 1 (2010), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf (reporting the “typical” outcome as three out of four trials resulting in convictions).

69. This translation between effect size d values and outcomes was described by Robert Rosenthal & Donald B. Rubin, *A Simple, General Purpose Display of Magnitude of Experimental Effect*, 74 J. EDUC. PSYCHOL. 166 (1982).

decisionmaking. These findings are more consistent with an implicit bias than a concealed explicit bias explanation.⁷¹

So far, we know that race effects have been demonstrated in juror studies (sometimes in counterintuitive ways), but admittedly little is known about “the precise psychological processes through which the influence of race occurs in the legal context.”⁷² Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors. Leading scholars from the juror bias field have expressly raised the possibility that the psychological mechanisms might be “unintentional and even non-conscious processes.”⁷³

Some recent juror studies by Justin Levinson and Danielle Young have tried to disentangle the psychological mechanisms of juror bias by using the IAT and other methods. In one mock juror study, Levinson and Young had participants view five photographs of a crime scene, including a surveillance camera photo that featured a masked gunman whose hand and forearm were visible. For half the participants, that arm was dark skinned; for the other half, that arm was lighter skinned.⁷⁴ The participants were then provided twenty different pieces of trial evidence. The evidence was designed to produce an ambiguous case regarding whether the defendant was indeed the culprit. Participants were asked to rate how much the presented evidence tended to indicate the defendant’s guilt or innocence and to decide whether the defendant was guilty or not, using both a scale of guilty or not guilty and a likelihood scale of zero to one hundred.⁷⁵

The study found that the subtle manipulation of the skin color altered how jurors evaluated the evidence presented and also how they answered the crucial question “How guilty is the defendant?” The guilt mean score was M=66.97 for

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⁷¹ See Samuel R. Sommers & Phoebe C. Ellsworth, White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom, 7 PSYCHOL. PUB. POLY & L. 201, 255 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000). That said, one could still hold to an explicit bias story in the following way: The juror has a negative attitude or stereotype that he is consciously aware of and endorses. But he knows it is not socially acceptable so he conceals it. When a case is racially charged, racial bias is more salient, so other jurors will be on the lookout for bias. Accordingly, the juror conceals it even more, all the way up to making sure that his behavior is completely race neutral. This explicit bias story is not mutually exclusive with the implicit bias story we are telling.


⁷³ Id. at 175.

⁷⁴ Levinson & Young, supra note 20, at 332–33 (describing experimental procedures).

⁷⁵ Id. at 334.
dark skin and M=56.37 for light skin, with 100 being “definitely guilty.” Measurements of explicit bias, including the Modern Racism Scale and feeling thermometers, showed no statistically significant correlation with the participants’ weighing of the evidence or assessment of guilt. More revealing, participants were asked to recall the race of the masked robber (which was a proxy for the light or dark skin), but many could not recall it. Moreover, their recollections did not correlate with their judgments of guilt. Taken together, these findings suggest that implicit bias—not explicit, concealed bias, or even any degree of conscious focus on race—was influencing how jurors assessed the evidence in the case.

In fact, there is even clearer evidence that implicit bias was at work. Levinson, Huajian Cai, and Young also constructed a new IAT, the Guilty–Not Guilty IAT, to test implicit stereotypes of African Americans as guilty (not innocent). They gave the participants this new IAT and the general race attitude IAT. They found that participants showed an implicit negative attitude toward Blacks as well as a small implicit stereotype between Black and guilty. More important than the bias itself is whether it predicts judgment. On the one hand, regression analysis demonstrated that a measure of evidence evaluation was a function of both the implicit attitude and the implicit stereotype. On the other hand, the IAT scores did not predict what is arguably more important: guilty verdicts or judgments of guilt on a more granular scale (from zero to one hundred). In sum, a subtle change

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76. See id. at 337 (confirming that the difference was statistically significant, F=4.40, p=0.034, d=0.52).
77. Id. at 338.
78. This finding built upon Levinson’s previous experimental study of implicit memory bias in legal decisionmaking. See Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 DUKE L.J. 345, 398–406 (2007) (finding that study participants misremembered trial-relevant facts in racially biased ways).
79. Levinson & Young, supra note 20, at 338.
81. Id. at 204. For the attitude IAT, D=0.21 (p<0.01). Id. at 204 n.87. For the Guilty–Not Guilty IAT, D=0.18 (p=0.01). Id. at 204 n.83.
82. Participants rated each of the twenty pieces of information (evidence) in terms of its probity regarding guilt or innocence on a 1–7 scale. This produced a total “evidence evaluation” score that could range between 20 (least amount of evidence of guilt) to 140 (greatest). Id. at 202 n.70 (citation omitted). The greater the Black = guilty stereotype or the greater the negative attitude toward Blacks, the higher the guilty evidence evaluation. The ultimate regression equation was: Evidence = 88.58 + 5.74 x BW + 6.61 x GI + 9.11 x AI + e (where BW stands for Black or White suspect; GI stands for guilty stereotype IAT score; AI stands for race attitude IAT score; e stands for error). Id. at 206. In normalized units, the implicit stereotype β=0.25 (p<0.05); the implicit attitude β=0.34 (p<0.01); adjusted R²=0.24. See id. at 206 nn.93–95.
83. Id. at 206 n.95.
in skin color changed judgments of evidence and guilt; implicit biases measured by the IAT predicted how respondents evaluated identical pieces of information.

We have a long line of juror research, as synthesized through a meta-analysis, revealing that jurors of one race treat defendants of another race worse with respect to verdict and sentencing. According to some experiments, that difference might take place more often in experimental settings when the case is not racially charged, which suggests that participants who seek to be fair will endeavor to correct for potential bias when the threat of potential race bias is obvious. Finally, some recent work reveals that certain IATs can predict racial discrimination in the evaluation of evidence by mock jurors. Unfortunately, because of the incredible difficulties in research design, we do not have studies that evaluate implicit bias in real criminal trials. Accordingly, the existing body of research, while strongly suggestive, provides inferential rather than direct support that implicit bias accounts for some of the race effects on conviction and sentencing.

b. Judge

Obviously, the judge plays a crucial role in various aspects of the trial, exercising important discretion in setting bail, deciding motions, conducting and deciding what can be asked during jury selection, ruling on the admissibility of evidence, presiding over the trial, and rendering verdicts in some cases. Again, as with the lawyers, there is no inherent reason to think that judges are immune from implicit biases. The extant empirical evidence supports this assumption. Judge Bennett, a former civil rights lawyer, shares his unnerving discovery of his own disappointing IAT results in Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POL’Y REV. 149, 150 (2010). Jeff Rachlinski and his coauthors are the only researchers who have measured the implicit biases of actual trial court judges. They have given the race attitude IAT to judges from three different judicial districts. Consistent with the general population, the White judges showed strong implicit attitudes favoring Whites over Blacks.

84. See Ian Ayres & Joel Waldfogel, A Market Test for Race Discrimination in Bail Setting, 46 STAN. L. REV. 987, 992 (1994) (finding 35 percent higher bail amounts for Black defendants after controlling for eleven other variables besides race).

85. Judge Bennett, a former civil rights lawyer, shares his unnerving discovery of his own disappointing IAT results in Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POL’Y REV. 149, 150 (2010).

86. See Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1210 (2009). White judges (N=85) showed an IAT effect $M=216$ ms (with a standard deviation of 201 ms). 87.1 percent of them were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. Black judges (N=43) showed a small bias $M=26$ ms (with a standard deviation of 208 ms). Only 44.2 percent of Black judges were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. See id.
Rachlinski and colleagues investigated whether these biases predicted behavioral differences by giving judges three different vignettes and asking for their views on various questions, ranging from the likelihood of defendant recidivism to the recommended verdict and confidence level. Two of these vignettes revealed nothing about race, although some of the judges were subliminally primed with words designed to trigger the social category African American. The third vignette explicitly identified the defendant (and victim) as White or Black and did not use subliminal primes. After collecting the responses, Rachlinski et al. analyzed whether judges treated White or Black defendants differently and whether the IAT could predict any such difference.

They found mixed results. In the two subliminal priming vignettes, judges did not respond differently on average as a function of the primes. In other words, the primes did not prompt them to be harsher on defendants across the board as prior priming studies with nonjudge populations had found.⁸⁷ That said, the researchers found a marginally statistically significant interaction with IAT scores: Judges who had a greater degree of implicit bias against Blacks (and relative preference for Whites) were harsher on defendants (who were never racially identified) when they had been primed (with the Black words). By contrast, those judges who had implicit attitudes in favor of Blacks were less harsh on defendants when they received the prime.⁸⁸

In the third vignette, a battery case that explicitly identified the defendant as one race and the victim as the other,⁸⁹ the White judges showed equal likelihood of convicting the defendant, whether identified as White or Black. By contrast, Black judges were much more likely to convict the defendant if he was identified as White as compared to Black. When the researchers probed more deeply to see what, if anything, the IAT could predict, they did not find the sort of interaction that they found in the other two vignettes—in other words, judges with strong implicit biases in favor of Whites did not treat the Black defendant more harshly.⁹⁰

Noticing the difference between White and Black judge responses in the third vignette study, the researchers probed still deeper and found a three-way interaction between a judge’s race, a judge’s IAT score, and a defendant’s race. No effect was found for White judges; the core finding concerned, instead, Black

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⁸⁸. See Rachlinski et al., supra note 86, at 1215. An ordered logit regression was performed between the judge’s disposition against the priming condition, IAT score, and their interaction. The interaction term was marginally significant at p=0.07. See id. at 1214–15 n.94.

⁸⁹. This third vignette did not use any subliminal primes.

⁹⁰. See id. at 1202 n.41.
judges. Those Black judges with a stronger Black preference on the IAT were less likely to convict the Black defendant (as compared to the White defendant); correlativey, those Black judges with a White preference on the IAT were more likely to convict the Black defendant.91

It is hard to make simple sense of such complex findings, which may have been caused in part by the fact that the judges quickly sniffed out the purpose of the study—to detect racial discrimination.92 Given the high motivation not to perform race discrimination under research scrutiny, one could imagine that White judges might make sure to correct for any potential unfairness. By contrast, Black judges may have felt less need to signal racial fairness, which might explain why Black judges showed different behaviors as a function of implicit bias whereas White judges did not.

Put another way, data show that when the race of the defendant is explicitly identified to judges in the context of a psychology study (that is, the third vignette), judges are strongly motivated to be fair, which prompts a different response from White judges (who may think to themselves “whatever else, make sure not to treat the Black defendants worse”) than Black judges (who may think “give the benefit of the doubt to Black defendants”). However, when race is not explicitly identified but implicitly primed (vignettes one and two), perhaps the judges’ motivation to be accurate and fair is not on full alert. Notwithstanding all the complexity, this study provides some suggestive evidence that implicit attitudes may be influencing judges’ behavior.

4. Sentencing

There is evidence that African Americans are treated worse than similarly situated Whites in sentencing. For example, federal Black defendants were sentenced to 12 percent longer sentences under the Sentencing Reform Act of 1984,93 and Black defendants are subject disproportionately to the death penalty.94

91. Id. at 1220 n.114.
92. See id. at 1223.
94. See U.S. GEN. ACCOUNTING OFFICE, GAO GGD-90-57, REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (finding killers of White victims receive the death penalty more often than killers of Black victims); David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview,
Of course, it is possible that there is some good reason for that difference, based on the merits. One way to check is to run experimental studies holding everything constant except for race.

**Probation officers.** In one study, Sandra Graham and Brian Lowery subliminally primed police officers and juvenile probation officers with words related to African Americans, such as “Harlem” or “dreadlocks.” This subliminal priming led the officers to recommend harsher sentencing decisions. As we noted above, Rachlinski et al. found no such effect on the judges they tested using a similar but not identical method. But, at least in this study, an effect was found with police and probation officers. Given that this was a subliminal prime, the merits could not have justified the different evaluations.

**Afrocentric features.** Irene Blair, Charles Judd, and Kristine Chapleau took photographs from a database of criminals convicted in Florida and asked participants to judge how Afrocentric both White and Black inmates looked on a scale of one to nine. The goal was to see if race, facial features, or both correlated with actual sentencing. Using multiple regression analysis, the researchers found that after controlling for the seriousness of the primary and additional offenses, the race of the defendant showed no statistical significance. In other words, White and Black defendants were sentenced without discrimination based on race. According to the

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96. Priming studies are quite sensitive to details. For example, the more subliminal a prime is (in time duration and in frequency), the less the prime tends to stick (the smaller the effects and the faster it dissipates). Rachlinski et al. identified some differences between their experimental procedure and that of Graham and Lowery’s. *See Rachlinski et al., * **supra** note 86, at 1213 n.88. Interestingly, in the Rachlinski study, for judges from the eastern conference (seventy judges), a programming error made their subliminal primes last only sixty-four milliseconds. By contrast, for the western conference (forty-five judges), the prime lasted 153 milliseconds, which was close to the duration used by Graham and Lowery (150 milliseconds). *See id. at 1206 (providing numerical count of judges’ prime); id. at 1213 n.84 (identifying the programming error). Graham and Lowery wrote that they selected the priming durations through extensive pilot testing “to arrive at a presentation time that would allow the primes to be detectable but not identifiable.” *Graham & Lowery, supra* note 87, at 489. It is possible that the truncated priming duration for the eastern conference judges contributed to the different findings between Rachlinski et al. and Graham and Lowery.
98. *Id. at 676.* Afrocentric meant full lips, broad nose, relatively darker skin color, and curly hair. It is what participants socially understood to look African without any explicit instruction or definition. *See id. at 674 n.1.
99. *Id. at 676.*
researchers, this is a success story based on various sentencing reforms specifically adopted by Florida mostly to decrease sentencing discretion.\textsuperscript{100}

However, when the researchers added Afrocentricity of facial features into their regressions, they found a curious correlation. Within each race, either Black or White, the more Afrocentric the defendant looked, the harsher his punishment.\textsuperscript{101} How much so? If you picked a defendant who was one standard deviation above the mean in Afrocentric features and compared him to another defendant of the same race who was one standard deviation below the mean, there would be a sentence difference of seven to eight months between them, holding constant any difference in their actual crime.\textsuperscript{102}

Again, if the research provides complex findings, we must grapple with a complex story. On the one hand, we have good news: Black and White defendants were, overall, sentenced comparably. On the other hand, we have bad news: Within each race, the more stereotypically Black the defendant looked, the harsher the punishment. What might make sense of such results? According to the researchers, perhaps implicit bias was responsible.\textsuperscript{103} If judges are motivated to avoid racial discrimination, they may be on guard regarding the dangers of treating similarly situated Blacks worse than Whites. On alert to this potential bias, the judges prevent it from causing any discriminatory behavior. By contrast, judges have no conscious awareness that Afrocentric features might be triggering stereotypes of criminality and violence that could influence their judgment. Without such awareness, they could not explicitly control or correct for the potential bias.\textsuperscript{104} If this explanation is correct, we have further evidence that discrimination is being driven in part by implicit biases and not solely by explicit-but-concealed biases.

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Where does this whirlwind tour of psychological research findings leave us? In each of the stages of the criminal trial process discussed, the empirical research

\textsuperscript{100} Id. at 677.

\textsuperscript{101} Id. at 676–77. Jennifer Eberhardt and her colleagues reached consistent findings when she used the same Florida photograph dataset to examine how Black defendants were sentenced to death. After performing a median split on how stereotypical the defendant looked, the top half were sentenced to death 57.5 percent of the time compared to the bottom half, which were sentenced to death only 24.4 percent of the time. See Jennifer L. Eberhardt et al., \textit{Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes}, 17 PSYCHOL. SCI. 383, 384 (2006). Interestingly, this effect was not observed when the victim was Black. See id. at 385.

\textsuperscript{102} See Blair et al., supra note 97, at 677–78.

\textsuperscript{103} See id. at 678 (hypothesizing that "perhaps an equally pernicious and less controllable process [is] at work").

\textsuperscript{104} See id. at 677.
gives us reason to think that implicit biases—attitudes and beliefs that we are not directly aware of and may not endorse—could influence how defendants are treated and judged. Wherever possible, in our description of the studies, we have tried to provide the magnitude of these effects. But knowing precisely how much work they really do is difficult. If we seek an estimate, reflective of an entire body of research and not any single study, one answer comes from the Greenwald meta-analysis, which found that the IAT (the most widely used, but not the only measure of implicit bias) could predict 5.6 percent of the variation of the behavior in Black–White behavioral domains.\footnote{See Greenwald et al., supra note 24, at 24 tbl.3 (showing that correlation between race attitude IAT (Black/White) and behavior in the meta-analysis is 0.236, which when squared equals 0.056, the percentage of variance explained).}

Should that be deemed a lot or a little? In answering this question, we should be mindful of the collective impact of such biases, integrated over time (per person) and over persons (across all defendants).\footnote{See Rachlinski et al., supra note 86, at 1202; Jerry Kang & Mahzarin Banaji, Fair Measures: A Behavioral Realist Revision of 'Affirmative Action,' 94 CALIF. L. REV. 1063, 1073 (2006).} For a single defendant, these biases may surface for various decisionmakers repeatedly in policing, charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer persuasiveness, guilt determination, sentencing recommendations, sentencing itself, appeal, and so on. Even small biases at each stage may aggregate into a substantial effect.

To get a more concrete sense, Anthony Greenwald has produced a simulation that models cumulating racial disparities through five sequential stages of criminal justice—arrest, arraignment, plea bargain, trial, and sentence. It supposes that the probability of arrest having committed the offense is 0.50, that the probability of conviction at trial is 0.75, and that the effect size of implicit bias is $r=0.1$ at each stage. Under this simulation, for a crime with a mean sentence of 5 years, and with a standard deviation of 2 years, Black criminals can expect a sentence of 2.44 years whereas White criminals can expect just 1.40 years.\footnote{The simulation is available at Simulation: Cumulating Racial Disparities Through 5 Sequential Stages of Criminal Justice, http://faculty.washington.edu/agg/UCLA_PULSE.simulation.xlsx (last visited May 15, 2012). If in the simulation the effect size of race discrimination at each step is increased from $r=0.1$ to $r=0.2$, which is less than the average effect size of race discrimination effects found in the 2009 meta-analysis, see supra note 105, the ratio of expected years of sentence would increase to 3.11 years (Black) to 1.01 years (White).} To appreciate the full social impact, we must next aggregate this sort of disparity a second time over all defendants subject to racial bias, out of an approximate annual
total of 20.7 million state criminal cases and 70 thousand federal criminal cases. And, as Robert Abelson has demonstrated, even small percentages of variance explained might amount to huge impacts.

B. The Civil Path

Now, we switch from the criminal to the civil path and focus on the trajectory of an individual bringing suit in a federal employment discrimination case—and on how implicit bias might affect this process. First, the plaintiff, who is a member of a protected class, believes that her employer has discriminated against her in some legally cognizable way. Second, after exhausting necessary administrative remedies, the plaintiff sues in federal court. Third, the defendant tries to terminate the case before trial via a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure (FRCP) 12(b)(6). Fourth, should that fail, the defendant moves for summary judgment under FRCP 56. Finally, should that motion also fail, the jury renders a verdict after trial. Again, at each of these

109. See Rachlinski et al., supra note 86, at 1202.
110. See Robert P. Abelson, A Variance Explanation Paradox: When a Little Is a Lot, 97 Psychol. Bull. 129, 132 (1985) (explaining that the batting average of a 0.320 hitter or a 0.220 hitter predicts only 1.4 percent of the variance explained for a single at-bat producing either a hit or no-hit). Some discussion of this appears in Kang & Lane, supra note 2, at 489.
111. We acknowledge that Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), made it much more difficult to certify large classes in employment discrimination cases. See id. at 2553–54 (holding that statistical evidence of gender disparities combined with a sociologist’s analysis that Wal-Mart’s corporate culture made it vulnerable to gender bias was inadequate to show that members of the putative class had a common claim for purposes of class certification under FED. R. CIV. P. 23(b)).
112. For example, in a Title VII cause of action for disparate treatment, the plaintiff must demonstrate an adverse employment action “because of” the plaintiff’s “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2006). By contrast, in a Title VII cause of action for disparate impact, the plaintiff challenges facially neutral policies that produce a disparate impact on protected populations. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). We recognize that employment discrimination law is far more complex than presented here, with different elements for different state and federal causes of action.
113. The U.S. Equal Employment Opportunity Commission (EEOC) process is critical in practical terms because the failure to file a claim with the EEOC within the quite short statute of limitations (either 180 or 300 days depending on whether the jurisdiction has a state or local fair employment agency) or to timely file suit after resorting to the EEOC results in an automatic dismissal of the claim. However, neither EEOC inaction nor an adverse determination preclude private suit. See 2 Charles Sullivan & Lauren Walter, Employment Discrimination Law and Practice § 12.03[B], at 672 (4th ed. 2012).
stages, implicit biases could potentially influence the outcome. To maintain a manageable scope of analysis, we focus on employer discrimination, pretrial adjudication, and jury verdict.

1. Employer Discrimination

For many, the most interesting question is whether implicit bias helped cause the employer to discriminate against the plaintiff. There are good reasons to think that some negative employment actions are indeed caused by implicit biases in what tort scholars call a “but-for” sense. This but-for causation may be legally sufficient since Title VII and most state antidiscrimination statutes require only a showing that the plaintiff was treated less favorably “because of” a protected characteristic, such as race or sex. But our objective here is not to engage the doctrinal and philosophical questions of whether existing antidiscrimination laws do or should recognize implicit bias-actuated discrimination. We also do not address what sorts of evidence should be deemed admissible when plaintiffs attempt to make such a case at trial. Although those questions are critically important, our

114. As explained when we introduced the Criminal Path, the number of stages identified is somewhat arbitrary. We could have listed more or fewer stages.

115. Section 703(a) of Title VII of the 1964 Civil Rights Act states that “[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of [an] individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1).


118. For example, there is considerable disagreement on whether an expert should be allowed to testify that a particular case is an instance of implicit bias. This issue is part of a much larger debate regarding scientists’ ability to make reasonable inferences about an individual case from group data. John Monahan and Laurens Walker first pointed out that scientific evidence often comes to court at two different levels of generality, one general and one specific. See Laurens Walker & John Monahan, Social Frameworks: A New Use of Social Science in Law, 73 VA. L. REV. 559 (1987). For instance, in a case involving the accuracy of an eyewitness identification, the general question might concern whether eyewitness identifications that are cross-racial are less reliable than same-race identifications; the specific question in the case would involve whether the cross-racial identification in this case was accurate. Interested in social science evidence, Monahan and Walker referred to this as “social framework” evidence, though their fundamental insight regarding frameworks applies to all scientific evidence. In the context of implicit biases, then, general research amply demonstrates the phenomenon in the population. However, in the courtroom, the issue typically concerns whether a particular decision or action was a product of implicit bias.

As a scientific matter, knowing that a phenomenon exists in a population does not necessarily mean that a scientist can reliably say that it was manifest in a particular case. This has led to a debate as to
task is more limited—to give an empirical account of how implicit bias may potentially influence a civil litigation trajectory.

Our belief that implicit bias causes some employment discrimination is based on the following evidence. First, tester studies in the field—which involve sending identical applicants or applications except for some trait, such as race or gender—have generally uncovered discrimination. According to a summary by Mark Bendick and Ana Nunes, there have been “several dozen testing studies” in the past two decades, in multiple countries, focusing on discrimination against various demographic groups (including women, the elderly, and racial minorities).119 These studies consistently reveal typical “net rates of discrimination” that range from 20–40 percent.120 In other words, in 20–40 percent of cases, employers treat subordinated groups (for example, racial minorities) worse than privileged groups (for example, Whites) even though the testers were carefully controlled to be identically qualified.

Second, although tester studies do not distinguish between explicit versus implicit bias, various laboratory experiments have found implicit bias correlations with discriminatory evaluations. For example, Laurie Rudman and Peter Glick demonstrated that in certain job conditions, participants treated a self-promoting and competent woman, whom the researchers termed “agentic,” worse than an

whether experts should be limited to testifying only to the general phenomenon or should be allowed to opine on whether a particular case is an instance of the general phenomenon. This is a complicated issue and scholars have weighed in on both sides. For opposition to the use of expert testimony that a specific case is an instance of implicit bias, see Faigman, Dasgupta & Ridgeway, supra note 19, at 1394 (“The research . . . does not demonstrate that an expert can validly determine whether implicit bias caused a specific employment decision.”); and John Monahan, Laurens Walker & Gregory Mitchell, Contextual Evidence of Gender Discrimination: The Ascendance of “Social Frameworks,” 94 VA. L. REV. 1715, 1719 (2008) (“[Testimony] in which the expert witness explicitly linked general research findings on gender discrimination to specific factual conclusions . . . exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by both the original and revised proposal of what constitutes ‘social framework’ evidence.”). For advancement of allowing expert testimony that a particular case is an instance of some general phenomenon, see Susan T. Fiske & Eugene Borgida, Standards for Using Social Psychological Evidence in Employment Discrimination Proceedings, 83 TEMPLE L. REV. 867, 876 (2011) (“Qualified social scientists who provide general, relevant knowledge and apply ordinary scientific reasoning may offer informal opinion about the individual case, but probabilistically.”).

In the end, lawyers may be able to work around this dispute by using an expert to provide social framework evidence that identifies particular attributes that exacerbate biased decisionmaking, then immediately calling up another witness who is personally familiar with the defendant’s work environment and asking that witness whether each of those particular attributes exists.

120. Id. (manuscript at 15).
equally agentic man.\textsuperscript{121} When the job description explicitly required the employee to be cooperative and to work well with others, participants rated the agentic female less hirable than the equally agentic male.\textsuperscript{122} Probing deeper, the researchers identified that the participants penalized the female candidate for lack of social skills, not incompetence.\textsuperscript{123} Explicit bias measures did not correlate with the rankings; however, an implicit gender stereotype (associating women as more communal than agentic)\textsuperscript{124} did correlate negatively with the ratings for social skills. In other words, the higher the implicit gender stereotype, the lower the social skills evaluation.\textsuperscript{125}

Third, field experiments have provided further confirmation under real-world conditions. The studies by Marianne Bertrand and Sendhil Mullainathan demonstrating discrimination in callbacks because of the names on comparable resumes have received substantial attention in the popular press as well as in law reviews.\textsuperscript{126} These studies found that for equally qualified—indeed, otherwise identical candidates, firms called back “Emily” more often than “Lakisha.”\textsuperscript{127} Less attention has been paid to Dan-Olof Ro oth’s extensions of this work, which found similar callback discrimination but also found correlations between implicit stereotypes and the discriminatory behavior.\textsuperscript{128} Rooth has found these correlations

\textsuperscript{121} Laurie A. Rudman & Peter Glick, \textit{Prescriptive Gender Stereotypes and Backlash Toward Agentic Women}, 57 J. SOC. ISSUES 743, 757 (2001). Agentic qualities were signaled by a life philosophy essay and canned answers to a videotaped interview that emphasized self-promotion and competence. \textit{See id.} at 748. Agentic candidates were contrasted with candidates whom the researchers labeled “androgynous”—they also demonstrated the characteristics of interdependence and cooperation. \textit{Id.}

\textsuperscript{122} The difference was $M=2.84$ versus $M=3.52$ on a 5 point scale ($p<0.05$). \textit{See id.} at 753. No gender bias was shown when the job description was ostensibly masculine and did not call for cooperative behavior. Also, job candidates that were engineered to be androgynous—in other words, to show both agentic and cooperative traits—were treated the same regardless of gender. \textit{See id.}

\textsuperscript{123} \textit{See id.} at 753–54.

\textsuperscript{124} The agentic stereotype was captured by word stimuli such as “independent,” “autonomous,” and “competitive.” The communal stereotype was captured by words such as “communal,” “cooperative,” and “kinship.” \textit{See id.} at 750.

\textsuperscript{125} \textit{See id.} at 756 ($r=0.49$, $p=0.001$). For further description of the study in the law reviews, see Kang, supra note 46, at 1517–18.


\textsuperscript{127} \textit{Id.} at 992.

\textsuperscript{128} Dan-Olof Rooth, \textit{Automatic Associations and Discrimination in Hiring: Real World Evidence}, 17 LABOUR ECON. 523 (2010) (finding that implicit stereotypes, as measured by the IAT, predicted differential callbacks of Swedish-named versus Arab-Muslim-named resumes). An increase of one standard deviation in implicit stereotype produced almost a 12 percent decrease in the probability that an Arab/Muslim candidate received an interview. \textit{See id.}
with not only implicit stereotypes about ethnic groups (Swedes versus Arab-Muslims) but also implicit stereotypes about the obese.129

Because implicit bias in the courtroom is our focus, we will not attempt to offer a comprehensive summary of the scientific research as applied to the implicit bias in the workplace.130 We do, however, wish briefly to highlight lines of research—variously called “constructed criteria,” “shifting standards,” or “casuistry”—that emphasize the malleability of merit. We focus on this work because it has received relatively little coverage in the legal literature and may help explain how complex decisionmaking with multiple motivations occurs in the real world.131 Moreover, this phenomenon may influence not only the defendant (accused of discrimination) but also the jurors who are tasked to judge the merits of the plaintiff’s case.

Broadly speaking, this research demonstrates that people frequently engage in motivated reasoning132 in selection decisions that we justify by changing merit criteria on the fly, often without conscious awareness. In other words, as between two plausible candidates that have different strengths and weaknesses, we first choose the candidate we like—a decision that may well be influenced by implicit factors—and then justify that choice by molding our merit standards accordingly.

We can make this point more concrete. In one experiment, Eric Luis Uhlmann and Geoffrey Cohen asked participants to evaluate two finalists for police chief—one male, the other female.133 One candidate’s profile signaled book smart, the other’s profile signaled streetwise, and the experimental design varied which profile attached to the woman and which to the man. Regardless of which attributes the male candidate featured, participants favored the male candidate and articulated their hiring criteria accordingly. For example, education (book

129. Jens Agerström & Dan-Olof Rooth, The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination, 96 J. APPLIED PSYCHOL. 790 (2011) (finding that hiring managers (N=153) holding more negative IAT-measured automatic stereotypes about the obese were less likely to invite an obese applicant for an interview).

130. Thankfully, many of these studies have already been imported into the legal literature. For a review of the science, see Kang & Lane, supra note 2, at 484–85 (discussing evidence of racial bias in how actual managers sort resumes and of correlations between implicit biases, as measured by the IAT, and differential callback rates).

131. One recent exception is Rich, supra note 25.

132. For discussion of motivated reasoning in organizational contexts, see Sung Hui Kim, The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper, 74 FORDHAM L. REV. 983, 1029–34 (2005). Motivated reasoning is “the process through which we assimilate information in a self-serving manner.” Id. at 1029.

Implicit Bias in the Courtroom

... was considered more important when the man had it. Surprisingly, even the attribute of being family oriented and having children was deemed more important when the man had it.

Michael Norton, Joseph Vandello, and John Darley have made similar findings, again in the domain of gender. Participants were put in the role of manager of a construction company who had to hire a high-level employee. One candidate’s profile signaled more education; the other’s profile signaled more experience. Participants ranked these candidates (and three other filler candidates), and then explained their decisionmaking by writing down “what was most important in determining [their] decision.”

In the control condition, the profiles were given with just initials (not full names) and thus the test subjects could not assess their gender. In this condition, participants preferred the higher educated candidate 76 percent of the time. In the two experimental conditions, the profiles were given names that signaled gender, with the man having higher education in one condition and the woman having higher education in the other. When the man had higher education, the participants preferred him 75 percent of the time. In sharp contrast, when the woman had higher education, only 43 percent of the participants preferred her.

The discrimination itself is not as interesting as how the discrimination was justified. In the control condition and the man-has-more-education condition, the participants ranked education as more important than experience about half the time (48 percent and 50 percent). By contrast, in the woman-has-more-education condition, only 22 percent ranked education as more important than experience. In other words, what counted as merit was redefined, in real time, to justify hiring the man.

Was this weighting done consciously, as part of a strategy to manipulate merit in order to provide a cover story for decisionmaking caused and motivated by explicit bias? Or, was merit refactored in a more automatic, unconscious, dissonance-reducing rationalization, which would be more consistent with an implicit bias story? Norton and colleagues probed this causation question in another series of studies.

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134. See id. (M=8.27 with education versus M=7.07 without education, on a 11 point scale; p=0.006; d=1.02).
135. See id. (M=6.21 with family traits versus 5.08 without family traits; p=0.05; d=0.86).
137. Id. at 820.
138. Id. at 821.
139. Id.
140. Id.
141. Id.
experiments, in the context of race and college admissions.\textsuperscript{142} In a prior study, they had found that Princeton undergraduate students shifted merit criteria—the relative importance of GPA versus the number of AP classes taken—to select the Black applicant over the White applicant who shared the same cumulative SAT score.\textsuperscript{143}

To see whether this casuistry was explicit and strategic or implicit and automatic, they ran another experiment in which participants merely rated admissions criteria in the abstract without selecting a candidate for admission.

Participants were simply told that they were participating in a study examining the criteria most important to college admissions decisions. They were given two sample resumes to familiarize themselves with potential criteria. Both resumes had equivalent cumulative SAT scores, but differed on GPA (4.0 versus 3.6) versus number of AP classes taken (9 versus 6). Both resumes also disclosed the applicant’s race. In one condition, the White candidate had the higher GPA (and fewer AP classes); in the other condition, the African American candidate had the higher GPA (and fewer AP classes).\textsuperscript{144} After reviewing the samples, the participants had to rank order eight criteria in importance, including GPA, number of AP classes, SAT scores, athletic participation, and so forth.

In the condition with the Black candidate having the higher GPA, 77 percent of the participants ranked GPA higher in importance than number of AP classes taken. By contrast, when the White candidate had the higher GPA, only 63 percent of the participants ranked GPA higher than AP classes. This change in the weighting happened even though the participants did not expect that they were going to make an admissions choice or to justify that choice. Thus, these differences could not be readily explained in purely strategic terms, as methods for justifying a subsequent decision. According to the authors,

\textquote{[t]hese results suggest not only that it is possible for people to reweight criteria deliberately to justify choices but also that decisions made under such social constraints can impact information processing even prior to making a choice. This suggests that the bias we observed is not simply post hoc and strategic but occurs as an organic part of making decisions when social category information is present.}\textsuperscript{145}


\textsuperscript{143} Id. at 44.

\textsuperscript{144} See id.

\textsuperscript{145} Id. at 46–47. This does not, however, fully establish that these differences were the result of implicit views rather than explicit ones. Even if test subjects did not expect to have to make admissions determinations, they might consciously select criteria that they believed favored one group over another.
The ways that human decisionmakers may subtly adjust criteria in real time to modify their judgments of merit has significance for thinking about the ways that implicit bias may potentially influence employment decisions. In effect, bias can influence decisions in ways contrary to the standard and seemingly commonsensical model. The conventional legal model describes behavior as a product of discrete and identifiable motives. This research suggests, however, that implicit motivations might influence behavior and that we then rationalize those decisions after the fact. Hence, some employment decisions might be motivated by implicit bias but rationalized post hoc based on nonbiased criteria. This process of reasoning from behavior to motives, as opposed to the folk-psychology assumption that the arrow of direction is from motives to behavior, is, in fact, consistent with a large body of contemporary psychological research.146

2. Pretrial Adjudication: 12(b)(6)

As soon as a plaintiff files the complaint, the defendant will try to dismiss as many of the claims in the complaint as possible. Before recent changes in pleading, a motion to dismiss a complaint under FRCP 8 and FRCP 12(b)(6) was decided under the relatively lax standard of *Conley v. Gibson.*147 Under *Conley*, all factual allegations made in the complaint were assumed to be true. As such, the court’s task was simply to ask whether “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim.”148

Starting with *Bell Atlantic Corp. v. Twombly,*149 which addressed complex antitrust claims of parallel conduct, and further developed in *Ashcroft v. Iqbal,*150 which addressed civil rights actions based on racial and religious discrimination post-9/11, the U.S. Supreme Court abandoned the *Conley* standard. First, district courts must now throw out factual allegations made in the complaint if they are merely conclusory.151 Second, courts must decide on the plausibility of the claim based on the information before them.152 In *Iqbal,* the Supreme Court held that

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146. See generally TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002).
148. *Id.* at 45–46.
151. *Id.* at 1951.
152. *Id.* at 1950–52.
because of an “obvious alternative explanation”\(^\text{153}\) of earnest national security response, purposeful racial or religious “discrimination is not a plausible conclusion.”\(^\text{154}\)

How are courts supposed to decide what is “Twom-bal”\(^\text{155}\) plausible when the motion to dismiss happens before discovery, especially in civil rights cases in which the defendant holds the key information? According to the Court, “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”\(^\text{156}\)

And when judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.\(^\text{157}\)

Moreover, consider what the directive to rely on common sense means in light of social judgeability theory.\(^\text{158}\) According to this theory, there are social rules that tell us when it is appropriate to judge someone. For example, suppose your fourth grade child told you that a new kid, Hannah, has enrolled in school and that she receives free lunches. Your child then asks you whether you think she is smart. You will probably decline to answer since you do not feel entitled to make that judgment. Without more probative information, you feel that you would only be crudely stereotyping her abilities based on her socioeconomic status. But what if the next day you volunteered in the classroom and spent twelve minutes observing

\(^{153}\) Id. (quoting Twombly, 550 U.S. 544) (internal quotation marks omitted).

\(^{154}\) Id. at 1952.


\(^{156}\) Iqbal, 129 S. Ct. at 1940.


Hannah interacting with a teacher trying to solve problems? Would you then feel that you had enough individuating information to come to some judgment?

This is precisely what John Darley and Paget Gross tested in a seminal experiment in 1983. When participants only received economic status information, they declined to evaluate Hannah’s intelligence as a function of her economic class. However, when they saw a twelve-minute videotape of the child answering a battery of questions, participants felt credentialed to judge the girl, and they did so in a way that was consistent with stereotypes. What they did not realize was that the individuating information in the videotape was purposefully designed to be ambiguous. So participants who were told that Hannah was rich interpreted the video as confirmation that she was smart. By contrast, participants who were told that Hannah was poor interpreted the same video as confirmation that she was not so bright.

Vincent Yzerbyt and colleagues, who call this phenomenon “social judgeability,” have produced further evidence of this effect. If researchers told you that a person is either an archivist or a comedian and then asked you twenty questions about this person regarding their degree of extroversion with the options of “True,” “False,” or “I don’t know,” how might you answer? What if, in addition, they manufactured an illusion that you were given individuating information—information about the specific individual and not just the category he or she belongs to—even though you actually did not receive any such information? This is precisely what Yzerbyt and colleagues did in the lab.

They found that those operating under the illusion of individuating information were more confident in their answers in that they marked fewer questions with “I don’t know.” They also found that those operating under the illusion gave more stereotype-consistent answers. In other words, the illusion of being informed made the target judgeable. Because the participants, in fact, had received no such individuating information, they tended to judge the person in accordance with their schemas about archivists and comedians. Interestingly, “in the debriefings,

161. See Yzerbyt et al., supra note 158.
162. This illusion was created by having participants go through a listening exercise, in which they were told to focus only on one speaker (coming through one ear of a headset) and ignore the other (coming through the other). They were later told that the speaker that they were told to ignore had in fact provided relevant individuating information. The truth was, however, that no such information had been given. See id. at 50.
163. See id. at 51 (M=5.07 versus 10.13; p<0.003).
164. See id. (M=9.97 versus 6.30, out of 1 to 20 point range; p<0.006).
subjects reported that they did not judge the target on the basis of a stereotype; they were persuaded that they had described a real person qua person.\textsuperscript{165} Again, it is possible that they were concealing their explicitly embraced bias about archivists and comedians from probing researchers, but we think that it is more probable that implicit bias explains these results.

Social judgeability theory connects back to \textit{Iqbal} in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under \textit{Conley}, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under \textit{Iqbal}, judges have been explicitly green-lighted to judge the plausibility of the plaintiff’s claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge’s schemas. Just as Yzerbyt’s illusion of individuating information entitled participants to judge in the laboratory, the express command of the Supreme Court may entitle judges to judge in the courtroom when they lack any well-developed basis to do so.

There are no field studies to test whether biases, explicit or implicit, influence how actual judges decide motions to dismiss actual cases. It is not clear that researchers could ever collect such information. All that we have are some preliminary data about dismissal rates before and after \textit{Iqbal} that are consistent with our analysis. Again, since \textit{Iqbal} made dismissals easier, we should see an increase in dismissal rates across the board.\textsuperscript{166} More relevant to our hypothesis is whether certain types of cases experienced differential changes in dismissal rates. For instance, we would expect \textit{Iqbal} to generate greater increases in dismissal rates for race discrimination claims than, say, contract claims. There are a number of potential reasons for this: One reason is that judges are likely to have stronger biases that plaintiffs in the former type of case have less valid claims than those in the latter. Another reason is that we might expect some kinds of cases

\textsuperscript{165}. \textit{Id.}

\textsuperscript{166}. In the first empirical study of \textit{Iqbal}, Hatamyar sampled 444 cases under \textit{Conley} (from May 2005 to May 2007) and 173 cases under \textit{Iqbal} (from May 2009 to August 2009). See Patricia W. Hatamyar, \textit{The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?}, 59 AM. U. L. REV. 553, 597 (2010). She found that the general rate of complaint dismissal rose from 46 percent to 56 percent. See \textit{Id.} at 602 tbl.2. However, this finding was not statistically significant under a Pearson chi-squared distribution test examining the different dismissal rates for \textit{Conley}, Twombly, and Iqbal for three results: grant, mixed, and deny.
to raise more significant concerns about asymmetric information than do others. In contracts disputes, both parties may have good information about most of the relevant facts even prior to discovery. In employment discrimination cases, plaintiffs may have good hunches about how they have been discriminated against, but prior to discovery they may not have access to the broad array of information in the employer’s possession that may be necessary to turn the hunch into something a judge finds plausible. Moreover, these two reasons potentially interact: the more gap filling and inferential thinking that a judge has to engage in, the more room there may be for explicit and implicit biases to structure the judge’s assessment in the absence of a well-developed evidentiary record.

Notwithstanding the lack of field studies on these issues, there is some evidentiary support for these differential changes in dismissal rates. For example, Patricia Hatamayr sorted a sample of cases before and after *Iqbal* into six major categories: contracts, torts, civil rights, labor, intellectual property, and all other statutory cases. She found that in contract cases, the rate of dismissal did not change much from *Conley* (32 percent) to *Iqbal* (32 percent). By contrast, for Title VII cases, the rate of dismissal increased from 42 percent to 53 percent. Victor Quintanilla has collected more granular data by counting not Title VII cases generally but federal employment discrimination cases filed specifically by Black plaintiffs both before and after *Iqbal*. He found an even larger jump. Under the *Conley* regime, courts granted only 20.5 percent of the motions to dismiss such cases. By contrast, under the *Iqbal* regime, courts granted 54.6 percent of them. These data lend themselves to multiple interpretations and suffer from various confounds. So at this point, we can make only modest claims. We merely suggest that the dismissal rate data are consistent with our hypothesis that *Iqbal’s* plausibility standard poses a risk of increasing the impact of implicit biases at the 12(b)(6) stage.

If, notwithstanding the plausibility-based pleading requirements, the case gets past the motion to dismiss, then discovery will take place, after which defendants will seek summary judgment under FRCP 56. On the one hand, this procedural posture is less subject to implicit biases than the motion to dismiss because more individuating information will have surfaced through discovery. On the
other hand, the judge still has to make a judgment call on whether any “genuine dispute as to any material fact” remains. Similar decisionmaking dynamics are likely to be in play as we saw in the pleading stage, for a significant quantum of discretion remains. Certainly the empirical evidence that demonstrates how poorly employment discrimination claims fare on summary judgment is not inconsistent with this view, though, to be sure, myriad other explanations of these differences are possible (including, for example, doctrinal obstacles to reaching a jury).173

3. Jury Verdict

If the case gets to trial, the parties will introduce evidence on the merits of the claim. Sometimes the evidence will be physical objects, such as documents, emails, photographs, voice recordings, evaluation forms, and the like. The rest of it will be witness or expert testimony, teased out and challenged by lawyers on both sides. Is there any reason to think that jurors might interpret the evidence in line with their biases? In the criminal trajectory, we already learned of juror bias via meta-analyses as well as correlations with implicit biases. Unfortunately, we lack comparable studies in the civil context. What we offer are two sets of related arguments and evidence that speak to the issue: motivation to shift standards and performer preference.

a. Motivation to Shift Standards

Above, we discussed the potential malleability of merit determinations when judgments permit discretion and reviewed how employer defendants might shift standards and reweight criteria when evaluating applicants and employees. Here, we want to recognize that a parallel phenomenon may affect juror decisionmaking. Suppose that a particular juror is White and that he identifies strongly with his Whiteness. Suppose further that the defendant is White and is being sued by a racial minority. The accusation of illegal and immoral behavior threatens the

172. FED. R. CIV. P. 56(a).
status of the juror’s racial ingroup. Anca Miron, Nyla Branscombe, and Monica Biernat have demonstrated that this threat to the ingroup can motivate people to shift standards in a direction that shields the ingroup from ethical responsibility.174

Miron and colleagues asked White undergraduates at the University of Kansas to state how strongly they identified with America.175 Then they were asked various questions about America’s relationship to slavery and its aftermath. These questions clumped into three categories (or constructs): judgments of harm done to Blacks,176 standards of injustice,177 and collective guilt.178 Having measured these various constructs, the researchers looked for relationships among them. Their hypothesis was that the greater the self-identification with America, the higher the standards would be before being willing to call America racist or otherwise morally blameworthy (that is, the participants would set higher confirmatory standards). They found that White students who strongly identified as American set higher standards for injustice (that is, they wanted more evidence before calling America unjust);179 they thought less harm was done by slavery;180 and, as a result, they felt less collective guilt compared to other White students who identified less with America.181 In other words, their attitudes toward America were correlated with the quantum of evidence they required to reach a judgment that America had been unjust.

In a subsequent study, Miron et al. tried to find evidence of causation, not merely correlation. They did so by experimentally manipulating national identification by asking participants to recount situations in which they felt similar to other Americans (evoking greater identification with fellow Americans) or different from other Americans (evoking less identification with fellow Americans).182

175. The participants were all American citizens. The question asked was, “I feel strong ties with other Americans.” Id. at 771.
176. A representative question was, “How much damage did Americans cause to Africans?” on a “very little” (1) to “very much” (7) Likert scale. Id. at 770.
177. “Please indicate what percentage of Americans would have had to be involved in causing harm to Africans for you to consider the past United States a racist nation” on a scale of 0–10 percent, 10–25 percent, up to 90–100 percent. Id. at 771.
178. “I feel guilty for my nation’s harmful past actions toward African Americans” on a “strongly disagree” (1) to “strongly agree” (9) Likert scale. Id.
179. See id. at 772 tbl.1 (r=0.26, p<0.05).
180. See id. (r=0.23, p<0.05).
181. See id. (r=0.21, p<0.05). Using structural equation modeling, the researchers found that standards of injustice fully mediated the relationship between group identification and judgments of harm; also, judgments of harm fully mediated the effect of standards on collective guilt. See id. at 772–73.
182. The manipulation was successful. See id. at 773 (p<0.05, d=0.54).
Those who were experimentally made to feel *less* identification with America subsequently reported very different standards of justice and collective guilt compared to others made to feel *more* identification with America. Specifically, participants in the low identification condition set lower standards for calling something unjust, they evaluated slavery’s harms as higher, and they felt more collective guilt. By contrast, participants in the high identification condition set higher standards for calling something unjust (that is, they required more evidence), they evaluated slavery’s harms as less severe, and they felt less guilt.183 In other words, by experimentally manipulating how much people identified with their ingroup (in this case, American), researchers could shift the justice standard that participants deployed to judge their own ingroup for harming the outgroup.

Evidentiary standards for jurors are specifically articulated (for example, “preponderance of the evidence”) but substantively vague. The question is how a juror operationalizes that standard—just how much evidence does she require for believing that this standard has been met? These studies show how our assessments of evidence—of how much is enough—are themselves potentially malleable. One potential source of malleability is, according to this research, a desire (most likely implicit) to protect one’s ingroup status. If a juror strongly identifies with the defendant employer as part of the same ingroup—racially or otherwise—the juror may shift standards of proof upwards in response to attack by an outgroup plaintiff. In other words, jurors who implicitly perceive an ingroup threat may require more evidence to be convinced of the defendant’s harmful behavior than they would in an otherwise identical case that did not relate to their own ingroup. Ingroup threat is simply an example of this phenomenon; the point is that implicit biases may influence jurors by affecting how they implement ambiguous decision criteria regarding both the quantum of proof and how they make inferences from ambiguous pieces of information.

b. Performer Preference

Jurors will often receive evidence and interpretive cues from performers at trial, by which we mean the cast of characters in the courtroom who jurors see, such as the judge, lawyers, parties, and witnesses. These various performers are playing roles of one sort or another. And, it turns out that people tend to have stereotypes about the ideal employee or worker that vary depending on the segment of the labor

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183. In standards for injustice, $M=2.60$ versus 3.39; on judgments of harm, $M=5.82$ versus 5.42; on collective guilt, $M=6.33$ versus 4.60. All differences were statistically significant at $p=0.05$ or less. See id.
market. For example, in high-level professional jobs and leadership roles, the supposedly ideal employee is often a White man.\textsuperscript{184} When the actual performer does not fit the ideal type, people may evaluate the performance more negatively.

One study by Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran, and Gary Blasi found just such performer preference with respect to lawyers, as a function of race.\textsuperscript{185} Kang and colleagues measured the explicit and implicit beliefs about the ideal lawyer held by jury-eligible participants from Los Angeles. The researchers were especially curious whether participants had implicit stereotypes linking the ideal litigator with particular racial groups (White versus Asian American). In addition to measuring their biases, the researchers had participants evaluate two depositions, which they heard via headphones and simultaneously read on screen. At the beginning of each deposition, participants were shown for five seconds a picture of the litigator conducting the deposition on a computer screen accompanied by his name. The race of the litigator was varied by name and photograph. Also, the deposition transcript identified who was speaking, which meant that participants repeatedly saw the attorneys’ last names.\textsuperscript{186}

The study discovered the existence of a moderately strong implicit stereotype associating litigators with Whiteness (IAT D=0.45);\textsuperscript{187} this stereotype correlated with more favorable evaluations of the White lawyer (ingroup favoritism since 91% of the participants were White) in terms of his competence (r=0.32, p<0.01), likeability (r=0.31, p<0.01), and hireability (r=0.26, p<0.05).\textsuperscript{188} These results were confirmed through hierarchical regressions. To appreciate the magnitude of the effect sizes, imagine a juror who has no explicit stereotype but a large implicit stereotype (IAT D=1) that the ideal litigator is White. On a 7-point scale, this juror would favor a White lawyer over an identical Asian American

\textsuperscript{184} See, e.g., Alice H. Eagly & Steven J. Karau, Role Congruity Theory of Prejudice Toward Female Leaders, 109 PSYCHOL. REV. 573 (2002); Alice H. Eagly, Steven J. Karau & Mona G. Makhijani, Gender and the Effectiveness of Leaders: A Meta-Analysis, 117 PSYCHOL. BULL. 125 (1995); see also JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 213–17 (2000) (discussing how conceptions of merit are designed around masculine norms); Shelley J. Correll et al., Getting a Job: Is There a Motherhood Penalty?, 112 AM. J. SOC. 1297 (2007).


\textsuperscript{186} See id. at 892–99 (describing method and procedure, and identifying attorney names as “William Cole” or “Sung Chang”).

\textsuperscript{187} See id. at 900. They also found strong negative implicit attitudes against Asian Americans (IAT D=0.62). See id.

\textsuperscript{188} Id. at 901 tbl.3.
lawyer 6.01 to 5.65 in terms of competence, 5.57 to 5.27 in terms of likability, and 5.65 to 4.92 in terms of hireability.189

This study provides some evidence that potential jurors’ implicit stereotypes cause racial discrimination in judging attorney performance of basic depositions. What does this have to do with how juries might decide employment discrimination cases? Of course, minority defendants do not necessarily hire minority attorneys. That said, it is possible that minorities do hire minority attorneys at somewhat higher rates than nonminorities. But even more important, we hypothesize that similar processes might take place with how jurors evaluate not only attorneys but also both parties and witnesses, as they perform their various roles at trial. To be sure, this study does not speak directly to credibility assessments, likely to be of special import at trial, but it does at least suggest that implicit stereotypes may affect judgment of performances in the courtroom.

We concede that our claims about implicit bias influencing jury decisionmaking in civil cases are somewhat speculative and not well quantified. Moreover, in the real world, certain institutional processes may make both explicit and implicit biases less likely to translate into behavior. For example, jurors must deliberate with other jurors, and sometimes the jury features significant demographic diversity, which seems to deepen certain types of deliberation.190 Jurors also feel accountable191 to the judge, who reminds them to adhere to the law and the merits. That said, for reasons already discussed, it seems implausible to think that current practices within the courtroom somehow magically burn away all jury biases, especially implicit biases of which jurors and judges are unaware. That is why we seek improvements based on the best understanding of how people actually behave.

Thus far, we have canvassed much of the available evidence describing how implicit bias may influence decisionmaking processes in both criminal and civil cases. On the one hand, the research findings are substantial and robust. On the other hand, they provide only imperfect knowledge, especially about what is actually happening in the real world. Notwithstanding this provisional and limited knowledge, we strongly believe that these studies, in aggregate, suggest that implicit bias in the trial process is a problem worth worrying about. What, then, can be done? Based on what we know, how might we intervene to improve the trial process and potentially vaccinate decisionmakers against, or at least reduce, the influence of implicit bias?

189. These figures were calculated using the regression equations in id. at 902 n.25, 904 n.27.
190. See infra text accompanying notes 241–245.
III. INTERVENTIONS

Before we turn explicitly to interventions, we reiterate that there are many causes of unfairness in the courtroom, and our focus on implicit bias is not meant to deny other causes. In Part II, we laid out the empirical case for why we believe that implicit biases influence both criminal and civil case trajectories. We now identify interventions that build on an overlapping scientific and political consensus. If there are cost-effective interventions that are likely to decrease the impact of implicit bias in the courtroom, we believe they should be adopted at least as forms of experimentation.

We are mindful of potential costs, including implementation and even overcorrection costs. But we are hopeful that these costs can be safely minimized. Moreover, the potential benefits of these improvements are both substantive and expressive. Substantively, the improvements may increase actual fairness by decreasing the impact of implicit biases; expressively, they may increase the appearance of fairness by signaling the judiciary’s thoughtful attempts to go beyond cosmetic compliance.192 Effort is not always sufficient, but it ought to count for something.

A. Decrease the Implicit Bias

If implicit bias causes unfairness, one intervention strategy is to decrease the implicit bias itself. It would be delightful if explicit refutation would suffice. But abstract, global self-commands to “Be fair!” do not much change implicit social cognitions. How then might we alter implicit attitudes or stereotypes about various social groups?193 One potentially effective strategy is to expose ourselves to countertypical associations. In rough terms, if we have a negative attitude toward some group, we need exposure to members of that group to whom we would have a positive attitude. If we have a particular stereotype about some group, we need exposure to members of that group that do not feature those particular attributes.

193. For analysis of the nature versus nurture debate regarding implicit biases, see Jerry Kang, Bits of Bias, in IMPLICIT RACIAL BIAS ACROSS THE LAW 132 (Justin D. Levinson & Robert J. Smith eds., 2012).
These exposures can come through direct contact with countertypical people. For example, Nilanjana Dasgupta and Shaki Asgari tracked the implicit gender stereotypes held by female subjects both before and after a year of attending college.\textsuperscript{194} One group of women attended a year of coed college; the other group attended a single-sex college. At the start of their college careers, the two groups had comparable amounts of implicit stereotypes against women. However, one year later, those who attended the women’s college on average expressed no gender bias, whereas the average bias of those who attended the coed school increased.\textsuperscript{195} By carefully examining differences in the two universities’ environments, the researchers learned that it was exposure to countertypical women in the role of professors and university administrators that altered the implicit gender stereotypes of female college students.\textsuperscript{196}

Nilanjana Dasgupta and Luis Rivera also found correlations between participants’ self-reported numbers of gay friends and their negative implicit attitudes toward gays.\textsuperscript{197} Such evidence gives further reason to encourage intergroup social contact by diversifying the bench, the courtroom (staff and law clerks), our residential neighborhoods, and friendship circles. That said, any serious diversification of the bench, the bar, and staff would take enormous resources, both economic and political. Moreover, these interventions might produce only modest results. For instance, Rachlinski et al. found that judges from an eastern district that featured approximately half White judges and half Black judges had “only slightly smaller” implicit biases than the judges of a western jurisdiction, which contained only two Black judges (out of forty-five total district court judges, thirty-six of them being White).\textsuperscript{198} In addition, debiasing exposures would have to compete against the other daily real-life exposures in the courtroom that rebias. For instance, Joshua Correll found that police officers who worked in areas with high minority demographics and violent crime showed more shooter bias.\textsuperscript{199}

If increasing direct contact with a diverse but countertypical population is not readily feasible, what about vicarious contact, which is mediated by images,\textsuperscript{194}

\begin{footnote}
\textsuperscript{195} See id. at 651.
\textsuperscript{196} See id. at 651–53.
\textsuperscript{198} See Rachlinski et al., supra note 86, at 1227.
\textsuperscript{199} See Correll et al., supra note 51, at 1014 (“We tentatively suggest that these environments may reinforce cultural stereotypes, linking Black people to the concept of violence.”).
\end{footnote}
Implicit Bias in the Courtroom

videos, simulations, or even imagination and which does not require direct face-to-face contact. Actually, the earliest studies on the malleability of implicit bias pursued just these strategies. For instance, Nilanjana Dasgupta and Anthony Greenwald showed that participants who were exposed vicariously to counternotypical exemplars in a history questionnaire (for example, Black figures to whom we tend to have positive attitudes, such as Martin Luther King Jr., and White figures to whom we tend to have negative attitudes, such as Charles Manson) showed a substantial decrease in negative implicit attitudes toward African Americans. These findings are consistent with work done by Irene Blair, who has demonstrated that brief mental visualization exercises can also change scores on the IAT.

In addition to exposing people to famous counternotypical exemplars, implicit biases may be decreased by juxtaposing ordinary people with counternotypical settings. For instance, Bernard Wittenbrink, Charles Judd, and Bernadette Park examined the effects of watching videos of African Americans situated either at a convivial outdoor barbecue or at a gang-related incident. Situating African Americans in a positive setting produced lower implicit bias scores.

There are, to be sure, questions about whether this evidence directly translates into possible improvements for the courtroom. But even granting numerous caveats, might it not be valuable to engage in some experimentation? In chambers and the courtroom buildings, photographs, posters, screen savers, pamphlets, and decorations ought to be used that bring to mind counternotypical exemplars or associations for participants in the trial process. Since judges and jurors are differently situated, we can expect both different effects and implementation strategies. For example, judges would be exposed to such vicarious displays regularly as a feature of their workplace environment. By contrast, jurors would be exposed only

201. Nilanjana Dasgupta & Anthony G. Greenwald, On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 807 (2001). The IAT effect changed nearly 50 percent as compared to the control (IAT effect $M_{vs} = 78\text{ms versus } 174\text{ms, } p<0.01$) and remained for over twenty-four hours.
204. Id. at 819.
205. How long does the intervention last? How immediate does it have to be? How much were the studies able to ensure focus on the positive counternotypical stimulus as opposed to in a courtroom where these positives would be amidst the myriad distractions of trial?
during their typically brief visit to the court. Especially for jurors, then, the goal is not anything as ambitious as fundamentally changing the underlying structure of their mental associations. Instead, the hope would be that by reminding them of countertypical associations, we might momentarily activate different mental patterns while in the courthouse and reduce the impact of implicit biases on their decisionmaking.

To repeat, we recognize the limitations of our recommendation. Recent research has found much smaller debiasing effects from vicarious exposure than originally estimated. Moreover, such exposures must compete against the flood of typical, schema-consistent exposures we are bombarded with from mass media. That said, we see little costs to these strategies even if they appear cosmetic. There is no evidence, for example, that these exposures will be so powerful that they will overcorrect and produce net bias against Whites.

B. Break the Link Between Bias and Behavior

Even if we cannot remove the bias, perhaps we can alter decisionmaking processes so that these biases are less likely to translate into behavior. In order to keep this Article’s scope manageable, we focus on the two key players in the courtroom: judges and jurors.

1. Judges

a. Doubt One’s Objectivity

Most judges view themselves as objective and especially talented at fair decisionmaking. For instance, Rachlinski et al. found in one survey that 97 percent of judges (thirty-five out of thirty-six) believed that they were in the top quartile in “avoid[ing] racial prejudice in decisionmaking” relative to other judges attending the same conference. That is, obviously, mathematically impossible.

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206. See Kang, supra note 46, at 1537 (raising the possibility of “debiasing booths” in lobbies for waiting jurors).
208. See Jennifer A. Joy-Gaba & Brian A. Nosek, The Surprisingly Limited Malleability of Implicit Racial Evaluations, 41 SOC. PSYCHOL. 137, 141 (2010) (finding an effect size that was approximately 70 percent smaller than the original Dasgupta and Greenwald findings, see supra note 201).
209. Other important players obviously include staff, lawyers, and police. For a discussion of the training literature on the police and shooter bias, see Adam Benforado, Quick on the Draw: Implicit Bias and the Second Amendment, 89 OR. L. REV. 1, 46–48 (2010).
210. See Rachlinski et al., supra note 86, at 1223.
Implicit Bias in the Courtroom

(One is reminded of Lake Wobegon, where all of the children are above average.) In another survey, 97.2 percent of those administrative agency judges surveyed put themselves in the top half in terms of avoiding bias, again impossible. Unfortunately, there is evidence that believing ourselves to be objective puts us at particular risk for behaving in ways that belie our self-conception.

Eric Uhlmann and Geoffrey Cohen have demonstrated that when a person believes himself to be objective, such belief licenses him to act on his biases. In one study, they had participants choose either the candidate profile labeled “Gary” or the candidate profile labeled “Lisa” for the job of factory manager. Both candidate profiles, comparable on all traits, unambiguously showed strong organization skills but weak interpersonal skills. Half the participants were primed to view themselves as objective. The other half were left alone as control.

Those in the control condition gave the male and female candidates statistically indistinguishable hiring evaluations. But those who were manipulated to think of themselves as objective evaluated the male candidate higher ($M=5.06$ versus $3.75$, $p=0.039$, $d=0.76$). Interestingly, this was not due to a malleability of merit effect, in which the participants reweighted the importance of either organizational skills or interpersonal skills in order to favor the man. Instead, the discrimination was caused by straight-out disparate evaluation, in which the Gary profile was rated as more interpersonally skilled than the Lisa profile by those primed to think themselves objective ($M=3.12$ versus $1.94$, $p=0.023$, $d=0.86$). In short, thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education, and the robe.

But is such a suggestion based on wishful thinking? Is there any evidence that education and reminders can actually help? There is some suggestive evidence from Emily Pronin, who has carefully studied the bias blindspot—the belief

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213. This was done simply by asking participants to rate their own objectivity. Over 88 percent of the participants rated themselves as above average on objectivity. See id. at 209. The participants were drawn from a lay sample (not just college students).

214. See id. at 210–11 ($M=3.24$ for male candidate versus 4.05 for female candidate, $p=0.21$).

215. See id. at 211.

216. See id. Interestingly, the gender of the participants mattered. Female participants did not show the objectivity priming effect. See id.
that others are biased but we ourselves are not.217 In one study, Emily Pronin and Matthew Kugler had a control group of Princeton students read an article from *Nature* about environmental pollution. By contrast, the treatment group read an article allegedly published in *Science* that described various nonconscious influences on attitudes and behaviors.218 After reading an article, the participants were asked about their own objectivity as compared to their university peers. Those in the control group revealed the predictable bias blindspot and thought that they suffered from less bias than their peers.219 By contrast, those in the treatment group did not believe that they were more objective than their peers; moreover, their more modest self-assessments differed from those of the more confident control group.220 These results suggest that learning about nonconscious thought processes can lead people to be more skeptical about their own objectivity.

b. Increase Motivation

Tightly connected to doubting one’s objectivity is the strategy of increasing one’s motivation to be fair.221 Social psychologists generally agree that motivation is an important determinant of checking biased behavior.222 Specific to implicit bias, Nilanjana Dasgupta and Luis Rivera found that participants who were consciously motivated to be egalitarian did not allow their antigay implicit attitudes to translate into biased behavior toward a gay person. By contrast, for those lacking such motivation, strong antigay implicit attitudes predicted more biased behavior.223

A powerful way to increase judicial motivation is for judges to gain actual scientific knowledge about implicit social cognitions. In other words, judges should be internally persuaded that a genuine problem exists. This education and


218. See Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 574 (2007). The intervention article was 1643 words long, excluding references. See id. at 575.

219. See id. at 575 (M=5.29 where 6 represented the same amount of bias as peers).

220. See id. For the treatment group, their self-evaluation of objectivity was M=5.88, not statistically significantly different from the score of 6, which, as noted previously, meant having the same amount of bias as peers. Also, the self-reported objectivity of the treatment group (M=5.88) differed from the control group (M=5.29) in a statistically significant way, p<0.01. See id.

221. For a review, see Margo J. Monteith et al., *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 211 (2009).


223. See Dasgupta & Rivera, *supra* note 197, at 275.
Implicit Bias in the Courtroom

awareness can be done through self-study as well as more official judicial education. Such education is already taking place, although mostly in an ad hoc fashion.\footnote{Several of the authors of this Article have spoken to judges on the topic of implicit bias.} The most organized intervention has come through the National Center for State Courts (NCSC). The NCSC organized a three-state pilot project in California, Minnesota, and North Dakota to teach judges and court staff about implicit bias.\footnote{See PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), available at http://www.ncsc.org/IBReport.} It used a combination of written materials, videos, resource websites, Implicit Association Tests, and online lectures from subject-matter experts to provide the knowledge. Questionnaires completed before and after each educational intervention provided an indication of program effectiveness.

Although increased knowledge of the underlying science is a basic objective of an implicit bias program, the goal is not to send judges back to college for a crash course in Implicit Psychology 101. Rather, it is to persuade judges, on the merits, to recognize implicit bias as a potential problem, which in turn should increase motivation to adopt sensible countermeasures. Did the NCSC projects increase recognition of the problem and encourage the right sorts of behavioral changes? The only evidence we have is limited: voluntary self-reports subject to obvious selection biases.

For example, in California, judicial training emphasized a documentary on the neuroscience of bias.\footnote{The program was broadcast on the Judicial Branch’s cable TV station and made available streaming on the Internet. See The Neuroscience and Psychology of Decisionmaking, ADMIN. OFF. COURTS EDUC. DIV. (Mar. 29, 2011), http://www2.courtinfo.ca.gov/cjer/aoctv/dialogue/neuro/index.htm.} Before and after watching the documentary, participants were asked to what extent they thought “a judge’s decisions and court staff’s interaction with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups.”\footnote{See CASEY ET AL., supra note 225, at 12 fig.2.} Before viewing the documentary, approximately 16 percent chose “rarely-never,” 55 percent chose “occasionally,” and 30 percent chose “most-all.” After viewing the documentary, 1 percent chose “rarely-never,” 20 percent chose “occasionally,” and 79 percent chose “most-all.”\footnote{See id.}

Relatedly, participants were asked whether they thought implicit bias could have an impact on behavior even if a person lacked explicit bias. Before viewing the documentary, approximately 9 percent chose “rarely-never,” 45 percent chose “occasionally,” and 45 percent chose “most-all.” After viewing the documentary, 1 percent chose “rarely-never,” 14 percent chose “occasionally,” and 84 percent
chose “most-all.” These statistics provide some evidence that the California documentary increased awareness of the problem of implicit bias. The qualitative data, in the form of write-in comments support this interpretation.

What about the adoption of behavioral countermeasures? Because no specific reforms were recommended at the time of training, there was no attempt to measure behavioral changes. All that we have are self-reports that speak to the issue. For instance, participants were asked to agree or disagree with the statement, “I will apply the course content to my work.” In California, 90 percent (N=60) reported that they agreed or strongly agreed. In North Dakota (N=32), 97 percent reported that they agreed or strongly agreed. Three months later, there was a follow-up survey given to the North Dakota participants, but only fourteen participants replied. In that survey, 77 percent of those who responded stated that they had made efforts to reduce the potential impact of implicit bias. In sum, the findings across all three pilot programs suggest that education programs can increase motivation and encourage judges to engage in some behavioral modifications. Given the limitations of the data (for example, pilot projects with small numbers of participants, self-reports, self-selection, and limited follow-up results), additional research is needed to confirm these promising but preliminary results.

From our collective experience, we also recommend the following tactics. First, training should commence early, starting with new-judge orientation when individuals are likely to be most receptive. Second, training should not immediately put judges on the defensive, for instance, by accusing them of concealing explicit bias. Instead, trainers can start the conversation with other types of decisionmaking errors and cognitive biases, such as anchoring, or less-threatening biases, such as the widespread preference for the youth over the elderly that IATs reveal. Third, judges should be encouraged to take the IAT or other measures of implicit bias.

229. Id. at 12 fig.3.
230. Comments included: “raising my awareness of prevalence of implicit bias,” “enlightened me on the penetration of implicit bias in everyday life, even though I consciously strive to be unbiased and assume most people try to do the same,” and “greater awareness—I really appreciated the impressive panel of participants; I really learned a lot, am very interested.” See CASEY ET AL., supra note 225, at 11.
231. See id. at 10.
232. See id. at 18. Minnesota answered a slightly different question: 81 percent gave the program’s applicability a medium high to high rating.
233. See id. at 20. The strategies that were identified included: “concerted effort to be aware of bias,” “I more carefully review my reasons for decisions, likes, dislikes, and ask myself if there may be bias underlying my determination,” “Simply trying to think things through more thoroughly,” “Reading and learning more about other cultures,” and “I have made mental notes to myself on the bench to be more aware of the implicit bias and I’ve re-examined my feelings to see if it is because of the party and his/her actions vs. any implicit bias on my part.”
bias. Numerous personal accounts have reported how the discomfiting act of taking the IAT alone motivates action. And researchers are currently studying the specific behavioral and social cognitive changes that take place through such self-discovery. That said, we do not recommend that such tests be mandatory because the feeling of resentment and coercion is likely to counter the benefits of increased self-knowledge. Moreover, judges should never be expected to disclose their personal results.

c. Improve Conditions of Decisionmaking

Implicit biases function automatically. One way to counter them is to engage in effortful, deliberative processing. But when decisionmakers are short on time or under cognitive load, they lack the resources necessary to engage in such deliberation. Accordingly, we encourage judges to take special care when they must respond quickly and to try to avoid making snap judgments whenever possible. We recognize that judges are under enormous pressures to clear ever-growing dockets. That said, it is precisely under such work conditions that judges need to be especially on guard against their biases.

There is also evidence that certain elevated emotional states, either positive or negative, can prompt more biased decisionmaking. For example, a state of happiness seems to increase stereotypic thinking, which can be countered when individuals are held accountable for their judgments. Of greater concern might be feelings of anger, disgust, or resentment toward certain social categories. If the emotion is consistent with the stereotypes or anticipated threats associated with that social category, then those negative emotions are likely to exacerbate implicit biases.

234. There are also ways to deploy more automatic countermeasures. In other words, one can teach one’s mind to respond not reflectively but reflexively, by automatically triggering goal-directed behavior through internalization of certain if-then responses. These countermeasures function implicitly and even under conditions of cognitive load. See generally Saaid A. Mendoza et al., Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512, 514–15, 520 (2010); Monteith et al., supra note 221, at 218–21 (discussing bottom-up correction versus top-down).


236. See Nilanjana Dasgupta et al., Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice, 9 EMOTION 585 (2009). The researchers found that implicit bias against gays and lesbians could be increased more by making participants feel disgust than by making participants feel anger. See id. at 588. Conversely, they found that implicit bias against Arabs could be increased more by making participants feel angry rather than disgusted. See id. at 589; see also David DeSteno et al., Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes, 15 PSYCHOL. SCI. 319 (2004).
In sum, judges should try to achieve the conditions of decisionmaking that allow them to be mindful and deliberative and thus avoid huge emotional swings.

d. Count

Finally, we encourage judges and judicial institutions to count. Increasing accountability has been shown to decrease the influence of bias and thus has frequently been offered as a mechanism for reducing bias. But, how can the behavior of trial court judges be held accountable if biased decisionmaking is itself difficult to detect? If judges do not seek out the information that could help them see their own potential biases, those biases become more difficult to correct. Just as trying to lose or gain weight without a scale is challenging, judges should engage in more quantified self-analysis and seek out and assess patterns of behavior that cannot be recognized in single decisions. Judges need to count.

The comparison we want to draw is with professional umpires and referees. Statistical analyses by behavioral economists have discovered various biases, including ingroup racial biases, in the decisionmaking of professional sports judges. Joseph Price and Justin Wolfers found racial ingroup biases in National Basketball Association (NBA) referees’ foul calling,237 Christopher Parsons and colleagues found ingroup racial bias in Major League Baseball (MLB) umpires’ strike calling.238 These discoveries were only possible because professional sports leagues count performance, including referee performance, in a remarkably granular and comprehensive manner.

Although NBA referees and MLB umpires make more instantaneous calls than judges, judges do regularly make quick judgments on motions, objections, and the like. In these contexts, judges often cannot slow down. So, it makes sense

237. Joseph Price & Justin Wolfers, Racial Discrimination Among NBA Referees, 125 Q. J. ECON. 1859, 1885 (2010) (“We find that players have up to 4% fewer fouls called against them and score up to 21% more points on nights in which their race matches that of the refereeing crew. Player statistics that one might think are unaffected by referee behavior [for example, free throw shooting] are uncorrelated with referee race. The bias in foul-calling is large enough so that the probability of a team winning is noticeably affected by the racial composition of the refereeing crew assigned to the game.”).

238. Christopher A. Parsons et al., Strike Three: Discrimination, Incentives, and Evaluation, 101 AM. ECON. REV. 1410, 1433 (2011) (“Pitches are slightly more likely to be called strikes when the umpire shares the race/ethnicity of the starting pitcher, an effect that is observable only when umpires’ behavior is not well monitored. The evidence also suggests that this bias has substantial effects on pitchers’ measured performance and games’ outcomes. The link between the small and large effects arises, at least in part, because pitchers alter their behavior in potentially discriminatory situations in ways that ordinarily would disadvantage themselves (such as throwing pitches directly over the plate).”).
to count their performances in domains such as bail, probable cause, and preliminary hearings.

We recognize that such counting may be difficult for individual judges who lack both the quantitative training and the resources to track their own performance statistics. That said, even amateur, basic counting, with data collection methods never intended to make it into a peer-reviewed journal, might reveal surprising outcomes. Of course, the most useful information will require an institutional commitment to counting across multiple judges and will make use of appropriately sophisticated methodologies. The basic objective is to create a negative feedback loop in which individual judges and the judiciary writ large are given the corrective information necessary to know how they are doing and to be motivated to make changes if they find evidence of biased performances. It may be difficult to correct biases even when we do know about them, but it is virtually impossible to correct them if they remain invisible.

2. Jurors

a. Jury Selection and Composition

_Individual screen._ One obvious way to break the link between bias and unfair decisions is to keep biased persons off the jury. Since everyone has implicit biases of one sort or another, the more precise goal would be to screen out those with excessively high biases that are relevant to the case at hand. This is, of course, precisely one of the purposes of voir dire, although the interrogation process was designed to ferret out concealed explicit bias, not implicit bias.

One might reasonably ask whether potential jurors should be individually screened for implicit bias via some instrument such as the IAT. But the leading scientists in implicit social cognition recommend against using the test as an individually diagnostic measure. One reason is that although the IAT has enough test-retest reliability to provide useful research information about human beings generally, its reliability is sometimes below what we would like for individual assessments. Moreover, real-word diagnosticity for individuals raises many more issues than just test-retest reliability. Finally, those with implicit biases need not

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239. The test-retest reliability between a person’s IAT scores at two different times has been found to be 0.50. For further discussion, see Kang & Lane, supra note 2, at 477–78. Readers should understand that “the IAT’s properties approximately resemble those of sphygmomanometer blood pressure (BP) measures that are used to assess hypertension.” See Anthony G. Greenwald & N. Sriram, No Measure Is Perfect, but Some Measures Can Be Quite Useful: Response to Two Comments on the Brief Implicit Association Test, 57 EXPERIMENTAL PSYCHOL. 238, 240 (2010).
be regarded as incapable of breaking the causal chain from implicit bias to judgment. Accordingly, we maintain this scientifically conservative approach and recommend against using the IAT for individual juror selection. 240

Jury diversity. Consider what a White juror wrote to Judge Janet Bond Arterton about jury deliberations during a civil rights complaint filed by Black plaintiffs:

During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about “those people” rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). Had just one African-American been sitting in that room, the content of discussion would have been quite different. And had the case been more balanced—one that hinged on fine distinction or subtle nuances—a more diverse jury might have made a material difference in the outcome.

I pass these thoughts onto you in the hope that the jury system can some day be improved. 241

This anecdote suggests that a second-best strategy to striking potential jurors with high implicit bias is to increase the demographic diversity of juries 242 to get a broader distribution of biases, some of which might cancel each other out. This is akin to a diversification strategy for an investment portfolio. Moreover, in a more diverse jury, people’s willingness to express explicit biases might be muted, and the very existence of diversity might even affect the operation of implicit biases as well.

In support of this approach, Sam Sommers has confirmed that racial diversity in the jury alters deliberations. In a mock jury experiment, he compared the deliberation content of all-White juries with that of racially diverse juries. 243 Racially diverse juries processed information in a way that most judges and lawyers would consider desirable: They had longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements, fewer

240. For legal commentary in agreement, see, for example, Anna Roberts, (Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias, 44 CONN. L. REV. 827, 856–57 (2012). Roberts suggests using the IAT during orientation as an educational tool for jurors instead. Id. at 863–66.
243. The juries labeled “diverse” featured four White and two Black jurors.
uncorrected statements, and greater discussion of race-related topics. In addition to these information-based benefits, Sommers found interesting predeliberation effects: Simply by knowing that they would be serving on diverse juries (as compared to all-White ones), White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty.

Given these benefits, we are skeptical about peremptory challenges, which private parties deploy to decrease racial diversity in precisely those cases in which diversity is likely to matter most. Accordingly, we agree with the recommendation by various commentators, including Judge Mark Bennett, to curtail substantially the use of peremptory challenges. In addition, we encourage consideration of restoring a 12-member jury size as "the most effective approach" to maintain juror representativeness.

b. Jury Education About Implicit Bias

In our discussion of judge bias, we recommended that judges become skeptical of their own objectivity and learn about implicit social cognition to become motivated to check against implicit bias. The same principle applies to jurors, who must be educated and instructed to do the same in the course of their jury service. This education should take place early and often. For example, Judge

245. See Sommers, supra note 242, at 87.
246. Other benefits include promoting public confidence in the judicial system. See id. at 82–88 (summarizing theoretical and empirical literature).
Bennett spends approximately twenty-five minutes discussing implicit bias during jury selection.\footnote{Judge Bennett starts with a clip from What Would You Do?, an ABC show that uses hidden cameras to capture bystanders’ reactions to a variety of staged situations. This episode—a brilliant demonstration of bias—opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock! Potential jurors immediately see how implicit biases can affect what they see and hear. What Would You Do? (ABC television broadcast May 7, 2010), available at http://www.youtube.com/watch?v=ge760GuNRg.}

At the conclusion of jury selection, Judge Bennett asks each potential juror to take a pledge, which covers various matters including a pledge against bias:

\begin{quote}
I pledge:
I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.\footnote{Mark W. Bennett, Jury Pledge Against Implicit Bias (2012) (unpublished manuscript) (on file with authors). In addition, Judge Bennett has a framed poster prominently displayed in the jury room that repeats the language in the pledge.}
\end{quote}

He also gives a specific jury instruction on implicit biases before opening statements:

\begin{quote}
Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common
sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.\footnote{Id.}

Juror research suggests that jurors respond differently to instructions depending on the persuasiveness of each instruction’s rationale. For example, jurors seem to comply more with an instruction to ignore inadmissible evidence when the reason for inadmissibility is potential unreliability, not procedural irregularity.\footnote{See, e.g., Saul M. Kassin & Samuel R. Sommers, Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046 (1997) (finding evidence that mock jurors responded differently to wiretap evidence that was ruled inadmissible either because it was illegally obtained or unreliable).} Accordingly, the implicit bias instructions to jurors should be couched in accurate, evidence-based, and scientific terms. As with the judges, the juror’s education and instruction should not put them on the defensive, which might make them less receptive. Notice how Judge Bennett’s instruction emphasizes the near universality of implicit biases, including in the judge himself, which decreases the likelihood of insult, resentment, or backlash from the jurors.

To date, no empirical investigation has tested a system like Judge Bennett’s—although we believe there are good reasons to hypothesize about its benefits. For instance, Regina Schuller, Veronica Kazoleas, and Kerry Kawakami demonstrated that a particular type of reflective voir dire, which required individuals to answer an open-ended question about the possibility of racial bias,
appeared successful at removing juror racial bias in assessments of guilt.\textsuperscript{254} That said, no experiment has yet been done on whether jury instructions specifically targeted at implicit bias are effective in real-world settings. Research on this specific question is in development.

We also recognize the possibility that such instructions could lead to juror complacency or moral credentialing, in which jurors believe themselves to be properly immunized or educated about bias and thus think themselves to be more objective than they really are. And, as we have learned, believing oneself to be objective is a prime threat to objectivity. Despite these limitations, we believe that implicit bias education and instruction of the jury is likely to do more good than harm, though we look forward to further research that can help us assess this hypothesis.

c. Encourage Category-Conscious Strategies

\textit{Foreground social categories.} Many jurors reasonably believe that in order to be fair, they should be as colorblind (or gender-blind, and so forth.) as possible. In other words, they should try to avoid seeing race, thinking about race, or talking about race whenever possible. But the juror research by Sam Sommers demonstrated that White jurors showed race bias in adjudicating the merits of a battery case (between White and Black people) unless they perceived the case to be somehow racially charged. In other words, until and unless White jurors felt there was a specific threat to racial fairness, they showed racial bias.\textsuperscript{255}

What this seems to suggest is that whenever a social category bias might be at issue, judges should recommend that jurors feel free to expressly raise and foreground any such biases in their discussions. Instead of thinking it appropriate to repress race, gender, or sexual orientation as irrelevant to understanding the case, judges should make jurors comfortable with the legitimacy of raising such issues. This may produce greater confrontation among the jurors within deliberation, and evidence suggests that it is precisely this greater degree of discussion, and even confrontation, that can potentially decrease the amount of biased decisionmaking.\textsuperscript{256}

This recommendation—to be conscious of race, gender, and other social categories—may seem to contradict some of the jury instructions that we noted

\begin{itemize}
\item \textsuperscript{254} Regina A. Schuller, Veronika Kazeles & Kerry Kawakami, \textit{The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom}, 33 LAW & HUM. BEHAV. 320 (2009).
\item \textsuperscript{255} See supra notes 70–71.
\end{itemize}
above approvingly. But a command that the race (and other social categories) of the defendant should not influence the juror’s verdict is entirely consistent with instructions to recognize explicitly that race can have just this impact—unless countermeasures are taken. In other words, in order to make jurors behave in a colorblind manner, we can explicitly foreground the possibility of racial bias.

Engage in perspective shifting. Another strategy is to recommend that jurors try shifting perspectives into the position of the outgroup party, either plaintiff or defendant. Andrew Todd, Galen Bohenhausen, Jennifer Richardson, and Adam Galinsky have recently demonstrated that actively contemplating others’ psychological experiences weakens the automatic expression of racial biases. In a series of experiments, the researchers used various interventions to make participants engage in more perspective shifting. For instance, in one experiment, before seeing a five-minute video of a Black man being treated worse than an identically situated White man, participants were asked to imagine “what they might be thinking, feeling, and experiencing if they were Glen [the Black man], looking at the world through his eyes and walking in his shoes as he goes through the various activities depicted in the documentary.” By contrast, the control group was told to remain objective and emotionally detached. In other variations, perspective taking was triggered by requiring participants to write an essay imagining a day in the life of a young Black male.

These perspective-taking interventions substantially decreased implicit bias in the form of negative attitudes, as measured by both a variant of the standard IAT (the personalized IAT) and the standard race attitude IAT. More important, these changes in implicit bias, as measured by reaction time instruments,

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257. See Bennett, supra note 252 (“[Y]ou must not consider the defendant’s race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.”).

258. Although said in a different context, Justice Blackmun’s insight seems appropriate here: “In order to get beyond racism we must first take account of race.” Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).


261. See id. at 1030.

262. Experiment one involved the five-minute video. Those in the perspective-shifting condition showed a bias of $M=0.43$, whereas those in the control showed a bias of $M=0.80$. Experiment two involved the essay, in which participants in the perspective-taking condition showed $M=0.01$ versus $M=0.49$. See id. at 1031. Experiment three used the standard IAT. See id. at 1033.
also correlated with behavioral changes. For example, the researchers found that those in the perspective-taking condition chose to sit closer to a Black interviewer,\(^{263}\) and physical closeness has long been understood as positive body language, which is reciprocated. Moreover, Black experimenters rated their interaction with White participants who were put in the perspective-taking condition more positively.\(^{264}\)

**CONCLUSION**

Most of us would like to be free of biases, attitudes, and stereotypes that lead us to judge individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so. And the best scientific evidence suggests that we—all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity—have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom. Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.

Confronted with a robust research basis suggesting the widespread effects of bias on decisionmaking, we are therefore forced to choose. Should we seek to be behaviorally realistic, recognize our all-too-human frailties, and design procedures and systems to decrease the impact of bias in the courtroom? Or should we ignore inconvenient facts, stick our heads in the sand, and hope they somehow go away? Even with imperfect information and tentative understandings, we choose the first option. We recognize that our suggestions are starting points, that they may not all work, and that, even as a whole, they may not be sufficient. But we do think they are worth a try. We hope that judges and other stakeholders in the justice system agree.

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\(^{263}\) See id. at 1035.

\(^{264}\) See id. at 1037.
Implicit bias: the brain’s automatic, instant association of stereotypes or attitudes toward particular groups, without our conscious awareness.

- The split-second decisions our brains make (e.g. reactions to or assumptions about someone) without our realizing it.

Racial anxiety: the brain’s stress response before or during inter-racial interactions.

- For people of color, racial anxiety happens when they fear they will experience bias from someone else, through discrimination, hostile treatment, or invalidation.
- For white people, racial anxiety happens when they fear their actions will be perceived as racist, or that they will be met with distrust or hostility.

Stereotype threat: the brain’s impaired cognitive functioning when a negative stereotype is activated.

- We are worried about confirming a negative stereotype about ourselves. This gets in the way of our ability to perform on a task.

INTERVENTIONS

Implicit Bias Interventions

“De-Biasing” – Efforts to Reduce Implicit Bias (i.e. “break the prejudice habit”)

Stereotype Behavior Replacement: Recognize when a response is based on a stereotype, label the response as stereotypical, reflect on why the response occurred, and consider how this biased response could be avoided in future. Replace the biased response with one that is consistent with egalitarian values.

Counter-stereotypic imaging: Imagine, in detail, counter-stereotypic others. These individuals can be real, fictional, or imagined. The strategy makes these images more readily available and useful for countering stereotypes.

Individuation: Gather specific information about individuals, in order to prevent making stereotypic inferences. This strategy helps people evaluate others based on personal, rather than group-based, attributes.
Perspective Taking: Imagine oneself to be a member of a stereotyped group. This increases empathy toward the group and reduces automatic group-based evaluations.

Increase Opportunities for Contact: Seek opportunities to encounter and engage in positive interactions with others. Contact decreases bias by altering mental representations of the group and improving evaluations of the group.

Break the Link Between Bias and Behavior

Doubt Objectivity: Presuming oneself to be objective actually increases the role of implicit bias. Acknowledge the presence of bias in order to counter its impact.

Increase Motivation to be Fair: Being internally motivated to be fair, rather than fear of external judgments, tends to decrease biased actions.

Improve Conditions of Decision-making: Think slow. Engage in mindful, deliberate processing to prevent implicit biases from kicking in and determining behaviors.

Count: Use data to detect biased behavior. Data can reveal racially disparate outcomes and help to identify patterns of behavior that may contribute to disparities.

Racial Anxiety Interventions

Scripts: Generate consistent language, especially for initial interactions. This helps ease anxiety and allows individuals to focus on making genuine connections.

Increase Intergroup Contact: Direct interaction between members of different racial groups can alleviate inter-group anxiety, reduce bias, and promote more positive inter-group attitudes and expectations for future contact.

Stereotype Threat Interventions

Social Belonging: Increase the sense of belonging for individuals in stereotyped groups. This makes social identity less salient as a marker of difference.

Growth Mindset: Abilities can be conceptualized as either fixed (“you have it or you don’t”) or able to be developed (“you can learn it”). When thought of as fixed, poor performance is equated with inadequacy, but with growth mindset, there is just more work to do.

Wise Feedback: If feedback is purely critical, it may be interpreted as the product of bias; if feedback is purely positive, it may be interpreted as racial condescension. Give feedback that communicates both high expectations and a confidence that the individual can meet those expectations – this reduces uncertainty about the motivation behind the feedback.
Women as Lawyers and Leaders

The rise of women in the legal profession

Women were first admitted to the American Bar Association in the United States in 1918. Female attorneys have traveled an exhilarating yet rocky road since—from token representation in the 1950s and ’60s, to working in the trenches, shoulder pads and all, in the 1980s and ’90s, and finally to achieving numerical parity in law school admissions, if not the profession itself, in the 2000s.

Together, these first generations of women in the law make up an incredibly accomplished group: they include three Supreme Court justices, two U.S. attorneys general, the first women state and federal judges in many regions, the first women deans of Ivy League law schools, and thousands of other successful women, including Samantha Power, Elizabeth Dole, Hillary Clinton, and Michelle Obama.

The history of women in the legal profession offers a unique vantage point from which to view the progress of women in society, both in the United States and worldwide. The legal profession is one of the most powerful, well remunerated, and respected in the world. Thus, women’s progress in the law is both a standard bearer and an emblem of progress in many cultures. The law not only plays a foundational role in a democracy, but is often a stepping stone to higher levels of leadership in business and public life. As such, opening the law to all citizens should be a goal in democratic societies. Yet if the law has not been particularly welcoming to white women, it has been even less so to women of color and those who otherwise depart from a traditionally male, Anglo-Saxon conception of lawyering.

In many ways, opening the bar to the broad range of human diversity is at odds with traditional conceptions of power in many societies, whether those axes of diversity fall along lines of race, ethnicity, class, sexual orientation, or physical disability. In that sense, the diverse women who have joined the profession in the past century stand at the vanguard of everything feminism once fought for and still stands for: assertive, persuasive women, in control of a room and advising deals—whether in a small town arena or at the highest levels of government and business.

As the introduction to the Harvard Law School (HLS) Career Study’s Preliminary Report notes:
Our findings are relevant to all those who care about the role of law in society. Legal professionals play critical roles across all segments of American society, most noticeably through the courts, but also in government, business, nongovernmental organizations, and other important institutions. Indeed, the Congressional Research Service's report profiling the 113th Congress (2013–2014) found that 169 members of the House of Representatives (38 percent of the House) and 57 senators (57 percent of the Senate) held law degrees. Many of these representatives—although certainly far from all—graduated from Harvard Law School and other prestigious law schools.

In this issue, we examine data from the HLS study and After the JD (AJD). Together, the two studies provide a wealth of data and insight into the rise of women in the legal profession and what it means to practice law today. We also talk with women in the legal profession across a range of generations and backgrounds: practicing attorneys, legal scholars, general counsel, judges, and business leaders, many of whom juggle children and their careers.

The Takeaway

It’s well known that American women have been at parity in law school classes for more than two decades. In one of the most powerful professions in the world, they have made significant inroads. But to gain equal representation at the highest levels, the culture of work must adjust to a societal structure in which dual-income families are now the overwhelming norm. Flexible policies that encompass the lifespan of a lawyer’s career and make room for periods of time at less than a breakneck pace will benefit men and women alike.

Harvard Law School Career Study and After the JD, Waves 1–3

The Harvard Law School Career Study (HLSCS) combines data from two unique sources: a comprehensive career survey of graduates, and admissions data and transcripts. The Center on the Legal Profession designed and administered the survey of four graduating classes: 1975, one of the first classes where women represented a significant percentage of students; 1985; 1995; and 2000, the last class that had been out of law school long enough to achieve important career milestones and the class best comparable to the nationwide sample in the After the JD study. Data was also collected from a random representative sample of female and male graduates from the 1950s and ‘60s.

By focusing on HLS graduates, the study examines women and men who enter the legal marketplace with largely similar elite qualifications. By studying women and men who are all graduates of a single prestigious law school, divergences in career paths are more easily associable to factors other than qualifications. In this issue, we present data from the study’s Preliminary Report.

After the JD, a study conducted under the auspices of the American Bar Foundation, is a longitudinal study that tracks the professional lives of more than 5,000 lawyers who entered the bar in or around the year 2000 through their first 10 to 12 years after law school. The first wave of the study was conducted in 2002–2003, the second wave in 2007–2008, and the third and final wave in 2011–2012.

The early vanguard

The United States saw its earliest female lawyers begin to appear at the close of the 19th century. Myra Bradwell was an early pioneer and suffragist: the wife of a prominent Chicago lawyer, she apprenticed in her husband’s office, then founded, edited, and managed a legal newspaper—the Chicago Legal News—that became a widely read nationwide legal publication.
Bradwell fought to change state laws giving women ownership of earnings and property in marriage in 1869, then petitioned both the Illinois State Supreme Court and the U.S. Supreme Court to be allowed to practice law. Her efforts did not succeed, but in 1890, four years before her death, the Illinois Supreme Court suddenly approved her application from nearly 20 years before. Two years later, the U.S. Supreme Court did the same. After Bradwell's death, her daughter, Bessie Bradwell Helmer, took over the helm of the Chicago Legal News and became one of the first women to be admitted to the Illinois bar after her mother.

Swept along by the first wave of feminism, which brought women's suffrage, hundreds of female lawyers sought employment during the 1920s—only to be turned down, then stopped short by the Great Depression. In the 1930s and '40s, Wall Street firms—Milbank Tweed, Sullivan & Cromwell, Cahill Gordon—began hiring their first women associates. (The same firms wouldn't make a woman an equity partner until the late '70s and early '80s.)

During World War II, a shortage of candidates saw some firms hiring women—only to demote them to secretaries and librarians when the war ended. By the time women began entering HLS in 1950, hundreds if not thousands of women had already graduated law school over the preceding 50 years—despite living in a time when many women were lucky to get jobs as secretaries, if they worked outside the home at all.

In the 1960s, women made up about 3 percent of the legal profession. Women like Geraldine Ferraro, Janet Reno (HLS '63), and Patricia Schroeder (HLS '64) were all turned down for jobs at major firms just out of law school. “In the 1960s, women had to be highly motivated in order to make it through those three difficult years,” Mary J. Mullarkey (HLS '68) a now-retired chief justice of the Colorado Supreme Court, wrote in 2004. “During my student days, I never met a female law student who was in school because her parents insisted that she go to law school or because she could not think of anything else to do after college.”

In this climate, Harvard's class of 1953 admitted 14 women (about 3 percent of the class). The HLS study presents a picture of the period, in which Harvard women did surprisingly well: 93 percent obtained full-time employment after graduating, compared to 98 percent of men. For women, 46 percent of those jobs were in law firms—another relatively high figure given the times (52 percent went into public sector jobs, such as government positions and nonprofits).

Despite the challenges, the first generations of women to graduate from HLS reported near-universal satisfaction with their decisions: 89 percent said they would still choose to go to law school, and 88 percent were happy with their career (even more than men, who reported 85 percent career satisfaction). Remarkably, 100 percent of all women respondents said they were satisfied with their decision to become a lawyer (vs. 93 percent of men).
Progress, but not enough

Elizabeth “Betsy” Munnell was a member of the HLS class of ’79, when, she recalls in an interview with The Practice, women made up 20 to 25 percent of her class. She went on to a career as a partner and rainmaker for Edwards Angell Palmer & Dodge in Boston. “I hated every minute,” she says. “None of us enjoyed themselves. It’s a rare person who found it particularly fun to be here, even when very seized by fascination for the law.”

However, she didn’t feel “beaten down” by the experience. “All of us faced enormous barriers to advancement that we didn’t expect to see,” she says. “But I think when you’re in the vanguard of something, and you’re actually a minority in some respects, you feel perhaps the confidence that you are in the vanguard—that you’re special because you made it to the vanguard.”

Munnell is disappointed by progress in the profession since. Though women are at near parity in graduation rates, they’re still not reaching the partner suites at anywhere near those levels. “Maybe we’re making a little progress, but not enough,” she says. “Imagine that in 35 years, all we’ve done is increase women graduates from 25 percent to 50 percent.”

“Women’s liberation powered our college years—feminism is a better term—and we all felt quite sure that not only would the population eventually be 50-50 in terms of new hires, but that, if not 50-50 among partners, we would certainly be in a very high concentration. Instead, there’s been literally almost no change whatsoever.”

In those early decades, women were admitted in token numbers at Harvard and most other law schools: enrollment for women hovered between 3 and 4 percent through the 1950s and ’60s—a grand total of 500 women a year nationwide. In 1968, as social activism swept like a brushfire through American youth, women’s first-year enrollment jumped to 7 percent nationwide. Each year thereafter saw increases: by the fall of 1972, that percentage had doubled to nearly 16 percent, and by 1977 it had doubled again, reaching 30 percent.

In Pinstripes and Pearls (Scribner 2003), Judith Richards Hope writes about the women in her HLS class of 1964:

In 1961, we didn’t really understand that we were storming the barricades, or that we were joining—and to some extent even starting—what turned out to be a revolution. Back then, law was a fraternity in every sense, a brotherhood bound by tradition, education, experience, and centuries of history. Except for the woman holding the scales of justice, “law” came complete with all of a fraternity’s paraphernalia, too: the exclusive men’s clubs where the deals were struck and the old boys’ network parceled out the opportunities; the all-male lounges in many courthouses and legislatures where cases were settled and legislation negotiated; and the men’s executive washrooms in law firms and corporations, not to mention in the robing room of the United States Supreme Court. We didn’t let it bother us too much. We couldn’t— it would have sunk us for sure.

As Harvard’s law school classes reached 20 to 25 percent enrollment for women in the late 1970s, it was an era *when it was possible, for the first time, for women to have the same expectations of professional and personal*

Nancy Gertner, a retired judge for the federal U.S. District of Massachusetts who now teaches at HLS, echoed the sentiment in an interview with *The Practice*. “My generation of women and the women before me—really the first women who became judges—for the most part had the experience of the most egregious kind of discrimination, and had a sense about what they wanted to reform.”

“Every time I gave a speech,” Gertner says, “I would get up and say I refused to be congratulated for being one of three women on the District of Massachusetts bench, because now—two decades after law schools began to graduate equal numbers of men and women—that’s a scandal.”

Visible representation

![Image](https://thepractice.law.harvard.edu/article/women-as-lawyers-and-as-leaders/)

Today, the U.S. Supreme Court has three women among its seven judges, the most the highest court has ever seen. In May, Loretta Lynch (HLS ’84) was named the first female African-American attorney general for the United States. The 2016 U.S. presidential primary contest will be the first to have two high-profile women candidates in the race: Hillary Clinton and Carly Fiorina, the former CEO of Hewlett-Packard. Such women are the new vanguard, as closely watched today as the first significant populations of women in law school.

There is other good news. Women have been at functional parity in entering law school classes since the fall of 2000, when they made up 49.4 percent of entering law school classes. However, those numbers dropped slightly, to 46 or 47 percent, after two years. On a slightly broader measure, women have made up more than 46 percent of entering classes since 1997—as Gertner notes, nearly 20 years ago. For the preceding decade, they made up more than 40 percent of entering classes, hitting the 40 percent mark in the fall of 1985.

As a result of this steady growth, women are seeing gains in the field as well. Women now make up 34 percent of practicing attorneys. The judiciary sees similar numbers: women hold a third of Supreme Court, circuit court, and state appellate judgships, and a fourth of federal court and all state court judgships, according to American Bar Association counts. They’re also one-fifth of law school deans, nearly half (46 percent) of associate deans, and two-thirds of assistant deans.

They’ve seen gains in corporate legal departments: one in five general counsel at *Fortune* 500 companies, and 17 percent of general counsel at *Fortune* 1000 companies, are women. Recent data from the Association of Corporate Counsel (ACC) suggest these numbers are growing rapidly. In the ACC’s 2015 survey of nearly 2,300 chief legal officers and general counsel, 34 percent of respondents were women. The ACC also recorded a jump in the number of women chief legal officers among Gen X-ers, 12 percentage points higher than the boomer generation, suggesting a strong leadership class following upon the achievements of their predecessors.

But the numbers go down from there. Women make up just 17 percent of law firm equity partners, according to a 2014 estimate from the National Association of Women Lawyers—including nonequity partners, they’re one in five partners overall. They’re just 4 percent of managing partners of the largest law firms. Women make up a third of all lawyers at law firms, according to 2013 National Association for Law Placement (NALP) figures; women of color make up just 6.5 percent of all lawyers, a number that’s remained stable since 2009.

Meanwhile, women of color experience the highest rates of attrition among associates: two-thirds leave before their fifth year at law firms, and 85 percent by their seventh year. Women of color are 2.5 percent of the NALP’s count of all partners (by which 7 percent of all law firm partners are minorities).

It’s worth noting that diversity varies considerably across geographic regions: Miami, San Francisco, and Los Angeles do best in the NALP count, with 9 percent of partners in Miami minority women (where a third of all partners are minorities), compared to just over 4 percent in Los Angeles (with 13 percent minority partner representation) and San Francisco (where women are 26 percent of partners). Some cities, such as Boston, Minneapolis, and Portland, Oregon, are at or above average on numbers of women but fall behind in minority representation, while inland cities tend to have the lowest numbers of both: minority women are 1.7 percent of associates in Salt Lake City, where white women are about 12 percent of partners, and minorities of either gender make up just 1.7 percent of partners in Nashville.
Meanwhile, earnings disparities abound. While public sector jobs see near parity in income (women earned 96 to 98 percent of men’s incomes in the third wave of the AJD study), income in every other employment setting is subject to a substantial gender gap. In the first wave of the AJD study, women just out of the gate—two or three years into practice—earned a median salary of $66,000, compared to $80,000 for men. The gap continues to widen over the course of a career: by the third wave of the study, 12 years into practice, men were earning 20 percent more than women overall. Meanwhile, men are two to five times as likely to make partner—even controlling for factors like grades, hours, and time out of the profession.

These disparities may be partly explained by the fact that the law—similar to politics, business, technology, and the hard sciences—is still highly homogenous. Other professions, such as medicine, accounting, and academia are much further along toward broad measures of diversity. It’s a bleak picture, as many have noted.

It matters how women fare in the profession. As the HLS study writes:

Simply put: if women who graduate from Harvard and other law schools encounter more challenges and have less opportunity than their male colleagues, then these women may very well be less able to assume the kind of important leadership positions that lawyers have traditionally played in our society. Indeed, given America’s commitment to, in the words inscribed above the door of the Supreme Court, Equal Justice Under Law, a legal world in which women lawyers have less opportunity to succeed than their male peers threatens the very legitimacy with which the public views the law, lawyers, and the legal profession.

New data, new challenges

The HLS and AJD studies provide particularly rich data sets for understanding more about the role and responsibilities of women working in the profession.

The studies challenge several longstanding hypotheses. For example, women in both studies now by and large do as well as or better than men academically. (In the Harvard study, women had slightly lower first-year grades, but caught up with men by the end of law school in cumulative GPAs, in part because they continued to be engaged in their courses at higher rates than men.) Women are also at parity among clerkships, securing 51 percent of all clerkships in 2012. Since judicial clerks are generally drawn from the ranks of the highest grade earners, this provides some evidence that they’re also at parity in terms of the top grade earners in each class.

In addition, there is data to indicate women work as many hours as men, if not more. In the Harvard study, those employed full-time in law firms reported working an average of 49 hours a week. But, contrary to the standard story, women in law firms worked, on average, more than men across all cohorts, with those in the class of 2000 working an additional eight hours—equivalent to a traditional full day—more than their male peers. Women also report working more hours than men in ACC surveys.

| Average hours worked per week within law firms (full-time) |
|-----------------|-----------------|-----------------|
|                 | Male            | Female          | Total           |
| 1975            | 48.6            | 54.0            | 48.8            |
| 1985            | 44.5            | 47.8            | 45.4            |
| 1995            | 52.8            | 52.9            | 52.8            |
| 2000            | 45.4            | 53.4            | 48.9            |
| Total           | 47.8            | 52.0            | 49.0            |

Source: HLSCS Preliminary Report.

Moreover, contrary to the prevailing narrative that discrimination is decreasing significantly over time, the percentage of HLS women who report discriminatory conduct has actually risen over the years, from a low of 30 percent for the class of 1975 to a high of more than 55 percent for the class of 2000. Moreover, while women consistently report experiencing discrimination more frequently than men, the latter percentage is also rising, from a low of 13 percent for the class of 1975 to a high of 21 percent for the class of 2000. While women work more hours than men, they are still subject to discrimination. In the Harvard study, women in the 1950s and ’60s cohort were unlikely to report discrimination—just 17 percent did—but most simply left the question unanswered. The study notes: “Perhaps like other stories of discrimination and humiliation suffered by those of this generation—whether these indignities were as a result of gender, race, religion, or some other personal
characteristic—these early pioneers simply may have chosen not to talk about the difficulties they faced, instead focusing on the opportunities they received.”

It’s unclear why reports have risen over time. It is possible that women in earlier classes were subjected to far more overt forms of sexism than later cohorts, but that the women in more recent cohorts have less tolerance for the discrimination that continues to exist. For men, the fact that the percentage claiming to have experienced gender-based discrimination remains both very small and relatively stable, while other reports of discrimination have risen over time, suggests that the growing diversity of the male population is causing the growth in the percentage of men reporting discrimination.

Despite this, women in all cohorts continue to report very high levels of satisfaction with their job and choice of career. In a 2014 study of work-life balance among chief legal officers and general counsel conducted by the ACC, 58 percent of both women and men also reported being happy with their overall balance. In the Harvard study, men’s satisfaction levels are primarily driven by the rewards of work—rewards sufficient to offset significant dissatisfaction with the substance of their work. Women, however, express much higher levels of satisfaction with the substance of their work, while expressing significant dissatisfaction with the rewards. Interestingly, neither men nor women expressed much satisfaction in their control over their working environments.

![Factors of satisfaction](image)

Private- and public-sector jobs; levels above zero indicate satisfaction, and below, dissatisfaction. Source: HLSCS Preliminary Report.

Why would women report such high levels of satisfaction, even while earning less and experiencing far greater levels of discrimination? Indeed, in the third wave of AJD, women in the largest firms reported higher levels of satisfaction than men. Called the “paradox of satisfaction,” it’s a mystery that has long puzzled researchers. Swethaa Ballakrishnen, a research fellow at the Center on the Legal Profession, suggests a “vanguard” effect: early women entrants to the profession may be happy enough with the myriad intellectual rewards and autonomy of their work that these benefits outweigh any disadvantages. Later generations are not so sanguine.

As the Harvard study states:

Stepping back from the particular details, this analysis underscores ... [that], while many factors will undoubtedly influence how a given lawyer perceives the mix of goods presented by any particular job, gender is likely to continue to play a significant role. ... Even women who graduate from Harvard Law School continue to face important challenges in the workplace. These challenges have undoubtedly shaped the way these graduates understand the benefits and burdens of particular legal careers. As more women move into the legal profession both in the United States and around the world, understanding these distinct challenges and opportunities will be increasingly important to the ability of every employment sector to attract and retain top talent.

**Earnings gap persists**

For all the canards the two studies challenge, some pernicious features of the legal profession are confirmed.
An earnings gap between men and women is particularly pronounced in the law—it is reflected in the Harvard study, AJD, and recent ACC studies. Ronit Dinovitzer is the principal investigator for AJD and a professor at the University of Toronto. “The takeaway story from AJD is that, even from the very beginning of lawyers’ careers, there is an earnings gap between men and women,” she comments. The primary driver of the earnings gap is private law firms, not the public sector, since public-sector pay scales are nearly equivalent.

Over the entire sample, women earned 83 percent of men’s raw earnings two to three years out of law school. In a paper written with Nancy Reichman and Joyce Sterling of the University of Denver, Dinovitzer examined the cause of this gap, restricting analysis to those working in private law firms. “Everyone generally says the reason women don’t earn as much as men is that women are burdened by childcare and they’re making different choices,” Dinovitzer says, such as choosing to leave employment. But the first wave of AJD looked at recent law graduates—the vast majority of whom were unmarried and childless.

“We controlled for all the things you would generally think cause an earnings gap,” Dinovitzer notes: credentials, law school, GPA, firm size, area of practice, hours worked, marriage status, children. “We put all of them into our models. Even when we controlled for all of those things, we end up finding that women continue to earn less than men”—5.2 percent less, in fact.

“Men are earning this not because they’re working more hours, not because they’re working in bigger firms, and not because they’re working in a more-lucrative practice setting,” she says. “What we ended up concluding is that the majority of this earnings gap, of this 5 percent, is what we call unexplained—which means that there is a devaluation of women in the labor market.”

Men simply earn more dollars for every credential they bring into the labor market, Dinovitzer explains. “For every increase in their GPA, for example, they earn more. For every hour they work, they earn more. Their credentials command more money compared to women on the labor market. That was our basic conclusion.”

The earnings gap widens over time. At the third wave of AJD, men were earning 20 percent more than women, on average. Men in the largest law firms in the third wave (109 total) were earning a $290,000 median income. For women under the same conditions (60 total), the median income was $191,000. Dinovitzer explains that analysis of the data is still ongoing, but the difference is probably due to partnership status: men were about twice as likely to be equity partners, and thus sharing in the overall profits of the firm, while women were more likely to be nonequity partners.

For decades, Dinovitzer notes, the presumption has been that once enough women entered the “pipeline” for advancement in the legal profession, they would surely advance, and earnings would even out. “People love the pipeline story,” she says. “We see it in the story about engineering, we see it in stories about MBAs: we just don’t have enough women. But the point is, we have enough women now. This is not the first class of women to be at the 50 percent mark. We’ve got to start looking at other issues.”

Parity among the elite?

Meanwhile, for those who advance in the profession, 61 percent of male and female HLS graduates working in law firms report their current position as being “equity partner/shareholder.” As the literature would predict, men—just over two-thirds—are more likely to report being equity partners than women—about half—though this difference is not statistically significant. Moreover, the overall percentage of female partners in the Harvard sample—48 percent—is far higher than in law firms generally (at 20 percent).

“Women earned 83 percent of men’s raw earnings two to three years out of law school, according to AJD data.”

“According to AJD data, men were about twice as likely to be equity partners, and thus sharing in the overall profits of the firm, while women were more likely to be nonequity partners.”
Recent trends in nonequity partnership are reflected among all HLS grads: there is a significant increase in the number of nonequity partners beginning with the 1995 cohort, where the overall percentage of nonequity partners jumps from just under 9 percent and 12 percent for the 1975 and 1985 cohorts, respectively, to over 23 percent for the 1995 cohort and almost 25 percent for the 2000 cohort. However—and contrary to reports elsewhere, as well as the national sample in the AJD data—there is no significant difference between the women and men who end up on the nonequity end. In other words, the difference between Harvard women and men who are nonequity partners is statistically insignificant.

That HLS graduates are much more likely to make partner than a national sample is probably unsurprising. But that women Harvard grads are so likely to make partner—nearly half of all women reporting—may be a hopeful sign.

If only it were that simple. Research on the legal profession makes clear that in today’s law firms, making partner is just the beginning of a new competition to become a “partner with power” in the organization. One measure of whether a given partner has achieved this status is whether he or she holds an important leadership position within the firm. In examining this question, the Harvard study found significant disparities between the management positions held by women and men. For instance, of respondents who ever held the title “managing partner,” 82 percent were men; 75 percent of those reporting that they had ever held the position of head of a practice group or area were men. Although the percentage of women holding these positions in the sample is larger than studies of women’s representation in these positions typically report, it remains low given the relatively higher percentage of HLS women who have become equity partners in the sample. The fact that women are less likely to hold these leadership positions has important consequences both for their own careers and for the governance, growth, and culture of the law firms in which they work.

Similarly, although nearly all of the lawyers working in law firms in the Harvard sample reported serving on committees, there was a significant difference in the type of committee by gender. As any observer of law firms knows, not all committees are created equal. Men traditionally have dominated what might be considered the “power” committees—committees dealing with recruiting, promotions, compensation, and management. On the other hand, women were more likely to have served on the diversity and quality of life committees.

Midcareer: The pipeline problem begins

Between about the seventh and eighth year of practice—by the second wave of the AJD study—associates begin to migrate out of law firms. Yet the reasons men and women give for this change tend to differ significantly. In addition, some women move to part-time work or drop out of the workforce entirely.

In the HLS study, there is a general migration of HLS graduates out of law firms across all cohorts. For example, 57 percent of the 1985 cohort went to law firms for their first job (55 percent of men; 59 percent of women). By the time they were surveyed 25 years later, the number working in law firms had dropped to 37 percent overall (44 percent of men; 26 percent of women). This trend is consistent with the third wave of the AJD study. Although both men and women in the Harvard study moved into the business sector, men were
significantly more likely to do so in positions where they did not practice law—and where they made a lot more money. Women were more likely to hold jobs in the business sector where they still practice law, primarily in-house counsel offices.

In the AJD study, women’s participation in the labor force had also dropped by the second wave, when 96 percent of men were working full-time, along with 76 percent of women—a number that did not change four years later, at the third wave. Thus, roughly one in four women had moved to part-time work or left the workforce entirely by the eight-year mark after passing the bar. (As a result of the study’s design, it’s not possible to say that proportion is made up of the same individuals, but only that the proportion of women out of the workforce remained steady.)

Perhaps unsurprisingly, children were the primary reason: 15 percent of respondents said they were working part-time in order to care for children, and 9 percent had left the workforce for the same reason. Men in the AJD study were almost universally unlikely to reduce hours after having a child, however: 96 percent in the third wave worked full-time.

Why do women have higher rates of attrition at law firms? And why do they feel they need to leave the workforce when they have children? Such decisions always occur as a result of a unique constellation of influences and pressures for each individual; below, we explore some of the factors that likely play into their decisions. Many affect both women who choose to have children, and those who don’t.

**Structural elements of disparity**

A number of factors affect women’s progression in the law, including:

**Leadership opportunities**

“There is a good, strong pipeline, but there are a number of challenges women still face in the workplace in terms of being able to claim an equal seat,” Veta Richardson, CEO of the Association of Corporate Counsel, says in an interview. She points to evidence that women are less likely to be given assignments that will allow them to move up or interact with executive management. “I think that a number of the old stereotypes still need to be broken in terms of the way the workplace looks at women in development and opportunities.”

“Although both men and women in the Harvard study moved into the business sector, men were significantly more likely to do so in positions where they did not practice law—and where they made a lot more money.”
Unconscious bias

Unconscious bias refers to the tendency—which most people are completely unaware of—to make assumptions regarding specific groups of people, particularly in- and out-groups, relative to their own social position (for more on this concept, see the Speaker's Corner). Researchers suggest one cause of women's failure to advance to leadership in greater numbers is an unconscious assumption about who should lead. “Who we naturally think of in our brains when we think of a leader—it’s still predominantly a male image,” says Ursula Wynhoven, general counsel and chief of governance and social sustainability for the United Nations Global Compact.

Wynhoven mentions Harvard’s Implicit Associations Test, which measures split-second associations between words and concepts, such as male, female, nurturer, or leader. (Try it out here.) “Even those of us who work on women’s empowerment issues take that test and find that we have a bias in favor of men as leaders, despite our best intentions.” When women have been at parity in law school classes for nearly 20 years, yet the needle hasn’t budged in women’s leadership during the same period, she says, “That’s when I think it’s appropriate to raise the issue of unconscious bias surrounding women involved in these decision-making processes.”

Machismo culture

Joan Williams, director of the Center for WorkLife Law and director of the Project for Attorney Retention, has described how law firms’ culture of overwork valorizes long hours and cuts short the possibility of family time, since caring for families is seen to be at odds with traditional definitions of “breadwinner” masculinity. When in effect, such a culture expects longer hours of men who are parents, but fewer for women parents. Some studies have documented that men in fact tend to work longer hours after having a child. Women who are parents in such a culture are held to the same norms, since family life is so undervalued within it. Those expectations of long hours automatically put women at a disadvantage. The “second shift” of child care, says Wynhoven, “makes it harder to put in, even if you wanted to, the same amount of extensive hours that maybe the ideal worker could put in.”

Lack of role models

While earlier generations may have been prepared for a male-dominated workplace, those entering the profession in the 1990s and 2000s—who were raised among far less gendered cultural norms—are almost certainly less so. A lack of role models and resulting isolation in the workplace may play a significant role in whether women see themselves as candidates for leadership or drop out altogether. “When the wall of photos here at the U.N. in a meeting room of the directors of a particular entity are all men—these things have an impact that we’re not even necessarily aware of,” says Wynhoven.

The care dimension

The structural limits of combining parenting and the workplace fall heavily upon women, Wynhoven says. “Women still have the vast majority of care responsibilities for children and other family members.”

In April, the United Nations released “Progress of the World’s Women 2015–2016,” a report about the status of women around the world. “One of the things the report highlighted is the care dimension,” she says. “Until we get that sorted, women will often have the second shift.”

Senior women at the United Nations—also represented in low numbers—tend not to have children, she says. “We have the same percentage issues here at the UN, I regret to say. We should really be able to walk the talk. So it makes it hard. I think when you’re looking at those role models, you just don’t see how you can have it all.” (For more on parenting and the law, see below.)

High personal expectations

High-achieving women often have high expectations of themselves, when a self-forgiving attitude might be more productive given the amount they’re juggling. More is expected of parenting, too, Wynhoven notes. “Parental expectations these days—they’re just so much more extensive than when we were kids in terms of the intellectually stimulating environment you should be creating for your child, their different activities, and the things you’re doing with them at home. These have tended to
Heading in-house

The structural features of many law firms—long hours, little flexibility, and a machismo culture in which women may be subjected to invidious outright or unconscious bias—may be related to the broad exodus from law firms documented in both the AJD and Harvard studies.

Major career shifts occurred across gender at about the seven- or eight-year mark, AJD found. At the first wave, several years after the bar, women and men were working in private law firms in relatively equal numbers: 65 percent of women and 71 percent of men. Yet, by the second wave, eight years after passing the bar, 50 percent of women were working in private firms (a 15-point drop). Men also left in droves, going from 71 percent to 58 percent in private firms (a 13-point difference). In the third wave, employment remained relatively stable across the sample. “Everyone is leaving private law firms over time,” says Dinovitzer.

“How do we characterize this?” Dinovitzer asks. “Sometimes I feel like saying this is about men’s careers beginning to look like women’s, to take on patterns we typically thought were for women. It’s not just women leaving private law firms.”

She points out that the number of men and women attorneys moving into business (everything from general counsel to opening a yoga studio) is also virtually equal: 18.5 percent of women and 19 percent of men worked in business. In addition, while historically women have been more likely to work in the public sector—for government entities, public defenders offices, and so on—AJD found, again, a less dramatic difference between men and women after 12 years of practice: 24 percent of men worked in the public sector, compared to 33 percent of women.

The overall picture, Dinovitzer says—at least in terms of employment setting—is one of greater similarity than difference. “On the one hand, yes, women do have a different profile than men. Their dominant profile is perhaps more similar to that of men. It’s not that the majority of women are in the public sector. If you were to look at just the shape, the general distribution is more similar to men than different.”

A move to in-house corporate counsel may be particularly attractive for women with children. Nicole Bigby is a partner and general counsel at Berwin Leighton Paisner, a U.K. “silver circle” firm, and a mother of two. The rise of women in-house has side benefits, she points out. “In some ways, perhaps a bit of a collateral benefit of a leaky pipe coming out of the private sector has meant that women have moved into in-house counsel positions. Traditionally, it was seen to be more family-friendly and the hours were more flexible. … But you’re now seeing, as women also move up the ranks, they become really quite visible and totally powerful female general counsel role models, who are also in the position through supply chain management with their law firms to say, ‘Well, actually, I want to see a diverse team. I want to see a team that replicates or mirrors the sort of diversity that I need to manage. Not only my legal team, but the business units my in-house lawyers manage.’”

Indeed, some in-house counsel are doing just that. Joe West served as associate general counsel at Walmart in the 2000s. During his tenure there, he instituted requirements that all of Walmart’s outside firms establish flexible work arrangements for their attorneys, West told The Practice. “The feedback that I received was tremendous from female lawyers, but especially from women partners,” he says. “A number of them felt like it would make it possible for them to continue on the track they were at, and make

“Everyone is leaving private law firms over time,” says Dinovitzer, a principal investigator in the AJD study.

“As women also move up the ranks,” says Bigby, a partner a Berwin Leighton Paisner, “They become really quite visible and totally powerful female general counsel role models.”
it less likely that other female lawyers who were associates and who were contemplating starting a family would drop out.”

West now heads the Minority Corporate Counsel Association (MCCA), which conducts a yearly survey of women and minority in-house attorneys. In MCCA’s most recent survey, even though minorities were hired and even promoted at a higher rate, they continued to leave firms in disproportionate numbers, he says. “The issue really isn’t an issue of attrition,” he says. “That’s part of the reason why there is such a gap at the leadership ranks in law firms between men and women. They still leave in larger numbers and in disproportionate numbers than men.”

While West agrees flexibility is a driver of attrition among women in law firms, it’s not the only one. “Another one, frankly, has to do with the culture of the law firm environment as compared, say, to in-house environments.” MCCA tracks minority representation at the general counsel level in Fortune 500 and Fortune 1000 companies, where growth for women of color has been “much more robust,” he says, than in law firms. “I think part of the reason is that in corporate law departments, there is a greater premium placed on collaboration. Collaborative work environments tend to favor women more than the über-competitive, sharp-elbow environments that you find in large law firms. In large firms, there is a premium placed on hoarding of contacts and hoarding of resources. If you are the person who hoards resources or hoards contacts, who doesn’t play well with others in corporate law departments, you are shunned and ostracized, and eventually you’re eliminated from the group. I don’t think it’s an accident that there is greater retention and greater advancement opportunities for women in-house than in law firm settings. The cultural differences between those two are really, really stark.”

Another factor West points to: professional development is much more institutionalized in corporate settings. “In in-house environments, you are almost required—particularly if it’s a large department—to develop the talent that reports to you. You don’t see that as much in law firms. Particularly after the economy took a downturn and you had more partners choosing to work longer and, again, guard more jealously and zealously their contacts and resources. People didn’t make the effort to develop talent coming up through the ranks generally, much less someone who looked differently than they did. But you do have that in-house. That’s the other difference you see, and that has worked to the detriment of the careers of a lot of women; again, even more so women of color.”

Legal partnership patterns

In 1829, Supreme Court Justice and former HLS professor Joseph Story described the law as “a jealous mistress that requires long and constant courtship.” Nearly two centuries later, many believe both the explicit and implicit messages embedded in Story’s infamous quip continue to hold true. To achieve success, today’s lawyers must put in longer and more constant hours than ever before. And the women and men who do so still work in careers that were designed not only for a man, but for a man who has a wife who does not work. Indeed, more than a few female lawyers have been heard to exclaim in exasperation as they try to manage the competing demands of their careers and personal lives that “What I really need is a wife!”

More than a few female lawyers have been heard to exclaim in exasperation as they try to manage the competing demands of their careers and personal lives that “What I really need is a wife!” In this section, The Practice examines how attorneys have attempted to integrate work and family commitments. The word “balance” is expressly not used as, like any other tension among large and complex commitments, it is unlikely that these domains will ever be in equipoise.

Across all the cohorts, women were less likely to be married than men. Apart from the 1975 cohort, women were less likely to have ever been married than men. Virtually all (94 percent) of the male law firm partners in the sample were married, compared to only two-thirds of female partners. A large disparity exists with respect to partners who have never been married, with 18 percent of female respondents falling into this category as compared to 2 percent of male respondents. Notably, however, there is no difference between the percentage of married women who have become partners in law firms (66 percent) and those who have not (65 percent)—and women who did marry and then become partner had spouses who worked less than they did.
Across all cohorts, women reported having a spouse or partner who earned a higher income than the spouse-partners of male respondents. This trend continues with respect to respondents who are partners in law firms, with the spouse/partner of female law firm partners earning more than twice as much as the spouse/partner of male law firm partners. This data provides some modest corroboration to support the thesis that male lawyers are more likely to have a spouse/partner who is in a less demanding job than the spouse/partner of a woman partner. Unlike hours worked, the study found no difference in the incomes of the spouses/partners of female respondents who are law firm partners compared to those who are not law firm partners.

For women, children first? Combining parenting and a legal career

Are the problems structural or personal? If the choices at first glance seem personal, they may be still structural—if the possibility to remain in the workforce seemed more realistic or attainable, more women might choose to do so. Indeed, many women currently out of the workforce indicate they intend to return.

Researchers have proposed a number of answers to these questions, says Ballakrishnen. “There’s a range of theories,” she says. “But the most obvious one is that [a legal career] intersects with women’s life courses very differently than it does for men.”
Women’s continuing disproportional responsibility for the requirements of the family “requires them to make very specific work versus life choices that men similarly placed don’t have to make,” Ballakrishnen notes. “So if a woman is choosing to stay on a partner track and choosing to put in 20 hours a day, five, six, seven, six days a week, she’s making a very conscious different choice about whether she’ll have children, when she can have those children, when she’ll get married, what that partner will mean to her, et cetera, in a way that a man who’s making those choices with work does not quite have.”

To begin, women were also less likely to have children—35 percent in the third wave of AJD, versus 28 percent of men (at about 40 years of age across the sample). When men did have children, they were more likely to have two or more children. That women in the law aren’t having children isn’t a tragedy unless those women actually wanted children, but felt their career didn’t allow the option. Researchers have documented a broad trend toward lower birth rates among educated women. Still, the disparities are stark.

For example, in the Harvard sample, across all cohorts and job sectors, men are likely to have slightly more children (2.3) than women (2.1). However, when looking at lawyers with no children, the difference between women and men is far more dramatic. Across all employment sectors, women are far more likely than men to have no children—31 percent and 19 percent, respectively. Although a gap exists for lawyers working in law firms (7 percent), it is significantly higher for lawyers working in the public sector and in business (practicing law)—15 percent and 13 percent, respectively.

Although that might make law firms appear to be relatively family-friendly compared to other employment sectors, the correlation between partnership and children tells a different story. For example, the percentage of female partners who have no children (24 percent) is twice as large as that of male partners with no children (12 percent). Moreover, while most partners—almost three-fourths—have two or more children, men are more likely than women to be in this category (77.5 percent and 64.1 percent, respectively).

There are documented penalties to having a child, particularly for women in the workforce. Studies show women who are pregnant or have children are frequently judged to be less competent than their male or childless female peers (“I had a baby, not a lobotomy!” one lawyer protested). They also take a financial hit: one study found women who took a year off lost 20 percent of their lifetime earnings. Women who took two or three years off sacrificed 30 percent. The media has often characterized these patterns as women “opting out”—simply choosing to stay home. But women’s high rates of satisfaction in the profession and with obtaining a legal degree, that seems far from a thorough accounting of the complex choices women who want children may feel compelled to make.

Dinovitzer notes, “I don’t think it’s as simple as women are opting out. I think it’s far more complicated than that, because people respond to their context, and people respond to the rewards that they’re given in the labor market as well. “Yes, there are women who make a choice not to work, but the question is, why are they making that choice? Some of them are turning down good positions, and some of them are saying, ‘Hey, if I’m not going to be valued in the workforce, if I’m not getting challenging work and challenging assignments, then I’ll look for something else.’”
Many women may feel pressured to make a stark choice: child or career. Indeed, in the ACC study of work-life balance, 70 percent of women respondents who were caregivers reported they thought having a child was detrimental to a career.

Ballakrishnen notes the roots of these decisions often go much deeper. “We’ve been socialized to say, ‘Hey, you should work really hard. You should go to law school. You should get the best education you can. But then also remember you are the primary caregiver for your family.’”

This puts firms that do make an effort to provide flexible arrangements in a difficult position when their efforts to retain women fail. “The firms put their hands up and think, ‘We’ve done everything we can, and women are the ones who are actually choosing to leave.’ What we don’t realize in that puzzle is that women are choosing to leave because you socialize young girls in ways that you don’t socialize boys, because gender binaries are the biggest difference in American society—and every society, really. We classify based on gender constantly, and we sort of have different assumptions of who should do child care and who should be balancing and juggling these odds, and they’re scripted in ways much more quickly for women than they are for men.”

Given these disparities, it is not surprising that significant differences in workforce participation between HLS female and male graduates continue to exist. For both women and men, as the number of children increases, participation in the full-time workforce declines. The rate of decline, however, is significantly different for the two groups. Men with one child are only slightly less likely than men with no children not to work full-time (83 percent and 88 percent, respectively). Although the percentage of full-time workers declines more significantly for men who have two or more children, their overall participation in the full-time workforce remains at about 75 percent; of the remaining quarter, around 10 percent are working part-time with the rest out of the paid workforce.

Women, however, follow a very different path. With no children, female HLS graduates in the sample were as likely as their male counterparts with two or more children (73.7 percent and 73.6 percent, respectively) to be in the full-time workforce. This percentage declines by 6.7 percentage points, to 67 percent, when having one child, and by another 18.7 percentage points, to 48.3 percent, when female respondents have two or more children.
Although there are undoubtedly many reasons women leave the full-time paid workforce after having children, the fact that more than half of women in the Harvard sample with two or more children have done so, with nearly a quarter out of the workforce altogether, is nevertheless a cause for concern. Whether purely as a matter of voluntary choice—or, as is often the case, a choice made in the shadow of what women reasonably believe is possible given the expectations of employers and society—the fact that so many talented female lawyers are not working full time, particularly at a time when the demand for talented and highly credentialed lawyers to tackle the complex problems facing the world today is so high, represents both a lost opportunity and a potentially looming crisis.

The maternal brick wall

Meanwhile, the lack of flexibility in law firms is simply too great a hurdle for many women—what the Center for WorkLife Law’s Williams and others have called hitting the “maternal wall.” When flexible options exist, they may be ad hoc, created for individuals rather than instituted as firm-wide policy, and thus not reliably supported or enforced. In a 2011 study, Stanford Law School’s Deborah L. Rhode found that more than 90 percent of firms report having part-time policies, yet only 4 percent of lawyers actually use them.

Interestingly, and contrary to some reports, women in the HLS study who worked part time were unlikely to report having left the practice of law, suggesting that they had negotiated just such an ad hoc arrangement. Of those who reported working part-time, nearly 70 percent said they were practicing law—nearly the same number as among both women and men working full-time. Women in this study may be the beneficiaries of a growing number of flexible positions among firms.

Even after moving in-house, women are often still concerned about time demands. The ACC’s work-life survey found 43 percent had considered moving to another company for balance reasons, compared to 25 percent of men. Women in the study reported working 47 hours on average, compared to men’s 50 hours. On the bright side, notes Veta Richardson, CEO of the ACC, in an interview. “Women are certainly very adept at juggling multiple responsibilities. Women are contributing significantly more than a 40-hour week. And in addition to that, they’re taking on even more responsibilities at home. So women are the ultimate jugglers. Perhaps they can do their work in 47 hours, whereas it takes the men 50.”

Williams’ maternal wall documents how many women hit a career full stop when they have children. But as Facebook’s Sheryl Sandberg argues, women may step back well before they even have children, in what she calls “leaving before you leave.” Gertner, the retired judge from Massachusetts, takes up this line of argument in “Feminism, Stalled: Thoughts on the Leaky Pipeline.” Women leave, she writes, “because the workplace had not changed materially over the past three decades, even with the new numbers of women, and neither had the family. So it was more than the idyllic pull of motherhood on the one hand; it was the push of real obstacles in the workplace on the other.”

This language of push and pull reflects a basic structural problem: that women “choose” to leave may not be so much a choice as a response to structural conditions. Gertner continues:

Women plan for their professional exit years in advance. They do not pursue the most difficult specialties or challenging jobs because someday they will want to have a better work/life balance. Perhaps, they do not even try for that equity partnership, knowing that it will wreak havoc with her childrearing responsibilities. The moment a woman starts thinking about having a child, she does not raise her hand anymore at work—no promotions, no new projects, no taking a seat at the table. If women lawyers do “lean back,” and leave the firms long before they qualify for partnership consideration, the pool of qualified women will surely diminish, making it harder
and harder to prove discrimination, and letting the firms more and more off the hook in their promotion decisions.

Women’s failure to achieve the success their numbers would have predicted is not because of inadequate mentoring or insufficient networking. We have to critique the structural impediments to women’s progress—the very organization of the legal workplace, the policies that enforce the “maternal wall,” the inadequacies and costs of daycare, and the government and private employment policies that reinforce traditional stereotypes about mothers and workers.

The ideal worker: High expectations for everyone

The sociologist Joan Acker has proposed the concept of the “ideal worker”—one who has no obligations or priorities outside work and is perpetually on the clock. That worker, she notes, is historically male.

There’s a “constant tension between having an ideal worker” in the law, Ballakrishnen notes, in which firms say, “Hey, we’re spending all this money on inclusion and diversity, and we’re going to have more women, and we’re going to have more people of color.’ It actually really doesn’t work because, once they’re in, you’re still expecting them to talk the talk and walk the walk of your ideal worker, who’s most often not a person of color and a man.”

But men, too, increasingly chafe at these expectations. Time with family and loved ones is important to virtually everyone, and men leave large law firms at similar rates to women, as Dinovitzer points out.

In 2013, a departing Supreme Court clerk for Justice Ginsburg took to the pages of The Atlantic to describe his next move: staying at home with his 1-year-old daughter while his wife embarked on a nonstop medical residency. “Men appear to be just as dissatisfied with the stickiness of gender-based norms as women,” Ryan Park (HLS ’10) wrote. “Nearly half of fathers report dissatisfaction with the amount of time that they are able to spend with their children—twice the rate of mothers who say the same. The gender-equality debate too often ignores this half of the equation. When home is mentioned at all, the emphasis is usually on equalizing burdens—not equalizing the opportunity for men, as well as women, to be there.”

In a 2012 Pew survey, similar numbers of fathers (50 percent) and mothers (56 percent) said they struggled to balance the demands of work with raising a family. And both fathers (48 percent) and mothers (52 percent) said they would stay at home with their children if financial necessity didn’t require them to work a job. There’s evidence a father’s time with children is good for the health of both the child and the man—including one study showing a reduced risk of death in men who took paternity leave.

A year after leaving his Supreme Court clerkship, the author returned to the job market. In interviews with law firms, he noted his commitment to accommodating his wife’s schedule and caring for their daughter. “This may well have cost me an offer or two,” he wrote:

Most of the senior partners I met with responded stiffly, with raised eyebrows and a bemused remark on how times have changed. (Sometimes, though not often, this was accompanied by a wistful aside about the time they’d lost with their own, now-grown children.) Younger partners of both genders, however, usually responded with warmth, understanding, and even enthusiasm, based on their own experiences managing a dual-career household.
Women are more likely to establish formal leave or part-time work arrangements with employers, often doing so at significant personal and career costs. In a recent study, a researcher at the Boston University School of Management found men often won’t risk those penalties—but find ways to take the time anyway. In a summary published in Harvard Business Review, Erin Reid described her finding that some men at a major consulting firm were in fact faking the 60- to 80-hour workweeks expected in that setting via a variety of stratagems, such as focusing on developing a local client base to reduce travel and organizing team members to cover for one another when parenting responsibilities cropped up. (Women in the study faked hours as well, but at a much lower percentage—11 percent vs. 31 percent of men.) One man said he had just returned from five days of skiing with his son: he answered emails in the mornings and evenings, without anyone, clients or coworkers, the wiser.

The MCCA's West says his in-house team at Walmart encouraged more men to take advantage of flextime arrangements, both internally and in conversations with outside counsel. "What we found anecdotally," he says, echoing the consulting study, "was that men actually do enjoy almost the same level of flexibility as women do. They just tend not to do it in as advertised or formalized a way because of the stigma. I think once people come to that realization, it will start removing some of the stigma associated with flexible work arrangements. Then those types of arrangements will work the way they're intended, which would be, ultimately, to facilitate retention."

The generational divide along parenting is likely to grow. Williams notes that members of generations X and Y increasingly value family over success at work. "Not only do young women increasingly feel entitled to be both ideal workers and ideal mothers," she writes, "but young men also feel increasingly entitled to take a more active role in childrearing."

The goal, Williams writes: to replace the "selfless-mother model and the breadwinner model with the model of a balanced worker, one who combines serious work commitments with serious family commitments and also with serious commitments to long-term self-development and enriching community life."

Making parenting possible

There is considerable evidence for the business benefits of offering flexibility to permanent employees. A 2014 study of the high billable-hour requirements common at most law firms points to the effects of long-term sleep deprivation on neurocognitive performance, as well as studies showing that reasonable limits on work hours can actually improve productivity. "Limiting hours logically should produce more efficient and ethical lawyering, while making law firms more feasible work environments for women," its author concluded. In other settings, offering work-life flexibility has been shown to improve service, morale, and loyalty. Meanwhile, diverse teams are linked to increased sales revenue, more customers, greater market share, and greater relative profits.

Firms with better attorney retention may also have a market advantage. "It's about retention," the MCCA's West emphasizes. "The fact is, retention is important to the client. I think in a lot of large firms, they think huge attrition is just a necessary cost of doing business. But corporate clients don't like attrition. It's expensive. You have lots of relationships and institutional knowledge [you lose] when firms have to rehire and retrain, and they sometimes want to do it at the client's expense. The goal really was to try to stem the tide of attrition among the ranks of women and minority lawyers, particularly women who happen to be minorities, but also for the benefit of the client and the benefit of the company—to be sure that we retained those lawyers who were doing really good work for the firm."

The Pregnancy Discrimination Act was passed in Congress in 1978, preventing discrimination on the basis of pregnancy in the workplace. Yet women who are pregnant, as well as those with children, continue to face broad discrimination in the workplace. Indeed, it may be the most socially accepted, frequently unremarked form of discrimination still in effect. The argument against such discrimination, Williams notes, is based on equality, not accommodation: in contrast to accommodation claims, she writes,

"Offering work-life flexibility has been shown to improve service, morale, and loyalty."

it is possible to design workplaces that reflect not only the bodies and traditional life patterns of men, but also those of people (disproportionately women) who need time off for childbearing, childrearing, and other family caregiving. Designing workplace objectives around an ideal worker...
who has a man’s body and men’s traditional immunity from family caregiving discriminates against women. Eliminating that ideal is not “accommodation”; it is the minimum requirement for gender equality.

The impulse to blur the distinction between discrimination and accommodation sends the unstated message that the woman ‘asking for accommodation’ is demanding special treatment. But the real problem lies with workplace structures rather than with the women. Solutions to work-family conflict lie in redefining the ideal worker by changing norms, practices, and policies.

A focus on making family life possible for dual-income families should have easy bipartisan appeal (that is, unless conservatives are in fact nostalgic for outmoded and impractical family patterns, rather than focused on the well-being of parents and children as they profess to be). Williams notes: “People across the political spectrum place a high value on family care—it is hardly an issue on the cultural fringe.”

Businesses often object that the costs of parental leave are simply too great. But contrast them with the cost of training a new associate. In a 2015 LexisNexis survey, a variety of firms reported average training costs for the first two years of employment at $19,000 annually per attorney. Williams notes that there are economic benefits to retaining employees via part-time arrangements—in client service, replacement costs, and improved quality and productivity.

Deirdre Stanley is general counsel and vice president at Thomson Reuters. Some jobs, she argues, aren’t feasible in the context of flexibility, particularly leadership positions that require being constantly on call. Yet, she says, individual contributor positions are often good candidates for flexible positions. “The problem is that we default too often to the fact that it has to be structured this way because it was always structured that way, right? People shouldn’t be polarized. It isn’t an either/or.”

An increasing corporate interest in reducing real estate footprint has led some organizations to encourage employees to work from home, she notes, allowing employees greater flexibility and corporations reduced costs via in-office desk sharing. “What’s going to make this most likely is when the cost becomes low enough to do things in a flexible way, which is what we’re moving toward. Once you start to have this intersection of cost with things from a flexibility standpoint—which may work better for women anyway—that’s when it’s really going to take off.”

**Shifting values**

What’s often missed in the discussion about women juggling family and career, Stanley points out, is that men haven’t historically had it all either. Indeed, sacrificing family for work is practically a cliché of modern manhood.

Younger generations may increasingly opt out of these binaries, says Sandra Yamate (HLS ’84), CEO of the Institute for Inclusion in the Legal Profession. “As we see more and more younger people who are entering the profession with their different generational values, some of this may end up beginning to happen a little bit on its own. It’s simply going to become the reality that all lawyers, regardless of gender, want to have a more fulfilling life, and it’s probably not going to be structured along the same lines that the profession has been structured for so many generations.”

Berwin Leighton Paisner’s Bigby emphasizes the validity of traveling at different speeds during a career, and “shifting the bell curve” for the broader population of women attorneys, not just the extraordinary women who’ve been in the vanguard. “There isn’t necessarily just one way to do a role or one trajectory which happens to be a straight line straight up—actually, there are other options,” she says. “You may make a move laterally which may give you really valuable industry experience or government experience, which at a point in your life may be important to you. Then there are other ways to come back into the pipeline, or move around the pipeline, or pick up your speed in the pipeline, if you want.”

> Women who are pregnant continue to face broad discrimination in the workplace.
“There is certainly a very visible issue in relation to women in senior positions in law firms, and it is not dissimilar to broader challenges that we see in the corporate space more generally,” Bigby says. “But it also forms part of a general challenge around being far more inclusive and diverse across ethnic and racial and LBGT issues. We do need to look at this as a much more holistic issue. That may mean actually being a bit more open-minded about the way people may move around, or what they need to do at different points in their career—which actually may mean thinking outside of the law firm organization. It may mean working in a more flexible environment, either at a client’s or another entity. But actually doing that planning with the best interest of the employee in mind is what’s most important.”

Broader definitions of diversity are a goal for many. “How much are organizations really willing to change to reflect a different demographic?” asks Amy Schulman, venture partner with Polaris Partners and CEO of Arsia Therapeutics. “There’s no doubt that, for women like me who are profoundly committed to seeing women and people of color succeed in positions of leadership and succeed at a greater rate, it is daunting that the numbers haven’t changed despite all the effort and intensity. But, for me, that just makes me all the more committed to doing what I can. I think individuals can make a difference. And institutions are aggregations of individuals. But at the end of the day, if each individual who is in a position of leadership and who is receptive to this makes that effort, then the organizations that we’re part of will change.

“You can’t give up on this,” Schulman says. “It’s too important; it’s too important to the generations that come after us, and you have to have a passion for it. It can’t be just kind of abstract, because it gets messy and it’s hard and complicated, and people get discouraged. You get scrutinized as leader, but you have to have that commitment.”

Now a professor at the University of Southern California and a partner at Quinn Emanuel, Susan Estrich was the first woman president of Harvard Law Review. She concludes the book Sex and Power (Riverhead Books, 2000), a meditation on women in politics, life, and work:

For me, and I hope for my daughter, feminism is a lesson in the possibilities of being a truly autonomous person. I teach it, and try to live it, as a critical perspective that opens up possibilities, not one that shuts them down and turns viewers into victims. See the unfairness, the discrimination, the line-drawing, the status quo, as what it is; see it so you are not bound by it. Understand that you are not alone, that it is not you, that this is bigger and beyond you. Understand those things not so that you will be paralyzed, but so that you will have the strength to act. Know that the law is on your side and that much of what was once considered acceptable no longer is; understand that revolution is possible, that we have already changed the world, and all we have to do is finish the job.

Reflecting that determination, Ballakrishnen notes that, while earlier generations may have been satisfied to simply get in the room, those who’ve matured in a far less stratified environment will have different expectations. “I’m more likely to look for stuff that primes gender than someone in a previous generation is. I’m not just thankful for the opportunity,” she says. “We’re not okay with just okay. We want more, and we’re not afraid. So the institutions which are going to come out ahead are the ones that see that and respect it and are likely to give it to us.”

“Change may be occurring from a lot of different directions,” Yamate notes. “I think that our sense of being a partner in a large firm in years to come may not actually be our model of success. It might take years and years and years to achieve that kind of parity, but that may be because our value system may be changing, just like we’ve seen significant societal shifts toward not only acceptance but support and alliance for LGBT rights. The time may come when we wonder, ‘Why was that an issue?’ Our values will have shifted, and those who really want to be high-powered partners in large law firms, working tons of hours and hopefully being compensated adequately for that, that will be one success story. But there will be others, too. And as more women enter the profession, that’s what we’re seeing.”
WOMEN AS LAWYERS AND LEADERS

Women as Lawyers and Leaders
The rise of women in the legal profession.

Women and Professional Development
The benefits of prioritizing retention and engagement.

The Power of Role Models
Women of color in the profession.

Women in the Global Legal Profession
The feminization of law worldwide?

15 Tips for Women in the Profession
Legal leaders share their thoughts.

Fostering Flexibility in Law Firms; Satisfaction in the Legal Profession
In the News: Highlighting key stories about the profession you may have missed.

Retaining Talented Women
From the Classrooms: Lessons from Ernst & Young.

Lessons on Life and Leadership
Speaker's Corner: Robin Ely is a professor of business administration and senior associate dean at Harvard Business School.
Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel

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Lucy Buford Ricca
Stanford University

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INTRODUCTION

Within the American legal profession, diversity is widely embraced in principle but seldom realized in practice. Women and minorities are grossly underrepresented at the top and overrepresented at the bottom. What accounts for this disparity and what can be done to address it are the subjects of this Article. It provides the first comprehensive portrait of the problem from the vantage of leaders of the nation’s largest legal organizations. Through their perspectives, this Article seeks to identify best practices for diversity in law firms and in-house legal departments, as well as the obstacles standing in the way.

Part I begins with an analysis of the challenges confronting the American bar with respect to diversity and the gap between the profession’s aspirations and achievements. Part II sets forth the methodology of the survey of law firm leaders and general counsel. Part III explores the survey’s findings, and Part IV concludes with a summary of best practices. “We can and should do better”1 was how one participant in the study described his firm’s progress, and that view is the premise of this Article.

I. CHALLENGES2

According to the American Bar Association (ABA), only two professions (the natural sciences and dentistry) have less diversity than law; medicine, accounting, academia, and others do considerably better.3 Women

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3. Elizabeth Chambliss, ABA Comm’n on Racial & Ethnic Diversity in the Legal Profession, Miles to Go: Progress of Minorities in the Legal Profession 6–7 (2005). For example, minorities account for about 25 percent of doctors and 21 percent of...
constitute over one-third of the profession but only about one-fifth of law firm partners, general counsel of Fortune 500 corporations, and law school deans.\(^4\) Women are less likely to make partner even controlling for other factors, including law school grades and time spent out of the work force or on part-time schedules.\(^5\) Studies find that men are two to five times more likely to make partner than women.\(^6\) Even women who never take time away from the labor force and who work long hours have a lower chance of partnership than similarly situated men.\(^7\) The situation is bleakest at the highest levels. Women constitute only 17 percent of equity partners.\(^8\) Women are also underrepresented in leadership positions, such as firm chairs and members of management and compensation committees.\(^9\) Only seven of the nation’s one hundred largest firms have a woman as chair or


managing partner. Gender disparities are similarly apparent in compensation. Those differences persist even after controlling for factors such as productivity and differences in equity/non-equity status.

Although blacks, Latinos, Asian Americans, and Native Americans now constitute about one-third of the population and one-fifth of law school graduates, they still only account for fewer than 7 percent of law firm partners. The situation is particularly bleak for African Americans, who constitute only 3 percent of associates and 1.9 percent of partners. In major law firms, about half of lawyers of color leave within three years. Attrition is highest for women of color; about 75 percent depart by their fifth year and 85 percent before their seventh. Compensation in law firms is lower for lawyers of color, with minority women at the bottom of the financial pecking order.

The situation is somewhat better for women in-house. Women hold the top legal job at 21 percent of Fortune 500 companies. That number increased from 17 percent in 2009. Interestingly, women seem to be doing best at the nation’s largest companies: four women are general counsel at the seventeen largest companies. But only 17 percent of general counsels in the Fortune 501–1000 are female. Minority representation in the general counsel ranks of the Fortune 500 is 10

17. ABA COMM’N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY 28 (2006).
19. Id.
20. Id.
21. Id.
percent. 22 Five percent of Fortune 500 general counsel are African American, 2 percent are Asian, and 2 percent are Hispanic. 23

II. METHODOLOGY

Between May and June 2014, a request to participate in this survey was sent to the managing partner or chair of the nation’s one hundred largest firms 24 and the general counsel of Fortune 100 corporations. Telephone interviews were scheduled with all of those who indicated a willingness to be surveyed. In some instances, the organization’s managing partner or general counsel identified someone else in charge of diversity initiatives to be contacted, and interviews were conducted with that person instead of, or in addition to, the managing partner or general counsel. Thirty firms and twenty-three corporations agreed to participate. Thirty spoke on the record; eleven requested anonymity; eleven requested that any quotations be cleared; and one did not indicate any preference. To gain additional perspectives, the authors interviewed members of a national search firm and a consultant on diversity, as well as in-house counsel of some smaller corporations. A list of survey participants appears as Appendix A.

By definition, those who were willing to take the time to participate in the study had a strong commitment to diversity. Moreover, they came from the sectors of the profession with the most resources available to invest in the issue. The findings therefore do not represent a cross section of the profession. Rather, they reflect the experience of those with the greatest willingness and ability to advance diversity in the profession. These participants’ insights can help illumine the most effective drivers of change.

III. Findings

A. Diversity As a Priority

For the vast majority of survey participants, diversity was a high priority. Although this comes as no surprise, given the self-selected composition of the study, the strength of that commitment was striking.

Among firms, several members spoke of diversity as one of their core values or as part of the firm’s identity. 25 A number of individuals stressed
that it was not just the “right thing to do,” but also critical to firms’ economic success. In elaborating on the business case for diversity, many firm leaders indicated that diversity was central to providing quality service to clients:

- “A diverse team is a more effective team; it has a broader base of experience . . . and the client gets a better product.”
- “You can’t get the best work without the best talent.”
- “This is a talent business. You need to cast the net broadly.”
- “The client base is changing and if we don’t change with it, our bottom line will be impaired as a result.”
- “We’re in the human capital business. [Diversity is a way to get] the best people and the best decision making.”

Some leaders also spoke of matching the clients and communities they served. One noted, “a diverse profile is important to our clients.” Larry Sonsini, Chair of Wilson Sonsini, noted that sixty different languages were spoken in Silicon Valley. Diversity, he said, is “inherent in what we do and who we represent. . . . Diversity is not a ‘check the box’ issue in this firm.” Joseph Andrew, the Global Chair of Dentons, made a similar point. Because the firm did not have a single nationality, its clients were diverse and the firm needed to follow suit.

Whether leaders’ views of diversity were fully shared within firm partnerships was, however, less clear. As the chair of one firm’s diversity initiative noted, “It is apparent to me that there are people in the firm who if they had their druthers, there would be less focus on diversity. They keep that view to themselves.”

Firm leaders communicated their commitment in multiple ways. Many gave periodic updates to leadership and the partnership and included it in their state of the firm speeches and speeches to summer associates. One

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26. See Telephone Interview with Nicholas Cheffings, supra note 25; Telephone Interview with Brad Malt, Chair, Ropes & Gray LLP (May 8, 2014); Telephone Interview with Wally Martinez, Managing Partner, Hunton & Williams LLP (July 22, 2014); Telephone Interview with Thomas Reid, Managing Partner, Davis Polk & Wardwell LLP (July 31, 2014).
27. Telephone Interview with Guy Halgren, supra note 27; Telephone Interview with Lee Miller, Global Co-Chairman, DLA Piper (June 23, 2014); Telephone Interview with Ahmed Davis, supra note 1.
made sure that every presentation to partners discussed diversity. Some included an update or a “come to Jesus” presentation at firm retreats. Many had a formal statement on their website and some put diversity information in their newsletters or annual reports. Diversity often figured in a firm’s strategic plan. One chair mentioned it in every major speech in an effort to keep it at the “forefront of peoples’ attention.” One had a partners’ meeting focused on the topic; another had a conclave on the issue for firm leadership, practice group leaders, office managing partners and other key people; and a third held diversity retreats annually. Some emphasized it in required training for firm leadership or new partners.

General counsel also stressed the importance of diversity, although some were slightly more reluctant to rank it among priorities. As one noted, “I don’t want to give you pablum. Every company says it’s a high priority. The issue is whether you are doing something about it.” Most emphasized the same reasons as law firm leaders. Diverse teams provided a more diverse perspective; they avoided “group think.” Corporations wanted to “reflect and represent the communities in which we operate.” It is the “right thing to do and smart business.”

with Lauren Nashelsky, Chair & Chief Exec. Officer, Morrison & Foerster LLP (June 24, 2014); Telephone Interview with Thomas Reid, supra note 26; Telephone Interview with Nadia Sager, Global Chair of Diversity Leadership Comm., Latham & Watkins LLP (May 7, 2014). Some leaders, including several who spoke off the record, had the diversity officer make a presentation at partner meetings. See, e.g., Telephone Interview with John Soroko, Chairman and Chief Exec. Officer, Duane Morris LLP (July 24, 2014).


40. Telephone Interview with Ahmed Davis, supra note 1 (“come to Jesus” talk); Telephone Interview with Robert Giles, supra note 25; Telephone Interview with Guy Halgren, supra note 27; Telephone Interview with Tyree Jones, Dir. of Global Diversity & Inclusion, Reed Smith LLP (July 2, 2014).

41. See Telephone Interview with Maya Hazell, supra note 25 (website and annual report); Telephone Interview with Lee Miller, supra note 38 (newsletter).

42. See, e.g., Telephone Interview with Bob Couture, Exec. Dir., McGuireWoods LLP (June 30, 2014).

43. Interview by Deborah L. Rhode with participant (June 26, 2014) (on file with author).

44. For the conclave, see Telephone Interview with Lee Miller, supra note 38. For the diversity retreats, see Telephone Interview with John Soroko, supra note 38. The information about the partners’ meeting came from an interview not for attribution.

45. Telephone Interview with Robert Giles, supra note 25 (leadership); Telephone Interview with Nadia Sager, supra note 38 (new hires).

46. These general counsel did not speak for attribution.


48. Telephone Interview with Stephanie Corey, Chief of Staff for Gen. Counsel, Flextronics Int’l Ltd. (July 17, 2014); Telephone Interview with Charles Parrish, Exec. Vice President, Gen. Counsel & Sec’y, Tesoro Corp. (July 25, 2014).

49. Telephone Interview with Teri McClure, Chief Legal Commc’ns & Compliance Officer & Gen. Counsel, United Parcel Serv., Inc. (July 17, 2014); accord Telephone Interview with Tara Rosnell, Assoc. Gen. Counsel, Procter & Gamble Co. (June 6, 2014).

50. Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author).
One mentioned being sued as a reason for focusing attention on the issue.

In terms of communication, corporations relied on more informal or indirect methods than law firms. The commitment could be conveyed through the leadership’s involvement with minority bar associations or the Leadership Council on Legal Diversity. Others stressed their diversity programming. One noted leaders’ emphasis on diversity to the people making hiring decisions. Another pointed to its inclusion in performance evaluations. Whatever the method of communication, it mattered that leaders were “personally and professionally committed.”

B. Diversity Initiatives

Diversity initiatives varied. Among law firms, some involved formal plans or goals. Rarely did these specify numerical targets. As the chair of one major Wall Street firm explained, “we don’t want to be limited” or to “set up unrealistic expectations.” Most firms had a committee, council, or task force charged with coordinating diversity efforts. For example, Wilmer Hale has a diversity committee with six partners representing the firm’s six offices, each of whom is responsible for heading a separate committee on diversity in each office. Orrick has an Inclusion Leadership Council, comprised of the heads of women’s and diversity initiatives, two rising star partners, and two former members of the firm’s board of directors. In addition to sponsoring training, speakers’ programs, and retreats, firms often had formalized mentorship or sponsorship initiatives. These sought to ensure that associates and junior partners of

51. Telephone Interview with Charles Parrish, supra note 48.
53. Telephone Interview with Susan Blount, Exec. Vice President & Gen. Counsel, Prudential Fin., Inc. (n.d.); Telephone Interview with Tara Rosnell, supra note 49.
54. Telephone Interview with Jonathan Hoak, Exec. Vice President & Gen. Counsel, Flextronics Int’l Ltd. (n.d.).
55. Telephone Interview with Mary Francis, Chief Corp. Counsel, Chevron Corp. (Apr. 29, 2014).
56. Telephone Interview with Debra Berns, supra note 52.
57. Telephone Interview with Brad Malt, supra note 26.
58. Telephone Interview with Lee Miller, supra note 38 (goals and objectives, not quotas for recruitment, retention, and promotion). But see Telephone Interview with Nicholas Cheffings, supra note 25 (global diversity plan that aspires to having women be 25 percent of partners in 2017 and 30 percent in 2022).
59. Interview by Deborah L. Rhode with participant (June 26, 2014) (on file with author).
60. Some had a committee and a smaller steering council. See Telephone Interview with Guy Halgren, supra note 27.
61. Telephone Interview with Peggy Giunta, Chief Legal Pers. & Dev. Officer, & Kenneth Imo, Dir. of Diversity, Wilmer Cutler Pickering Hale & Dorr LLP (July 28, 2014).
62. Telephone Interview with Mitch Zuklie, Global Chairman & Chief Exec. Officer, Orrick, Herrington & Sutcliffe LLP (May 9, 2014).
underrepresented groups had the professional development opportunities and assistance necessary to ensure retention and promotion. McGuireWoods is piloting a reverse mentoring program in which diverse associates mentor department chairs; the firm also gives a diversity and inclusion award at its annual partnership retreat. Some firms have adopted policies that conformed to best practices developed by outside groups, such as the Project for Attorney Retention. One firm required a slate that included at least one diverse candidate for every open lateral position. That practice is modeled on the Rooney Rule, which the National Football League established to ensure that minority candidates were considered for coaching positions.

Most firms had a dedicated budget for diversity; others financed their efforts with funds allocated for other purposes, such as business development or recruiting. Thomas Reid, managing partner at Davis Polk, explained his firm’s preference for an integrated approach: “I don’t want people thinking of this as just a cost. Diversity is part of business development efforts. If it’s seen as something we just have to do, it will not be sustainable.”

General counsel reported similar initiatives. Some have also adopted a modified Rooney Rule to guarantee diverse slates of candidates. One large technology company has a numerical goal for female hiring and promotion because the company found it challenging to achieve diversity in the technology industry. Most general counsel, however, did not focus on numerical goals. Many corporations had mentorship and sponsorship programs as well as speaker programs and training on unconscious bias. Also common were minority summer internships and other pipeline initiatives such as street law for high school students. J.P. Morgan has recently established a legal reentry program targeting lawyers—generally women—who have been out of the workforce for at least a year.

63. Telephone Interview with Carter Phillips, supra note 25.
64. Telephone Interview with Bob Couture, supra note 42.
65. Telephone Interview with Lee Miller, supra note 38.
66. Telephone Interview with Bob Couture, supra note 42.
68. Telephone Interview with Thomas Reid, supra note 26.
69. Telephone Interview with Susan Blount, supra note 53; Telephone Interview with Stephen Cutler, supra note 47; Telephone Interview with Bruce Kuhlik, Exec. Vice President & Gen. Counsel, Merck & Co., Inc. (July 18, 2014); Telephone Interview with Maryanne Lavan, Senior Vice President, Gen. Counsel & Corp. Sec’y, Lockheed Martin Corp. (July 17, 2014).
70. Telephone Interview with Debra Berns, supra note 52; Telephone Interview with Susan Blount, supra note 53; Telephone Interview with Maryanne Lavan, supra note 69; Telephone Interview with Teri McClure, supra note 49; Telephone Interview with Mary O’Connell, Head of Legal Operations, Google Inc. (June 5, 2014); Telephone Interview with Ashley Watson, Senior Vice President & Chief Ethics & Compliance Officer, Hewlett-Packard Co. (May 16, 2014).
71. Telephone Interview with Stephen Cutler, supra note 47.
eight-week internship, the company hopes to place them in permanent positions in the legal department.\footnote{72}{Id.}

Evaluations of the success of diversity initiatives were mixed. Virtually all managing partners and general counsel were proud of their efforts but varied in their assessments of results. Those who spoke for attribution had particular reasons to put their best foot forward, and some were confident that their workplace was an inclusive meritocracy.\footnote{73}{For example, one participant felt confident that diversity efforts were successful because “there isn’t any perception that people are here for any reason other than that they are doing a great job.” Interview by Deborah L. Rhode with participant (July 30, 2014) (on file with author). Another noted, “I really do perceive a color-blind and gender-blind environment.” Interview by Deborah L. Rhode with participant (June 30, 2014) (on file with author). One firm chair reported that “in terms of culture and inclusivity, our feedback suggests we are very successful.” Telephone Interview with Mitch Zuklie, supra note 62.}

A number mentioned awards from clients and minority or women’s organizations, as well as positive ratings from Working Mother Magazine or Yale Law Women.\footnote{74}{Telephone Interview with Tyree Jones, supra note 40; Telephone Interview with Brad Malt, supra note 26; Telephone Interview with Wally Martinez, supra note 26; Telephone Interview with Lee Miller, supra note 38; Telephone Interview with Jim Rishwain, Chair, Pillsbury Winthrop Shaw Pittman LLP (Aug. 2, 2014); Telephone Interview with Tara Rosnell, supra note 49; see also Yale Law Women, http://yalelawwomen.org/ (last visited Mar. 25, 2015).}

Most felt that their numbers were better than their peers, and most general counsel felt that their offices were often more successful than their companies as a whole. Many firm leaders and general counsel cited progress for women at leadership levels as an example of success. Although women are still underrepresented at the top, a common perception was that this was on the path to being fixed. Some general counsel were also proud of their records in channeling increased business to women- and minority-owned firms, although it could be a challenge finding them in areas where the corporation had the greatest needs. On the whole, participants mentioned more success in recruiting than in promotion and retention. Many mentioned the lack of progress concerning African American partners as a continuing challenge. Some were particularly careful not to be complacent. Comments included:

- “We could be better.”\footnote{75}{Telephone Interview with Maryanne Lavan, supra note 69.}
- “I don’t think anyone is satisfied with the profession overall. And despite all the efforts, it’s hard to see meaningful success in outside counsel.”\footnote{76}{Telephone Interview with Susan Blount, supra note 53.}
- “We do pretty good with hiring but we struggle with retention. It’s a constant effort.”\footnote{77}{Telephone Interview with Robert Giles, supra note 25.}
- “With minorities, we are hiring but not keeping them.”\footnote{78}{Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).}
• “You look at the numbers and it’s pretty depressing, but it’s better than it would have been without initiatives.”
• “It’s hard for us to walk away and say that we’ve moved the needle even though we’ve been trying. . . . It’s not a lack of trying, it’s a lack of impact.”
• “There’s always room for improvement.”
• “The numbers [concerning African American partners] are pathetic.”
• “Not nearly successful enough, no question about it.”

C. Challenges and Responses

When asked about the challenges they faced in pursuing their diversity objectives, participants stressed common themes. With respect to minorities, the greatest obstacle was the limited pool of candidates with diverse backgrounds and the fierce competition for talented lawyers. As one firm leader put it, “We hire many young diverse lawyers and then they often leave to go in-house, and then the clients come back and want diverse teams. That makes it difficult.”

A director of diversity lamented that “[o]ur firm is a place where others come to poach.” Others complained about the difficulties of achieving diversity in lateral hiring, because “if firms have diverse lawyers, they work hard to keep them.” Corporate counsel noted that they often could not pay as much as large law firms. Carter Phillips, chair of the executive committee of Sidley Austin, expressed a common frustration: “It’s tough even when you succeed in getting them in the door and giving them the best work, and they leave.”

A related frustration was that leaders were depending on a pipeline controlled by others. For example, across the technology industry, legal departments find it difficult to have a certain percentage of lawyers that meet their diversity goals because the entire pool of attorneys available to fulfill those goals is below that percentage. Some put the blame squarely

79. Interview by Deborah L. Rhode with participant (June 30, 2014) (on file with author).
80. Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).
81. Telephone Interview with Teri McClure, supra note 49.
82. Telephone Interview with Thomas Reid, supra note 26.
83. Interview by Deborah L. Rhode with participant (July 18, 2014) (on file with author).
84. Telephone Interview with Joseph Andrew & Jay Connolly, supra note 25; Telephone Interview with Susan Blount, supra note 53; Telephone Interview with David Braff, Partner & Co-Chair of Diversity Comm., Sullivan & Cromwell LLP (July 31, 2014); Telephone Interview with John Soroko, supra note 38.
85. Telephone Interview with Bob Couture, supra note 42.
86. Telephone Interview with Kenneth Imo, supra note 61.
87. Telephone Interview with Robert Giles, supra note 25.
88. Telephone Interview with Carter Phillips, supra note 25.
89. Telephone Interview with Mark Chandler, Gen. Counsel, Cisco Sys., Inc. (July 24, 2014).
on law schools. One law firm chair declined to participate in the study, explaining, “I simply believe that the academy is the principal problem and should be the focus of your inquiry. You’re losing the war at the intake, and we are dependent upon you. . . . Fill our pipeline with diverse talent, and through sponsorship and other initiatives we’ll know what to do with it.”

Other participants put some of the responsibility on society: “A law firm alone can’t make overnight changes; some of where we would like to be depends on [the] broader society.” To one managing partner, the situation regarding African American lawyers was “hopeless” given issues with the pipeline.

With respect to women, the principle problem mentioned was a “culture that focuses heavily on hours as a metric of contribution.” According to one general counsel:

> Until law firms make certain fundamental changes in their business model, it’s going to be hard to make meaningful statistical change. . . . When you look at women after forty years [of being in the pipeline] and look at leadership levels, law firms don’t seem to be the right stewards on these issues. . . . To get beyond [current levels] firms will have to look at how people coach and invest in talent.

A further challenge was “getting everybody to buy into the issue. Not all men see that there is a need to address women’s issues. They see women partners and don’t see inhibitions.”

Some firms identified broader attitudinal problems. They specified implicit bias, “diversity fatigue,” and the difficulty of having an “honest conversation” on the issue. “Keeping the dialogue fresh and avoiding platitudes” was a continuing challenge. At Lockheed Martin, “the struggle is to avoid backlash and people just checking the box.” United Parcel Service worked hard to keep diversity as a “consistent focus . . . incorporat[ed] in the ways we do business, as opposed to . . . the next flavor of the month.” For one smaller company, not part of the study’s sample, the biggest challenge was “pushback from white males. . . . We need to reassure [them that they] aren’t being displaced, [and] get [them] engaged in the process.”

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90. Telephone Interview with Tyree Jones, supra note 40 (noting drop in diverse attorneys attending law schools).
91. Email from Peter Kalis, Chairman & Global Managing Partner, K&L Gates LLP, to Deborah Rhode, Professor of Law, Stanford Law School (June 13, 2014, 14:06 PST) (on file with author).
92. Telephone Interview with Nicholas Cheffings, supra note 25.
93. Interview by Deborah L. Rhode with participant (June 3, 2014) (on file with author).
94. Telephone Interview with Maya Hazell, supra note 25.
95. Telephone Interview with Susan Blount, supra note 53.
96. Telephone Interview with Nicholas Cheffings, supra note 25.
97. Telephone Interview with Kenneth Imo, supra note 61.
98. Telephone Interview with Ahmed Davis, supra note 1.
99. Telephone Interview with Mary Francis, supra note 55.
100. Telephone Interview with Maryanne Lavan, supra note 69.
101. Telephone Interview with Teri McClure, supra note 49.
102. Telephone Interview with Jonathan Hoak, supra note 54.
For some participants the biggest challenge was the location or nature of their organization. A few had their principal offices in Midwestern cities that “don’t have a critical mass of racially diverse professionals.”103 Aetna has its corporate headquarters in Hartford, Connecticut, a city not all that “attractive to diverse groups.”104 Boston was reportedly less attractive to African American lawyers than other cities.105 Some companies were in an industry not seen as “sexy” to “diverse lawyers [who] have a lot of options.”106 The general counsel of an oil and gas company noted that “[it’s] not easy to recruit. You can’t get any more old industry than us.”107

Other participants expressed frustration with the pace of progress. Those in organizations where attrition was low had to realize that “change is very slow.”108 Pipeline programs took a long time to have immediate impact. “It’s a marathon, not a sprint,” said the Global Co-Chairman of DLA Piper.109 The Chair of Morrison & Foerster agreed: “There’s no magic bullet or overnight fix. . . . You never get a boulder up the hill.”110 The long-term nature of the struggle required a consistency in focus that was challenging to maintain. As one general counsel put it, “[W]hen [your] day job is putting out fires, [diversity] doesn’t always make it to [the] priority of the day. Then six months out, you realize [you] haven’t made much progress.”111

Responses to these challenges took a variety of forms. Many firms invested in mentorship and sponsorship programs. Some took special steps to support their rising stars, such as pairing them with a partner mentor or sending them to outside leadership programs.112 One placed “a thumb on the scale” for qualified diversity candidates for leadership positions.113 Often the diversity officer sat in on evaluations and/or hiring decisions, or was notified when a diverse candidate received adverse performance ratings. One firm established a diversity challenge, which asked all attorneys to devote forty hours a year to diversity-related efforts, including recruiting, mentoring, participating in various events, and so forth. Some firms and clients partnered on diversity programs, which often increased their appeal. Some companies also offered internships or secondments for

103. Telephone Interview with Andrew Humphrey, Managing Partner, Faegre Baker Daniels LLP (July 18, 2014).
104. Telephone Interview with William Casazza, Executive Vice President & Gen. Counsel, Aetna, Inc. (June 30, 2014).
105. Telephone Interview with Brad Malt, supra note 26.
106. Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).
107. Telephone Interview with Charles Parrish, supra note 48.
108. Interview by Lucy Buford Ricca with participant (July 30, 2014) (on file with author).
109. Telephone Interview with Lee Miller, supra note 38.
110. Telephone Interview with Larren Nashelsky, supra note 48.
111. Telephone Interview with Mary O’Connell, supra note 70.
112. Telephone Interview with Diane Patrick, Co-Managing Partner & Chair of Diversity Comm., Ropes & Gray LLP (May 9, 2014).
113. Telephone Interview with Robert Giles, supra note 25.
minority law firm attorneys that could enhance their skills and build personal relationships.

Diversity training, particularly around unconscious bias, was common. One firm had lawyers take the implicit bias test or a refresher course before making promotion decisions. Others required it for new hires or anyone involved in recruitment. Evaluations of its effectiveness were mixed. Some felt the programs were “not solving a problem that we had.” In one firm, the training had created a “bad tone around the subject. . . . It made people feel nervous.” In another firm, “people felt preached to and imposed upon.” The same program provoked disagreement in one firm. The firm’s leader did not see the “value” of it; the firm’s head of human relations disagreed. According to the Chair of Hogan Lovells, “[M]ost people don’t think they need it, but most take from the training the need for understanding the possibility of unconscious bias.” Another agreed: “[People] don’t know what they don’t know.” Lawyers were sometimes “pleasantly surprised” at the usefulness of the programs. A few leaders felt that it helped if programs were billed as something other than “diversity” initiatives, and many believed that the experience “helped with opening dialogue and making people aware.” No one had a concrete basis for his or her perception. As one chair of a diversity initiative acknowledged, “[I w]ould like to . . . know whether participants are taking away anything which affects practice. [I d]on’t have any data.”

Another strategy involved affinity groups, variously named, which almost all firms and corporations sponsored. Some groups included not just traditional categories based on race, ethnicity, sexual orientation, and gender, but also religion, disability, parent, and veteran status. Many of these groups were actively involved in recruiting, mentoring, and providing business development skills and opportunities. Some held retreats. Many had sponsors from the senior ranks of the organization. Their formality and usefulness varied. One concern was that white men felt excluded or threatened, or that certain groups were better than others in getting their issues addressed. “I’ve always believed [that] separating people rather than

114. Telephone Interview with Joseph Andrew & Jay Connolly, supra note 25.
115. Telephone Interview with Brad Malt, supra note 26.
117. Telephone Interview with Diane Patrick, supra note 112.
118. Interview by Lucy Buford Ricca with participant (June 30, 2014) (on file with author).
119. Telephone Interview with Nicholas Cheffings, supra note 25.
120. Telephone Interview with Lauren Nashelsky, supra note 38.
121. Interview by Deborah L. Rhode with participant (July 1, 2014) (on file with author).
122. Telephone Interview with Ahmed Davis, supra note 1; accord Telephone Interview with Carter Phillips, supra note 25 (“[It’s] hard to tell how successful they have been.”).
123. At most companies, the affinity groups were company-wide, not specific to the legal department.
124. At several law firms, the only formal group was the women’s initiative/group.
bringing them together is not the way to go,” said one firm chair. One general counsel felt that the groups were “not as effective as people hoped they would be. . . . I don’t think they’ve made a difference.” Others had received feedback that they were “incredibly” important. One company had had senior executives come out in LGBT forums. At the very least, most participants believed that these groups provided a sense of community and an opportunity for raising concerns that should be communicated to management. They helped ensure that diversity was “front and center” in the workplace.

D. Accountability

Participants were asked a number of questions about the structures used to achieve accountability on diversity-related issues. The first was whether they did anything to monitor the experience of employees concerning diversity. Eleven firms and sixteen companies reported relying on surveys to assess experiences related to diversity. “We survey ourselves up the wazoo,” reported one general counsel. Most included diversity-related questions as part of a general quality of life survey; some had conducted surveys just on diversity. Some organizations held focus groups as a supplement or substitute for surveys. However, many leaders appeared to see no necessity for formal assessments; they believed that the organization’s “culture and open door policy” made people feel that they could raise concerns. One firm worried that the issues could be “somewhat uncomfortable, so we have left it to informal dialogue.” But it is precisely because of the discomfort connected with raising such issues openly that some organizations found anonymous surveys useful. Many firms also collected information from exit interviews and 360 performance reviews. One conducted “stay” interviews with minority attorneys to find out what factors were most important to their retention.

Participants were also asked what, if any, measures were in place to hold employees accountable for progress on diversity issues. “Nothing that has teeth,” said one general counsel. “I wish there were some,” responded another, “That’s a good idea.” It is, in fact, an idea that many companies

125. Interview by Deborah L. Rhode with participant (June 24, 2014) (on file with author).
126. Interview by Deborah L. Rhode with participant (July 30, 2014) (on file with author).
127. Telephone Interview with Maryanne Lavan, supra note 69.
128. Some law firms did not conduct their own survey but relied on the responses of their attorneys to Vault or Am Law surveys. These were included in the survey number.
129. Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author).
130. Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).
131. Telephone Interview with Andrew Humphrey, supra note 103.
132. Interview by Deborah L. Rhode with participant (July 16, 2014) (on file with author).
133. Interview by Deborah L. Rhode with participant (June 30, 2014) (on file with author).
and law firms have embraced in some form. Seventy-seven percent of companies and 80 percent of firms surveyed made some effort to assess individual employees’ performance on diversity. Some used the data from employee surveys to assess the performance of managers. Others used 360 performance reviews or information submitted as part of lawyers’ self-evaluations. Some allocated specific dollar amounts to diversity contributions.  

Participants divided on the usefulness of tying compensation to performance on diversity. Twenty-nine percent of companies and 43 percent of firms surveyed acknowledged that an individual’s diversity efforts could play a role in compensation decisions. According to one firm leader, financially rewarding diversity efforts gets people’s attention and makes them realize that diversity is part of their job. Other leaders disagreed. Hogan Lovells had “taken the view that artificially incentivizing people to do the right thing is not the right way. We want it to be part of the culture of the firm. . . . [But] commitment to diversity above and beyond what we would normally expect is something we would take into account.” Other organizations similarly made it a matter for those who had “gone [the] extra mile” on diversity issues. One company had gone “back and forth” and was still debating the issue. The general counsel wanted it to be “part of [the] culture” but was unsure if incentives were the way to get there.

Corporate clients also had opportunities to hold law firms accountable by requiring data on diversity and allocating their business on that basis. Most companies reported asking for general information on firms’ composition as well as specific information about the staffing of their own matters. Rarely did general counsel report terminating representation over the issue, although some seemed prepared to do so. As the chief of legal operations at Google noted, “as much as we encourage it, there isn’t a penalty or reward.” Only one firm reported losing business over the issue. Some companies gave awards and some had targeted expenditures

134. Associates as well as partners were rewarded.
135. Telephone Interview with Nicholas Cheffings, supra note 25.
136. Interview by Deborah L. Rhode with participant (June 26, 2014) (on file with author).
137. Telephone Interview with Teri McClure, supra note 49.
138. Id.
139. One general counsel did not ask because “we are hiring individual lawyers and not basing on social criteria.” Telephone Interview by Deborah L. Rhode with participant (July 24, 2014) (on file with author).
140. One had “moved matters from firms that didn’t have the same commitment as we have.” Telephone Interview with Teri McClure, supra note 49. Another recalled letting a firm go about eight years ago because of its record on women. Another said she would terminate a firm if she didn’t see a “diverse slate.” Telephone Interview with Maryanne Lavan, supra note 69. One said he would not take an existing matter away but would “decrease business and channel it to firms doing the right thing.” Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author). Another said, “[W]e have not dropped a firm but it is a factor in who we approve.” Telephone Interview with Ashley Watson, supra note 70.
141. Telephone Interview with Mary O’Connell, supra note 70.
on minority or women-owned firms. One leader reported experience with a bonus program allocating additional business to firms that had a certain number of minorities and women working on their matters.\textsuperscript{142} Most general counsel thought, “[T]he firms get it. This isn’t a hard sell.”\textsuperscript{143} Evaluations of the effectiveness of these accountability efforts varied. A number of general counsel felt frustrated by the lack of progress made by outside firms. The senior vice president and chief ethics and compliance officer at Hewlett Packard expressed common views with uncommon candor. “We’ve always tracked it . . . but we’re not that great at [getting results].”\textsuperscript{144}

According to one general counsel, “they want to send glossy documents describing their programs. It’s not very productive.”\textsuperscript{145} Some faulted themselves for not “following through” on the reports. One felt frustrated with firms that “want me to goad them into doing the right thing.”\textsuperscript{146}

For their part, firms found it “frustrating . . . when clients take a hard stick on this and then don’t do anything in response. People are doing cartwheels to comply and then don’t get an increase in business . . . .”\textsuperscript{147} Some corporations “say this is important but don’t pay attention to it.”\textsuperscript{148} “A lot of it is half-hearted. . . . Even the most detailed response to questions never gets a follow-up.”\textsuperscript{149} One firm chair noted that clients’ concern ran the gamut; some made diversity their top priority while others got questionnaire results year after year “and that’s the last we heard of it.”\textsuperscript{150} “It ebbs and flows. If you get a [general counsel] who is passionate about the issue, it gets a lot of traction. If that person leaves or gets preoccupied, it fades.”\textsuperscript{151} Most of the interest came from large corporations; midsize companies and individual clients showed little interest. One firm chair thought that clients on the whole had gotten more serious about their inquiries. “[This] has moved over the last five years from ‘we want to be [seen as] doing this’ to ‘we want to see that it’s happening.’”\textsuperscript{152}

When asked if pressure from clients had changed firm practices, many leaders said it had not.

- “We would be doing it anyway.”\textsuperscript{153}

\begin{itemize}
  \item \textsuperscript{142} Telephone Interview with Ahmed Davis, supra note 1 (describing Microsoft’s approach).
  \item \textsuperscript{143} See, e.g., Telephone Interview with Mary Francis, supra note 55.
  \item \textsuperscript{144} Telephone Interview with Ashley Watson, supra note 70.
  \item \textsuperscript{145} Telephone Interview with participant (n.d.) (on file with author).
  \item \textsuperscript{146} Interview by Deborah L. Rhode with participant (July 18, 2014) (on file with author).
  \item \textsuperscript{147} See, e.g., Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).
  \item \textsuperscript{148} Interview by Deborah L. Rhode with participant (June 23, 2014) (on file with author).
  \item \textsuperscript{149} Interview by Deborah L. Rhode with participant (Aug. 6, 2014) (on file with author).
  \item \textsuperscript{150} Telephone Interview with Guy Halgren, supra note 27.
  \item \textsuperscript{151} Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).
  \item \textsuperscript{152} Telephone Interview with Nicholas Cheffings, supra note 25.
  \item \textsuperscript{153} Id.
“We expect as much from ourselves or more than our clients do.” 154

“I’d like to believe [this] hasn’t affected our commitment.” 155

“We haven’t been dragged to [the] conclusion” that diverse teams make for better lawyering. 156

Other firm leaders registered a positive impact from the requirements. “Partners are responsive to anything clients highlight as a concern and follow up.” 157 Some “wished there were more pressure. . . . It has helped to get people to see diversity as a bottom line issue. . . . It gets partners’ attention.” 158 Others similarly “welcomed” client interest because it “reinforces the importance of our own efforts.” 159 At the very least, the “collective pressure from a lot of committed counsel has prevented things from being worse than they are.” 160 According to Perkins Coie’s managing partner, client pressure “really does help send the message home. . . . You get what you measure. It’s a good thing to do, and if this [pressure] helps us achieve it, so be it.” 161 Others agreed. Client inquiries had “raised awareness among partners—they were paying attention because they know clients care about it.” 162 Senior lawyers who “may not have been all that committed listen when a client says we care about quality, cost, and diversity.” 163

E. Work/Family Issues

A final question asked leaders how they had addressed issues of work/life balance and how successful they had been. The vast majority claimed to have been successful. “If you don’t want to lose good people, you have to be flexible.” 164 A common view was that “we work hard but it’s not a sweatshop.” 165 Most organizations guaranteed fairly generous parental leaves, permitted flexible time and reduced hour schedules, and allowed telecommuting at least to some extent. A few had emergency childcare or on-site centers. 166 Law firms often were at pains to “demonstrate that you can be a successful partner with a balanced schedule—reduced hours or part time. This is important to attract the best talent: you don’t need to be a

154. Telephone Interview with Jim Rishwain, supra note 74.
155. Telephone Interview with Andrew Humphrey, supra note 103.
156. Telephone Interview with John Soroko, supra note 38.
157. Telephone Interview with Maya Hazell, supra note 25.
158. Interview by Deborah L. Rhode with participant (July 1, 2014) (on file with author).
159. Accord Telephone Interview with Larren Nashelsky, supra note 38 (“Clients reinforce the message.”); Telephone Interview with Diane Patrick, supra note 112 (“Some general counsel are active in pressing the issue. That’s a good thing for us.”).
160. Telephone Interview with Susan Blount, supra note 53.
161. Telephone Interview with Robert Giles, supra note 25.
162. Telephone Interview with Kenneth Imo, supra note 61.
163. Telephone Interview with Mitch Zuklie, supra note 62.
164. Telephone Interview with Lee Miller, supra note 38.
165. Telephone Interview with Guy Halgren, supra note 27.
166. Telephone Interview with David Braff, supra note 84 (emergency care); Telephone Interview with Thomas Milch, supra note 25 (on-site childcare).
staff attorney or [on a] different track.” Championing flexibility was also important in corporations. As one leader noted: “It’s feasible for . . . caregivers to have a flexible work schedule; [they] really can do the work from anywhere.”

“But,” she added, “there is the inherent obstacle in that in the legal profession [there is] a lot of work to do.” Many leaders made a similar point:

- “Everyone feels stressed. . . . It’s the profession we’ve chosen. It’s a client service profession and a demanding job.”
- “It’s a tough environment to be part-time in.”
- “Clients expect availability twenty-four hours a day.”
- “We run a 24/7 business and it’s international. We have a difficult and time-committed job.”
- “It’s really difficult in the industry, especially for primary caretakers.”
- “It’s a real tough [issue]. We do programs on the subject but I’m not sure people have time to attend. I don’t think we’ve done anything really to address that issue.”
- “You have to be realistic. It’s a demanding profession. . . . I don’t claim we’ve figured it out.”

Although some leaders were sensitive to the problem of “schedule creep,” and tried to avoid escalation of reduced hours, others saw the problem as inevitable. As one firm chair put it, “When you go on a reduced schedule, there are times when [you] have to work full-time to demonstrate [you] can do the job. [Lawyers] need a support system in place so that they can demonstrate the skills to be promoted. Sometimes people don’t recognize that.”

Most general counsel felt that “corporations are easier places to combine work and family than law firms are.” As one general counsel put it, part of the reason “that lawyers move from firms to in-house is to achieve a

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167. Telephone Interview with Joseph Andrew & Jay Connolly, supra note 25; accord Telephone Interview with Robert Giles, supra note 25 (“[We’ve] made a lot of people partner while [they were] on part-time status.”).
168. Telephone Interview with Debra Berns, supra note 52.
169. Id.
170. Telephone Interview with Susan Blount, supra note 53.
171. Interview by Deborah L. Rhode with participant (July 1, 2014) (on file with author).
172. Interview by Deborah L. Rhode with participant (June 24, 2014) (on file with author).
173. Telephone Interview with Teri McClure, supra note 49.
174. Telephone Interview with Larren Nashelsky, supra note 38.
175. Telephone Interview with Stephanie Corey, supra note 48.
176. Telephone Interview with Andrew Humphrey, supra note 103.
177. Telephone Interview with Kenneth Imo, supra note 61.
178. Interview by Deborah L. Rhode with participant (July 30, 2014) (on file with author).
better work-life balance.” 179  Another noted, “People could make more money in law firms. To counter that, we offer a better work/life balance as well as a competitive salary.” 180  Because lawyers in-house do not bill by the hour, “no one is looking over your shoulder to make sure [you] are in [your] chair twelve hours a day. We just look to people to get their jobs done.” 181  The general counsel of Cisco stated his belief that “the point is to measure output rather than input. We don’t care how many hours are worked on a particular matter as long as the project gets done.” 182  The general counsel of Aetna felt similarly: “We work pretty hard. But we let people do it at a time and place convenient to them.” 183

Leaders were of mixed views on whether to use their “family friendly” status in recruiting. Some were proud of their policies and their ranking by organizations like the Yale Law Women. Others opted for a lower profile. “I don’t put it out there because I don’t want to attract people who are coming for that reason,” said one general counsel. 184  A firm chair similarly recalled that “we made the mistake of recruiting around work/life balance and got people who thought we weren’t a ‘type A’ intense place.” 185

Whether organizations could do more to address the issue also evoked varied responses. Some leaders wished “we could stop talking about it because it raises the expectation that we can do something about it.” 186  Others were less resigned. “The whole company, including the legal department, has room for improvement when it comes to work/life balance,” said one general counsel. 187  Others similarly felt more change was inevitable, and desirable. “If we crack the code on work/life balance it will help women,” said Mitch Zuklie, Chair of Orrick. 188

IV. BEST PRACTICES

The findings from this study, together with other research and interviews with headhunters and a diversity consultant, suggest a number of best practices for advancing diversity in law firms and in-house legal departments.

179. Telephone Interview with Chan Lee, Vice President & Assistant Gen. Counsel, Pfizer, Inc. (July 29, 2014).
180. Telephone Interview with Gretchen Bellamy, supra note 52.
181. Interview by Lucy Buford Ricca with participant (July 30, 2014) (on file with author).
182. Telephone Interview with Mark Chandler, supra note 89.
183. Telephone Interview with William Casazza, supra note 104.
184. Interview by Deborah L. Rhode with participant (July 18, 2014) (on file with author).
185. Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author).
186. Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).
187. Telephone Interview with Charles Parrish, supra note 48.
188. Telephone Interview with Mitch Zuklie, supra note 62.
A. Commitment and Accountability

The first and most important step toward diversity and inclusion is to make that objective a core value that is institutionalized in organizational policies, practices, and culture. The commitment needs to come from the top. An organization’s leadership must not only acknowledge the importance of diversity but also establish structures for promoting it and for holding individuals accountable. To that end, leaders need to take every available opportunity to communicate the importance of the issue, not just in words, but in recruiting, evaluation, and reward structures.

“What doesn’t work is when leaders talk about the value of inclusion but fail to make it more than the seventh, eighth, or ninth priority,” said Christie Smith, managing principal of Deloitte University Leadership Center for Inclusion. So too, Miriam Frank, vice president of recruiters Major, Lindsey & Africa, saw “some companies purport to put it at the top of the list, but when push comes to shove, other qualities will creep up the ladder.” By contrast, true commitment from an organization’s leadership can help stave off frustration or “diversity fatigue” that occurs when lawyers feel that programs are simply window dressing. What also does not work, according to Smith, are programs and initiatives around diversity without leadership expectations tied to [them]. . . . There are a lot of well-intentioned leaders who have abdicated responsibility to a few in the organization rather than making diversity and inclusion the responsibility of every leader in their organization. . . . [They] have stated values around inclusion but [they] don’t live up to those values.

To institutionalize diversity, a central priority should be developing effective systems of evaluation, rewards, and allocation of leadership and professional development opportunities. Women and minorities need to have a critical mass of representation in key positions such as management and compensation committees. Supervisors need to be held responsible for their performance on diversity-related issues, and that performance should be part of self-assessments and bottom-up evaluation structures. Although survey participants were divided in their views about tying compensation to diversity, most research shows that such a linkage is

190. Telephone Interview with Miriam Frank, Vice President, Major, Lindsey & Africa (June 9, 2014).
191. Telephone Interview with Christie Smith, supra note 189.
necessary to demonstrate that contributions in this area truly matter. Performance appraisals that include diversity but that have no significant rewards or sanctions are unlikely to affect behavior.193

Pressure from clients to hold firms accountable is also critical. Such initiatives need to include not just inquiries about diversity, which most clients make, but also follow-ups, which occur less often. Good performance needs to be rewarded; inadequate performance should carry real sanctions. This kind of pressure ensures that “regular partners have to think about it.”194

B. Self-Assessment

As an ABA Presidential Commission on Diversity recognized, self-assessment should be a critical part of all diversity initiatives.195 Leaders need to know how policies that affect inclusiveness play out in practice. That requires collecting both quantitative and qualitative data on matters such as advancement, retention, assignments, satisfaction, mentoring, and work/family conflicts. Periodic surveys, focus groups, interviews with former and departing employees, and bottom-up evaluations of supervisors can all cast light on problems disproportionately experienced by women and minorities. Monitoring can be important not only in identifying problems and responses, but also in making people aware that their actions are being assessed. Requiring individuals to justify their decisions can help reduce unconscious bias.196

C. Affinity Groups

Affinity groups for women and minorities are extremely common, but data on their effectiveness is mixed. Survey participants generally agreed with research suggesting that, at their best, such groups provide useful advice, role models, contacts, and development of informal mentoring relationships.197 By bringing lawyers together around common interests, these networks can also forge coalitions on diversity-related issues and

194. Telephone Interview with Thomas Reid, supra note 26.
generate useful reform proposals. Yet their importance should not be overstated. As one senior vice president put it, “[There’s] only so much progress you can make by talking to people just like you. [You are] preaching to the choir.” The only large-scale study on point found that networks had no significant positive impact on career development; they increased participants’ sense of community but did not do enough to put individuals “in touch with what . . . or whom they [ought] to know.”

**D. Mentoring and Sponsorship**

One of the most effective interventions involves mentoring and sponsorship, which directly address the difficulties of women and minorities in obtaining the support necessary for career development. Many organizations have formal mentoring programs that match employees or allow individuals to select their own pairings. Research suggests that well-designed initiatives that evaluate and reward mentoring activities can improve participants’ skills, satisfaction, and retention rates. However, most programs do not require evaluation or specify the frequency of meetings and set goals for the relationship. Instead, they permit a “call me if you need anything” approach, which leaves too many junior attorneys reluctant to become a burden. Ineffective matching systems compound the problem; lawyers too often end up with mentors with whom they have little in common. Formal programs also may have difficulty inspiring the kind of sponsorship that is most critical. Women and minorities need advocates, not simply advisors, and that kind of support cannot be mandated. The lesson for organizations is that they cannot simply rely on formal structures. They need to cultivate and reward sponsorship of women and minorities and monitor the effectiveness of mentoring programs.

**E. Work/Family Policies**

Organizations need to ensure that their work/family policies are attuned to the needs of a diverse workplace, in which growing numbers of men as well as women want flexibility in structuring their professional careers. To
that end, organizations should ensure that they have adequate policies and cultural norms regarding parental leave, reduced schedules, telecommuting, and emergency childcare. Most of the organizations surveyed had such formal policies. But existing research shows a substantial gap between policies and practices. One study found that although over 90 percent of law firms reported having part-time policies, only approximately 4 percent of lawyers actually use them.\textsuperscript{206} Those who choose reduced schedules too often find that they aren’t worth the price. Their hours creep up, the quality of their assignments goes down, their pay is not proportional, and they are stigmatized as “slackers.”\textsuperscript{207}

Surveying lawyers and collecting data on part-time policy utilization rates and promotion possibilities are critical in educating leaders about whether formal policies work in practice as well as in principle. Too many organizations appear resigned to the idea that law is a 24/7 profession.\textsuperscript{208} Too few have truly engaged in the kind of self-scrutiny necessary to develop effective responses. As one survey participant noted, his firm’s policies were “a work in progress.” Other leaders need to take a similar view, and to subject their practices to ongoing self-assessment.

\textbf{F. Outreach}

Organizations can also support efforts to expand the pool of qualified minorities through scholarships, internships, and other educational initiatives, and to expand their own recruiting networks. The ABA’s Pipeline Diversity Directory describes about 400 such initiatives throughout the country.\textsuperscript{209} Many survey participants were undertaking such programs in recognition of their long-term payoffs. Some organizations had also cultivated contacts with organizations that support diverse talent. As one general counsel noted, “[I]f we are creative and think outside the box about the skills and experience needed to succeed in a position, we can find more qualified talent, including qualified diverse talent, for the pools from which we hire.”\textsuperscript{210}

\textbf{CONCLUSION}

Implementing these practices requires a sustained commitment and many leaders expressed understandable frustration at the slow pace of change. What is encouraging about this study, however, is that such a commitment

\textsuperscript{206} Deborah L. Rhode, \textit{From Platiitudes to Priorities: Diversity and Gender Equity in Law Firms}, 24 GEO. J. LEGAL ETHICS 1041, 1056 (2011).

\textsuperscript{207} \textit{Id}. at 1056–57.

\textsuperscript{208} See discussion \textit{supra} Part III.E. (discussing work/family issues).


appears widely shared. That, in itself, is a sign of progress. As one chair noted, "Ten years ago, it wasn’t uncomfortable to walk into a room with a non-diverse team. The temperature of the water has changed. It’s hard to succeed without a commitment to diversity." Leaders of the profession recognize that fact. The challenge now is to translate aspirational commitments into daily practices and priorities.

211. Telephone Interview with Greg Nitzkowski, supra note 28.
## Appendix A: Participant List

<table>
<thead>
<tr>
<th>Fortune 100 Companies</th>
<th>Am Law 100 Firms</th>
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<tbody>
<tr>
<td>Aetna, Inc.</td>
<td>Arnold &amp; Porter LLP</td>
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<tr>
<td>Am. Int’l Grp., Inc.</td>
<td>Davis Polk &amp; Wardwell LLP</td>
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<td>Chevron Corp.</td>
<td>Dentons</td>
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<td>Cisco Systems, Inc.</td>
<td>DLA Piper</td>
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<td>Comcast Corp.</td>
<td>Duane Morris LLP</td>
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<td>ConocoPhillips Co.</td>
<td>Faegre Baker Daniels LLP</td>
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<td>Google Inc.</td>
<td>Fish &amp; Richardson P.C.</td>
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<td>Hewlett-Packard Co.</td>
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<td>Intel Corp.</td>
<td>Hunton &amp; Williams LLP</td>
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<td>Johnson Controls, Inc.</td>
<td>Holland &amp; Knight LLP</td>
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<td>JPMorgan Chase &amp; Co.</td>
<td>Kirkland &amp; Ellis LLP</td>
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<td>Lockheed Martin Corp.</td>
<td>Latham &amp; Watkins LLP</td>
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### Additional Participants

- Major, Lindsey & Africa
- Deloitte & Touche LLP
- Flextronics Int’l Ltd.
- NetApp
HIGH POTENTIALS IN THE PIPELINE:
LEADERS PAY IT FORWARD

Sarah Dinolfo
Christine Silva
Nancy M. Carter

THE PROMISE OF FUTURE LEADERSHIP: HIGHLY TALENTED EMPLOYEES IN THE PIPELINE
About Catalyst

Founded in 1962, Catalyst is the leading nonprofit membership organization expanding opportunities for women and business. With offices in the United States, Canada, Europe, and India, and more than 500 preeminent corporations as members, Catalyst is the trusted resource for research, information, and advice about women at work. Catalyst annually honors exemplary organizational initiatives that promote women’s advancement with the Catalyst Award.
WHO TOOK A CHANCE ON YOU?

— Thomas Falk,
Chairman & CEO, Kimberly-Clark Corporation
Successful Leaders Recognize That Investing in Talent Development is Crucial to Business Success. They also recognize that getting ahead in one’s career is often an outcome of someone staking his or her own reputation on recommending an individual for an important role. Maybe a leader took this chance on an individual even before that person had “earned it,” not because the individual was a direct report, but because the leader saw the win-win of investing in a future leader.

Who are these preeminent leaders who focus on setting talent in their organizations up for success? Were they themselves sponsored, coached, or given job or career advice from others in the past, and are they now “paying it forward” by developing others? Finally, are there any differences in the extent to which women and men pay it forward?

In Catalyst’s longitudinal research series The Promise of Future Leadership: Highly Talented Employees in the Pipeline, our findings have refuted a number of myths that suggest that the gender gap in leadership exists and persists because of women’s choices or actions. In the series of reports, we have shown that despite doing all the things they have been told would lead to advancement, women’s careers lag men’s. In this latest installment, we build upon these findings by examining factors associated with being developed and, in turn, paying it forward. We found that:

- Critical career experiences lead talent to pay it forward.
- Paying it forward pays off in the form of greater advancement and higher compensation.
- Women pay it forward and to a greater extent than men.

These findings indicate that the gender gap can’t be fully explained by women not developing future leaders. As well, this busts the myth of the Queen Bee syndrome, which suggests that women don’t help other women in the workplace. Not only did we find that women high potentials are actively developing others, we found that, compared to men, they were more likely to be developing women.

The key findings from the 2010 survey, illustrative quotes, and questions for consideration included throughout this report are designed to encourage reflection on how talent is identified and developed within your organization. But reflection alone is insufficient. Leaders should use the prompts in the Consider This sections in this report as a call to action to identify and remedy gaps in talent management processes within their organizations.

At the end of the day, it’s not about what women are going to do. It’s about what the leadership is doing. Senior leaders need to be far more accountable for their actions.

—Kathy H. Hannan
National Managing Partner, Corporate Social Responsibility and Diversity
KPMG LLP
In gathering information on whether or not high potentials received career development from others, we asked them to consider their network—the people with whom they discuss important work matters, from bouncing ideas around to getting advice on key decisions, strategizing projects, evaluating options, or discussing career goals. We also asked participants to identify the most helpful person in their network and what this person provided them with—job or career advice, sponsorship, support, or role-modeling. The definitions of each type of career development as used in the survey and in this report are:

- **Job or Career Advice:** The person provides advice on specific tasks, offers coaching, or provides general information about navigating the organization.
- **Sponsorship:** The person open doors for you, has power and/or an influential position within the organization and uses it in your favor to advocate for you and help you get projects and assignments that can enhance your position and visibility.
- **Support:** The person provides friendship, empathy, or caring beyond the job.
- **Role-Modeling:** The person sets an example you aspire to emulate.

We also asked high potentials, “Do you currently offer support such as coaching, mentoring, or advising to someone (a protégé) who is not a direct report with the goal of developing their career?” Unless otherwise specified, when the phrases “development,” “developing others,” or “developmental support” are used in this report, we are referring to the coaching, mentoring, or advice high potentials received themselves or provided to another.

**HIGH POTENTIALS WHO HAVE RECEIVED DEVELOPMENT FROM OTHERS ARE MORE LIKELY TO PAY IT FORWARD AND DEVELOP FUTURE TALENT**

[Being sponsored and paying it forward] is a good model...It has a significant impact on how successful you are in your career, and then how you treat other people [who] need you to be a mentor, a counselor, a sponsor.

— Man Protégé
We found that, when asked about the trusted people with whom they discussed important career matters, high potentials who received developmental support from others are more likely to now be developing the next generation of leaders. They are “paying it forward” and providing others with the same help that they themselves received along the way.

**What Matters When it Comes to Paying it Forward**

When it comes to paying it forward:

- **Being developed matters:** a higher percentage of high potentials who had received developmental support in the past two years were more likely to be offering similar support to a protégé.
  
  - *59%* of those who received developmental support were now, in turn, developing others compared to 47% of those who hadn't received this type of support.³

- **Numbers matter:** the more people high potentials received developmental advice from, the more likely they were to pay it forward to others.
  
  - Controlling for other factors, the greater the number of people who have developed these high potentials, the greater their likelihood of, in turn, developing others.⁴

- **The type of development received matters:** if high potentials had received sponsorship, they were more likely to be paying it forward.
  
  - If any of the top three people with whom high potentials frequently discussed career matters provided them with sponsorship, high potentials, in turn, were more likely to pay it forward to others.⁵
    - *66%* of high potentials who were sponsored were developing others vs. 42% who hadn’t been sponsored.⁶
  - Other types of development high potentials received, including role modeling, job or career advice, and support, did not directly predict their likelihood of paying it forward.⁷
• Level matters: high potentials who hold higher-level positions were more likely to be developing others.8

• For example, 64% of high potentials at the senior executive/CEO level were developing others compared to only 30% of high potentials at the individual contributor level.9

• Being proactive about career advancement matters: high potentials who have most proactively used career advancement strategies10 in recent years to get ahead were more likely to develop others than those who had been less proactive.11

• For example, 63% of those who actively used career advancement strategies that focus both within and outside their organizations are now developing future leaders compared to 42% of high potentials who are relatively inactive with regard to their own career advancement strategies.12

• Paralleling the findings in The Myth of the Ideal Worker: Does Doing All the Right Things Really Get Women Ahead?, we found no difference between women and men regarding the extent to which they used proactive career advancement strategies in recent years.13

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**CONSIDER THIS**

High Potentials Are More Likely to Develop Future Talent if Others Have Similarly Invested in Their Advancement

(Having been sponsored) made me want to do the same. I recognized the value it provided me, and I certainly wanted to have the opportunity to provide that value to other people.

—Man Sponsor

• How are you and others throughout your organization creating a culture of talent development while curbing actions that work against an inclusive process?
• Are you increasing awareness about the importance of developing others, highlighting role models who do it well, creating touch points between talent and influential leaders, or perhaps developing formal programs?
• What would take talent development to the next level for your organization?
HIGH POTENTIALS WHO DEVELOP OTHERS EXPERIENCE GREATER CAREER GROWTH

The project [my sponsor helped me secure] was so successful that by the time we were done and I had advanced, I was able to promote a number of other people in the department because they had gotten visibility that they otherwise wouldn’t have gotten.

—Woman Sponsor

• Developing a protégé predicted high potentials’ compensation growth\(^\text{14}\) as well as their advancement.\(^\text{15}\)

  • High potentials who were developing a protégé had $25,075\(^\text{16}\) greater compensation growth from 2008 to 2010:

    • Women and men benefitted equally from developing others. There was no difference in compensation growth or career advancement between women and men who were developing others.\(^\text{17}\)

CONSIDER THIS

Developing Others Pays Off in Greater Career Advancement and Compensation Growth

• How does your organization recognize and reward the efforts of employees who are proactively developing others, particularly senior leaders?
• Are rewards linked to achieving goals for developing others? If not, should more direct links between developing others and incentives be offered in your organization?
• Does your organization position talent development as a necessary leadership skill and competency for advancement?
WOMEN ARE PAYING IT FORWARD MORE THAN MEN, AND THEY’RE LARGELY DEVELOPING OTHER WOMEN

She’s taken such a vested interest in my career that I want to pay that back to others.

—Woman Protégé

• Women are more likely to develop others when compared to men. Among high potentials who reported they had someone developing them over the course of their careers, women were more likely than men to now be paying it forward and offering similar support to someone else.

  • 65% of women who had been developed were paying it forward, compared to 56% of men.18

• Women and men are providing the same types of support to their protégés. When we asked high potentials how they have been most helpful to their protégés, we found that there were no significant differences in what women and men provided their protégés.

  • 67% of both women and men gave their protégés career or job advice.
• An equivalent proportion of women and men offered sponsorship to their protégés (9% of women, 13% of men).
• Additionally, there were no differences between men and women when it came to stereotypically “feminine” support such as social support (7% of women, 8% of men) and role-modeling (15% of women, 11% of men).

• **Women were more likely than men to be developing women.**

• Consistent with research that people gravitate toward others like themselves—the “like likes like” phenomenon—we found that women are more likely than men to be developing women.

• **73% of women who were developing others were developing female talent compared to only 30% of men who were developing female talent.**

## WOMEN PAY IT FORWARD: TAKING THE STING OUT OF THE QUEEN BEE MYTH

Women’s actions stand out more because there isn’t a critical mass of them at the top.

—Shahla Aly, Vice President, Solutions Delivery, Microsoft IT Microsoft Corporation

The Queen Bee syndrome suggests that women do not help other women get ahead, and that they may even actively keep other women down, which some say contributes to the gender gap. Though assumptions of a Queen Bee syndrome persist, our findings on high-potential leaders in the pipeline support a growing body of research that unravels this myth. We found that women who have received development themselves are developing others even more than men who have been developed. And not only are women offering career development support to others, they are, again, more than men, helping other women climb the corporate ladder.

And it doesn’t end when women reach the top. Our findings also showed that senior women are developing others—just as senior men are—and that senior men and women are more likely than those in more junior roles to be paying it forward and developing others.

These findings show that the majority of women are not vying to be the Queen Bee while holding others back. Instead they are paying development forward to other women. And while our results show that not all women are developing other women, it’s also true that not all men help other men. The main difference is that the failure by some men to pay it forward is not attributed to their gender group as a whole and, thus, is not used to negatively characterize all men’s behavior. The failure of some women to pay it forward, however, is used to negatively characterize women’s behavior as a group.
• Senior women—just as with senior men—were more likely than those in more junior roles to be developing others.26

• Additionally, women don’t let long hours get in the way of developing talent. Among high potentials working more than 60 hours a week, women were more likely than men to be developing others (76% of women vs. 57% of men).27

CONSIDER THIS

Men Are More Likely To Develop Other Men, and Women Are More Likely to Develop Other Women

Given that men still overwhelmingly hold the most senior positions,28 and that getting men involved in women’s development creates men who become champions of women’s advancement,29 more men should view developing female talent as part of their role as a leader.

• Is there a compelling, well-communicated business case for diversity of thought and development in your organization?
• Are you encouraging your leaders to “look broadly, look deeply, and look often”30 to find talent that may not be getting exposure and support?
• How well do you showcase senior women—and men—who develop female talent?
DEVELOPING HIGH POTENTIALS IS AN ESSENTIAL LEADERSHIP ACTIVITY

I remember one of my bosses telling me a long time ago, “As you grow in an organization and you become a leader, part of your job essentially is to make time for people who want to get insights from you or want to bounce career ideas off you...” I took that very much to heart, I [have] used it for myself, and I also have always been very supportive of other people coming to me for things like that.

—Woman Protégé

Through this research on the careers of high potentials, we found that those who received development themselves were more likely to develop the next generation of leaders at the organization. In particular, sponsorship stands out as the type of development that predicts most directly whether or not someone will pay it forward after having received such support. It may be that protégés who have received this type of career development feel strongly indebted to the leader who took a chance on them and, thus, feel they have more of an obligation to do the same for others.

In addition, those who are more proactive in strategically advancing their careers are more likely to develop others. Thus, high potentials may see helping others, particularly those other than their direct reports, as part of their own advancement strategy within the organization. It can increase their visibility and create a followership that can serve the high potential well when focusing on rising within the organization.

We also found that paying it forward pays off, literally, in terms of further career progression and greater compensation growth. Not only does developing others help build a strong talent pipeline with a pay-it-forward mentality, those who engage in this type of development receive tangible and direct rewards for investing time in others.

Finally, we found that women are paying it forward to other women, adding to the existing research that busts the Queen Bee myth. We did find, however, that not all women are developing others just as not all men are developing others. If women are developing others—and to an even greater extent than men are—why does the Queen Bee myth persist? Perhaps it is because there are so many more men in the senior ranks that any one man’s actions aren’t taken as reflective of men as a group the way women’s actions seem to reflect on their entire gender.

Organizations—and individual leaders—should consider what they should start doing, keep doing, or stop doing with regard to paying talent development forward. Because paying it forward pays back.
APPENDIX 1: METHODOLOGY

Findings for this report derive from responses to an online survey fielded in 2010, which provided additional information on career progression initially collected in 2008. Data in this report are based on responses from the 742 respondents who had attended full-time MBA programs and had worked full-time at a company or firm as of the 2008 survey. Analyses focus on these high potentials’ experiences between the 2008 and 2010 surveys with respect to how they themselves have been developed by others and what effect, if any, this development has had on whether or not they were paying it forward. This strategy allowed us to identify the spillover effects of development of high-potential talent from 2008–2010. We also investigated the benefits high potentials receive as a result of investing in others’ careers.


3. Comparison is significant at p<.05.

4. We conducted a logistic regression to predict the likelihood that high potentials are (versus are not) developing others. Controlling for gender, age (as a proxy for prior work experience), level in 2010, and time since MBA, we found that the number of people high potentials discussed career matters with significantly predicted their likelihood of developing others; those with more advisors were more likely to develop others at p<.05. The regression excludes high potentials who reported that they had zero advisors.

5. We conducted a logistic regression to predict the likelihood that high potentials are (versus are not) developing others. Controlling for gender, age, level in 2010, time since MBA, and number of people in their network (excluding those respondents who reported not discussing career matters with anyone), we found that any of their top three network connections provided them with sponsorship, high potentials were more likely to develop others at p<.05.

6. Comparison is significant at p<.05.

7. In the logistic regression predicting the likelihood that high potentials are (versus are not) developing others, controlling for gender, age, level in 2010, time since MBA, and number of people in their network (excluding those who reported not discussing career matters with anyone), we found that receiving role modeling, job or career advice, or social support were not significant predictors of likelihood to develop others, p>.1.

8. We conducted a logistic regression to predict the likelihood that high potentials are (versus are not) developing others. Controlling for gender, age, and time since MBA, we found that the high potentials’ level in 2010 significantly predicted their likelihood of developing others, with those in higher levels being more likely to develop others at p<.05.

9. Comparison is significant at p<.05.


11. We created a scale measuring recent proactiveness based on the mean of responses to 20 items assessing the extent to which high potentials had used various career advancement strategies between the 2008 and 2010 surveys. We conducted a logistic regression controlling for gender, age, level in 2010, time since MBA, and number of people in their network (excluding those respondents who reported not discussing career matters with anyone). Recent proactiveness predicted the development of others at p<.05.

12. Comparison is significant at p<.05. See Nancy Carter and Christine Silva, The Myth of the Ideal Worker: Does Doing All the Right Things Get Women Ahead? (Catalyst, 2011).

13. This finding builds on previous findings, here showing that women and men continue to use career advancement strategies equally as careers have progressed over this time period. There was no significant difference on mean scores for recent proactiveness for men (3.14) and women (3.09), p>.1. For more on high potentials’ use of career advancement strategies, please see Nancy Carter and Christine Silva, The Myth of the Ideal Worker: Does Doing All the Right Things Get Women Ahead? (Catalyst, 2011).

14. In a linear regression predicting the logarithm of current compensation as of 2010, controlling for gender, age, logarithm of compensation in 2008, level in 2008, level in 2010, time since MBA, industry, and global region, developing others was a significant predictor of compensation growth at p<.05. As salaries varied so greatly, a log-transformed salary variable was used in analyses to minimize variance. In addition, outliers more than four standard deviations above the mean were excluded. As respondents reported salaries in the currency in which they were earned, purchasing power parity (PPP) conversions were used to account for differences in global cost of living. See: Alan Heston, Robert Summers, and Bettina Aten, “Penn World Table Version 6.3.” Center for International Comparisons of Production, Income and Prices at the University of Pennsylvania (August 2009).
15. In a linear regression predicting level in 2010, controlling for gender, age, level in 2008, time since MBA, industry, and global region, developing others was a significant predictor of advancement at p<.05.

16. In a linear regression predicting compensation in 2010 (in PPP-adjusted dollars), controlling for gender, age, compensation in 2008, level in 2008, level in 2010, time since MBA, industry, and global region, developing others was a significant predictor of compensation growth at p<.05. The dollar value associated with the predictor variable “developing others” in the regression is $25,075, which takes into account compensation differences associated with the control variables. This statistically significant figure is shown for illustrative purposes, as tests of compensation growth rely on logarithm-transformed PPP-adjusted variables to minimize the impact of variance across salaries and geographic regions.

17. In a linear regression predicting the logarithm of current compensation as of 2010, controlling for gender, age, logarithm of compensation in 2008, level in 2008, level in 2010, time since MBA, industry, global region, and whether high potentials are developing others, an interaction term of gender and developing others was not a significant predictor of compensation growth, p>.1. In a linear regression predicting level in 2010, controlling for gender, age, level in 2008, time since MBA, industry, global region, and whether high potentials are developing others, an interaction term of gender and developing others was not a significant predictor of career advancement, p>.1.

18. Comparison is significant at p<.1.


20. Comparisons are not statistically significant, p>.1.


22. Comparison significant at p<.05.

23. Staines et al.


25. We asked high potentials to identify whether their protégé is lower or higher than they are in the organization hierarchy. We did not capture protégé level within the survey and thus could not do comparisons to determine if senior men or women are more likely to develop junior women vs. men.

26. First, we ran the above logistic regression to predict the likelihood that high potentials are (versus are not) developing others separately for women and men. Controlling for age and time since MBA, we found that the high potentials’ level in 2010 significantly predicted their likelihood of developing others, true for both women (p<.1) and men (p<.05). Similarly, in a logistic regression on the entire sample—women and men combined—to predict the likelihood of developing others, with controls for gender, age, time since MBA, and level in 2010, an interaction term of gender and level in 2010 was not a significant predictor at p>.1.

27. Comparison is significant at p<.05.


31. In total, 1,479 people responded to the 2010 survey, representing a response rate of 54 percent. The 742 respondents reported on here were thus part of the 4,143 respondents whose responses served as the basis for previous reports. For more information, please see The Promise of Future Leadership: Highly Talented Employees in the Pipeline Methodology.
ACKNOWLEDGMENTS

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Any proceeds from this publication will go toward the projects of the ABA Commission on Women in the Profession.

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Despite our best efforts, we inadvertently may misspell or omit a name. We sincerely regret any such errors and greatly appreciate being informed of them so that we can correct our records. To report any mistakes or oversights, please contact the ABA Commission on Women in the Profession at 312/988-5715.
In the groundbreaking study *Visible Invisibility: Women of Color in Law Firms*, the American Bar Association Commission on Women in the Profession analyzed the challenges that women of color in private practice face, including demeaning comments or harassment; a lack of networking opportunities; denial of assignments; a lack of access to billable hours; limited client development opportunities; unfair performance evaluations; and lower compensation. Not surprisingly, these and other barriers have impacted the retention and advancement of women of color, particularly into the partnership ranks of the nation’s major law firms.

According to the National Association for Law Placement (NALP), minorities hold only 5.4 percent of law firm partner positions among the ranks of the nation’s major law firms.* The numbers are even more disturbing for minority women, who hold only 1.5 percent of partner positions. These statistics are troubling and reveal that law firms have a long road to travel before achieving equality within the workplace.

In 1999, the general counsel of approximately 500 major corporations affirmed the essential need for diversity in the workplace by acting as signatories to *Diversity in the Workplace—A Statement of Principle*. In 2004, seeing a need for a more aggressive statement, Roderick Palmore, then Executive Vice President and General Counsel of Sara Lee Corporation, published a *Call to Action: Diversity in the Legal Profession*, which sets forth consequences for law firms pertaining to corporate expectations related to law firm diversity. The general counsel of more than 120 major corporations have signed the *Call to Action* and pledged a willingness to enforce that commitment with consequences both positive and negative. While we commend these and other corporate initiatives, it is clear that law firms need to accelerate and intensify their efforts.

So what can a firm do to further develop its commitment to diversity? This publication offers strategies that law firms can and should implement to improve diversity within the workplace. It also provides insightful advice from 28 women of color who have reached the partnership ranks of their law firms despite the barriers standing in their way. While individual journeys may differ, their counsel and insight are invaluable. Taken together, we hope the initial study and this publication will educate and inspire new and renewed efforts.

There is no one solution for eradicating barriers within law firms; neither is there one formula for establishing a truly open and diverse profession, but the strategies outlined are a starting point. This conversation is not over, but we hope this publication, shared with you and others in your workplace, will move all to act with conviction for meaningful change.

Pamela J. Roberts
Chair
Commission on Women in the Profession

* Analysis done by NALP from demographic information collected for its 2007-2008 *NALP Directory of Legal Employers.*
From Visible Invisibility to Visibly Successful:

Success Strategies for Law Firms and Women of Color in Law Firms

Highlights

From Visible Invisibility to Visibly Successful: Success Strategies for Law Firms and Women of Color in Law Firms is the follow-up publication to Visible Invisibility: Women of Color in Law Firms (2006), the groundbreaking national study by the ABA Commission on Women in the Profession that discusses the intersection of race and gender and its impact on women of color in law firms. This report on success strategies for law firms and women of color is the result of information, insights, and advice gathered from 28 women of color partners in national law firms and an examination of law firm practices that contributed to their success. Each of the 28 accomplished women of color who contributed to this report experienced diverse journeys and shared their varying perspectives on how they embarked on careers in law firms, their positive and challenging experiences in law firms, the leadership roles they assumed in changing law firms, and the personal strategies they employed to be successful in law firms in spite of being “the first” or “the only” woman of color in their different firms.

The interviews and analyses identified two categories of strategies that need to occur simultaneously in order for law firms to achieve sustained success with women of color: 1) institutional changes in the way law firms are run, and 2) the empowerment of individual women of color to build the support, skills, resources, and power to succeed in spite of the barriers that currently exist in law firms.

Success Strategies for Law Firms

1. Grow and sustain active outreach to women of color through the firm’s recruiting efforts.
2. Develop concrete measurement tools through which progress can be tracked, analyzed, and measured.
3. Develop various channels throughout the firm in which inclusive formal and informal networking can occur, and connect the networking activities to foster greater dialogue between persons of varied backgrounds, ethnicities, and races.
4. Develop quantitative measures for tracking and analyzing the flow of work within all the practice groups in the firm, and hold leaders of practice groups accountable for ensuring that work is distributed in an equitable and unbiased way.
5. Create general categories of skills and knowledge that younger lawyers can use to monitor their own success.
6. Build systems of self-advocacy into the attorney evaluation processes, and ensure that attorneys who are evaluating other attorneys are trained to evaluate in an open, effective, and unbiased manner.
7. Integrate business development skills-building into all areas of an attorney’s development in the firm.
8. Develop a succession-planning strategy for the firm that integrates the inclusion of senior associates and junior partners in key firm management committees.
9. Create an effective Diversity Committee or similar leadership structure by ensuring meaningful participation by firm leadership, clear strategic planning around diversity issues, and adequate resources to effectively execute the clear strategies.

Success Strategies for Women of Color in Law Firms

1. “Believe in yourself, and do not let anyone shake your belief in yourself.”
2. “Give excellence. Get success.”
3. “If you can’t find mentors, you have to make mentors.”
4. “It takes a village to raise a lawyer.”
5. “Network, network, network.”
6. “It’s all about that book [of business].”
7. “Take care of yourself.”
8. “Show up. Speak up.”
I. Introduction and Methodology

Visible Invisibility: Women of Color in Law Firms, the groundbreaking national study by the ABA Commission on Women in the Profession that discusses the intersection of race and gender and its impact on women of color in law firms, revealed some startling realities about the experiences of women of color:

- 49% of women of color reported having been subjected to demeaning comments or other types of harassment while working at a private law firm (compared with only 2% of white men reporting the same experiences).
- 62% of women of color reported being excluded from both informal and formal networking opportunities (compared with only 4% of white men reporting the same exclusion).
- 49% of women of color reported being informally mentored by white men (as compared to 74% of white men who reported being mentored by other white men).
- 44% of women of color reported being passed over for desirable work assignments (compared with only 2% of white men reporting the same experiences).
- 31% of women of color reported getting at least one unfair performance evaluation (less than 1% of white men reported ever having received an unfair performance evaluation).

These and other disparities identified in the experiences of women of color in law firms as compared to their white male counterparts allow us to better understand why women of color have a nearly 100% attrition rate from law firms at the end of eight years. The statistics are disturbing, and they reveal the distance that law firms have yet to travel in ensuring equal opportunity for all talented lawyers who enter this important sector of the legal profession.

Following the publication of Visible Invisibility, and with the aspiration of making the invisible visible, the Commission on Women examined the insights of women of color who have succeeded in entering the partnership ranks of national law firms, in spite of the statistics that predicted their failure and the barriers that challenged them much of the way. This report on success strategies for law firms and women of color is the result of that effort and has been developed through information, insights, and advice gathered from women of color partners in national law firms and an examination of law firm practices that contributed to their success.

The research methodology for this qualitative study of success strategies included: 1) 19 confidential, semi-structured, one-on-one interviews with women of color partners in national law firms; 2) a qualitative scan of policies, programs, and strategies that firms are undertaking to increase their overall recruitment, retention, and advancement of racial/ethnic minorities and women; and 3) confidential informal dialogues with nine women of color partners in national law firms who were specifically solicited for their feedback on the success strategies outlined in this report.

The above interviews and analyses identified two categories of strategies that need to occur simultaneously in order for law firms to achieve sustained success with women of color: 1) the implementation of institutional changes in the way law firms are run, and 2) the provision of resources and support sufficient to empower individual women of color to develop the skills and network to succeed in spite of the barriers that currently exist in law firms.

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1. Of the 19 initial interviewees, 9 were African American, 7 were Asian Americans, and 3 were Hispanic. Two of the interviewees had practiced for less than 10 years, 4 had practiced between 11-15 years, 5 had practiced between 16-20 years, and 8 had practiced for over 20 years. One of the interviewees was in a smaller law firm while 18 were in large national law firms.

2. Of the 9 follow-up interviewees, 3 were African American, 2 were Asian Americans, 1 was Native American, and 3 were Hispanic. One of the interviewees had practiced for less than 10 years, 4 had practiced between 11-15 years, 3 had practiced between 16-20 years, and 1 had practiced for over 20 years.
II. Perspectives and Identification of Issues by Women of Color in Large Law Firms

The 28 women of color partners who participated in the initial and follow-up component of this study were specifically identified because of their longevity and prominence in law firms, their experience with diversity efforts in their firms and professional organizations, and their willingness to contribute their time and voices to this project. The confidential interviews provided an opportunity for these women to share their unique journeys and to offer their insights into the decision-making processes that led them to pursue a legal career and the personal strategies they employed to gain and sustain success in law firms. The interviewees also were asked to comment on best practices within law firms with regard to the hiring and retention of lawyers of color, particularly women of color.

These accomplished women experienced diverse journeys. They share, however, remarkable similarities, especially in regard to their personal resolve to be successful, their creativity and resilience in overcoming obstacles, and their unwavering faith in themselves.

I relied much more on my creativity to craft my career than I did evidence of what was actually around me. All of the women in my family were hardworking. They were strong. But none were professionals. I wanted to be hardworking like the women I knew, strong like them. But I also wanted to be a professional. And they told me I could, so I did.

Once their desires and creativities got them into law school, the academic achievements of the women also varied. Some of the interviewees were able to get the information they needed to focus their academic journey through ad hoc mentors and participation in various incarnations of the Council of Legal Education Opportunities (CLEO) program available at the time they began their law school careers. Others struggled to figure it out on their own. Several of the interviewees followed the route traditionally ascribed to partners in large law firms: attendance at top law schools, superior academic performance, participation on law reviews, and a career progression beginning as a summer associate in a firm where their ultimate career would be made. Most, however, reported a “more scenic” progression through their law school experience. Without mentors to help them focus on the right strategies or clarify their priorities, most of the women did not have an opportunity to learn the “unwritten rules” until well into their law school experiences, sometimes after their grades had already suffered. One woman summarized her “cluelessness about the little things” by reflecting:

No one told me that there were good outlines already floating around the law school. I had no idea. I made my own outlines from scratch, and they were horrible. By the time I realized I had to be plugged in with the white students to get the good outlines, it was already the end of my second year.

Education

The 28 women of color—all trailblazers in the legal profession—had varied educational experiences leading into law school. Some attended grade and high schools where the student body was primarily composed of minority students; others attended schools where no one looked like them. Some women experienced different demographics when their families moved from one region of the country to another.

While some of the interviewees knew at a relatively early age that they wanted to pursue a career in law, others were drawn to the law later in life by the reputation and stature of the profession. One woman commented on how she was drawn to being a lawyer: “I didn’t go to college wondering what I was going to do; I knew I was going to be a lawyer.” Another woman noted that the legal profession was a tool for getting the decision-making power she sought: “So when I went to college . . . I did not say ‘I want to be a lawyer’; I said, ‘I want to be a professional; I want to be a decision maker.’”

I relied much more on my creativity to craft my career than I did evidence of what was actually around me. All of the women in my family were hardworking. They were strong. But none were professionals. I wanted to be hardworking like the women I knew, strong like them. But I also wanted to be a professional. And they told me I could, so I did.

The majority of the interviewees had neither lawyers in their families nor access to lawyers who could serve as role models in their early life experiences. Few had parents who had been professionals, and only one had a parent who was a lawyer. That said, they drew inspiration and strength from their families, but they constructed careers out of their desires to expand beyond the realities they saw around them. As one woman reflected:

No one told me that there were good outlines already floating around the law school. I had no idea. I made my own outlines from scratch, and they were horrible. By the time I realized I had to be plugged in with the white students to get the good outlines, it was already the end of my second year.

3. The Council of Legal Education Opportunities has held workshops and institutes for disadvantaged students entering law schools since 1968. They have evolved over the years from a volunteer-run organization to non-profit project officially housed in the ABA’s Fund for Justice and Education. See www.abanet.org/cleo.
I also didn’t know anything about law firms. The whole interviewing thing was like a foreign language. I didn’t have an interpreter. When I went to the placement office, the woman just looked at me and suggested that I interview in the public sector.

**Early Career Positioning**

For those women able to navigate the law school process from the outset, their careers followed the classic pattern of early entrance into large law firm culture through a summer associate program after their second year of law school. Others participated in judicial clerkships, accepted government positions, or took positions with small firms or legal service providers. A few selected their first legal position as a result of considerations such as the location of family or boyfriends. Others, as a result of somewhat mediocre grades and degrees from less than prestigious law schools, initially struggled to find career opportunities. No matter where they started, they shared the commonality of being committed to succeeding. As one woman stated, “I didn’t see any job as too small or too big. I wasn’t necessarily happy with where I initially was, but I knew I was going to be good. I stayed focused on that.”

Once positioned in their first jobs, the interviewees were exposed to a variety of firm cultures. Typically, they were in firms that had very few women and even fewer lawyers of color. Access to mentors, sponsors, or champions was limited. Many of the women realized early in their careers that they were not going to be “adopted” by partner mentors the same way they saw their peers being mentored. Nonetheless, the thread of “making mentors” where none existed was woven through many of the women’s experiences, especially in their realization that they needed to reach across to the white male partners in order for their careers to be successful. One woman recalled that “my life learning lesson . . . is that you really need mentors across races.”

As the interviewees settled into their careers, their experiences varied widely. The interviewees who were litigators generally appeared to know immediately that this was their path within the profession and pursued it in their first law firm position. Others who developed transactional practices seemed less inclined initially, but grew into the area of practice they ultimately pursued—sometimes following a mentor, sometimes a client, and sometimes their own substantive interests. One interviewee noted: “Because mentoring and the work that you get go hand in hand in law firms, I wasn’t sure at first if I was interested in the kind of work that my mentor did, but he wanted to see me succeed, and when I thought about the opportunities he would give me, that practice area just started looking better and better.”

Most of the interviewees worked in a number of organizations or firms over the course of their careers. The movement across these entities was motivated by factors such as logical career evolution, bad experiences within firms, and changes in life course situations. As the interviewees cultivated client relationships and developed business, some were pursued or courted by their future employers.

Most of the women in this study recounted various degrees of negative experiences in their firms. Sometimes the negative experiences were general workplace issues that drove them to look for work environments where they would have greater control over their lives. One woman contacted a headhunter because she realized that the first firm in which she had taken a job was a bad fit for her: “I didn’t see myself staying at that firm because people were billing an average of 2,200 hours, and that was considered a slacker, and I knew I wasn’t going to sell my soul to that . . . and, I liked to spend time with my baby, and I heard about other firms with different reputations, so I contacted a headhunter.”

Other times, the negative experiences were more specific to their trailblazing journeys as the first female partner of color or the first partner of color in their firms. For example, few of the large firms had either diversity committees or dedicated personnel whose efforts were focused on diversity concerns. With no organizational focus on diversity, these pioneers experienced high levels of stress and dissatisfaction with their careers, causing them to question whether they really were enjoying their careers in the law. Their dissatisfaction arose from difficulties with colleagues, encounters with both gender and racial stereotypes, problems with developing a book of business, and hurdles in gaining recognition and credit for the work they did. One woman became so stressed that she developed physical symptoms, resulting in her physician’s recommendation that she take a leave of absence:

“I took two months off. I literally just slept the first week. The second week, I started losing weight. I had gained 35 pounds since I had started at that firm. I started working out, taking yoga, and I was really happy. Then, it occurred to me . . . I don’t have to go back. So, I didn’t. I worked with a headhunter to find a firm that really worked for me, and I’m happy and successful.

Another woman laughed as she described her fourth year as an associate: I was doing some environmental work and focusing on all these definitions of toxicity and waste. Air
I was doing some environmental work and focusing on all these definitions of toxicity and waste. Air pollution . . . water pollution . . . noise pollution . . . and one day, I walked into the firm and decided that people pollution was also a form of toxicity, and I was in a toxic environment. I stayed at that firm for another two years, but I had a better attitude about it once I decided that I was going to leave sooner rather than later.

Diversity Committees

Just as many of the women “made” their own mentors, they either initiated or became involved in “making” change in their firms as well. “As I grew up and matured, it made sense that my firm needed to grow up too,” said one woman, “so I started the Diversity Committee. For about two years, there were, like, three people on the committee. But now, it’s thriving.” Many of the interviewees helped to create the diversity committees in their firms or have participated actively in these committees, often in leadership roles. While the goal of these committees is similar across law firms, the interviewees expressed a wide divergence in their actual operation. Some felt that, after a flurry of activity, the committee within their firm often became stagnant and ineffective; others felt that the committees within their firms were functioning well but not doing all that they could be doing. Many of the interviewees indicated that with respect to work-life balance—e.g., parental leave, part-time positions—their firms had established some successful policies.

Interviewees cited a number of factors that are essential elements of a successful diversity committee. These included, with regard to structure, the investment and participation of a managing partner and periodic assistance from outside consultants to help set agendas and develop plans with benchmarks. In addition, the interviewees commented that the assignment of permanent, committed staff devoted to diversity issues was critical to ensure that attorneys, particularly attorneys of color, who were growing or maintaining a practice had the administrative support needed. As one woman commented: “You can say that’s a policy, but what happens on the implementation is what you’ve got to watch out for.” Administrative support was necessary both for the successful implementation of a firm’s diversity efforts and the alleviation of pressures from the women of color to whom the diversity efforts were important. Another woman observed that although the firm benefited greatly from her efforts on diversity, her compensation did not reflect her work on the issue: “I spend all year on this, and they are touting our efforts to our clients and such, and at the end of the year, I hear that they are disappointed by my hours. I realized then that I couldn’t do this at the expense of my career.”

Some interviewees commented that unless there was a deep, firmwide commitment to diversity, a diversity committee was not likely to produce tangible results. For instance, a situation where an individual is identified and asked to undertake the responsibility of a diversity officer as an add-on to other firm responsibilities might not result in an effective outcome. One lawyer stated that at her firm, a white male partner was identified as the Diversity Partner, with the logic that if he became passionate about the plan, others would follow by the example he set. One women of color stated, “It can’t just be the issue of the women of color or the men of color or the women. Everybody’s got to have a stake in the outcome, and that was the key focus of it.”

The interviewees expressed concern that diversity committees have been more successful in their recruiting efforts and less successful in their retention efforts. The interviewees also observed that retention, although a critical concern in diversity, was a challenge impacting all associates. One woman remarked that the sheer number of opportunities in the marketplace was a major cause of attrition of associates at her firm: “Ten years ago, if you treated people badly, what choice did they have? Now, there are firms doing good things, and the associates have choices. If we don’t meet their needs, they will go elsewhere.” Another woman commented that the younger generation generally expects that diversity be a key component of a good workplace: “. . . the people that are just out of law school now, people that are first and second years, I think they see the world differently. I think they do expect more inclusion . . . they expect more diversity.”

“…the people that are just out of law school now, people that are first and second years, I think they see the world differently. I think they do expect more inclusion . . . they expect more diversity.”

“I was doing some environmental work and focusing on all these definitions of toxicity and waste. Air pollution . . . water pollution . . . noise pollution . . . and one day, I walked into the firm and decided that people pollution was also a form of toxicity, and I was in a toxic environment. I stayed at that firm for another two years, but I had a better attitude about it once I decided that I was going to leave sooner rather than later.”
they expect more in general.” Many interviewees noted that younger lawyers of color had a different set of expectations about inclusion based on their life experiences. These expectations, combined with the continued lack of mentoring and the increased number of opportunities in the marketplace, made retention of women of color a particularly challenging issue for law firms, according to several interviewees.

The reluctance of law firms to serve as leaders on diversity efforts was also identified as a potential weakness. As one interviewee noted: “Law firms and management are not very creative, and they are afraid to do things that other people have not done. I think it really affects diversity programs, because no one is significantly creative.” Another lawyer echoed these sentiments:

Notwithstanding their frustrations with diversity programs, many of the respondents reported personal satisfaction from their efforts to make the path easier for women of color who followed in their footsteps. One partner noted that “it was very natural for me to get involved and stay involved with this issue because it is a part of my life to change what I see around me to make it better for others. It is a part of what makes my career satisfying as a whole.”

Mentoring
Mentoring was identified as both a critical element of retention and a very complex concept. The interviewees agreed that mentoring needed to be hands-on, assertive, and aggressive. There was also relative agreement that mentors should be positioned to provide advice, access to good clients and assignments, and situated in the sphere of influence within the firm. Capturing the essence of the concept while distinguishing a mentor from a sponsor, one interviewee noted: “I can be a mentor, but I can’t be a significant sponsor, because I don’t have the power that I’m perceived to have within the context of the firm.” One key way in which mentors can make a major difference is through the assignment process—helping women of color obtain important client work in which they are trusted to do the job. In describing what the lawyers in her first firm did to mentor her, one interviewee commented:

Notwithstanding their frustrations with diversity programs, many of the respondents reported personal satisfaction from their efforts to make the path easier for women of color who followed in their footsteps. One partner noted that “it was very natural for me to get involved and stay involved with this issue because it is a part of my life to change what I see around me to make it better for others. It is a part of what makes my career satisfying as a whole.”

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Notwithstanding their frustrations with diversity programs, many of the respondents reported personal satisfaction from their efforts to make the path easier for women of color who followed in their footsteps. One partner noted that “it was very natural for me to get involved and stay involved with this issue because it is a part of my life to change what I see around me to make it better for others. It is a part of what makes my career satisfying as a whole.”

Mentoring
Mentoring was identified as both a critical element of retention and a very complex concept. The interviewees agreed that mentoring needed to be hands-on, assertive, and aggressive. There was also relative agreement that mentors should be positioned to provide advice, access to good clients and assignments, and situated in the sphere of influence within the firm. Capturing the essence of the concept while distinguishing a mentor from a sponsor, one interviewee noted: “I can be a mentor, but I can’t be a significant sponsor, because I don’t have the power that I’m perceived to have within the context of the firm.” One key way in which mentors can make a major difference is through the assignment process—helping women of color obtain important client work in which they are trusted to do the job. In describing what the lawyers in her first firm did to mentor her, one interviewee commented:

They did really good things in terms of assignments, but also in terms of constructive criticism and allowing you to develop. Because a lot of what happens to lawyers of color in particular is, you make a mistake and you’re not allowed to learn from it and move on.

According to several of the women, mentoring was also instrumental to the development of a client base—a factor more critical to the success and mobility of a lawyer than the number of billable hours one generates. A good mentoring relationship creates an entry for the mentee into key networks, both internally within the firm and externally in key industry circles. One woman stated that “who introduces you to the right people is as critical as getting in front of the right people. People are busy. They will take a phone call from you or go to lunch with you if you say the right name.”

The respondents agreed that ensuring a good fit between the mentor and mentee is more critical than pairing relationships along racial lines. One interviewee reflected:“I think you need mentors across racial lines and . . . I think you need both . . . . As a person of color, no matter how much anyone empathizes with you, unless they’ve been through it, it’s kind of hard to understand the dynamic of what it is you feel and experience.” Concurring, another lawyer noted: “I think we ought to be their informal ones, but they ought to have a formal one who’s somebody else. And they need to get out of that notion of thinking the only mentors they can have are [of their same race.]”

A good mentoring relationship creates an entry for the mentee into key networks, both internally within the firm and externally in key industry circles.
III. Success Strategies for Law Firms

Based on the statistics in the Visible Invisibility report and the insights provided by the women of color interviewed for this study, law firms need to change these key areas of their organizational structures and cultures:

1. Grow and sustain active outreach to women of color through the firm’s recruiting efforts.
   - Firms should participate in job fairs and develop relationships with minority student organizations. They should consider offering positions to students after their first year of law school and partner with law schools to develop programs that address the intricacies of constructing resumes and understanding the practice of law and law firm culture.
   - Law firms should integrate into their recruiting strategies the recognition that young lawyers of color have different expectations with regard to inclusion (such as broader definitions of diversity, more comprehensive diversity policies and programs, and efforts that focus specifically on work allocation, mentoring, and professional development) from the generation that preceded them, and that young lawyers generally have different expectations with regard to their career trajectories.

2. Develop concrete measurement tools through which progress can be tracked, analyzed, and measured. Women of color often reported how difficult it was for them to illustrate to the firms that there were impediments to their ability to succeed, because firms did not maintain data in a consistent way that allowed them to see the points at which women of color were not being included in the opportunities available within the firm.
   - Track how many women of color are hired into the firm and how many are leaving by practice area, seniority, office (if you have multiple offices), and other criteria that are specifically relevant to your firm.
   - Recognize the value of maintaining good relationships with young lawyers who leave the firm, regardless of their reason for doing so. The associate of today may be the client or referral source of tomorrow. Part of that effort should be to assist young lawyers who wish to leave the firm in finding a position that is best suited to them.
   - Implement an effective exit interview strategy where you can gather candid information about why people are leaving the firm and where they are going.

3. Develop various channels throughout the firm in which inclusive formal and informal networking can occur, and connect the networking activities to foster greater dialogue between persons of varied backgrounds, ethnicities, and races. Although many women of color had formal mentors assigned to them through formal mentoring programs, they felt that the more effective mentoring occurred in the informal mentoring where partners developed meaningful relationships with associates, invested in the associates’ success, and eventually sponsored the associates when promotion decisions came up. Women of color often felt that white men were uncomfortable around them and, therefore, did not reach out to mentor them in this critical way.
   - Create opportunities for the firm leadership to communicate consistently to partners the importance of mentoring in an inclusive way that offers real opportunities to all lawyers hired into the firm.
   - Implement confidential upward review processes so that associates can evaluate the ways in which they feel they are being effectively or ineffectively mentored. To strengthen the impact of the upward review process, a portion of partner compensation should be linked to effectiveness ratings that partners receive from associates.
   - Create frequent opportunities (group lunches, practice group breakfasts, CLE sessions, etc.) where people can talk about their practices, client development activities, bar activities, etc., with each other. The more opportunities people of diverse backgrounds have to interact with women of color and the work they are doing, the sooner they will naturally lose some of their discomfort at the perceived differences.
   - Integrate seniority-specific opportunities for women of color lawyers to shadow, liaise, and work with more senior lawyers. For example, assign junior lawyers to a client pitch team to conduct background research on the industry, the company, and the lawyers in the target legal department. Also, consider assigning income partners and even senior associates to liaison roles on key firm committees, such as the management/executive committees, compensation committees, policy committees, etc.
   - Create active affinity groups as support mechanisms within a firm. They serve a purpose by recognizing that not all people of color experience the same issues.

4. Develop quantitative measures for tracking and analyzing the flow of work within all the practice groups in the firm, and hold leaders of practice groups accountable for ensuring that work is distributed in an equitable and
unbiased way. Women of color consistently cited the quantity and quality of work to which they had access as one of the primary factors influencing their decisions to stay at particular firms or to look for opportunity elsewhere.

- Develop clear measurement tools to track how work is being distributed within various sectors of the law firm. These metrics will be especially effective if they measure specific data points, such as the comparison of how women of color’s quarterly hours compare with everyone else’s hours; the analysis of how many women of color are working on key clients for the firm; the analysis of how many women of color are included in client pitches and are given meaningful roles in the work that results from those pitches; and the comparison of the utilization rates of women of color with the utilization rates of their peers.
- Create a role for the Diversity Committee or a partner in the firm to track the above statistics on a monthly or quarterly basis to identify and correct emerging issues with associates at an early stage.
- Create accountability mechanisms by which practice group leaders are responsible for monitoring and correcting work-flow imbalances within practice groups.

5. Create general categories of skills and knowledge that younger lawyers can use to monitor their own success. Women of color frequently expressed frustration with the lack of transparency in regard to expectations, evaluations, and promotion decisions, which hindered their ability to identify best practices and strategies for their own careers. The lack of transparency also was cited as a barrier to women of color comparing their advancement in law firms to the advancement of their peers.

- Develop and communicate “core competencies” for the various seniority levels and practice areas within the law firm, including specific expectations for partnership selection. For example, the core competencies for a junior associate in a real estate practice group will differ from the core competencies for a senior associate in securities litigation. Although it is challenging for law firms to create these sets of core competencies and expectations, the level of transparency that this process will engender will lead to much greater retention of women of color.
- Create consistent opportunities within the firm (panel discussions, small group lunches, etc.) for associates to have conversations with partners and firm leaders on what the firm expects from them, what the firm expects from associates generally, how promotion decisions are made, and how the partnership election process works.
- There should be intervention structures in place to identify and address problems experienced by young lawyers earlier in their career trajectory rather than at the point of the partnership decision.

6. Build systems of self-advocacy into the attorney evaluation processes and ensure that attorneys who are evaluating other attorneys are trained to do so in an open, effective, and unbiased manner. Many women of color reported that they felt their performance evaluations were unfair for two core reasons: 1) they felt that they did not receive the feedback in the course of working with someone even when they rigorously sought that feedback, and 2) they did not feel that they had a voice in advocating for themselves when no one was advocating on their behalf.

- Develop a self-evaluation system for all associates through which they can communicate to the firm their perspectives regarding their annual objectives, what actions they took to accomplish those objectives, what challenges they faced in accomplishing their objectives, and other such self-advocacy items that allow the younger lawyers to have a meaningful voice in their evaluation process.
- Develop and implement a leadership development curriculum within the firm that focuses on teaching younger lawyers key communication, conflict resolution, team management, and other such skills in addition to the legal skills that they are already required to master.

7. Integrate business development skills-building into all areas of an attorney’s development in the firm.

- Involve younger associates on pitch teams and strategically plan for greater involvement and communication with clients early in an associate’s career.
- Integrate business development skills into all formal training programs.
- Create specific client development training workshops for senior associates who need to hone those skills in preparation for partnership.
- Invest in business development coaches who can work with individuals on a more extensive basis during their senior associate and junior partnership years to build better networks and translate contacts into clients.
- Identify clients who share the firm’s commitment to diversity, and find ways to partner with those clients to create greater visibility and exposure to the women of color within your firm.

8. Develop a succession planning strategy for the firm that integrates the inclusion of senior
associates and junior partners in key firm committees.

- Assign an associate and/or junior partner liaison to the management/executive committee (or a sub-committee of that committee) to introduce and develop firm management and leadership skills to younger lawyers.
- Identify leadership and management skill sets that are necessary for firm leaders and develop workshops for younger lawyers to introduce these skills to them at a younger age.

9. Create an effective Diversity Committee or similar leadership structure by ensuring meaningful participation by firm leadership, clear strategic planning around diversity issues, and adequate resources to effectively execute the clear strategies. Women of color generally reported positive feelings toward the existence of Diversity Committees in their firms, but they often felt that the committees were not well supported by the leadership of the firm and that they did not have a clear strategic direction through which they could make sustainable changes.

- Create and maintain a visible and working role on the Diversity Committee for one or two key firm leaders, and ensure that the Diversity Committee has representation from diverse groups within the firm but is not comprised only of diverse lawyers.
- Develop and follow a detailed strategic plan for the Diversity Committee’s efforts and communicate the successes of the Diversity Committee to the whole firm on a regular basis. These plans should be reviewed regularly. This includes investment in administrative support and in funding for a diversity officer whose full-time responsibility is to move the Committee’s efforts forward.
- Create an external advisory board comprising leaders from the community, academics, and/or clients to whom the firm will report on its diversity efforts on a quarterly or semi-annual basis. The external accountability can both demonstrate a solid commitment to real action and create new sources of ideas and support for the firm’s efforts.
- Create compensation systems that recognize contributions to the firm’s diversity efforts.

IV. Success Strategies for Women of Color in Law Firms

If law firms diligently developed, executed, and sustained the success strategies outlined in the previous section, they would be creating an environment in which women of color could thrive. The success of women of color, however, cannot be purely dependent on or delayed by the progress that law firms need to make. Women of color need to take charge of their own careers, and they need to navigate strategically to maximize their own success in spite of the challenges and barriers that they currently face.

The following success strategies for women of color in law firms are a synthesis of the perspectives, insights, and advice shared by the women of color partners who contributed their voices to this study.

1. “Believe in yourself, and do not let anyone shake your belief in yourself.”

In reflecting on their paths to success, many of the women of color partners talked about a pivotal incident or two where their faith in themselves was severely tested. In many cases, their confidence was tested by something which had a taint of racial or gender bias to it.

“You look around and you don’t see people who look like you in the partnership, and then you deal with a bad situation where people are questioning your merit, your worth, and there is a moment where you wonder, for real, if you are good enough to make it. That’s the moment where you cannot let their answer be your answer.”

2. “Give excellence. Get success.” Several of the interviewees talked about the need for excellence as a building block for success. Many noted that excellence was a prerequisite for success for all lawyers in law firms, but it was especially critical for women of color to be seen, first and foremost, as excellent lawyers. One partner noted that excellence in the practice of law can mean the difference between being a “woman of color”

“You look around and you don’t see people who look like you in the partnership, and then you deal with a bad situation where people are questioning your merit, your worth, and there is a moment where you wonder, for real, if you are good enough to make it. That’s the moment where you cannot let their answer be your answer.”
You have to be open enough to be mentored by white men. If you go to them, they will usually be there, but they are probably scared to come to you first.”

“You have to admit that we have issues asking for help. We think that it’s weak [to ask for help]. That’s crazy. You can’t do this by yourself. You have to have help. And lots of it. You have to have help taking care of your kids, your house, and those incidentals of life, like picking up dry-cleaning, that can throw off your whole day. You have to have help in meeting the right people so you can network. You have to have help becoming a good lawyer. You have to have help in getting clients. And you have to ask for it. If it’s hard for you to ask for help, practice asking with friends and family first. Then reach out to people in minority bars. And eventually work up to the white men in your firm. If you don’t get help, you won’t succeed.”

If you don’t get help, you won’t succeed.”

3. “If you can’t find mentors, you have to make mentors.” One experience that most of the women of color partners in this study shared is that they sought out and pursued senior lawyers to be their mentors even though they saw that many of the senior lawyers were reaching out to young white men and ignoring the women of color. As one partner stated: “Yes, it’s unfair. I had to work a lot harder to get mentors than the white guys. But I didn’t take it personally. I wanted to be successful, and I was going to be successful. And if the mentor didn’t come to me, I went to the mentor.” Another partner focused on the need to have several mentors: “It’s unrealistic to think that any one mentor can take care of you. I always tried to have lots of mentors, and I had to be thoughtful about it. I figured out what I needed, and I identified people who could help me get what I needed, and I asked. Okay, sometimes I harassed, but I got my mentors. And, by the way, many of them were white men. You have to be open enough to be mentored by white men. If you go to them, they will usually be there, but they are probably scared to come to you first.”

4. “It takes a village to raise a lawyer.” Many of the women of color partners talked about the various ways in which they built support systems outside of their law firms to compensate for the lack of support systems within. The support systems were often a combination of informal women of color networking groups, minority bar associations, family, and friends. Almost all of the partners talked about the importance of women of color realizing that doing it alone was unrealistic and not an ingredient for success. As one partner said: “Women of color have to admit that we have issues asking for help. We think that it’s weak [to ask for help]. That’s crazy. You can’t do this by yourself. You have to have help. And lots of it. You have to have help taking care of your kids, your house, and those incidentals of life, like picking up dry-cleaning, that can throw off your whole day. You have to have help in meeting the right people so you can network. You have to have help becoming a good lawyer. You have to have help in getting clients. And you have to ask for it. If it’s hard for you to ask for help, practice asking with friends and family first. Then reach out to people in minority bars. And eventually work up to the white men in your firm. If you don’t get help, you won’t succeed.”

5. “Network, network, network.” Women of color partners frequently cited that their ability to create and deepen relationships with a broad range of people helped them overcome many of the barriers that they faced because they had someone to whom they could turn for information, advice, resources, or another job if they were looking to make an exit. They also advised that women of color proactively had to create these relationships. One partner reflected on her own experiences of starting off as a shy woman who didn’t like to network: “When I was a younger lawyer, I didn’t realize how critical networking was. I thought it would be enough to put my head down, do my work, do it well, and voila, success would come. I’m quite shy. I hate networking. As I started getting more senior, I realized that I didn’t have the same access as people who could network. So, I decided to start networking like it was homework, a part of my job. I would set goals of meeting one new person a week, following up with one contact for lunch a week, and so on. Pretty soon, I was networking. I had a network, but I don’t see myself as a schmoozer, you know. When my firm really screwed me on comp one year, I had another offer after three phone calls. When my firm found out, they realized what they had in me, and they did right by me.”

6. “It’s all about that book [of business].” Recognizing the reality that portable business is the key to success in any law firm today, many of the women cited the need for women of color to focus on strategically building their books of business. One woman discussed how she hired a coach for herself because the firm did not have adequate training on business development: “I really did see it as an investment in myself and my career. The coach helped me figure out how to network in a more targeted way specifically to make business contacts, and she and I had a weekly conference call to go over what I had done that week to stay on track. It kept me focused.”
7. “Take care of yourself.” “It’s a marathon, not a sprint,” said one partner, adding, “You have to take care of yourself physically, mentally, spiritually, and everything in between. Success in law firms is one part intellect and four parts stamina.” Navigating the challenges of isolation, racial and gender bias, and many other barriers in the workplace can take a physical and mental toll on women of color. This toll is especially critical to recognize and resolve because practicing law in a law firm is, in and of itself, an activity of high stress. Self-care was stated by several of the women of color partners as a key strategy in setting up a successful legal career: “It sounds crazy, but the first thing I tell young women of color who come into the firm is to stay on schedule with annual physical checkups, get flu shots every November, have one physical activity that you do at least four times a week, get monthly massages, and have a therapist on standby. Go ahead and laugh, but in addition to my legal skills, it’s this stuff that keeps me on my toes. They know not to mess with me because I’m ready to fight the long fight.”

8. “Show up. Speak up.” Due to increasingly busy schedules, a lot of social events get skipped according to some of the women of color partners. “That is a big mistake. You have to show up. Out of sight, out of mind. You have to be visible to the people in your firm. Yes, you are tired. You are cranky. You want to go home. But you have to show up. Maybe it’s only for five minutes, but you have to show up,” stated one partner. Another partner took this advice further: “When you are at events, talk. Speak up. Walk up to people and talk. Talk about the weather, about anything. People pay attention to people who speak up. And if you speak up in the little ways, people will also listen when you need to speak up on the big things. The first time you open your mouth can’t be when you have a problem with something.”

V. Looking Ahead: Success Strategies for Women of Color in Law Firms

In order to transform the careers of women of color in law firms from visibly invisible to visibly successful, law firms have to first understand the specific issues facing women of color, and then address these issues in partnership with the women of color in their workforce. This report has outlined various strategies through which law firms can lay the foundations for women of color to have successful law firm careers and for women of color to ensure that they succeed. With consistent commitment and strategic action, the attrition statistics of women of color in law firms can be reversed, and the reversal of these statistics not only ensures true opportunity for all lawyers in law firms, but also will make law firms stronger and more competitive in an increasingly global marketplace where diversity is a critical component for sustained success.

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