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DIVERSITY AND GENDER EQUITY IN LEGAL PRACTICE

*Deborah L. Rhode**

I. INTRODUCTION

One irony of this nation's continuing struggle for diversity and gender equity in employment is that the profession leading the struggle has failed to set an example in its own workplaces. In principle, the American bar is deeply committed to equal opportunity and social justice. In practice, it lags behind other occupations in leveling the playing field. 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.¹ Part of the problem lies in a lack of consensus on what exactly the problem is. What accounts for gender, racial, and ethnic inequalities in law firms? Who is responsible for addressing them? Which proposed solutions would be worth the cost?

These are not new questions. But recent economic and client pressures have made clear the need for better answers. Many of the obstacles to diversity and equity in legal practice are symptomatic of deeper structural problems. This Article focuses primarily on barriers involving gender, race, and ethnicity. Although these are not the only relevant dimensions of diversity, they provide a useful framework because they affect the greatest number of lawyers and have been subject to the most systematic research. However, much of the analysis below has broader application to improving the quality of professional life for other groups in legal settings.

The following discussion tracks conventional usage in referring to "women and minorities," but that should neither obscure the unique experience of women of color, nor mask differences within and across racial and ethnic groups. The point, rather, is to understand how different identities intersect to structure the professional experience.

* Ernest W. McFarland Professor of Law and Director of the Center on the Legal Profession, Stanford University. This article builds on the Robert S. Marx Lecture at the University of Cincinnati Law School, and draws on DEBORAH L. RHODE, *LAWYERS AS LEADERS* 129–53 (2013) [hereinafter RHODE, *LAWYERS AS LEADERS*] and Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 *GEO. J. LEGAL ETHICS* 1041 (2011) [hereinafter Rhode, *Platitudes to Priorities*]. The research assistance of Aaron Henson is gratefully acknowledged.

1. ELIZABETH CHAMBLISS, *MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION* ix (2004). For example, minorities account for about 25 percent of doctors and 21 percent of accountants, but only 11 percent of lawyers. Sara Eckel, *Seed Money; Skadden Gives \$10 Million to Boost Diversity*, *AM. LAWYER*, Sept. 1, 2008, at 20; *Legal Profession Statistics*, *AM. BAR ASS'N*, http://www.americanbar.org/resources_for_lawyers/profession_statistics.html (last visited Feb. 2, 2014).

II. THE GAP BETWEEN PRINCIPLE AND PRACTICE

A. Gender

Viewed historically, the American legal profession has made substantial progress in the struggle for gender equity. Until the late 1960s, women constituted no more than about three percent of the profession and were largely confined to low-prestige practice settings and specialties.² Now, about half of new lawyers are female; they enter law firms at about the same rate as men, and are fairly evenly distributed across substantive areas.³ In most surveys, women also express approximately the same overall level of satisfaction in practice as do men.⁴

Yet significant gender inequalities persist. Women constitute over a third of the profession but only about a fifth of law firm partners, general counsel of Fortune 500 corporations, and law school deans.⁵ 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.⁶ Studies find that men are two to five times more likely to make partner than women.⁷ Even women who never take time out of the labor force and who work long hours have a lower chance of

2. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988).

3. For new entrants, see Andrew Bruck & Andrew Canter, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2103 (2008); Miguel R. Rivera, *A New Business and Cultural Paradigm for the Legal Profession*, 26 NO. 8 ACC DOCKET 66, 68 (2008). For specialties, see Fiona Kay & Elizabeth Gorman, *Women and the Legal Profession*, 4 ANN. REV. LAW & SOC. SCI. 299, 303 (2008).

4. See Kay & Gorman, *supra* note 3, at 316 (summarizing studies); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 260 (2006).

5. ABA Comm'n on Women in the Profession, *A Current Glance at Women in Law*, AM. BAR ASS'N (Feb. 2013), http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_feb2013.authcheckdam.pdf. See also *MCCA Survey: Women General Counsel at Fortune 500 Companies Reaches New High*, METRO. CORPORATE COUNSEL (Aug. 8, 2012), <http://www.metrocorpocounsel.com/news/19992/mcca-survey-women-general-counsel-fortune-500-companies-reaches-new-high>; *Women in Law in the U.S.*, CATALYST (Mar. 11, 2013), <http://www.catalyst.org/knowledge/women-law-us> [hereinafter *Women in Law*].

6. Theresa M. Beiner, *Not All Lawyers Are Equal: Difficulties that Plague Women and Women of Color*, 58 SYRACUSE L. REV. 317, 328 (2008); Mary C. Noonan et al., *Is the Partnership Gap Closing for Women? Cohort Differences in the Sex Gap in Partnership Chances*, 37 SOC. SCI. RES. 156, 174-75 (2008).

7. A study of young lawyers by the American Bar Foundation (ABF) found that women attained equity partner status at about half the rate of men. See Ronit Dinovitzer et al., *After the JD II: Second Results from a National Study of Legal Careers*, AM. BAR FOUND. AND NALP FOUND. FOR LAW CAREER RES. AND EDUC. 63 (2009), <http://law.du.edu/documents/directory/publications/sterling/AJD2.pdf>. A study by the Federal Equal Employment Opportunity Commission found that male lawyers were five times as likely to become partners as their female counterparts. See *Diversity in Law Firms*, EQUAL EMP'T OPPORTUNITY COMM'N 29, 33 (2003), <http://www.eeoc.gov/eeoc/statistics/reports/index.cfm>.

partnership than similarly situated men.⁸ The situation is bleaker still at the level of equity partner. Precisely how bleak is impossible to say, because firms have resisted providing data and some use different definitions of equity partner in reporting diversity ratios and profits per partner. However, the best available evidence suggests that women constitute about fifteen to sixteen percent of equity partners.⁹ Women are also underrepresented in leadership positions such as chairs and members of management and compensation committees.¹⁰ Gender disparities are similarly apparent in compensation.¹¹ Those differences persist even after controlling for factors such as productivity and differences in equity/nonequity status.¹²

So too, although female lawyers report about the same overall career satisfaction as their male colleagues, women experience greater dissatisfaction with key dimensions of practice, such as level of responsibility, recognition for work, and chances for advancement.¹³ In attempting to account for this paradox, theorists suggest two explanations. The first involves values. Women may ascribe less significance to aspects of their work environment on which they are disadvantaged, such as compensation and promotion, than to other factors such as intellectual challenge, which evokes greater satisfaction among female attorneys.¹⁴ A second theory is that women have a lower sense of entitlement, in part because their reference group is other

8. Mary C. Noonan & Mary E. Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 ANNALS AM. ACAD. POL. & SOC. SCI 130, 133–34 (2004); Kenneth G. Dau-Schmidt et al., *Men and Women of the Bar: The Impact of Gender on Legal Careers*, 16 MICH. J. GENDER & L. 49, 96–97, 100–02, 107, 111–12 (2009).

9. Leigh Jones, *Percentage of Women in NLJ 350 Law Firms Remains Low*, NAT'L L.J., June 12, 2013; Barbara M. Flom, *Report of the Seventh Annual NAWL National Survey on Retention and Promotion of Women in Law Firms*, NAT'L ASS'N OF WOMEN LAWYERS AND NAWL FOUND. (Oct. 2012), <http://www.nawl.org/d/do/60>.

10. *Women in Law*, *supra* note 5; María Pabón López, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead By Reviewing Current Trends*, 19 HASTINGS WOMEN'S L.J. 53, 71 (2008); Joan C. Williams & Veta T. Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, PROJECT FOR ATT'Y RETENTION AND MINORITY CORPORATE COUNSEL ASS'N 14 (July 2010), <http://worklifelaw.org/Publications/SameGlassCeiling.pdf>.

11. Karen Sloan, *ABA Issues Toolkit, Aiming To Eliminate Gender Pay Gap*, NAT'L L.J., Mar. 18, 2013 (women law firm partners earn about \$66,000 less than their male partners); Flom, *supra* note 9, at 15.

12. Marina Angel et al., *Statistical Evidence on the Gender Gap in Law Firm Partner Compensation* 3 (Temple U. Beasley Sch. of Law Legal Studies, Paper No. 2010-24), available at <http://ssrn.com/abstract=1674630>; Ronit Dinovitzer et al., *Differential Valuation of Women's Work: A New Look at the Gender Gap in Lawyer's Incomes*, 88 SOC. FORCES 819, 835–47 (2009).

13. Ronit Dinovitzer et al., *After the JD: First Results from a National Study of Legal Careers*, AM. BAR FOUND. AND NALP FOUND. FOR LAW CAREER RES. AND EDUC. 58 (2004), <http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf>; López, *supra* note 10, at 69; Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27, 47 (2004).

14. Kay & Gorman, *supra* note 3, at 317–18.

women or because they have “made peace with second best.”¹⁵ In either case, female lawyers’ dissatisfaction with certain aspects of practice, which is reflected in disproportionate rates of attrition, should be cause for concern in a profession committed to equal opportunity and diversity.

B. Race and Ethnicity

Progress for racial and ethnic minorities has also been substantial, but slower than progress for white women. In 1960, lawyers of color accounted for less than one percent of the profession.¹⁶ Although blacks, Latinos, Asian-Americans, and Native Americans now constitute about a third of the population and a fifth of law school graduates, they still only account for fewer than seven percent of law firm partners and nine percent of general counsels of Fortune 500 corporations.¹⁷ In major law firms, about half of lawyers of color leave within three years.¹⁸ Attrition is highest for women of color; about seventy-five percent depart by their fifth year and eighty percent before their seventh.¹⁹ Compensation in law firms is lower for lawyers of color with minority women at the bottom of the financial pecking order.²⁰

Satisfaction surveys reflect mixed and sometimes paradoxical results. In a large national study of young lawyers by the American Bar Foundation, blacks were happiest with their decision to become a lawyer and the substance of their legal work; whites and Asian-Americans were the happiest in their job settings.²¹ Among lawyers in large firms, the ABA’s Commission on Women in the Profession found stark differences among racial groups. White men graded their career satisfaction as A, white women and minority men graded theirs as B, and minority women hovered between B minus and C plus.²²

In short, the legal profession reflects substantial gender, racial, and

15. David L. Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 LAW & SOC. INQUIRY 251, 280 (1989).

16. MARC GALNATER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 58–62 (1994).

17. *Women and Minorities in Law Firms by Race and Ethnicity—An Update*, NAT’L ASS’N FOR LAW PLACEMENT (Apr. 2013), <http://www.nalp.org/0413research>; *MCCA’s 13th Annual Minority General Counsel Survey*, DIVERSITY AND THE BAR, Sept.–Oct. 2012, at 30.

18. NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW*, 250 n.55 (2010).

19. Deepali Bagati, *Women of Color in U.S. Law Firms*, CATALYST 1–2 (2009), http://www.catalyst.org/system/files/Women_of_Color_in_U.S._Law_Firms.pdf.

20. ABA Comm’n on Women in the Profession, *Visible Invisibility: Women of Color in Law Firms*, AM. BAR ASS’N 28 (2006) [hereinafter *Visible Invisibility*].

21. Donovitzer et al., *supra* note 7, at 64.

22. LEVIT & LINDER, *supra* note 18, at 14.

ethnic differences in both subjective and objective measures of career achievement. But what accounts for those differences and how they can be addressed remain matters of dispute.

III. EXPLAINING THE GAP

A. Capabilities and Commitment

In a parody of diversity efforts during a celebrated British television series, “Yes Minister,” a stodgy white male civil servant explained the folly of such initiatives. By his logic, if women had the necessary commitment and capabilities, they would already be well-represented in leadership positions. Since they weren’t well-represented, they obviously lacked those qualifications. It should come as no surprise that similar views are common among law firm leaders. After all, those in charge of hiring, promotion, and compensation decisions are those who have benefitted from the current structure, and who have the greatest stake in believing in its fairness. Although many leaders are willing to concede the persistence of bias in society in general, they rarely see it in their own firms. Rather, they attribute racial, ethnic, and gender differences in lawyers’ career paths to differences in capabilities and commitment.²³

For lawyers of color, the most common explanation for underrepresentation is underperformance, measured by traditional merit standards. Minorities on average have lower law school grades than their white counterparts.²⁴ Because the vast majority of lawyers believe that grades and law school rank are important in hiring, racial disparities appear to be an unintended but inevitable consequence of the merit system.²⁵ One in-depth study of attitudes toward diversity found that the standard narrative in large firms ran something like this:

We understand that most big firms began in an era of overt discrimination. We regret this, and for many years have attempted to do something about it. We have tried a variety of things, and will continue

23. John M. Conley, *Tales of Diversity: Lawyers’ Narratives of Racial Equity in Private Firms*, 31 LAW & SOC. INQUIRY 831, 841–42, 851–52 (2006).

24. Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2006); Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711, 740 (2004).

25. Around 80 percent of male partners and around 70 percent of female partners hold these views. *Sustaining Pathways to Diversity: The Next Steps in Understanding and Increasing Diversity & Inclusion in Large Law Firms*, MINORITY CORPORATE COUNSEL ASS’N 16 (2009) [hereinafter *Sustaining Pathways*], http://www.mcca.com/_data/global/images/Research/5298%20MCCA%20Pathways%20final%20version%202009.pdf.

to work very hard at the problem. However, it is very, very difficult to solve the problem without lowering our standards, which, of course, we can't do. All of this adds up to a metaphorical shrug.²⁶

In midsize firms, the narrative is much the same, with the added twist that they cannot compete with large firms in money or prestige in recruiting “qualified” lawyers of color.²⁷ In effect, firm leaders “claim to be trapped by a system that they have created and choose to maintain.”²⁸ Yet that system is highly imperfect in screening for talent; considerable research suggests that law firms grossly overestimate the effectiveness of credentials like grades and law school prestige in predicting performance.²⁹

Although concerns about merit surface for white women as well as racial and ethnic minorities, the “woman problem” is commonly explained in terms not of credentials but of commitment and client development. Because women continue to have disproportionate family responsibilities and are more likely to reduce their schedules or to take time out of the workplace than men, they are assumed to be less available, less dependable, and less worthy of extensive mentoring. In the ABA Commission on Women study, almost three-quarters of female lawyers reported that their career commitment had been questioned when they gave birth or adopted a child. Only nine percent of their white male colleagues and fifteen percent of minority male colleagues had faced similar challenges.³⁰ In another bar survey, although women and men reported working similar hours, over a quarter of male lawyers thought their female counterparts worked less and a fifth rated the number of hours these women worked as “fair to poor.”³¹ Women are also often presumed to be less adept in business development and in the self-promotional abilities that underlie it.³²

These attitudes may help to explain the relatively low priority that many law firm leaders attach to diversity and their relatively rosy assessment of efforts to enhance it. In a survey by the ABA Commission on Women, only twenty-seven percent of white men felt

26. Conley, *supra* note 23, at 841.

27. *Id.* at 844.

28. *Id.* at 850.

29. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 526–27 (1996); James B. Rebitzer & Lowell J. Taylor, *Efficiency Wages and Employment Rents: The Employer-Size Wage Effect in the Job Market for Lawyers*, 13 J. LAB. ECON. 678, 690 (1995).

30. *Visible Invisibility*, *supra* note 20, at 33–34.

31. López, *supra* note 10, at 65.

32. Bagati, *supra* note 19, at 37; Tiffani N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85, 125 (2009); López, *supra* note 10, at 73.

strongly that it was important to increase diversity in law firms, compared with eighty-seven percent of women of color and sixty-one percent of white women.³³ In a survey by Catalyst, only eleven percent of white lawyers felt that diversity efforts were failing to address subtle racial bias, compared with almost half of women of color. Only fifteen percent of white men felt that diversity efforts were failing to address subtle gender bias, compared with half of women of color and forty percent of white women.³⁴

The research summarized below, however, suggests that many lawyers underestimate the impact of unconscious bias and overestimate the effectiveness of current responses. Those who are truly committed to a just and inclusive workplace need a better understanding of what gets in the way. This includes a deeper appreciation of how racial, ethnic, and gender stereotypes affect not just evaluations of performance but the performance itself, and the relative value attached to specific performance measures.

B. Racial, Ethnic, and Gender Stereotypes

Racial, ethnic, and gender stereotypes play a well-documented, often unconscious, role in American culture, and legal workplaces are no exception. The stereotypes vary across groups. For example, blacks and Latinos bump up against assumptions that they are less qualified. Many report that their competence is constantly questioned, and that even if they graduated from an elite law school, they are assumed to be beneficiaries of affirmative action rather than meritocratic selection.³⁵ Blacks who are assertive risk being viewed as angry or hostile.³⁶ Asian-Americans are saddled with the myths of the “model minority;” they are thought to be smart and hardworking, but also insufficiently assertive to command the confidence of clients and legal teams.³⁷ The special

33. *Visible Invisibility*, *supra* note 20, at 19.

34. Bagati, *supra* note 19, at 13.

35. MARIA CHÁVEZ & JOE R. FEAGIN, EVERYDAY INJUSTICE: LATINO PROFESSIONALS AND RACISM 72 (2011); Jill L. Cruz & Melinda S. Molina, *National Study on the Status of Latinas in the Legal Profession Few and Far Between: The Reality of Latina Lawyers*, 37 PEPP. L. REV. 971, 1010 (2010); Garner K. Weng, *Racial Bias in Law Practice*, CAL. MAG., Jan. 2003, 37–38; Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. RÉV. 1013, 1014 (2004).

36. *Visible Invisibility*, *supra* note 20, at 25; Weng, *supra* note 35, at 37–38.

37. Mona Mehta Stone, *Asian American Lawyers: Differences Abound*, in IILP REVIEW 2011: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 76 (2011), available at <http://www.theiilp.com/Resources/Documents/IILPReview2011.pdf>; LeeAnn O’Neill, *Hitting the Legal Diversity Market Home: Minority Women Strike Out*, 3 AM. U. MOD. AM. 7 (2007); Bagati, *supra* note 19, at 37; *Visible Invisibility*, *supra* note 20, at 25; Sonia Ospina & Erica Foldy, *A Critical Review of Race and Ethnicity in the Leadership Literature: Surfacing Context, Power, and the Collective Dimensions of Leadership*, 20 LEADERSHIP Q. 876, 880 (2009).

stigma confronting women of color is apparent in the frequency with which they are still mistaken for secretaries, court reporters, or interpreters.³⁸

The result is that talented minorities lack the presumption of competence granted to white male counterparts; up and coming whites may be fast tracked based on promise, while minorities need to demonstrate performance.³⁹ Even outstanding capabilities of a leader of color may do little to dislodge traditional assumptions. Psychologists refer to this as the “flower blooming in winter” effect.⁴⁰ A classic example is the description Senator Joseph Biden offered of Barack Obama during the 2008 presidential campaign, as the “first mainstream African-American who is articulate and bright and clean and a nice-looking guy.”⁴¹ Although the exceptional lawyer can get a special boost, such praise does little to assist those aspiring to such roles.

Gender stereotypes also subject women to double standards and a double bind. Despite recent progress, women, like minorities, often fail to receive the presumption of competence enjoyed by white men.⁴² In national surveys, between a third and three-quarters of female lawyers believe that they are held to higher standards than their colleagues.⁴³ A recent study of performance evaluations finds some support for those perceptions; it reveals that similar descriptions of performance result in lower ratings for women.⁴⁴ Male achievements are more likely to be attributed to capabilities, and female achievements to external factors, a

38. *Visible Invisibility*, *supra* note 20, at 18; Cruz & Molina, *supra* note 35; O’Neill, *supra* note 37, at 8; Gladys García-López, “*Nunca Te Toman En Cuenta [They Never Take You Into Account]*”: *The Challenges of Inclusion and Strategies for Success of Chicana Attorneys*, 22 GENDER & SOC’Y 590, 601–03 (2008).

39. David A. Thomas, *The Truth About Mentoring Minorities: Race Matters*, HARV. BUS. REV., Mar.–Apr. 2001, at 99, 104.

40. ELLA L. J. EDMONDSON BELL & STELLA M. NKOMO, OUR SEPARATE WAYS: BLACK AND WHITE WOMEN AND THE STRUGGLE FOR PROFESSIONAL IDENTITY 145 (2001).

41. Lynette Clemetson, *The Racial Politics of Speaking Well*, N.Y. TIMES (Feb. 4, 2007), <http://www.nytimes.com/2007/02/04/weekinreview/04clemetson.html>.

42. For competence, see Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2256 (2010); Cecilia L. Ridgeway & Paula England, *Sociological Approaches to Sex Discrimination in Employment*, in SEX DISCRIMINATION IN THE WORKPLACE 189, 195 (Faye J. Crosby et al. eds., 2007). For women’s need to work harder, see López, *supra* note 10, at 73. Even in experimental situations where male and female performance is objectively equal, women are held to higher standards, and their competence is rated lower. Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 59 SOC. PSYCHOL. Q. 237 (1996). For the special pressures faced by women of color, see García-López, *supra* note 38, at 603–04.

43. Deborah L. Rhode & Joan C. Williams, *Legal Perspectives on Employment Discrimination*, in SEX DISCRIMINATION IN THE WORKPLACE 235, 245 (Faye J. Crosby et al. eds., 2007); *Sustaining Pathways*, *supra* note 25, at 32.

44. Monica Beirnat et al., *The Language of Performance Evaluations: Gender-Based Shifts in Content and Consistency of Judgment*, 3 SOC. PSYCHOL. & PERSONALITY SCI. 186 (2011).

pattern that social scientists describe as “he’s skilled, she’s lucky.”⁴⁵

Mothers, even those working full-time, are assumed to be less available and committed, an assumption not made about fathers.⁴⁶ In one representative study, almost three-quarters of female lawyers reported that their career commitment had been questioned when they gave birth or adopted a child. Only nine percent of their white male colleagues, and fifteen percent of minority male colleagues, had faced similar challenges.⁴⁷ Yet women without family relationships sometimes face bias of a different order: they are viewed as “not quite normal” and thus “not quite leadership material.”⁴⁸

Women are also rated lower than men on qualities associated with leadership, such as assertiveness, competitiveness, and business development.⁴⁹ Even though women are more likely to use effective leadership styles, people more readily credit men with leadership ability and more readily accept men as leaders.⁵⁰ An overview of more than one hundred studies confirms that women are rated lower when they adopt authoritative, seemingly masculine styles, particularly when the evaluators are men, or when the woman’s role is one typically occupied by men.⁵¹ What is assertive in a man seems abrasive in a woman, and

45. Janet K. Swim & Lawrence J. Sanna, *He’s Skilled, She’s Lucky: A Meta-Analysis of Observers’ Attributions for Women’s and Men’s Successes and Failures*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 507 (1996); Jeffrey H. Greenhaus & Saroj Parasuraman, *Job Performance Attributions and Career Advancement Prospects: An Examination of Gender and Race Effects*, 55 ORG. BEHAV. & HUM. DECISION PROCESSES 273, 276, 290 (1993).

46. Amy J. C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60 J. SOC. ISSUES 701, 709 (2004); Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 745 (2004).

47. *Visible Invisibility*, *supra* note 20, at 83. See also Reichman & Sterling, *supra* note 13, at 63–64.

48. SYLVIA ANN HEWLETT ET AL., *THE SPONSOR EFFECT: BREAKING THROUGH THE LAST GLASS CEILING* 24 (2011), available at <http://hbr.org/product/the-sponsor-effect-breaking-through-the-last-glass/an/10428-PDF-ENG>; MICHELE COLEMAN MAYES & KARA SOPHIA BAYSINGER, *COURAGEOUS COUNSEL: CONVERSATIONS WITH WOMEN GENERAL COUNSEL IN THE FORTUNE 500*, at 129 (2011) (quoting Dana Mayer).

49. Deborah L. Rhode & Barbara Kellerman, *Women and Leadership: The State of Play*, in *WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 7* (Barbara Kellerman & Deborah L. Rhode eds., 2007); *Women “Take Care,” Men “Take Charge.” Stereotyping of U.S. Business Leaders Exposed*, CATALYST (Oct. 19, 2005), <http://www.catalyst.org/knowledge/women-take-care-men-take-charge-stereotyping-us-business-leaders-exposed>; Linda L. Carli & Alice H. Eagly, *Overcoming Resistance to Women Leaders: The Importance of Leadership Styles*, in *WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 127, 127–29* (Barbara Keller & Deborah L. Rhode eds., 2007); Wald, *supra* note 42, at 2256.

50. Alice Eagly, *Female Leadership Advantage and Disadvantage: Resolving the Contradictions*, 31 PSYCHOL. WOMEN Q. 1, 5, 9 (2007); Carli & Eagly *supra* note 49, at 128–29; Laurie A. Rudman & Stephen E. Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26 PERSONALITY AND SOC. PSYCHOL. BULL. 1315 (2000).

51. D. Anthony Butterfield & James P. Grinnell, “Re-Viewing” *Gender, Leadership, and*

female leaders risk seeming too feminine or not feminine enough. Either they may appear too “soft” or too “strident”—either unable to make tough decisions or too pushy and arrogant to command respect.⁵²

Self-promotion that is acceptable in men is viewed as unattractive in women.⁵³ In a telling Stanford Business School experiment, participants received a case study about a leading venture capitalist with outstanding networking skills. Half the participants were told that the individual was Howard Roizen; the other half were told that she was Heidi Roizen. The participants rated the entrepreneurs as equally competent but found Howard more likeable, genuine, and kind, and Heidi more aggressive, self-promoting, and power hungry.⁵⁴ Even the most accomplished lawyer leaders can encounter such biases. Brooksley Born, now widely acclaimed for her efforts to regulate high-risk derivatives while chair of the Commodity Futures Commission was dismissed at the time as “abrasive,” “strident,” and a “lightweight wacko.”⁵⁵ In commenting on those characterizations, a former aid noted, “She was serious, professional, and she held her ground against those who were not sympathetic to her position I don’t think that the failure to be ‘charming’ should be translated into a depiction of stridency.”⁵⁶ Hillary Clinton has been subject to even more vitriolic descriptions: “power-hungry,” “castrating,” “Hitlerian,” and “feminazi.”⁵⁷ During her presidential campaign, she coped with sales of a Clinton nutcracker, charges that she reminded men of a scolding mother or first wife, and

Managerial Behavior: Do Three Decades of Research Tell Us Anything?, in HANDBOOK OF GENDER AND WORK 223, 235 (Gary N. Powell ed., 1999); JEANETTE N. CLEVELAND ET AL., WOMEN AND MEN IN ORGANIZATIONS: SEX AND GENDER ISSUES AT WORK 106–07 (2000).

52. Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCH. REV. 574, 576 (2002); Alice H. Eagly, *Achieving Relational Authenticity in Leadership: Does Gender Matter?*, 16 LEADERSHIP Q. 459, 470 (2005); see generally *The Double-Bind Dilemma for Women in Leadership: Damned if You Do, Damned if You Don’t*, CATALYST (July 15, 2007), <http://www.catalyst.org/knowledge/double-bind-dilemma-women-leadership-damned-if-you-do-doomed-if-you-dont-0>; LINDA BABCOCK & SARA LASCHEVER, WOMEN DON’T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE 87–89 (2007); MAYES & BAYSINGER, *supra* note 48, at 131.

53. Carli & Eagly, *supra* note 49, at 130; Williams & Richardson, *supra* note 10, at 48; Laurie A. Rudman, *To Be or Not To Be (Self-Promoting): The Consequences of Counterstereotypical Impression Management*, in POWER AND INFLUENCE IN ORGANIZATIONS 287, 290 (Roderick M. Kramer & Margaret A. Neale eds., 1998).

54. Francis Flynn et al., *Too Tough Too Soon, Familiarity and the Backlash Effect 2011* (Stanford Business School, unpublished paper) (on file with author).

55. Rick Schmitt, *Prophet and Loss*, STANFORD MAG., Mar.–Apr. 2009, available at https://alumni.stanford.edu/get/page/magazine/article/?article_id=30885 (quoting Arthur Levitt); MICHAEL HIRSH, CAPITAL OFFENSE: HOW WASHINGTON’S WISE MEN TURNED AMERICA’S FUTURE OVER TO WALL STREET 1, 12 (2010) (quoting Robert Rubin and unnamed staffer).

56. Schmitt, *supra* note 55 (quoting Michael Greenberger) (internal quotation marks).

57. Katha Pollitt, *Hillary Rotten: Sexist Sticks and Stones*, in THIRTY WAYS OF LOOKING AT HILLARY: REFLECTIONS BY WOMEN WRITERS 16–18 (Susan Morrison ed., 2008).

hecklers with signs demanding “Iron my shirt.”⁵⁸

Other cognitive biases compound the force of traditional stereotypes. People are more likely to notice and recall information that confirms their prior assumptions than information that contradicts those assumptions; the dissonant facts are filtered out.⁵⁹ For example, when lawyers assume that a working mother is unlikely to be fully committed to her career, they more easily remember the times when she left early than the times when she stayed late. So too, when female and minority lawyers are assumed to be less effective, their failures will be recalled more readily than their achievements. Both women and minorities also receive less latitude for mistakes.⁶⁰ That, in turn, may make these lawyers reluctant to seek risky “stretch assignments” that would demonstrate outstanding capabilities. Biased assumptions about lawyers’ commitment or competence can also affect the allocation of work. The result is to prevent women and minorities from getting opportunities that would demonstrate or enhance their capabilities, which creates a cycle of self-fulfilling prophecies.⁶¹

C. In-Group Bias: Mentoring Sponsorship, Networks, and Assignments

A related set of obstacles involves in-group favoritism. Extensive research has documented the preferences that individuals feel for members of their own groups. Loyalty, cooperation, favorable evaluations, mentoring, and the allocation of rewards and opportunities are greater for individuals who are similar in important respects, including gender, race, and ethnicity.⁶² As a consequence, women and minorities face difficulty developing “social capital:” access to advice, support, sponsorship, desirable assignments, and new business opportunities.⁶³ In law firms, racial and ethnic minorities often report

58. Marie Cocco, *Misogyny I Won't Miss*, WASHINGTON POST, May 15, 2008, at A14; Kathleen Deveny, *Just Leave Your Mother Out of It*, NEWSWEEK, Mar. 17, 2008, at 32.

59. David L. Hamilton & Jim W. Sherman, *Stereotypes*, in HANDBOOK OF SOCIAL COGNITION 1–68 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1994). For confirmation bias generally, see PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR POLICY MAKERS 277–89 (2010).

60. Robin J. Ely et al., *Taking Gender into Account: Theory and Design for Women's Leadership Development Programs*, 10 ACAD. MGMT. LEARNING & EDUC. 474, 477 (2011); Foschi, *supra* note 42; *Visible Invisibility*, *supra* note 20, at 27.

61. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1234 (1995).

62. Williams & Richardson, *supra* note 10, at 49–50; Ridgeway & England, *supra* note 42, at 197; Marilyn B. Brewer & Rupert J. Brown, *Intergroup Relations*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 554 (Daniel T. Gilbert et al. eds., 1998); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert et al. eds., 1998).

63. The term comes from Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 248–49 (John G. Richardson ed., 1986). For

isolation and marginalization, while many white women similarly experience exclusion from “old boys” networks.⁶⁴ In ABA research, sixty-two percent of women of color and sixty percent of white women, but only four percent of white men, felt excluded from formal and informal networking opportunities; most women and minorities would have liked better mentoring.⁶⁵

Part of the problem lies in numbers. Many organizations lack sufficient women and minorities at senior levels who can assist others on the way up. The problem is not an absence of commitment. Recent research finds no evidence for the Queen Bee syndrome, in which women reportedly keep others from getting ahead.⁶⁶ In a Catalyst study, almost three-quarters of women who were actively engaged in mentoring were developing female colleagues, compared with thirty percent of men.⁶⁷ But the underrepresentation of women in leadership positions, and the time pressures for those juggling family responsibilities, leaves an insufficient pool of potential mentors. Although a growing number of organizations have formal mentoring programs, these do not always supply adequate training, rewards, or oversight to ensure effectiveness.⁶⁸ And these formal programs cannot substitute for relationships that develop naturally and that yield not simply advisors but sponsors—individuals who act as advocates and are in positions to open opportunities. As participants in one ABA study noted, female leaders may have “good intentions,” but are already pressed with competing work and family obligations or “don’t have a lot of power so they can’t really help you.”⁶⁹ Concerns about the appearance of sexual harassment or sexual affairs discourage some men from forming mentoring relationships with junior women, and discomfort concerning issues of race and ethnicity deters some white lawyers from crossing the color divide.⁷⁰ In cross racial mentoring

discussion in the legal context, see Cindy A. Schipani et al., *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L. & POL’Y 89 (2009); see generally Fiona M. Kay & Jean E. Wallace, *Mentors as Social Capital: Gender, Mentors, and Career Rewards in Legal Practice*, 79 SOC. INQUIRY 418 (2009).

64. For minorities, see *Visible Invisibility*, *supra* note 20, at 18; Wilkins & Gulati, *supra* note 29, at 593. For women, see Reichman & Sterling, *supra* note 13, at 65; Timothy O’Brien, *Up the Down Staircase*, N.Y. TIMES, Mar. 19, 2006, at A4; Williams & Richardson, *supra* note 10, at 16–17.

65. *Visible Invisibility*, *supra* note 20, at 35; Jill Schachner Chanen, *Early Exits*, 92 A.B.A. J. 32, 36 (2006).

66. Sarah Dinolfo et al., *High Potentials in the Pipeline: Leaders Pay it Forward*, CATALYST 7 (2012), http://www.catalyst.org/system/files/High_Potentials_In_the_Pipeline_Leaders_Pay_It_Forward.pdf.

67. *Id.*

68. See Rhode, *Platitudes to Priorities*, *supra* note *, at 1071 nn.202–203, 1072 nn.204–206.

69. *Visible Invisibility*, *supra* note 20, at 12–17.

70. For the role of sexual concerns, see HEWLETT ET AL., *supra* note 48, at 35. For race-related

relationships, candid dialogue may be particularly difficult. Minority protégés may be reluctant to raise issues of bias for fear of seeming oversensitive. White mentors may be reluctant to offer candid feedback to minority associates for fear of seeming racist or of encouraging them to leave. The result is that midlevel lawyers of color can find themselves “blindsided by soft evaluations:” “your skills aren’t what they are supposed to be, but you didn’t know because no one ever told you.”⁷¹

Assumptions about commitment and capabilities also keep mentors from investing in female or minority subordinates who seem unlikely to stay or to succeed.⁷² Such dynamics also put pressure on these lawyers to assimilate to prevailing norms. As one attorney of color put it, the only way to succeed in a large firm is to “make them almost forget you’re Hispanic”⁷³ If a minority lawyer “just doesn’t fit in,” the assumption is that the problem lies with the individual not the institution.⁷⁴

In-group favoritism is also apparent in the allocation of work and client development opportunities. Many organizations operate with informal systems that channel seemingly talented junior lawyers (disproportionately white men), to leadership tracks, while relegating others to “workhorse” positions.⁷⁵ In the ABA Commission study, forty-four percent of women of color, thirty-nine percent of white women, and twenty-five percent of minority men reported being passed over for desirable assignments; only two percent of white men noted similar experiences.⁷⁶ Other research similarly finds that women and minorities are often left out of pitches for client business.⁷⁷

Lawyers of color are also subject to “race matching”; they receive work because of their identity, not their interests, in order to create the right “look” in courtrooms, client presentations, recruiting, and

barriers in mentoring, see Monique R. Payne-Pikus et al., *Experiencing Discrimination: Race and Retention in America’s Largest Law Firms*, 44 LAW & SOC’Y REV. 553, 561 (2010).

71. *Visible Invisibility*, *supra* note 20, at 27. See also Thomas, *supra* note 39, at 105.

72. *Visible Invisibility*, *supra* note 20, at 15–16; Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008); Payne-Pikus et al., *supra* note 70, at 576.

73. Melinda S. Molina, *Los Puentes y Las Barreras: Latinas in the Legal Profession*, in IILP REVIEW 2011: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 42, 46 (2011), available at <http://www.theiilp.com/Resources/Documents/IILPReview2011.pdf>.

74. Bagati, *supra* note 19, at 16; *Diversity in the Legal Profession: The Next Steps*, AM. BAR ASS’N 43 (Apr. 2010) [hereinafter *Next Steps*], http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf.

75. *Visible Invisibility*, *supra* note 20, at 21; Wilkins & Gulati, *supra* note 29, at 565–71.

76. *Visible Invisibility*, *supra* note 20, at 21.

77. Williams & Richardson, *supra* note 10, at 42.

marketing efforts. Although this strategy sometimes opens helpful opportunities, it can also place lawyers in what they describe as “mascot” roles in which they are not developing their own professional skills.⁷⁸ Linda Mabry, the first minority partner in a San Francisco firm, recounts an example in which she was asked to join a pitch to a shipping company whose general counsel was African-American:

When the firm made the pitch about the firm’s relevant expertise, none of which I possessed, it was clear that the only reason I was there was to tout the firm’s diversity, which was practically nonexistent. In that moment I wanted to fling myself through the plate-glass window of that well-appointed conference room.⁷⁹

Race matching is particularly irritating when lawyers of color are assumed to have skills and affinities that they in fact lack. Examples include a Japanese-American asked to a meeting to solicit a Korean client and a Latina who was assigned documents in Spanish even after she explained that she wasn’t fluent in the language.⁸⁰ “Oh, you’ll be fine,” she was told, “look [anything unfamiliar] up in a dictionary.”⁸¹

D. Workplace Structures and Gender Roles

Escalating workplace demands and inflexible practice structures pose further obstacles to diversity and inclusion. Hourly demands have risen significantly over the last quarter century, and what hasn’t changed are the number of hours in the day. Technology that makes it possible for lawyers to work at home makes it increasingly impossible not to. Constant accessibility has become the new norm, with attorneys electronically tethered to their workplaces. The cost is disproportionately born by women, because as noted below, they are disproportionately likely to assume primary caretaking responsibilities.

The problem is compounded by the inadequacy of structural responses. Despite some efforts at accommodation, a wide gap persists between formal policies and actual practices concerning work/life conflicts. Although over ninety percent of American law firms report policies permitting part-time work, only about six percent of lawyers actually use them.⁸² Many lawyers believe, with good reason, that any

78. *Visible Invisibility*, *supra* note 20, at 21; O’Neill, *supra* note 37, at 10.

79. Linda A. Mabry, *The Token*, CAL. LAWYER, July 2006, at 76.

80. *Visible Invisibility*, *supra* note 20, at 26; David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good For Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1595–96 (2004).

81. *Visible Invisibility*, *supra* note 20, at 26 (internal quotation marks omitted).

82. *Most Lawyers Working Part-Time Are Women—Overall Number of Lawyers Working Part-Time Remains Small*, NAT’L ASS’N FOR LAW PLACEMENT 7 (Dec. 17, 2009),

reduction in hours or availability would jeopardize their careers.⁸³ Part-time status and time out of the workforce generally results in long-term losses in earnings as well as lower chances for partnership.⁸⁴ In one survey of University of Michigan law school graduates, just a single year out of the workforce correlated with a third lower chance of making partner and an earnings reduction of twenty-eight percent.⁸⁵ Stories of the “faster than a speeding bullet” maternity leave are all too common. One woman who drafted discovery responses while timing her contractions saw it as a sensible display of commitment. After all, if you are billing at six minute intervals, why waste one? Those who opt for a reduced schedule after parental leave often find that it isn’t worth the price. Their schedules aren’t respected, their hours creep up, the quality of their assignments goes down, their pay is not proportional, and they are stigmatized as “slackers.”⁸⁶

Although these are not only “women’s issues,” women bear their greatest impact. Despite a significant increase in men’s domestic work over the last two decades, women continue to shoulder the major burden.⁸⁷ It is still women who are most likely to get the phone call that federal district judge Nancy Gertner received on the first day that she was about to ascend the bench: “Mama, there’s no chocolate pudding in my [lunch].”⁸⁸ In the American Bar Foundation’s Survey of young lawyers, women were about seven times more likely than men to be working part-time or to be out of the labor force, primarily due to childcare.⁸⁹ In the University of Michigan study, only one percent of fathers had taken parental leave, compared with forty-two percent of

http://www.nalp.org/uploads/NALP_09PartTimePressRel.pdf.

83. Paula A. Patton, *Women Lawyers, Their Status, Influence, and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 173, 180 (2005). For lower partnership rates, see Beiner, *supra* note 6, at 326; Dau-Schmidt et al., *supra* note 8; Mona Harrington & Helen Hsi, *Women Lawyers and Obstacles to Leadership*, MIT WORKPLACE CTR. 28–29 (2007), http://web.mit.edu/workplacecenter/docs/law-report_4-07.pdf.

84. David Leonhardt, *Financial Careers Come at a Cost to Families*, N.Y. TIMES, May 26, 2009, at B1; Dau-Schmidt et al., *supra* note 8, 95–96; Beiner, *supra* note 6, at 326.

85. Noonan & Corcoran, *supra* note 8, at 146.

86. See Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207, 2213 (2002). For stigma, see HOLLY ENGLISH, GENDER ON TRIAL: SEXUAL STEREOTYPE AND WORK/LIFE BALANCE IN THE LEGAL WORKFORCE 212 (2003) (reporting perceptions about slackers); López, *supra* note 10, at 95–96; Cynthia Thomas Calvert et al., *Reduced Hours, Full Success: Part-Time Partners in U.S. Law Firms*, PROJECT FOR ATT’Y RETENTION 17 (Sept. 2009), <http://amlawdaily.typepad.com/files/part-timepartner.pdf> (reporting that even among lawyers who had achieved partnership, about 40 percent feel stigma from taking part-time schedules).

87. Bureau of Labor Statistics, *American Time Use Survey—2010 Results*, U.S. DEP’T LABOR TABLE 1 (Jun. 22, 2011), http://www.bls.gov/news.release/archives/atus_06222011.pdf.

88. NANCY GERTNER, IN DEFENSE OF WOMEN: MEMOIRS OF AN UNREpentANT ADVOCATE 246 (2011).

89. Dinovitzer et al., *supra* note 7, at 62.

women.⁹⁰ Part of the reason for those disparities is that the small number of fathers who opt to become full-time caretakers experience particular penalties. Male lawyers suffer even greater financial and promotion consequences than female colleagues who make the same choice.⁹¹

The problems are likely to increase. “Millennial” lawyers have expectations inconsistent with prevailing norms.⁹² Growing numbers of men as well as women are expressing a desire for better work–life balance, and examples of lawyers of all ages who insist on it are increasingly visible. A *New York Times* article titled, “He Breaks for Band Recitals,” reported that Barack Obama was willing to leave key meetings in order to get home for dinner by six or attend a school function of his daughters.⁹³

Although bar leaders generally acknowledge the problem of work/life balance, they often place responsibility for addressing it anywhere and everywhere else. In private practice, clients get part of the blame. Law is a service business, and their expectations of instant accessibility reportedly make reduced schedules difficult to accommodate. Resistance from supervisors can be equally problematic. Particularly in a competitive work environment, they have obvious reasons to prefer lawyers at their constant beck and call.⁹⁴

Yet the problems are not as insurmountable as is often assumed. The evidence available does not indicate substantial resistance among clients to reduced schedules. They care about responsiveness, and part-time lawyers generally appear able to provide it.⁹⁵ In one recent survey of part-time partners, most reported that they did not even inform clients of their status and that their schedules were adapted to fit client needs.⁹⁶ Accounting, which is also a service profession, and anything but indifferent to the bottom line, has developed a business model that more than offsets the costs of work/family accommodation by increasing retention.⁹⁷ Considerable evidence suggests that law practice could do the same, and reap the benefits in higher morale, lower recruitment and training expenses, and less disruption in client and collegial

90. Noonan & Corcoran, *supra* note 8, at 137.

91. Dau-Schmidt et al., *supra* note 8, at 112–13; LEVIT & LINDER, *supra* note 18, at 12–13.

92. Virginia Grant & Marci M. Krufka, *The Young and the Restless*, L. PRACTICE, July–Aug. 2004, at 48; Galanter & Henderson, *supra* note 72, at 1922–23.

93. Sheryl Gay Stolberg, *He Breaks for Band Recitals*, N.Y. TIMES (Feb. 12, 2010), <http://www.nytimes.com/2010/02/14/fashion/14dad.html>.

94. Galanter & Henderson, *supra* note 72, at 1921.

95. Calvert et al., *supra* note 86, at 13, 22.

96. *Id.* at 9, 13, 21.

97. Deloitte and Touche has been a leader. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 493 (2001).

relationships.⁹⁸ Although some leadership positions may be hard to reconcile with substantial family demands, many women could be ready to cycle into those positions as family obligations decrease. The challenge lies in creating workplace structures that make it easier for lawyers of both sexes to have satisfying personal as well as professional lives and to ensure that those who temporarily step out of the workforce or reduce their workload are not permanently derailed by the decision.

E. Backlash

A final obstacle to diversity and gender equity initiatives involves backlash; the concern is that addressing these issues might add more to the problem than the solution. Firm leaders who appear to support “special” treatment of women and minorities also have to worry about resentment among their white male counterparts. In their view, too much “reverse discrimination” causes backlash, and “stretch hires of minorities who are not qualified sometimes does much to undermine . . . acceptance of diversity and inclusion.”⁹⁹ As one white male lawyer put it, “taking opportunities . . . from those with merit and giving [them] . . . to people based upon race, gender, or sexual identity is forcing us apart not bringing us together I can think of few things worse for an ostensibly color blind and meritocratic society.”¹⁰⁰ In a letter to the editor of the *National Law Journal*, a self-described “young, white straight male attorney, who also happens to be politically progressive” similarly protested employment termination decisions partly attributable to “meeting an important client’s newly asserted diversity demands.”¹⁰¹ From his perspective, “surely firing people even partially on the basis of an immutable characteristic is as unjust when done in the name of increasing diversity as it is when done to maintain homogeneity.”¹⁰² Many white lawyers appear to agree. In one ABA survey, only forty-two percent supported affirmative action.

By contrast, ninety-two percent of blacks expressed support.¹⁰³ And a strong case can be made that the insistence on color blindness comes generations too early and centuries too late. As David Wilkins argues, diversity initiatives remain necessary to “detect and correct the myriad subtle, but nevertheless pervasive, ways that . . . current practices

98. LEVIT & LINDER, *supra* note 18, at 170; Calvert et al., *supra* note 86, at 10–12.

99. *Sustaining Pathways*, *supra* note 25, at 25.

100. *Id.* at 15.

101. Ben Martin, *Letter to the Editor*, NAT’L L.J., Nov. 6, 2006.

102. *Id.*

103. Wendell Lagrand, *Getting There*, 85 A.B.A. J. 54 (1999).

differentially disadvantage certain [groups based on color].”¹⁰⁴

IV. THE LIMITS OF LAW

Although antidiscrimination law provides some protection from overt bias, it is ill-suited to address contemporary racial, ethnic, and gender obstacles. Close to fifty years experience with civil rights legislation reveals almost no final judgments of discrimination involving law firms.¹⁰⁵ The frequency of informal settlements is impossible to gauge, but the barriers to effective remedies are substantial. Part of the problem is the mismatch between legal definitions of discrimination and the social patterns that produce it. To prevail in a case involving professional employment, litigants generally must establish that they were treated adversely based on a prohibited characteristic, such as race, ethnicity, or sex.¹⁰⁶ Yet as the preceding discussion suggested, many disadvantages for women and minorities do not involve such overtly discriminatory treatment.

Nor is it often possible for individuals to know or to prove whether they have been subject to bias, given the subjectivity of evaluation standards. Evidentiary barriers are often insurmountable, both because lawyers generally are smart enough to avoid creating paper trails of bias and because colleagues with corroborating evidence are reluctant to provide it for fear of jeopardizing their own positions.¹⁰⁷ Even those who believe that they have experienced discrimination have little incentive to come forward, given the high costs of complaining, the low likelihood of victory, and the risks of informal blacklisting.¹⁰⁸ Many women and minorities do not want to seem “too aggressive” or “confrontational,” to look like a “bitch,” or to be typecast as an “angry black.”¹⁰⁹ Lawyers who do express concerns are often advised to “let

104. Wilkins, *supra* note 80, at 1572–73.

105. See Eyana J. Smith, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. PA. J. LAB. & EMP. L. 789 (2004).

106. Title VII of the federal Civil Rights Act prohibits employment discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (2012). For an overview, see KATHERINE T. BARTLETT ET AL., *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 89 (6th ed. 2013).

107. Rhode & Williams, *supra* note 43, at 243; *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987).

108. The problem is true of employment discrimination litigation generally. See Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663 (2005); Linda Hamilton Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, in *SEX DISCRIMINATION IN THE WORKPLACE* 295, 296, 309–10 (Faye J. Crosby et al. eds., 2007).

109. *Visible Invisibility*, *supra* note 20, at 20 (“aggressive,” “bitch”); Williams & Richardson, *supra* note 10, at 38 (“confrontational”); Reichman & Sterling, *supra* note 13, at 69 (“bitch”); Cruz & Molina, *supra* note 35, at 1019 (“rock the boat”); Marcia Coyle,

bygones be bygones,” or to “move on.”¹¹⁰ Channels for candid dialogue are all too rare. Most law firms do not give associates opportunities to offer feedback about their supervisors, and of lawyers who provide such evaluations, only about five percent report changes for the better.¹¹¹ The message in many law firm cultures is that “[c]omplaining never gets you anywhere . . . because then you’re [perceived as] not being a team player”¹¹²

Lawyers who persist in their complaints are putting their professional lives on trial, and the profiles that emerge are seldom entirely flattering. In one widely publicized case involving a gay associate who sued Wall Street’s Sullivan and Cromwell for bias in promotion, characterizations of the plaintiff in press accounts included “smarmy,” and “a paranoid kid with a persecution complex.”¹¹³ In an equally notorious sex discrimination suit, Philadelphia’s Wolf, Block, Schorr & Solis-Cohen denied a promotion to Nancy Ezold, whom firm leaders believed lacked both analytic abilities and other characteristics that might compensate for that deficiency. According to one partner, “It’s like the ugly girl. Everybody says she’s got a great personality. It turns out [that Ezold] didn’t even have a great personality.”¹¹⁴ What she did have, however, was sufficient evidence to prevail at trial. At the time she was rejected for partnership, the firm’s litigation department had just one woman out of fifty-five partners; nationally, by contrast, about eleven percent of partners at large firms were female.¹¹⁵ Ezold had positive evaluations by the partners for whom she had worked, and a comparison with other male associates who had been promoted revealed performance concerns at least as serious as those raised about her. Characterizations of some of those men included: “wish-washy and immature,” “[m]ore sizzle than steak,” and “[n]ot real smart.”¹¹⁶ The record also revealed gender stereotypes, such as some partners’ belief that Ezold was too

Black Lawyer’s Life, Suit Told By A White Author; New Book By a WSJ Editor Tells of a Harvard Law Grad Who Sued Katten Muchin, NAT’L L.J., Jan. 11, 1999, at A14 (quoting Mungin) (“angry black”).

110. For the advice, see Robert Kolker, *The Gay Flannel Suit*, N.Y. MAG. (Oct. 24, 2007), <http://nymag.com/news/features/28515/>; see also *Visible Invisibility*, *supra* note 20, at 21. For negative consequences following complaints about compensation, see Williams & Richardson, *supra* note 10, at 38.

111. NAT’L ASS’N FOR LAW PLACEMENT, *HOW ASSOCIATE EVALUATIONS MEASURE UP: A NATIONAL STUDY OF ASSOCIATE PERFORMANCE ASSESSMENTS* 74 (2006).

112. *Visible Invisibility*, *supra* note 20, at 27 (internal quotation marks omitted).

113. Kolker, *supra* note 110.

114. Deborah L. Rhode, *What’s Sex Got to Do With It: Diversity in the Legal Profession*, in *LEGAL ETHICS STORIES* 233, 246 (Deborah L. Rhode & David Luban eds., 2006) (quoting Charles Kopp).

115. *Id.* at 235.

116. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175, 1184–87 (E.D. Pa. 1990), *rev’d*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 510 U.S. 826 (1993).

“assertive” and too preoccupied with “women’s issues.”¹¹⁷ Despite such evidence, the court of appeals found for the firm. In its view, the performance concerns of the two-thirds of partners who voted against Ezold were not so “obvious or manifest” a pretext to show discrimination.¹¹⁸ Yet, given the damage to the firm’s reputation and recruiting efforts, the victory was hardly a full vindication. In reflecting on the decision not to settle the matter, one firm leader concluded: “This may have been a case that wasn’t worth winning.”¹¹⁹

Similar evidentiary difficulties confront women who take reduced schedules and find themselves out of the loop of challenging assignments and career development opportunities. In dismissing a class action complaint brought by mothers against Bloomberg News, the district court expressed widely prevailing views: “[t]he law does not mandate ‘work-life balance.’”¹²⁰ In an organization “which explicitly makes all-out dedication its expectation, making a decision that preferences family over work comes with consequences.”¹²¹ Attorneys who experience such consequences seldom see options other than exit. One mother who returned from leave after three years at a firm found her situation hopeless: “I was simply dropped from all my work, with no questions or discussion It was as if I had fallen off the planet.”¹²²

Not only does current antidiscrimination law provide insufficient remedies for individuals, it also offers inadequate incentives for institutions to address unintended biases. Columbia Law Professor Susan Sturm’s research suggests that fear of liability can discourage organizations from collecting “information that will reveal problems . . . or patterns of exclusion that increase the likelihood that they will be sued.”¹²³ Yet while law has supplied inadequate pressures for diversity initiatives, other considerations are pushing strongly in that direction. Both the moral and business case for diversity should inspire leaders in law to do more to build inclusiveness in their institutions and in their own ranks as well.

117. *Id.* at 1188.

118. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 534 (3d Cir. 1992). *See also* Rhode, *supra* note 114, at 243.

119. Rhode, *supra* note 114, at 245 (quoting Robert Segal).

120. *Equal Emp’t Opportunity Comm’n v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 485 (S.D.N.Y. 2011).

121. *Id.*

122. Amelia J. Uelmen, *The Evils of “Elasticity”: Reflections on the Rhetoric of Professionalism and the Part-Time Paradox in Large Firm Practice*, 33 *FORDHAM URB. L.J.* 81, 83 (2005).

123. Sturm, *supra* note 97, at 476.

V. THE CASE FOR DIVERSITY

Beginning in the late 1980s, bar leaders launched a series of initiatives designed to increase minority representation and influence in the profession. Drawing on arguments gaining influence in the corporate sector, they stressed the business case for diversity. As the Minority Corporate Counsel Association puts it: “law firms commit to becoming diverse because their future, market share, retention of talent, continuation of existing relationships with corporate clients, and performance depend on understanding and anticipating the needs of an increasingly diverse workforce and marketplace.”¹²⁴

A 2010 report by the ABA Presidential Initiative Commission on Diversity similarly emphasized that “[i]t makes good business sense to hire lawyers who reflect the diversity of citizens, clients, and customers from around the globe. Indeed, corporate clients increasingly require lawyer diversity and will take their business elsewhere if it is not provided.”¹²⁵

Advocates of gender equity take a similar approach. A widely recognized 2009 *Manifesto on Women in Law* elaborates the business case. Its core principles state:

A. The depth and breadth of the talent pool of women lawyers establishes a clear need for the legal profession to recruit, retain, develop, and advance an exceptionally rich source of talent.

B. Women increasingly have been attaining roles of influence throughout society; legal employers must achieve gender diversity in their leadership ranks if they are to cultivate a set of leaders with legitimacy in the eyes of their clients and members of the profession.

C. Diversity adds value to legal employers in countless ways—from strengthening the effectiveness of client representation to inserting diverse perspectives and critical viewpoints in dialogues and decision making.¹²⁶

In support of these claims, advocates rely on a variety of evidence. For example, some social science research suggests that diverse viewpoints encourage critical thinking and creative problem solving; they expand the range of alternatives considered and counteract “group think.”¹²⁷ Some studies also find a correlation between diversity and

124. Wilkins, *supra* note 80, at 1570 n.101 (quoting Scott Mitchell) (internal quotation marks omitted).

125. *Next Steps*, *supra* note 74, at 9.

126. *The Austin Manifesto*, CTR. FOR WOMEN IN LAW (May 1, 2009), <http://www.utexas.edu/law/centers/cwil/the-austin-manifesto/>.

127. Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74

profitability in law firms as well as in Fortune 500 companies.¹²⁸ Other research has drawn on signaling theory to argue that diversity conveys a credible commitment to equal opportunity and responsiveness to diverse stakeholders.¹²⁹

It is, however, important not to overstate the business case for diversity. Not all social science research finds strong performance benefits from diversity.¹³⁰ If poorly managed, it can heighten conflict, arid communication problems, or cause outsiders to suppress divergent views.¹³¹ Nor do all studies find a correlation between diversity and profitability.¹³² In those that do, it is unclear which way causation runs. Financial success may sometimes do more to enhance diversity than the converse; organizations that are on strong financial footing are better able to invest in diversity initiatives and sound employment practices such as mentoring and work/life accommodations that promote both diversity and profitability.¹³³

There are, however, other strong reasons to support diversity initiatives. As the ABA Presidential Initiative Commission noted, increasing numbers of corporate clients are making diversity a priority in allocating work. Over a hundred companies have signed the *Call to Action: Diversity in the Legal Profession*, in which they pledge to “end or limit . . . relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.”¹³⁴ A growing number impose specific requirements, including reports on diversity within the firm and in the teams working on their matters, as well as

AM. SOC. REV. 208, 220 (2009); Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference? The Promise and Reality of Diverse Teams on Organizations*, 6 PSYCHOL. SCI. PUB. INT. 31, 35 (2005); Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 13 (2009).

128. See Brayley & Nguyen, *supra* note 127, at 13–14; David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 51 (2003). For a review of this evidence and its methodological limitations, see Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?* (Rock Ctr. for Corp. Governance, Working Paper No. 89, 2010).

129. Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 446–48 (2008).

130. See studies discussed in Rhode & Packel, *supra* note 128.

131. See studies discussed in Brayley & Nguyen, *supra* note 127; Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809 (2011); Jonathan S. Leonard et al., *Do Birds of a Feather Shop Together? The Effects on Performance of Employees' Similarity with One Another and with Customers*, 25 J. ORG. BEHAV. 731 (2004); Wilkins, *supra* note 80, at 1588–90.

132. See studies discussed in Rhode & Packel, *supra* note 128; Dobbin & Jung, *supra* note 131.

133. Brayley & Nyugen, *supra* note 127, at 34; Kathleen A. Farrell & Philip L. Hersch, *Additions to Corporate Boards: The Effect of Gender*, 11 J. CORP. FIN. 85 (2005).

134. *A Call to Action: Diversity in the Legal Profession Commitment Statement*, MINORITY CORP. COUNSEL ASS'N (Oct. 2004), <http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074>.

relevant firm policies and initiatives.¹³⁵ Wal-Mart, which has been the most public and detailed in its demands, specifies that firms must have flexible time policies and include as candidates for relationship partner for the company at least one woman, one lawyer of color, and one partner on a flexible schedule. It has also terminated relationships with firms that have failed to meet its diversity standards.¹³⁶ The Gap also inquires into flexible time policies and sets out expectations for improvements with firms that fail to meet its goals.¹³⁷ Microsoft provides incentives for firms to hit its diversity targets.¹³⁸

Again, it is important not to overstate the reach of these initiatives. Almost no research is available to assess the impact of these policies, to determine how widely they are shared, or to ascertain how often companies that have pledged to reduce or end representation in appropriate cases have actually done so. The only national survey on point, conducted in 2007, did not find that diversity was one of the most important factors in general counsels' choice of outside law firms, and it is unclear how much has changed in the intervening years.¹³⁹ Still, the direction of client concerns is clear, and in today's competitive climate, the economic and symbolic leverage of prominent corporations should not be discounted.

Moreover, there are other benefits of diversity initiatives. As noted earlier, some policies, such as those involving work–family accommodations, make business sense. So does fostering diverse perspectives when any resulting conflict can be effectively managed. In addition, as the discussion below suggests, many practices that would improve conditions for women and lawyers of color serve broader organizational interests. Better mentoring programs, more equitable compensation and work assignment, and greater accountability of supervising attorneys are all likely to have long-term payoffs, however difficult to quantify with precision. Skeptics of the business case for diversity often proceed as if the business case for the current model is

135. Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 *FORDHAM L. REV.* 2577 (2012).

136. *Id.* at 2597–2600; Clare Tower Putnam, Comment, *When Can a Law Firm Discriminate Among Its Own Employees to Meet a Client's Request? Reflections on the ACC's Call to Action*, 9 *U. PA. J. LAB. & EMP. L.* 657, 660 (2007); Karen Donovan, *Pushed by Clients, Law Firms Step Up to Diversity Efforts*, *N.Y. TIMES* (July 21, 2006), <http://www.nytimes.com/2006/07/21/business/21legal.html>.

137. *Diversity Business Matters: 2011 Corporate Programs Supporting Business for Diverse Outside Counsel*, *CAL. MINORITY COUNSEL PROGRAM* 18 (Mar. 2011), http://c.ymcdn.com/sites/www.cmcp.org/resource/resmgr/files/diversity_business_matters.pdf.

138. Melanie Lasoff Levs, *Carrot Money to Diversify*, *DIVERSITY & THE BAR*, Sept.–Oct. 2008, at 59.

139. Mary Swanton, *18th Annual Survey of General Counsel: Survey Snapshots*, *INSIDECOUNSEL*, July 2007, at 55.

self-evident. Few experts on law firm management agree.¹⁴⁰

The fact that data is lacking on many of these benefits is a reason to avoid exaggerating their significance, but not to dismiss their relevance. In a world in which the talent pool is half women and one-fifth lawyers of color, it is reasonable to assume that firms will suffer some competitive disadvantage if they cannot effectively recruit and retain these groups. Part of the reason that such disadvantages have been hard to quantify is that comparative data on diversity traditionally have been hard to come by. Now, with the emergence of more complete and accessible databases, job candidates and clients who care about racial, ethnic, and gender equity can make more informed decisions.¹⁴¹ Their decisions are likely to be significant, particularly if diversity is at least a potential tie breaker in today's increasingly competitive legal market.

The question then becomes how organizations can help institutionalize diversity and build cultures of inclusiveness. And equally important, what can women and minorities do to enhance their own career options?

VI. STRATEGIES FOR INDIVIDUALS

To improve their chances for success, women and minorities should be clear about their goals, seek challenging assignments, solicit frequent feedback, develop mentoring relationships, and cultivate a reputation for effectiveness. Succeeding in those tasks also requires attention to unconscious biases and exclusionary networks that can waylay careers.

So, for example, aspiring female lawyers need to strike the right balance between "too assertive" and "not assertive enough." Surveys of successful managers and professional consultants underscore the importance of developing a leadership style that fits the organization, and is one "with which men are comfortable . . ."¹⁴² That finding is profoundly irritating to some lawyers. At an ABA Summit on Women's Leadership, many participants railed against asking women to adjust to men's needs. Why was the focus always on fixing the female? But as others pointed out, this is the world that women inhabit, and it is not just men who find overly authoritative or self-promoting styles off putting. To maximize effectiveness, women need ways of projecting a decisive

140. For a sampling of criticism, see Williams & Richardson, *supra* note 10, at 51–55.

141. See, e.g., BUILDING A BETTER LEGAL PROFESSION, <http://www.betterlegalprofession.org/index.php/php> (making large firms' relative performance on diversity and other measures readily available online) (last visited May 8, 2014).

142. *Women in U.S. Corporate Leadership: 2003*, CATALYST 13 (2003), <http://www.catalyst.org/knowledge/women-us-corporate-leadership-2003>; ELEANOR CLIFT & TOM BRAZAITIS, MADAM PRESIDENT: SHATTERING THE LAST GLASS CEILING 321, 324 (2000).

and forceful manner without seeming arrogant or abrasive. Experts suggest being “relentlessly pleasant” without backing down.¹⁴³ Strategies include frequently smiling, expressing appreciation and concern, invoking common interests, emphasizing others’ goals as well as their own, and taking a problem-solving rather than critical stance.¹⁴⁴ Successful lawyers such as Sandra Day O’Connor have been known for that capacity. In assessing her prospects for success in the Arizona state legislature, one political commentator noted that “Sandy . . . is a sharp gal” with a “steel-trap mind . . . and a large measure of common sense She [also] has a lovely smile and should use it often.”¹⁴⁵ She did.

Formal leadership training and coaching can help in developing interpersonal styles, as well as capabilities such as risk-taking, conflict resolution, and strategic vision. Leadership programs designed particularly for women or minorities provide especially supportive settings for addressing their special challenges.¹⁴⁶ Profiles of successful leaders can also provide instructive examples of the personal initiative that opens professional opportunities. These lawyers did not wait for the phone to ring. Michele Mayes, one of the nation’s most prominent African-American female general counsels, recalls that after receiving some encouragement from a woman mentor, she approached the chief legal officer at her company and “told him that I wanted a job like his.”¹⁴⁷ After the shock wore off, he worked up a list of the skills and experiences that she needed and recruited her to follow him to his next general counsel job. She never replaced him, but with his assistance she prepared for his role in other Fortune 500 companies. Louise Parent, the general counsel of American Express, describes learning to “raise my hand” for challenging assignments and being willing to take steps down and sideways on the status ladder in order to get the experience she needed.¹⁴⁸ Terry McClure, the general counsel of United Parcel Service, was told she needed direct exposure to business operations if she wanted to move up at the company. After accepting a position as district manager, she suddenly found herself as a “lawyer, a black woman,

143. LINDA BABCOCK & SARA LASCHEVER, *ASK FOR IT: HOW WOMEN CAN USE THE POWER OF NEGOTIATION TO GET WHAT THEY REALLY WANT* 253 (2008).

144. *Id.* at 252–62.

145. JOAN BISKUPIC, *SANDRA DAY O’CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE* 56 (2005) (quoting Benie Wynn) (internal quotation marks omitted).

146. Ely et al., *supra* note 60; Erin White, *Female Training Classes Flourish*, WALL ST. J. (Sept. 25, 2006, 12:01 AM), <http://online.wsj.com/news/articles/SB115914673783772716>. The Leadership Council on Legal Diversity also offers a fellowship program for minorities on the leadership track.

147. MAYES & BAYSINGER, *supra* note 48, at 82.

148. *Id.* at 69.

[with] no operations experience . . . [w]alking into [a] warehouse the first day with all the truck drivers”¹⁴⁹ Her success in that role was what helped put her in the candidate pool for general counsel.

Setting priorities and managing time are also critical leadership skills. Establishing boundaries, delegating domestic tasks, and giving up on perfection are essential for those with substantial caretaking commitments. What lawyers should not sacrifice is time spent developing relationships with influential mentors.¹⁵⁰ To forge those strategic relationships, lawyers need to recognize that those from whom they seek assistance are under similar time pressures. The best mentoring generally goes to the best mentees: those who are reasonable and focused in their needs and who make sure the relationship is mutually beneficial. Lawyers who step out of the labor force should find ways of keeping professionally active. Volunteer efforts, occasional paying projects, continuing legal education, and reentry programs can all aid the transition back.

VII. STRATEGIES FOR ORGANIZATIONS

The most important factor in ensuring equal access to professional opportunities is a commitment to that objective, which is reflected in organizational policies, priorities, and reward structures.¹⁵¹ That commitment needs to come from the top. An organization’s leadership needs not simply to acknowledge the importance of diversity, but also to establish structures for promoting it, and to hold individuals accountable for the results. The most successful approaches generally involve task forces or committees with diverse and influential members who have credibility with their colleagues and a stake in the results.¹⁵² The mission of that group should be to identify problems, develop responses, and monitor their effectiveness.

As an ABA Presidential Commission on Diversity recognized, self-

149. *Id.* at 77.

150. Susan A. Berson, *The Rules (For Women): Steps May Be Unspoken But They Are Necessary, Successful Partners Say*, 98 A.B.A. J. 28 (2012); Linda Bray Chanow & Lauren Stiller Rikleen, *Power in Law: Lessons from the 2011 Women’s Power Summit on Law and Leadership*, CTR. FOR WOMEN IN LAW 27, 32 (Jan. 2012), http://www.utexas.edu/law/wp/wp-content/uploads/centers/cwil/Summit_White_Paper-FINAL.pdf.

151. Frank Dobbin et al., *Diversity Management in Corporate America*, 6 CONTEXTS 21 (2007); CATALYST, ADVANCING WOMEN IN BUSINESS 6, 12–13 (1998); CATALYST, WOMEN OF COLOR IN CORPORATE MANAGEMENT: A STATISTICAL PICTURE 69 (1998).

152. Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 HARV. J.L. & GENDER 279, 283 (2007); Jeanine Prime et al., *Strategy Matters: Evaluating Company Approaches for Creating Inclusive Workplaces*, CATALYST 6 (May 15, 2010), <http://www.catalyst.org/knowledge/strategy-matters-evaluating-company-approaches-creating-inclusive-workplaces>; Beiner, *supra* note 6, at 333.

assessment should be a critical part of all diversity initiatives.¹⁵³ 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.¹⁵⁴

Whatever oversight structure an employer chooses, a central priority should be effective systems of evaluation, rewards, and allocation of professional development opportunities. Supervising lawyers and department heads need to be held responsible for their performance on diversity-related issues, and that performance should be part of bottom-up evaluation structures.¹⁵⁵ Such accountability is, of course, far easier to advocate than to achieve, particularly given the absence of systematic research on what oversight strategies actually work. Our knowledge is mainly about what doesn't. Performance appraisals that include diversity but lack significant rewards or sanctions are unlikely to affect behavior.¹⁵⁶ However, little is known about what has helped firms deal with powerful partners who rate poorly on diversity, or whether incentives like mentoring awards and significant bonuses are effective in changing organizational culture. More experimentation and sharing of information could help organizations translate rhetorical commitments into institutional priorities. Many bar associations as well as groups such as the Leadership Counsel on Legal Diversity have initiatives to promote such collaboration.

Some research is available on specific strategies that are frequently part of diversity initiatives. One of the least effective is training. Surveyed lawyers tend to be at best "lukewarm" about the usefulness of diversity education, and experts who have studied its effectiveness are

153. *Next Steps*, *supra* note 74, at 28.

154. Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AM. J. SOC. 1479, 1485 (2008); Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1381 (2008).

155. Bagati, *supra* note 19, at 49; Rhode & Kellerman, *supra* note 49, at 27; Ridgeway & England, *supra* note 42, at 202; Ely et al., *supra* note 60, at 481; Joanna Barsh & Lareina Yee, *Unlocking the Full Potential of Women at Work*, WALL ST. J., at 11 (Apr. 30, 2012), <http://online.wsj.com/public/resources/documents/womenreportnew.pdf>.

156. Dobbin & Kalev, *supra* note 152, at 293–94; Dobbin et al., *supra* note 151, at 23–24.

even less enthusiastic.¹⁵⁷ In a large-scale review of diversity initiatives across multiple industries, training programs did not significantly increase the representation or advancement of targeted groups.¹⁵⁸ Part of the problem is that such programs typically focus only on individual behaviors not institutional problems; they also provide no incentives to implement recommended practices, and sometimes provoke backlash among involuntary participants.¹⁵⁹

Another common strategy is networks and affinity groups for women and minorities. Almost all large firms report women's initiatives that include networking.¹⁶⁰ Many organizations also support groups for minority lawyers within or outside the firm. These vary in effectiveness. At their best, they provide useful advice, role models, contacts, and development of informal mentoring relationships.¹⁶¹ Affinity groups for women of color can be especially important in reducing participants' sense of isolation. By bringing potential leaders together around common interests, these networks can also forge coalitions on diversity-related issues and generate useful reform proposals.¹⁶² Yet 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 lawyers "in touch with what they need to know, or whom they need to know, to move up."¹⁶³

One of the most effective interventions involves mentoring, 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. Well-designed initiatives that evaluate and reward mentoring activities can improve participants' skills, satisfaction,

157. Darden, *supra* note 32, at 100. For the limited research and mixed or negative findings on effectiveness, see Deborah L. Rhode, *Social Research and Social Change: Meeting the Challenge of Gender Inequality and Sexual Abuse*, 30 HARV. J.L. & GENDER 11, 13–14 (2007); Elizabeth Levy Paluck, *Diversity Training and Intergroup Contact: A Call to Action Research*, 62 J. SOC. ISSUES 577, 583, 591 (2006).

158. Dobbin & Kalev, *supra* note 152, at 293–95; Dobbin et al., *supra* note 151, at 23–25.

159. Darden, *supra* note 32, at 117; Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 L. & SOC'Y. REV. 23, 34 (1998).

160. *National Survey on Retention and Promotion of Women in Law Firms*, NAT'L ASS'N OF WOMEN LAWYERS 15 (Nov. 2007), <http://www.nawl.org/p/cm/ld/fid=82#surveys>.

161. Cindy A. Schipani et al., *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L. & POL'Y 89, 131 (2009); Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 594 (2006); Rhode & Kellerman, *supra* note 49, at 30.

162. Bob Yates, *Law Firms Address Retention of Women and Minorities*, CHICAGO LAWYER, Mar. 2007, available at <http://www.mbtlaw.com/pubs/lfam2007.pdf>.

163. Dobbin et al., *supra* note 151, at 25.

and retention rates.¹⁶⁴ However, most programs do not require evaluation or specify the frequency of meetings and goals for the relationship.¹⁶⁵ Instead, they permit a “call me if you need anything” approach, which leaves too many junior attorneys reluctant to become a burden.¹⁶⁶ Ineffective matching systems compound the problem; lawyers too often end up with mentors with whom they have little in common.¹⁶⁷ Formal programs also 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 leaders is that they cannot simply rely on formal structures. They need to model, cultivate, and reward sponsorship of women and minorities, and to monitor the effectiveness of mentoring programs. Identifying and nurturing high performers should be a priority.¹⁶⁸ In building cultures of inclusion, it is important to emphasize the mutual benefits that can flow from mentoring relationships. Quite apart from the satisfaction that comes from assisting those in need of assistance, mentors may receive more tangible payoffs from fresh insights and from the loyalty and influence that their efforts secure. They can also take pride in laying the foundations for an organization that is reflective of, and responsive to, the public it serves.

Organizations can also support efforts to expand the pool of qualified minorities through scholarships and other educational initiatives. For example, the law firm Skadden and Arps has pledged ten million dollars for a ten-year program offering law school preparation to students from disadvantaged backgrounds.¹⁶⁹ As one ABA official noted, “it’s the kind of money we need to make a difference Now we need just 500 other law firms to take action”¹⁷⁰

To make these reforms possible, organizations need leaders who are personally invested in building a broad consensus for diversity and in

164. Kalev et al., *supra* note 161, at 594; Rhode & Kellerman, *supra* note 49, at 30; Schipani et al., *supra* note 161, at 100–01; IDA O. ABBOTT, *THE LAWYER’S GUIDE TO MENTORING* 25, 32–33 (2000).

165. *Diversity and Gender Equity in the Legal Profession: Best Practices Guide*, MINN. STATE BAR ASS’N (June 2008), <http://www2.mnbar.org/committees/DiversityImplementation/DiversityBestPracticesGuideFinal.pdf>.

166. *Id.* at 77 (internal quotation marks omitted).

167. Ida O. Abbott, *Mentoring Across Differences*, *DIVERSITY AND THE BAR*, July–Aug. 2006, available at <https://mcca.com/index.cfm?fuseaction=page.viewpage&pageid=959>; Leigh Jones, *Mentoring Plans Failing Associates; High Attrition Rates Still Hit Firms Hard*, *NAT. L.J.*, Sept. 18, 2006.

168. Nancy M. Carter & Christine Silva, *Pipeline’s Broken Promise*, *CATALYST* 5 (2010), http://www.catalyst.org/system/files/Pipeline’s_Broken_Promise_Final_021710.pdf.

169. Eckel, *supra* note 1, at 20.

170. *Id.* at 20 (quoting Ruthe Ashley) (internal quotation marks omitted).

addressing any sources of backlash or inertia.¹⁷¹ This agenda has to be seen not as a “women’s” or “minority” issue, but as an organizational priority in which women and minorities have a particular stake. As consultants emphasize, “[i]nclusion can be built only through inclusion.”¹⁷² Change “needs to happen in partnership *with* the people of the organization not *to* them.”¹⁷³ Leaders are critical in creating that sense of unity and in translating rhetorical commitments into organizational priorities.

171. RHODE, LAWYERS AS LEADERS, *supra* note *, at 153.

172. FREDERICK A. MILLER & JUDITH H. KATZ, THE INCLUSION BREAKTHROUGH: UNLEASHING THE REAL POWER OF DIVERSITY 37 (2002).

173. *Id.* at 38.