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GENDER BIAS AS THE NORM IN THE LEGAL PROFESSION: IT'S STILL A [WHITE] MAN'S GAME

Kimberly Jade Norwood*

INTRODUCTION

This volume, born in the spirit of commemoration, celebrates 150 years of women at Washington University School of Law. I am honored to be a part of an institution that has facilitated the entry of women into the legal profession since 1869. That year, not one *but two* women—Phoebe Couzins and Lemma Barkeloo—were admitted to Washington University School of Law. Barkeloo took and passed the bar exam in February of her first year of law school, becoming Missouri's first and the country's second woman licensed to practice law.¹ Couzins would go on to graduate from the law school in 1871, making her not only the first female graduate of Washington University School of Law but also one of the first female graduates of any U.S. law school.² Cassandra Flipper, believed to be the first African American female to attend the law school, did not enter for almost another hundred years: Flipper matriculated in 1963 and graduated in 1966.³

When Couzins and Barkeloo started, there were no female faculty members at Washington University School of Law. Our first female faculty

* Henry H. Oberschelp Professor of Law, Washington University. I want to thank my husband, Ronald Alan Norwood, Esquire, my colleague Karen Tokarz, Charles Nagel Professor of Public Interest Law & Public Service; and attorney, poet and friend, CeLillianne Green, for their comments on earlier drafts of this essay. I also want to thank the several Washington University School of Law administrators who helped me find the answers to manifold small statistical questions: Joyce A. McCray Pearson, Associate Dean of the Law Library and Senior Lecturer in Law; Katherine Scannell, Associate Dean for Admissions and Placement; Elizabeth Walsh, Associate Dean Student Life; Frederick Chan, Senior Cataloging Librarian. I also wish to thank Pedro Juan Windsor, Managing Director of the ABA Office of Diversity and Inclusion; and Jeff Allum, Research Director for the AALS, for their assistance. Finally, a special thank-you to my research assistants, Laurel McFarland and David Reck.

1. Karen Tokarz, *Lemma Barkeloo and Phoebe Couzins: Among the Nation's First Women Lawyers and Law School Graduates*, 6 WASH. U. J.L. & POL'Y 181, 183 (2001).

2. *Id.* at 186.

3. Email from Joyce A. McCray Pearson, Assoc. Dean of the Wash. Univ. Law Library, to Kimberly J. Norwood, Henry H. Oberschelp Professor of Law, Wash. Univ. Sch. of Law (Dec. 4, 2019, 1:10 PM) (on file with author).

on tenure track, Jean Ashman, joined the faculty in the early 1950s. She would be the faculty's only tenured/tenure-track female for thirty years.⁴ In 1981, Susan Appleton, the Lemma Barkeloo & Phoebe Couzins Professor of Law at the law school today, was the next female to receive tenure at the law school.⁵ I became the first Black female tenure-track faculty member in 1990; I was tenured in 1996.

Things have vastly improved since I joined the faculty in 1990. At that time, female law students were less than half of the entering law school class; by 2019, the proportion of female law students reached fifty-two percent.⁶ The female faculty has steadily grown as well. Where in 1990 there were five tenured and tenure-track females on the faculty out of approximately thirty-five tenured and tenure-track faculty members,⁷ today almost half of our tenured and tenure-track faculty are female (seventeen out of thirty-six).⁸ We hired our first female dean in 2014.⁹

At one time, Washington University was a front-runner, but many law schools throughout the country have been on a similar trajectory in recent years. Women are now consistently around fifty percent of the entering classes at law schools around the country.¹⁰ In fact, the number of female

4. WASH. UNIV. SCH. OF LAW, 1955-56 BULLETIN 7 (Dec. 1954), https://archive.org/details/b41079188_1944-1960/page/n507 [<https://perma.cc/XDS8-N42V>]. Professor Marilyn Ireland joined the Washington University School of Law faculty in 1973 on the tenure track. WASH. UNIV. SCH. OF LAW, 1973-74 BULLETIN (Dec. 1972), https://archive.org/details/b41079188_1961-1974/page/n817 [<https://perma.cc/57KK-8X3B>].

5. *Faculty Receive Tenure*, WASH. U. REC., June 4, 1981, at 3, <http://digitalcommons.wustl.edu/record/207> [<https://perma.cc/M65X-Z7M7>].

6. Email from Katherine Scannell, Assoc. Dean for Admissions and Placement, Wash. Univ. Sch. of Law, to Kimberly J. Norwood, Henry H. Oberschelp Professor of Law, Wash. Univ. Sch. of Law (Sept. 2, 2019, 5:23 PM) (on file with author).

7. WASH. UNIV. SCH. OF LAW, 1989-90 BULLETIN 43-55; WASH. UNIV. SCH. OF LAW, 1990-91 BULLETIN 43-55. The five tenured female faculty members on the faculty when I joined in the fall of 1990 were Susan Appleton, Kathleen Brickey, Karen Tokarz, Francis Foster Simon, and Barbara Flagg.

8. *Faculty and Staff Directory*, WASH. U. SCH. L., <https://law.wustl.edu/faculty-and-research/faculty-staff-directory/> [<https://perma.cc/2CSC-GEUS>].

9. Nancy Staudt rejoined our faculty (she was a professor from 2000 to 2006) as dean of the law school in 2014. *Historical Timeline*, WASH. U. SCH. L., <https://law.wustl.edu/about/our-history/historical-timeline/> [<https://perma.cc/4WCW-84C3>].

10. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., A CURRENT GLANCE AT WOMEN IN THE LAW 4 (2019), https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf [<https://perma.cc/V9UM-D7KG>].

law students nationwide surpassed male law students in 2017.¹¹ Women now represent thirty percent of tenure-track positions on law school faculties¹² and are thirty-five percent of law school deans.¹³ More generally, women make well over a third of all lawyers in the United States.¹⁴ Bottom line: more women are going to law school, and becoming lawyers and law professors.

This is surely cause for celebration. Nevertheless, even as we enter the profession in greater numbers, we still have challenges to overcome, or to use one of my favorite quotes, we have “miles to go before [we] sleep.”¹⁵ Despite the steady gains over the years, women still face tremendous impediments as we attempt to climb hierarchical ladders in the legal profession.

This essay addresses two intersecting areas of major concern: gender bias and racially gendered bias in the legal profession, both of which are very real and pervasive. As this essay highlights, there is much work to do on the gender equality and equity scales for women in all aspects of the legal academy and legal profession. So, as we commemorate laudable milestones such as 150 years of women at Washington University School of Law, let us to be mindful of the work yet to do. We cannot rest. We have many miles to go before we sleep. Below are a just a few highlights of the issues.

11. ACCESSLEX INST., LEGAL EDUCATION DATA DECK: KEY TRENDS ON ACCESS, AFFORDABILITY AND VALUE (2018), <https://www.accesslex.org/legal-education-data-deck> [https://perma.cc/4XXF-LZW3]; see also Elizabeth Olson, *Women Make Up Majority of Law Students for First Time*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html> [https://perma.cc/7XQK-PZYM].

12. LaWanda Ward, *Female Faculty in Male Dominated Fields: Law, Medicine, and Engineering*, NEW DIRECTIONS FOR HIGHER EDUC., Autumn 2008, at 63, 63 (2008).

13. Karen Sloan, *More Minority Women Ascend to Law Dean Job*, LAW.COM (Jan. 10, 2019), <https://www.law.com/nationallawjournal/2019/01/10/more-minority-women-ascend-to-law-dean-jobs/> [https://perma.cc/2U9P-CY3V].

14. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 10, at 1.

15. See ROBERT FROST, STOPPING BY WOODS ON A SNOWY EVENING (1923), <https://www.poetryfoundation.org/poems/42891/stopping-by-woods-on-a-snowy-evening> [https://perma.cc/G6AY-WASU].

I. BIAS IN THE LEGAL PROFESSION

A. Gender Bias

In the legal academy, although more women are applying to law schools, a higher percentage of men are accepted.¹⁶ Despite strong female presence in law schools throughout the country, the data shows that these students are treated differently from male students, particularly White male students, once matriculated. For example, White male students are more likely to have their emails answered by their professors, are more likely to be mentored by their professors, are more likely to receive letters of recommendation, and are more likely to receive glowing letters of recommendation.¹⁷ As a natural result, the data also shows that White male students are more likely to be hired into law firms.¹⁸

Female faculty also face barriers. Students judge female faculty more harshly in evaluations, thus impacting retention, promotion, salary, and

16. ACCESSLEX INST., *supra* note 11, at 4. Additionally, admission rates declined for People of Color from 2016 to 2017, but stayed the same for White applicants. *Id.* at 7.

17. See, e.g., Katherine L. Milkman, Modupe Akinola & Dolly Chugh, *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway Into Organizations*, 100 J. APPL. PSYCHOL. 1678 (2015) (this study of over 6,500 professors in eighty-nine disciplines and 259 institutions “found that when considering requests from prospective students seeking mentoring in the future, faculty were significantly more responsive to White males than to all other categories of students, collectively, particularly in higher-paying disciplines and private institutions”); Marcie Bianco, *Wharton Study Shows the Shocking Result When Women and Minorities Email Their Professors*, MIC (May 1, 2014), <https://www.mic.com/articles/88731/wharton-study-shows-the-shocking-result-when-women-and-minorities-email-their-professors> [<https://perma.cc/8BZH-PWH3>]; Scott Jaschik, *The Bias for White Men*, INSIDE HIGHER ED (Apr. 24, 2014), <https://www.insidehighered.com/news/2014/04/24/study-finds-faculty-members-are-more-likely-respond-white-males-others> [<https://perma.cc/J8EZ-C4K6>].

18. AM. BAR ASS’N COMM’N ON WOMEN IN THE PROF., *supra* note 10, at 2.

even tenure.¹⁹ More time demands are made of female faculty.²⁰ And, the top twenty law reviews in the nation are much more likely to read and to publish articles written by male professors than by female professors.²¹ This is important since promotion and tenure are tied to both the *number* of scholarly articles a professor publishes and *where* those articles are published. If the people making publishing decisions are biased in favor of male faculty for example, that directly affects the elevation of female

19. Pamela A. Wilkins, *Law School in A Different Voice: Legal Education As A Work of Mercy*, 63 ST. LOUIS U. L.J. 401, 448–49 (2019) (“[D]espite the strong evidence that standard student evaluations of teaching reflect gender and racial bias, especially in large classes, and despite the weak evidence of any correlation between strong teaching evaluations and student learning, these student evaluations are used in decision making regarding tenure and promotion and in consideration for teaching awards and other awards for faculty excellence. Moreover, they both reflect and shape perceptions of faculty members’ intellectual abilities.”); see also Landon D. Reid, *The Role of Perceived Race and Gender in the Evaluation of College Teaching on RateMyProfessors.com*, 3 J. DIVERS. HIGHER EDUC. 137 (2010); Kristina Mitchell, *Student Evaluations Can’t Be Used to Assess Professors: Our Research Shows They’re Biased Against Women. That Means Using Them is Illegal*, SLATE (Mar. 19, 2018), <https://slate.com/human-interest/2018/03/student-evaluations-are-discriminatory-against-female-professors.html> [<https://perma.cc/MKU4-7ZZK>]; David A. M. Peterson, Lori A. Biederman, David Andersen, Tessa M. Ditonto & Kevin Roe, *Mitigating Gender Bias in Student Evaluations of Teaching*, PLOS ONE (May 15, 2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0216241> [<https://perma.cc/P9MR-UYLN>]; McGee Nall, *Professors, Students Battle Sexism in Classroom*, THE RED & BLACK (Apr. 7, 2016), https://www.redandblack.com/culture/professors-students-battle-sexism-in-classroom/article_362041c6-fc6d-11e5-8d9e-4b5f3070def6.html [<https://perma.cc/PUF9-BAV3>]; Anya Kamenetz, *Why Female Professors Get Lower Ratings*, NPR (Jan. 25, 2016, 7:00 AM), <https://www.npr.org/sections/ed/2016/01/25/463846130/why-women-professors-get-lower-ratings> [perma.cc/YY94-LE8H]; Benjamin Schmidt, *Gender Bias Exists in Professor Evaluations*, N.Y. TIMES (Dec. 16, 2015, 3:20 AM), <https://www.nytimes.com/roomfordebate/2015/12/16/is-it-fair-to-rate-professors-online/gender-bias-exists-in-professor-evaluations> [<https://perma.cc/24ZK-8YAZ>].

20. Colleen Flaherty, *Dancing Backwards in High Heels: Study Finds Female Professors Experience More Work Demands and Special Favor Requests, Particularly from Academically “Entitled” Students*, INSIDE HIGHER ED (Jan 10, 2018), <https://www.insidehighered.com/news/2018/01/10/study-finds-female-professors-experience-more-work-demands-and-special-favor> [<https://perma.cc/TV3H-MS36>].

21. Shontee Maya Pant, *Examining the Gender Gap in Legal Scholarship: An Empirical Study* (2019) (unpublished manuscript) (on file with author). Now add the COVID-19 pandemic to this mix and a perfect storm is created. Because many women are the primary caretakers of their children and because children are not going to daycare or school, but are home all day and now need help, care, food, concern, online homework and Zoom help, the mothers are carrying the brunt of this childcare. This is directly impacting the research and writing of many mothers who are also academics. Indeed, one editor said the problem is so stark that he has never seen anything like this. And male academicians are soaring, by the way. As one article recently shared, a male colleague told his faculty, “[on] the bright side of things, . . . [self-quarantine] gives me time to concentrate on writing.” Caroline Kitchener, *Women Academics Seem to be Submitting Fewer Papers During Coronavirus. “Never Seen Anything Like It,” Says One Editor*, LILY (Apr. 24, 2020), <https://www.thelily.com/women-academics-seem-to-be-submitting-fewer-papers-during-coronavirus-never-seen-anything-like-it-says-one-editor/> [<https://perma.cc/R79G-QPVU>].

faculty.²² There is also a gender pay gap in the academy.²³ The gap is even greater as between tenured and tenure-track faculty on the one hand and

22. We hit a milestone in 2019. For the first time in history, the editors in chief of the top 16 law schools in the nation are all women. Ann E. Marimow, *For the First Time, Flagship Law Journals at Top U.S. Law Schools Are All Led by Women*, WASH. POST (Feb. 7, 2020), https://www.washingtonpost.com/local/legal-issues/for-the-first-time-flagship-law-journals-at-top-us-law-schools-are-all-led-by-women/2020/02/07/b4d3bc64-4836-11ea-bc78-8a18f7afcee7_story.html [<https://perma.cc/2F29-E77N>]. Hopefully, this will have a direct effect on not only what but *who* gets published.

23. Salary information for private schools is difficult to collect and evaluate. There is some evidence in the public sphere. See, e.g., Paula A. Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 IDAHO L. REV. 867 (2016). The University of Denver Sturm College of Law investigated gender disparities in salaries of its own professors and found that

[f]or Full Professors (excluding the former Dean), females constitute 32% of the group and receive 30% of the salary dollars, both before and after this round of raises. The median salary for female Full Professors was \$7,532/year less than that for males before this round of raises and \$11,282/year less than that for males after this round of raises. The mean salary for female Full Professors was \$14,870/year less than that for males before this round of raises and \$15,859/year less than that for males after this round of raises.

Memorandum from Martin Katz, Dean, Univ. of Denver Sturm Coll. of Law, to the Faculty of Univ. of Denver Sturm Coll. of Law: Faculty Salary Competitiveness Initiative (Dec. 13, 2012), <http://www.scribd.com/doc/152790023/DU-Faculty-Competitiveness>. This discrepancy prompted a lawsuit by Lucy Marsh and six additional female law professors at the Sturm College of Law alleging gender-based discrimination. The suit was settled in 2018, with the law school agreeing to pay \$2.66 million to these seven law school professors and to make changes to the faculty compensation policies. Colleen Flaherty, *Closing the Pay Gap*, INSIDE HIGHER ED (May 18, 2018), <https://www.insidehighered.com/news/2018/05/18/u-denver-settles-eeoc-agreeing-pay-266-million-seven-female-law-professors-who> [<https://perma.cc/BZ38-AN7E>]. Following the settlement, the law school made professor salaries transparent and now a new lawsuit has been filed by Rashmi Goel, alleging sex and race discrimination. Goel is the associate professor who has been teaching at the school the longest, and yet her salary is at least \$30,000 less than the average salary of the other eleven associate professors. Elizabeth Hernandez, *DU Law School's "Fix" For its Gender-Pay Gap Revealed a Female Professor Makes \$30,000 Less Than Her Peers*, DENVER POST (June 5, 2019), <https://www.denverpost.com/2019/06/05/du-sturm-college-of-law-pay-gap/> [<https://perma.cc/63ZA-9F77>]. The gender pay gap seen here is not unique to law professors, but includes educators generally, and Ph.D. students as well. See, e.g., Jonah S. Berger and Molly C. McCafferty, *Female Tenured Harvard Profs Paid on Average 92.5 Cents on the Dollar Compared to Men, Survey Shows*, HARV. CRIMSON (Apr. 24, 2019), <https://www.thecrimson.com/article/2019/4/24/fas-pay-gap-2019/> [<https://perma.cc/L2XC-77SH>]; Brenda Iasevoli, *What's Behind the Gender Pay Gap Among Educators*, ED. WK. (June 15, 2018), http://blogs.edweek.org/edweek/teacherbeat/2018/06/whats_behind_the_gender_pay_gap.html [<https://perma.cc/2PV5-MF3A>]; Vimal Patel, *The Ph.D. Pay Gap*, CHRONICLE HIGHER ED. (May 15, 2015), https://www.chronicle.com/article/The-PhD-Pay-Gap/230041?key=MxOwD_a0gVbHhdzLxKm14RCJvCH_j2twtoptOIUDJX9VosQ5Ehe6tMj8ddZKhUc2JwVYk9pWm1fQy0tX2IxY0xsa051WHZMwMhmQXVRUEh1MUNFQI9RV0tJSQ [<https://perma.cc/H35Q-ZGVU>].

legal research and writing instructors—over seventy percent of whom are women—on the other hand.²⁴

Law firms have even more troubling statistics. Firms overall have experienced increases in the numbers of women entering law practice. Yet, women lawyers continue to struggle to have their voices heard in their firms; they struggle to be mentored as they watch their male counterparts taken under wings and nurtured. In addition, attaining partnership remains a gendered struggle.²⁵ This is true even for firms who rank at the top of diversity performance surveys. Recall the recent shock wave at the proud visual announcement by Paul Weiss of its new partnership class in 2018. Twelve senior associates were promoted to partner. All were White. And, with one exception, all were male.²⁶ Let us look a little closer here.

Data released for 2019 reveals that women are nearly fifty percent of associates at law firms throughout the United States.²⁷ Yet, they are only 22.7% of partners and nineteen percent of equity partners.²⁸ This cannot be fully explained by claiming that the women “probably chose family over

24. Sahar F. Aziz, *Identity Politics is Failing Women in Legal Academia*, J. LEGAL EDUC. (forthcoming Fall 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452553.

25. See generally DEBORAH L. RHODE, AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., THE UNFINISHED AGENDA, WOMEN AND THE LEGAL PROFESSION (2001), <http://womenlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf> [<https://perma.cc/63MC-MMSZ>].

26. Noam Scheiber & John Eligon, *Elite Law Firm's All White Partner Class Stirs Debate on Diversity*, N.Y. TIMES (Jan. 27, 2019), <https://www.nytimes.com/2019/01/27/us/paul-weiss-partner-diversity-law-firm.html> [<https://perma.cc/7T7S-Q8HH>].

27. VAULT.COM & MINORITY CORP. COUNSEL ASS'N, VAULT/MCCA LAW FIRM DIVERSITY SURVEY 2019 REPORT (2019) 4, 21, <http://www.vault.com/images/pdf/downloads/VaultMCCALawFirmDiversitySurvey2019Report.pdf> [<https://perma.cc/6TCB-GS9T>].

28. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 10, at 2. Similar figures are present in corporate America. In 2018, data from LeanIn.org showed White men were thirty-six percent of entering corporate class hires and White women were thirty-one percent of entering corporate class hires. The figures are nearly identical. But as these hires progress through the corporate hierarchy, White men almost double their representation at the C-suite level. White men were sixty-eight percent of the C-suite positions whereas White women were a mere nineteen percent of the C-suite positions. See LEANIN.ORG, WOMEN IN THE WORKPLACE (2018), https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2019.pdf. Attrition does not explain the problem. *Id.* at 6; see also AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 10. The term “C-suite” is “a term used to describe corporate officers and directors. The term is derived from the use of the letter C in most high-level positions, such as Chief Operating Officer.” *C-Suite*, BUSINESS DICTIONARY, <http://www.businessdictionary.com/definition/c-suite.html> [<https://perma.cc/N3TR-AK39>].

career.”²⁹ Even when potentially confounding variables are controlled, we see stark differences in the way female lawyers are mentored, evaluated, and promoted as compared to male lawyers.³⁰ Women are often denied informal mentoring opportunities with senior (usually all White and male) partners.³¹ These are important because it is through these relationships that one learns the unwritten norms and expectations. Similarly, female lawyers are sometimes excluded from social events—and those social events often lead to mentorships, networking, and client development opportunities.³² Troubling issues have arisen, even in cases where the women lawyers are “invited” to the outings. I am reminded of a story told to me by a lawyer about one of her clients, a senior associate in a major law firm. This associate, a female, was invited to an outing with the client. The problem: the outing was to a strip club. The associate did not want to go.

Additional troubling realities for female lawyers in various legal environments include: differences in the quality of work assignments distributed; there is disparate treatment between working mothers and

29. See, e.g., Deborah Rhode, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (May 27, 2015, 7:25 AM), <https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/> [https://perma.cc/P7MJ-U27E] (noting a study in which managing partners of large law firms “explained the ‘woman problem’ by citing women’s different choices and disproportionate family responsibilities”); Sindhu Sundar, *How 4 Firms Are Moving the Needle on Gender Diversity*, LAW360 (July 23, 2017), <https://www.law360.com/articles/946773/how-4-firms-are-moving-the-needle-on-gender-diversity> [https://perma.cc/7AF8-35G7]; Anusia Gillespie & Scott Westfahl, *The Elephant in the Room: Advancing Women to Partnership*, LAW360 (July 21, 2017), <https://www.law360.com/articles/940511/the-elephant-in-the-room-advancing-women-to-partnership> [https://perma.cc/8SKQ-6EZ5] (arguing that disparities in partnership numbers for women are due to the increased average age of law school graduates, thus coinciding with prime years for having children).

30. JOAN C. WILLIAMS, MARINA MULTHAUP, SU LI & RACHEL KORN, AM. BAR ASS’N COMM’N ON WOMEN IN THE PROF., YOU CAN’T CHANGE WHAT YOU CAN’T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION (2018), <https://www.mcca.com/wp-content/uploads/2018/09/You-Cant-Change-What-You-Cant-See-Executive-Summary.pdf> [https://perma.cc/M2WJ-DFCG] (“You Can’t Change What you Can’t See”); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1 (2010); Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 HOFSTRA L. REV. 1001, 1003 (2002); Mark Walsh, *Number of Women Arguing Before the Supreme Court Has Fallen Off Steeply*, A.B.A. J. (Aug 1, 2018, 2:30 AM), http://www.abajournal.com/magazine/article/women_supreme_court_bar?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories#When:07:30:00Z [https://perma.cc/8WBF-9FVV].

31. RHODE, *supra* note 25.

32. *Id.*

working fathers; there are negative assumptions about the competence of women.³³ And there is the “bitch factor.” While one danger a woman has to deal with is of being considered too soft or not nurturing and caring, it is also true that aggressiveness and assertiveness—qualities expected, sought after, and rewarded in men—are punished when exhibited by women.”³⁴

Female trial lawyers must also deal with gender bias thrown at them by opposing counsel, judges, juries, and almost everyone in the court building. The range of affronts female lawyers face include opposing counsel filing “no crying” motions to ensure that the female lawyers will control their emotions; assumptions the female lawyer is not a lawyer at all; being told to wear makeup, to dye their gray hair, to monitor the tone of their voice, to wear heels but not too high, to wear skirts but not too short, to wear

33. *Id.* at 15-19.

34. *See id.* at 6; *see also* SHERYL SANDBERG, *LEAN IN: WOMEN, WORK AND THE WILL TO LEAD* 39-42 (2013) (reporting on a study in which students evaluated successful entrepreneurs differently depending on entrepreneur’s gender; the study revealed that students were harder on the female entrepreneur for engaging in the same behavior as the male entrepreneur, i.e., focusing on career and being aggressive and purposeful in climb to the top); You Can’t Change What You Can’t See, *supra* note 31 at pp.22-23. This problem exists in legal academia as well. Sahar F. Aziz, *The Alpha Female and the Sinister Seven*, in *PRESUMED INCOMPETENT II: INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA* (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289242.

pantyhose, and to smile.³⁵ The gender pay gap exists in the legal profession as well.³⁶

Because of this and related conduct, we have seen more and more gender bias lawsuits filed against law firms in the last few years. Lawsuits by female lawyers against their employers include allegations of inequitable evaluation, promotion, credits, and other compensation matters; pregnancy-related benefits claims; and even sexual harassment.³⁷

35. See, e.g., Lara Bazelon, *What It Takes to Be a Trial Lawyer If You're Not a Man*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/> [https://perma.cc/8UE8-LB8E]; see also Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2034 n.48 (2017); Tsedale M. Melaku, *Why Women and People of Color in Law Still Hear "You Don't Look Like a Lawyer"*, HARV. BUS. REV. (Aug. 7, 2019), <https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer> [https://perma.cc/ZAZ3-UDZ2]; Rosa Inocencio Smith, *What It's Like when a Coworker Tells You to Smile*, ATLANTIC (Oct. 27, 2016, 9:15 AM), <https://www.theatlantic.com/notes/2016/10/what-its-like-when-a-coworker-tells-you-to-smile/505493/> [https://perma.cc/4P7B-6MBZ]; Elizabeth Forester, "Don't Be So Aggressive": Gender Bias in the Courtroom (unpublished manuscript) (on file with author). Some of you may have been surprised to learn that "no crying" motions exist. Bazelon tells the story in her article: In a case where attorney Faiella was representing the plaintiff, before the trial even began, the court took up a motion filed by defense counsel. The motion sought to "preclude emotional displays" during the trial by plaintiff's counsel, attorney Faiella. The motion continued, "Counsel for the Plaintiff, Elizabeth Faiella, has a proclivity for displays of anguish in the presence of the jury, including crying..." Faiella's predicted flood of tears, he continued, could be nothing more than "a shrewdly calculated attempt to elicit a sympathetic response." The motion was denied. But, as attorney Faiella remarked, the damage had been done; not only did she feel (and does she feel every time these motions are filed against her—with zero factual basis) demeaned, but she resented the fact that the attorney successfully communicated to the judge that she "will deploy her feminine wiles to get what she wants." Bazelon, *supra* note 35. Compare this to male lawyers who raise their voice or show anger in the courtroom. They are admired and praised for zealous advocacy for their clients. Not true if done by a woman. Women are often considered overly emotional. *Id.*

36. See, e.g., AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 10, at 6; see also Diversity Inc., *Panel Best Practices in Closing the Gender Pay Gap*, YOUTUBE (May 3, 2018), <https://www.youtube.com/watch?v=dz-PsVzfyD4&feature=youtu.be>; [https://perma.cc/3MAW-QXU6]; *Race and Gender Wage Gaps*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/issue/race-gender-wage-gaps/> [https://perma.cc/ZS3S-MXAQ].

37. *The Lawyer Helping Make Gender Changes in Law Firms: And The 2 Things That Are Stopping Them*, LAWFUEL (May 28, 2019), <https://www.lawfuel.com/blog/the-lawyer-helping-make-gender-changes-in-law-firms-and-the-2-things-that-are-stopping-them/> [https://perma.cc/DE2E-PHYQ]; Jacqueline Bell & Natalie Rodriguez, *What 12 Gender Bias Complaints Say About BigLaw*, LAW360 (May 27, 2019), <https://www.law360.com/articles/1162862/what-12-gender-bias-complaints-say-about-biglaw> [https://perma.cc/FJX9-H2UB] (last three years have seen an onslaught of gender bias lawsuits against law firms); WILLIAMS ET AL., *supra* note 30 (one in four women lawyers is the victim of sexual harassment by lawyers in their firm); *Zero Tolerance Program Toolkit Identifying and Combating Sex-Based Harassment in the Legal Profession*, A.B.A., <https://ambar.org/zerotolerance> [https://perma.cc/7MSJ-BL7Q] ("A woman who has not been harassed in some form, based on her gender, does not exist.").

B. Racial Bias

Adding race brings all of this to new lower heights.³⁸ *The American Lawyer's* June 2014 issue on the challenges facing non-White lawyers showed that despite the legal profession's professed commitment to diversity, Black lawyers, at 4.2% of the legal profession, paled in comparison to Blacks in other professions: During this same time period, Blacks were 9.8% of accountants, 8.5% of financial managers, and 7.1% of physicians.³⁹ Sure, there is work to do in these other professions as well. But it is interesting that a profession dedicated to justice would lag so substantially in who gets to be part of painting the landscape of society. A 2016 report by Law360 revealed that at both the associate level and the partner level, Black lawyers are rare. In 2016, Blacks were 8.6% of the law students entering law schools but were just 3.9% of law firm associates and 1.9% of law firm partners.⁴⁰ At the same time, White people constituted then 60.5% of the law school student population, 79.1% of law firm associates, and 91% of law firm partners.⁴¹ WOW!

Law360 went further. It showed that for every Black lawyer, there were twenty-eight White lawyers; for every Black non-partner, there were twenty White non-partners; for every Black non-equity partner, there were thirty-seven White non-equity partners; and for every Black equity partner, there were fifty three White equity partners.⁴² I simultaneously chuckle and cry when I hear the accusations of some White males that a crisis looms because of their belief that they are losing jobs to non-Whites. As these figures demonstrate, there is indeed a crisis, but it is not White males having employment opportunities taken away from them.⁴³

38. See generally RHODE, *supra* note 25, at 15; ELIZABETH CHAMBLISS, AM. BAR ASS'N COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROF., MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (2005); Bazelon, *supra* note 35.

39. Julie Friedman, *The Diversity Crises: Big Law is Losing the Race*, AM. LAW., June 2014, at 46, <http://www.americanlawyer-digital.com/americanlawyer-ipauth/201406ip?pg=1#pg1> [<https://perma.cc/QPY2-CTNP>].

40. Christina Violante, *Racial Diversity Stagnating at US Law Firms*, LAW360 (Aug. 20, 2017, 8:02 PM), <https://www.law360.com/articles/955026/racial-diversity-stagnating-at-us-law-firms> [<https://perma.cc/NZW9-RTFJ>]. The 2019 data is near identical. Jacqueline Bell, *Law360's Diversity Snapshot By The Numbers*, LAW360 (July 7, 2019), <https://www.law360.com/articles/1171482>.

41. Violante, *supra* note 40.

42. *Id.*

43. A constant theme I hear from law students in my school is that White students are "probably" not getting hired because of affirmative action. One of my White male former student recently complained

Indeed, the data from the Law360 reveal something even more sinister: firms seem to prefer to spend their diversity capital on Asian attorneys at the expense of Black and Hispanic attorneys. We know that “Black attorneys are the least represented at every echelon, especially at the highest ranks,”⁴⁴ and that “[a]fter [B]lack attorneys, Hispanics are the least-represented in private practice” despite that group being the largest minority law student group in 2016.⁴⁵ Interestingly, though, Asian students, a mere 6.4% of the law school population in 2016, were hired at over twice the rate of both Black and Hispanic law associates, coming in at 9.6% of the non-partner population (as compared to Black associates at 3.9% and Hispanic associates at 4.4%). Asians again surpassed Black and Hispanic lawyers at the partnership level as well, coming in at 3.3% of law firm partners, compared to 1.9% of Blacks and 2.6% of Hispanics.⁴⁶ This remains largely true according to the 2019 data published by the National Association for Law Placement (NALP), at both the associate and partner levels:

NALP’s analysis found that representation of associates of color has continued to increase since 2010 (from 19.53% to 25.44%) following widespread layoffs in 2009....

Much of the increase in the representation of people of color since 2011 can be attributed to increased representation of Asians among associates. While overall representation of people of color fell in 2010, this was not the case for Asian associates. Asian associates now make

to me that he was told that he should not expect to secure a summer associate position at a Big Law firm because he was told that firms are only interested in law students of color. The numbers do not lie; there is no threat to White males. *Id.* Despite the reality, there remains concern among Whites that they are losing their jobs to non-White people. See, e.g., Don Gonyea, *Majority of White Americans Say They Believe Whites Face Discrimination*, NPR, (Oct. 24, 2017), <https://www.npr.org/2017/10/24/559604836/majority-of-white-americans-think-theyre-discriminated-against> [https://perma.cc/C3M3-QKYQ]. The idea that People of Color are taking jobs away from White people seems to be based on the proposition that certain jobs and opportunities belong to one group over another. Therefore, when People of Color get slices of the pie, somehow this means that they are taking away something that belongs to the other group. Again, not true. See Max Boot, *Get a Grip, White People. We’re Not the Victims*, WASH. POST (Aug. 6, 2019), <https://www.washingtonpost.com/opinions/2019/08/06/get-grip-White-people-were-not-victims/> [https://perma.cc/C5EL-B5S5].

44. Violante, *supra* note 40.

45. *Id.*

46. *Id.*

up 12.17% of all associates, with representation having risen about 2.9 percentage points, from 9.28% in 2009.

Latinx associate representation has also grown in more recent years. After fluctuating between 3.81% and 3.95% of associates between 2009 and 2014, Latinx associates have slightly outnumbered Black or African-American associates since 2015. In 2019, 5.17% of associates were Latinx, increasing almost half a percentage point from 2018.

In contrast to trends among Asian and Latinx associates, representation of Black or African-Americans among associates fell every year from 2010 to 2015, but has grown slightly in each of the past four years from 2016-2019, and finally surpassed the 2009 level of 4.66% in 2019 by 0.1 percentage points, reaching 4.76%. . . .⁴⁷

But, as is the case with associates, most of the increase in representation of partners of color since 2009 can be attributed to an increase of Asian and Latinx men partners in particular. Representation of Black or African-Americans among partners has only increased about a quarter of one percent during this period and was 1.97% in 2019, up slightly from 1.83% in 2018. Black or African-American and Latinx women each still account for less than one percent of all partners, at 0.75% and 0.80% respectively, in 2019.⁴⁸

I certainly do not mean to pit one non-White group over another. Indeed, by my estimates, all non-White groups are losing.⁴⁹ But the elephant in this room must be confronted. Even in a world where law firms seek to

47. NAT'L ASS'N FOR LAW PLACEMENT, 2019 REPORT ON DIVERSITY IN U.S. LAW FIRMS 5 (2019) (emphasis added), https://www.nalp.org/uploads/2019_DiversityReport.pdf [<https://perma.cc/9UXX-5XUY>].

48. *Id.* at 6 (emphasis added) (citations omitted).

49. The ALM Diversity Scorecard from 2003-2017 reveals that “over the past decade and a half, the share of diverse attorneys has increased from 10.3% to 16.1%. Over the same period, the share of African-American attorneys has not changed at all. The percentage of Asian and Hispanic attorneys has ticked up slightly but still remains in the single digits, at 7.1% and 3.8% respectively.” Erin Hichman, *There's a Diversity Problem at Law Firms—What Can Be Done?*, (Mar. 7, 2019), <https://www.law.com/2019/03/07/theres-diversity-problem-at-law-firms-what-can-be-done/> [<https://perma.cc/5A9B-2UGN>].

diversify, there are racial and ethnic differences in which People of Color are hired.

C. *The Intersection of Race and Gender Discrimination*

The already dismal numbers for Black lawyer employment are even more alarming when one focuses on women in the legal profession and zooms in on Black female representation in that space. According to the 2019 NALP report, women in private practice are 46.77 percent of all associates; that figure drops to 2.80% if we focus only on Black women.⁵⁰ Similarly, for partnership, while women are 24.17% of partners, that figure drops to 0.75% for Black women.⁵¹ For equity partner? Women are 20.3% of all equity partners⁵² NALP does not report what percentage of this total is comprised of women of color or Black women in particular. What NALP does report is that a mere 7.6% of equity partners are people of color.⁵³ This figure includes, men, women, Asian, Black, Hispanic, Latino and all other nonwhite groups. In sum, according to NALP, “the gains for women and partners of color have been minimal at best. . . . women of color continue to be the most dramatically underrepresented group at the partnership level, a pattern that holds across all firm sizes and most jurisdictions.”⁵⁴

Similarly dismal statistics also exist for law professors. Females are 25.1% of tenured law professors and Women of Color are seven percent of that total; the portion of Black female tenured law professors is not readily available.⁵⁵ White women are twenty-two percent of state court judges; Women of Color are eight percent; the percentage of these judges who are

50. NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 47, at 11, 16.

51. *Id.* at 14.

52. *Id.* at 17.

53. *Id.*; see also Vivia Chen, *Black Female Lawyers Face the Double Jeopardy of Racial and Gender Stereotyping*, LAW.COM (Nov. 30, 2017), <https://www.law.com/americanlawyer/2017/11/30/black-female-lawyers-face-the-double-jeopardy-of-racial-and-gender-stereotyping/> [<https://perma.cc/YS38-AZZ7>].

54. NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 47, at 6.

55. ELIZABETH MERTZ ET AL., AM. BAR FOUND., AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES 14-15 (2011); Carmen G. Gonzalez, *Women of Color in Legal Education: Challenging the Presumption of Incompetence*, FED. LAWYER 49 (July 2014) https://upcolorado.com/excerpts/PresumedIncompetent_FederalLawyer.pdf [<https://perma.cc/TKE3-R49D>]. The data breaking down White female faculty and Black female faculty is not tracked by the American Association of Law Schools. Telephone interview with Jeff Allum, Director of Research, American Association of Law Schools (Aug. 15, 2019).

Black females is not teased out.⁵⁶ Approximately one third of federal Article III judges are women, but only 8.62% are Women of Color and only four percent are Black women.⁵⁷

Additionally, what is a national gender pay gap vis-à-vis men and women is also a racial pay gap among women. White women earn seventy-nine cents on the dollar as compared to non-Hispanic White males; Black women earn sixty-four cents on the dollar; Latina women earn fifty-four cents on the dollar; and Native women earn fifty-eight cents on the dollar. In other words, even as White women are paid twenty-one cents less on the dollar than non-Hispanic White men, they make fifteen cents more per dollar than Black women, twenty-five cents per dollar more than Latina women, and twenty-one cents more per dollar than Native women.⁵⁸

At every level, the data reveal that women lawyers of color suffer far more than any other demographic.⁵⁹ In fact, there is a “double whammy” effect: Women of Color are treated more negatively than both non-White men and White women. The negative consequences of being both a Person of Color and a female have been explored in other contexts.⁶⁰ We see

56. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 10, at 5; *see also* THE GAVEL GAP, AM. CONST. SOC'Y FOR L. & POL'Y, <https://gavelgap.org/> [<https://perma.cc/4VCR-3DEW>].

57. Amber Fricke & Angela Onwuachi-Willig, *Do Female “Firsts” Still Matter? Why They Do for Female Judges of Color*, 2012 MICH. ST. L. REV. 1529, 1537.

58. NAT'L PARTNERSHIP FOR WOMEN & FAMS., QUANTIFYING AMERICA'S GENDER WAGE GAP BY RACE/ETHNICITY 1-2 (2019); *see also* *Race & Gender Wage Gaps*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/issue/race-gender-wage-gaps/> [<https://perma.cc/3UG4-7UFV>]; Nigel Roberts, *Unequal Pay For Black Women Continues After Trump Reverses Obama Rule Trump will Allow Employers to Hide Gender and Race Pay Disparities*, NEWSONE (Aug. 30, 2017), <https://newsone.com/3740389/Black-women-equal-pay/> [<https://perma.cc/9TJM-GKRN>]. These wage gaps persist even when controlling for level of education. Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, FACTTANK (July 1, 2016), <https://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/> [<https://perma.cc/5TQV-PX6G>].

59. JANET E. GANS EPNER, AM. BAR ASSOC., COMM'N ON WOMEN IN THE PROF., *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* 9, 12 (2006). Lean in data from 2018 shows that Women of color are seventeen percent of entry level in the corporate pipeline as compared to thirty-one percent of White women. By the time one is elevated to the C-suite, White women are represented at nineteen percent; Women of Color at four percent. *See* LEANIN.ORG, *supra* note 28

60. In her groundbreaking article “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” Professor Crenshaw analyzed Title VII lawsuits filed by Black women who attempted to pursue a combination race/gender discrimination claim. After finding no scarcity of White women (therefore no gender claim) and no scarcity of Black men (therefore no race claim), the Black female plaintiffs were denied the opportunity to advance their claims using a combination of race and gender as the focus. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of*

similar negative consequences resulting from the intersection of race and gender in the legal profession as well.⁶¹

At every level, data exists affirming the conclusion that Black women are treated more harshly than White women in our profession.⁶² We see it in how they are treated by law students;⁶³ we see it in how lawyers evaluate judges;⁶⁴ and many Black female lawyers in law firms will tell you that there is a difference between how they are treated in their firms vis-à-vis how Black male lawyers in those firms are treated.⁶⁵ Additionally, studies reveal that resumés with Black-sounding names decrease the chance of a callback interview with a firm by over fifty percent.⁶⁶ Black hairstyles, such as braids, afros, locs, and twists, are viewed in “mainstream” professional

Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 142-143. Professor Crenshaw has also studied this in the context of Black girls in school. Her research shows that Black girls are six times more likely to be suspended from schools than White girls. There is both a race problem and a gender problem. See KIMBERLÉ WILLIAMS CRENSHAW, PRISCILLA OCEN & JYOTI NANDA, *BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED* (2015), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf [<https://perma.cc/8Z2J-GEGG>]; see also Crenshaw, *supra* note 65, at 140. This intersection of race and gender creates its own separate category. This intersection, referred to by Professor Crenshaw as intersectionality, is “a metaphor for understanding the ways that multiple forms of inequalities or disadvantage sometimes compound themselves and they create obstacles that often are not understood within conventional ways of thinking about antiracism or feminism or whatever social justice advocacy structures we have.” Nat’l Ass’n Indep. Schs., *Kimberlé Crenshaw: What is Intersectionality?*, YOUTUBE (June 22, 2018), <https://www.youtube.com/watch?v=ViDtnfQ9FHc> [<https://perma.cc/SB7E-NDQV>].

61. See *infra* note 76 and accompanying text.

62. WILLIAMS ET AL., *supra* note 30, at 8; Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN’S L. REV. 235, 235 n.2 (2008) (providing an extensive bibliography on racial bias in the legal academy); Eva Lilienfeld, *How Student Evaluations Are Skewed Against Women and Minority Professors*, CENTURY FUND (June 10, 2016), <https://tcf.org/content/commentary/student-evaluations-skewed-women-minority-professors/?agreed=1> [<https://perma.cc/H3VT-RARP>]; Robert S. Chang & Adrienne D. Davis, *An Epistolary Exchange Making Up is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J.L. & GENDER 1, 32 (2010).

63. For a comprehensive look at the treatment of Women of Color in the legal academy, see PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutiérrez Y. Muhs, Yolanda Flores Niemann, Carmen G. González, & Angela P. Harris eds., 2012).

64. A recent evaluation of judges in Missouri revealed, “African American judges were rated significantly below Caucasian judges. This was chiefly due to the significantly lower ratings given to African American female judges. Caucasian female judges were rated highest of all the groups.” Gary K. Burger & Lawrence K. Pickett, Jr., *Missouri’s Evaluation of Judges, 2014-2018* (Apr. 10, 2019) (unpublished manuscript) (on file with the author) (emphasis added).

65. See GANS EPNER, *supra* note 59, at 9.

66. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

worlds as unprofessional and can prevent a callback or hire, without regard to the neatness or cleanliness of the hair.⁶⁷ Black female summer associates and associates complain about how their bodies, clothes, and hair are aggressively “policed” in the work environment.⁶⁸ From hair to body type to clothes to attitude, Black females are told they do not belong.

A lawsuit recently filed by Sharika Robinson, a young Black female associate at Robinson, Bradshaw & Hinson highlights many of the issues here.⁶⁹ Ms. Robinson’s lawsuit alleged violations of civil rights and

67. EEOC v. Catastrophe Mgmt. Sols., 837 F.3d 1156, 1160 (11th Cir. 2016). Compelling scholarship exists on the racially discriminatory effects in the policing of Black women’s hairstyles in the employment settings. See D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair* in EEOC v. Catastrophe Management Solutions, 71 U. MIAMI L. REV. 987 (2017); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2009-10); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991). See also a comprehensive study on the racially discriminatory implications of such hair discrimination as documented in ALEXIS MCGILL JOHNSON, RACHEL D. GODSIL, JESSICA MACFARLANE, LINDA R. TROPP & PHILLIP ATIBA GOFF, *THE “GOOD HAIR” STUDY”: EXPLICIT AND IMPLICIT ATTITUDES TOWARD BLACK WOMEN’S HAIR* (2017), <https://perception.org/wp-content/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf> [<https://perma.cc/S9GP-UJQH>].

Five states recently passed legislation protecting Black hair styles. See S.B. 188, 2019-20 Sess. (Cal. 2019); S.B. A07797, 2019-2020 S. Assemb., Reg. Sess. (N.Y. 2019); A-5564 (N.J. 2019); H.B. 20-1048 (Colo. 2020); S.B. 50/H.B. 1514 (Va. 2020). The State of Washington has passed legislation that is awaiting the Governor’s signature. See *An Act Relating to Hair Discrimination*, H.B. 2602 (Wash. 2020). Similar legislation is pending in dozens of other states. See Zack Linly, *Hair Love Across the Nation: 3 States Passed Laws Ending Black Hair Discrimination Within a Week*, (Feb 16, 2020), <https://theglowup.theroot.com/hair-love-across-the-nation-3-states-passed-laws-endin-1841731428>; Colorado House Passes CROWN Act, (Feb. 12, 2020), <https://denver.cbslocal.com/2020/02/12/crown-act-colorado-house-passes/>; Press Release, LaKeshia Myers, State Representative, Wisc. 12th Dist., Representative LaKeshia Myers Introduces CROWN Act Aimed at Eliminating Hair Discrimination in Wisconsin (Aug. 1, 2019), <https://urbanmilwaukee.com/pressrelease/representative-lakeshia-myers-introduces-crown-act-aimed-at-eliminating-hair-discrimination-in-wisconsin/> [<https://perma.cc/EJ3K-4CHZ>]; Adrian Mojica, *Tennessee Legislator Wants to Prevent Discrimination Based on Hairstyles*, FOX17 NASHVILLE (July 17, 2019), <https://fox17.com/news/local/tennessee-legislator-wants-to-prevent-discrimination-based-on-hairstyles> [<https://perma.cc/KLZ4-VAUL>]; Lauren Gibbons, *Hairstyle Discrimination Would be Banned in Michigan Under House Bill*, MLIVE (July 19, 2019), <https://www.mlive.com/news/2019/07/hairstyle-discrimination-would-be-banned-in-michigan-under-house-bill.html> [<https://perma.cc/KLZ4-VAUL>]; Jataria McGee, *Kentucky Could Become Third State to Ban Discrimination Based on Hair Styles*, WLWT5 (Aug. 29, 2019), <https://www.wlwt.com/article/kentucky-could-become-third-state-to-ban-discrimination-based-on-natural-hairstyles/28864284> [<https://perma.cc/3TT6-5UXD>].

68. I am unable to share the names of the law students and lawyers who shared this information with me. They are very worried about career advancement and possible retaliation.

69. Complaint, *Robinson v. Robinson Bradshaw & Hinson*, No. 3:19-cv-00109 (W.D.N.C. Mar. 4, 2019), <http://www.abajournal.com/files/RobinsonSuit.pdf> [<https://perma.cc/Y9BY-DQFV>].

fraudulent and deceptive practices.⁷⁰ In her sixty-six-page complaint, she details the ways in which the firm allegedly discriminated against her vis-à-vis White lawyers, male and female, and Black male lawyers in the firm.⁷¹ The plaintiff referenced problems with inadequate mentoring and evaluation, being assigned “grunt work” and not getting meaningful work and experiences, being ignored or not invited to various outings, and having her pay reduced and being discriminated against because of pregnancy, and more.⁷² As the filing of this complaint made its way through social media, I heard rumblings from lawyers, shocked by the allegations and questioning whether such allegations could be true. Are the allegations true? That we do not know. Could they be true? Absolutely. One need only look at some of the decades of data compiled by institutions including the American Bar Association (ABA).⁷³ These allegations are not uncommon experiences for Black female lawyers.

II. THE FAILURE OF DIVERSITY AND INCLUSION EFFORTS

In the end, the sad reality is that both White women and Women of Color continue to experience glass and cement ceilings in the ascent to the top.⁷⁴ But why? For many years, the ABA has espoused the desire to be more diverse and more inclusive.⁷⁵ It created several commissions whose primary focus is diversity and inclusion.⁷⁶ Indeed, one of the goals of the ABA itself is to “eliminate bias and enhance diversity and inclusion

70. *Id.*

71. *Id.*

72. *Id.* Plaintiff also alleged that the firm misrepresented its commitment to diversity. *Id.* The lawsuit recently settled. Dave Simpson, *Robinson Bradshaw Settles Bias Suit Calling It A 'Plantation'*, LAW360, <https://www.law360.com/articles/1183214>.

73. See, e.g., Friedman, *supra* note 36; GANS EPNER, *supra* note 59.

74. Julia Carpenter, *Forget the 'Glass Ceiling.' Women of Color Face a 'Concrete Ceiling.'*, CNN (Aug. 8, 2018), <https://money.cnn.com/2018/08/06/pf/women-of-color-ceos/index.html> [perma.cc/6TL2-JE8V]; *The 2019 Law360 Glass Ceiling Report*, LAW360 (May 30, 2019), <https://www.law360.com/articles/1164440/the-2019-law360-glass-ceiling-report> [perma.cc/TCG2-8WQB].

75. *About ABA Goal III and the Commission*, A.B.A. (Mar. 28, 2012), <https://www.americanbar.org/groups/diversity/disabilityrights/resources/GoalIII/> [https://perma.cc/9VBY-5ANG].

76. *Diversity and Inclusion Center*, A.B.A., <https://www.americanbar.org/groups/diversity/> [https://perma.cc/682Q-MT5C].

throughout the Association, legal profession, and justice system.”⁷⁷ In 2016, the ABA passed Resolution 113, which calls on all providers of legal services to expand and create more opportunities and opportunities at all levels for diverse attorneys.⁷⁸ The supreme courts of various states have created commissions related to the fair treatment of people who have been historically left behind; thus, there are commissions on disability, gender, gender identity and expression, race, and ethnicity.⁷⁹ Some states have

77. The four goals of the American Bar Association are 1) to “serve [its] members,” 2) to “advocate for the profession,” 3) to “eliminate bias [and] enhance diversity,” and 4) to “advance the rule of law.” *See About ABA*, A.B.A., https://www.americanbar.org/about_the_aba/ [perma.cc/B4MD-AWTW].

78. Resolution 113 provides as follows:

RESOLVED, That the American Bar Association urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys; and

FURTHER RESOLVED, That the American Bar Association urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys; and

FURTHER RESOLVED, That for purposes of this resolution, “diverse attorneys” means attorneys who are included within the ambit of Goal III of the American Bar Association.

Resolution 113: Economic Case Policy Expanding Economic Opportunities for Lawyers from Diverse Backgrounds, A.B.A., <https://www.americanbar.org/groups/diversity/resources/360-commission/> [perma.cc/L7A2-CC6F]. In connection with this resolution, the ABA Commission on Racial and Ethnic Diversity in the Profession, of which I am a commissioner, supervises a Model Diversity Survey (MDS). The MDS helps with implementation of Resolution 113 by creating a standardized survey which corporations would require their law firm clients to use so that corporations can compare apples to apples when assessing the diversity level of firms. *See* Letter from Twenty-Four Chief Legal Officers to Other Chief Legal Officers of Fortune 1000 Firms (Sept. 7, 2016), <https://www.americanbar.org/content/dam/aba/administrative/diversity/letter-from-the-signatories-general-counsel-implementation-of-aba-resolution-113.pdf> [perma.cc/9UTF-9MHX]. Currently over one hundred companies have committed to requiring their law firms to track their demographic data by use of the MDS. *See Model Diversity Signatory List*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/model_diversity_signatory_list.pdf [perma.cc/Z795-TQM6]. The MDS was the brainchild of the first Black female president of the ABA, Paulette Brown. I was honored to serve under one of her first appointed commissions, the Diversity and Inclusion 360 Commission, in 2015. For more on this Commission, *see 360 Commission*, A.B.A., <https://www.americanbar.org/groups/diversity/resources/360-commission/> [perma.cc/L7A2-CC6F].

79. I currently serve as a commissioner on the Missouri Commission on Racial and Ethnic Fairness. Created in 2015, “the goal of the commission is to eliminate systemic barriers to racial and ethnic fairness in the Missouri court system by identifying challenges, researching solutions and making recommendations for improvement.” *Commission on Racial and Ethnic Fairness*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=95153> (last visited Oct. 12, 2019).

ethical rules mandating—albeit minimal—yearly bias training.⁸⁰ The American Association of Law Schools (AALS) includes in its mission the support of one of its core values: diversity.⁸¹ Almost all law schools and law firms (especially those considered “Big Law”) throughout the country have statements on their websites professing their commitment to gender and racial equity.⁸² Hundreds of CEOs around the nation have pledged to “advance diversity and inclusion within the workplace.”⁸³ General counsels throughout the country have gotten involved:

More than 170 general counsel and corporate legal officers have signed an open letter to big law firms, lamenting new partner classes that “remain largely male and largely white.” The letter says their companies will prioritize their legal spend on those firms that commit to diversity and inclusion.

The letter [was] signed by chief legal officers in a variety of industries, including those in technology, retail, media, hospitality and financial services. The companies

80. On June 30, 2019, the Missouri Supreme Court amended Missouri Rule of Professional Responsibility 15.05(e). The new rule, effective July 1, 2019, provides as follows:

15.05. CONTINUING LEGAL EDUCATION REQUIREMENTS

* * *

(e) For each reporting year, each lawyer shall complete and report at least two credit hours of accredited programs and activities devoted exclusively to professionalism, substance abuse and mental health, legal or judicial ethics, or malpractice prevention *and at least one credit hour of accredited programs and activities devoted exclusively to cultural competency, diversity, inclusion, and implicit bias*, unless the lawyer has not actively practiced law in Missouri during the period or has given notice of inactive status pursuant to Rule 6.03. Completion of these requirements shall be reported to The Missouri Bar as specified by The Missouri Bar.

Order Dated June 30, 2019 (Mo. 2019) (en banc) (emphasis added), <https://www.courts.mo.gov/page.jsp?id=141933>.

81. *About AALS*, ASS’N AM. L. SCHS., <https://www.aals.org/about/> [perma.cc/UM48-FQTK].

82. See, for example, Washington University School of Law’s own commitment to diversity. *Diversity Resources*, WASH. U. SCH. L., <https://law.wustl.edu/about/diversity-and-inclusion/> [perma.cc/G83K-KQLC]. Paul, Weiss, one of the largest firms in the United States, is a leader in the diversity space. See, e.g., Scheiber and Eligon, *supra* note 26. Its website on its commitment to diversity and inclusion is impressive. *Diversity & Inclusion*, PAUL WEISS, <https://www.paulweiss.com/about-the-firm/diversity-inclusion> [perma.cc/R2MF-X4R4]. Yet, even it, too, suffers from being unable to accomplish its stated goal. See *supra* note 26 and accompanying text.

83. CEO ACTION FOR DIVERSITY & INCLUSION, <https://www.ceoaction.com/ceos/> [https://perma.cc/C3N3-YKPJ].

range from small tech outfits to large corporations, such as Google Fiber, Etsy, Heineken USA, Chobani Global Holdings, Waymo, Lyft, Vox Media, S&P Global Ratings and Booz Allen Hamilton. . . .

“We, as a group, will direct our substantial outside counsel spend to those law firms that manifest results with respect to diversity and inclusion, in addition to providing the highest degree of quality representation. We sincerely hope that you and your firm will be among those that demonstrate this commitment[.]”⁸⁴

Many law firms also have diversity and inclusion officers whose sole mission it is to increase gender, racial, and ethnic diversity in their employment environment.⁸⁵

We check the boxes. We attend the diversity and inclusion CLEs (and many attendees are even mentally engaged).⁸⁶ We appear to be doing the right things. We appear to be committed. Our profession gives the appearance that it has collectively rolled up its sleeves and is actively

84. Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business Top Lawyers at Major Companies Banded Together to Craft an Ultimatum After Seeing “Largely Male and Largely White” New Law Firm Partner Classes at Paul Weiss and Other Firms*, LAW.COM (Jan. 27, 2019), <https://www.law.com/americanlawyer/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business/> [<https://perma.cc/6C6H-35GA>].

85. Virginia Grant, *The Dawn of an Emerging Position: The Law Firm Diversity Manager*, MINORITY CORP. COUNSEL ASS’N, <https://www.mcca.com/mcca-article/the-dawn-of-an-emerging-position/> [perma.cc/QA2S-R8MA]. See, e.g., J. Danielle Carr, Director of Diversity and Inclusion, POLSINELLI, <https://www.polsinelli.com/notfound?item=%2fprofessionals%2fdaniellecarr&user=extranet%5cAnonymous&site=website> [perma.cc/52CV-8C9M]; Kobi Kennedy Brinson, Chair, Diversity and Inclusion Committee, WINSTON & STRAWN, LLP, <https://www.winston.com/en/who-we-are/professionals/brinson-kobi-kennedy.html> [perma.cc/HRV6-WM63].

86. I teach bias CLE workshops regularly. I can attest to the fact that not all lawyers who attend my workshops are mentally present. I often struggle with whether I should ask these lawyers, sitting in an ethical workshop to obtain ethical CLE credit, to close their newspapers, or to stop surfing on the web, or to stop texting on their cell phones. Of course, my evaluations are already subject to some diminution. I have found that it is very difficult for White audiences—and the CLE audiences I typically find myself in front of are primarily White and male—to hear about bias, explicit or implicit, from me, a Black female speaker. Indeed, a White male judge once complimented me on a bias workshop I delivered to a group of judges. He went on, revealing to me in confidence that several judges in the audience told him that while I made them feel uncomfortable, they would have had a better experience had I been White. I had suspected this might be true, but to have it confirmed was still a bit shocking. I should note, too, that many of the judges in this group professed to be “colorblind.” I have often wondered if the judges who proclaimed not to see color were part of the group who expressed a preference for a White (and male) speaker.

working to include lawyers of color. The public messaging of the commitment is strong; so strong that there are actually young White educated law students who believe, data aside, that they are not landing employment opportunities because the jobs are going to lawyers of color.⁸⁷ Aside from the privileged assumptions here (my job was taken away from me), how can we get these educated minds to actually *look* at the numbers?⁸⁸ The difference between messaging and announced goals on the one hand and the actual numbers on the other could not be more stark.⁸⁹ It is important that people see these data. Otherwise resentment builds and attempting to view the situation from an equity lens falls flat.

I not only worry about the faulty messaging that is sent to anyone trying to secure employment at a firm, but I am beginning to wonder whether there is a sincere commitment to solving these issues. I remember vividly when I attended my first meeting in 2015 as a commissioner on the newly formed Missouri Supreme Court Commission on Racial and Ethnic Fairness. A report of all major law firms in the state of Missouri was distributed to the Commission. I had been involved in the collection of data for firms in Missouri some ten years earlier.⁹⁰ As I compared that ten-year data with the data in the report in front of me, my heart sank. The demographic data revealed that over the ten-year period there was virtually no increase (and even decreases in many instances) in the numbers of non-White lawyers generally, and Black lawyers in particular, at large law firms throughout the state of Missouri.⁹¹

87. See *supra* note 43.

88. In Robin DiAngelo's *White Fragility*, she speaks of a White male participant in a workshop she delivered on bias and white supremacy who complained, "a White person can't get a job anymore." ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM I* (BEACON PRESS 2018). This, Professor DiAngelo notes, was said in a room of forty employees, all but two of whom were White. *Id.*

89. NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 47; see also *The Diversity Scorecard*, 41 AM. LAW. WKLY. 27 (June 1, 2019); Dylan Jackson, *Diversity Scorecard: African American Lawyers Are Being Left Out*, AM. LAWYER (May 28, 2019), <https://www.law.com/americanlawyer/2019/05/28/diversity-scorecard-african-american-lawyers-are-being-left-out/> [<https://perma.cc/6QEX-35L8>]; Hichman, *supra* note 49.

90. In 2006, under the leadership of St. Louis's Mound City Bar Association (MCBA) then-President Pamela Meanes, MCBA produced several comprehensive reports looking at racial and ethnic diversity in the early 2000s. The report covered law professions in bar association leadership, law firm and corporate employment, and in law schools. Those reports are available at <http://www.moundcitybar.com/practice.html> [<https://perma.cc/3JFE-PC3C>].

91. MO. SUP. CT. COMM'N ON RACIAL AND ETHNIC FAIRNESS, IV-2-12 (2015) (on file with author).

Why? What exactly are firms doing to hire lawyers of color, specifically Black lawyers? Some argue there is a supply issue. I refer the reader to the data shared earlier about the percentages of Black and Asian law students as compared to their percentages as associates and as partners. The percentage of Asian law students is much lower than Black law students, but this completely reverses when one looks at the percentages of Asian and Black associates in the firms.⁹² So, while there is a supply issue, that does not totally explain what we see. Moreover, to the extent that there is a supply issue, fix it! Yes; pipeline issues can be addressed. Law firms, especially Big Law, can invest in their future by assuring the steady flow of future lawyers into the legal profession pipeline. There are models available for firms interested in this kind of investment.⁹³

Another concern I have is the way data is compiled. Current methods often obscure the real numbers. For example, I can find data on the ABA website on the demographics of male and female lawyers; that website also has data on the percentages of White lawyers, Black lawyers, Non-White Hispanic lawyers, and Asian lawyers. But it does not have data on the

92. See *supra* notes 44-49 and accompanying text.

93. See, e.g., *National Pipeline Diversity Initiatives Directory*, A.B.A. (Oct. 29, 2018), https://www.americanbar.org/groups/diversity/diversity_pipeline/resources/pipeline_diversity_directory/ [https://perma.cc/88FZ-NWEG]; Aebra Coe, *Can High School Internships Help Close Law's Diversity Gap?*, LAW360 (Sept. 10, 2019), https://www.law360.com/legalethics/articles/1193612/can-high-school-internships-help-close-law-s-diversity-gap?nl_pk=6aadb407-f2db-43c7-8e1d-3910f3075a74&utm_source=newsletter&utm_medium=email&utm_campaign=legalethics. Consider too, scholarship-based programs to help defray the costs to take the LSAT, for example. There is some evidence that Big Law has made some efforts to diversify their organizations with “diversity scholarships,” “affinity groups,” and “diversity fellowships” for existing law students. For example, consider the Baker McKenzie Diversity Fellowship. *Diversity Fellowship*, BAKER MCKENZIE (June 2019), <https://www.bakermckenzie.com/en/careers/job-opportunities/na/baker-mckenzie-diversity-fellowship> [https://perma.cc/2RTM-K95Z]. However, efforts should not only include more of this but also energy spent on reaching undergraduate and high school students to create a pipeline into the legal field. An example of such a program is the “Bridging the Gap” scholarship. This scholarship started in June 2018 by four minority first-year students at Washington University School of Law targets minority pre-law students. Its goal is to close the gap between socioeconomically disadvantaged aspiring attorneys and the opportunities that await them in law school by helping to offset the cost of preparing and applying to law school. Further, each recipient receives close mentorship by current law students on how to succeed in the admission process and in their academic and professional career. Scholarships like “Bridging the Gap” help to diversify the legal field because they help to broaden the pool of qualified candidates. Interview with Elizabeth Privat, Wash. Univ. Sch. of Law class of 2021 (“Bridging the Gap” co-founder).

percentage of White male lawyers or Black female lawyers.⁹⁴ That kind of data is not available.⁹⁵ The AALS similarly does not keep this kind of data (because it relies on the data it gets from the ABA—which does not keep this data).⁹⁶ Law firms will point to their diversity statistics as evidence that they are doing all they can to combat this problem. However, in doing so, they sometimes combine statistics of women, People of Color, and LGBTQ people, which then gives a false depiction of who is represented.⁹⁷ Just look at the figure quoted earlier on women partners: 22.7% for “women” breaks down to 0.56% for Black women.⁹⁸ This is important data to know. Recognizing diversity concerns but lumping them all together does a disservice to more marginalized groups, such as Black women. To be relevant, meaningful, transparent, and accountable, the data must be parsed.

CONCLUSION

Lawyers have some of the greatest thinking minds on the planet. Yet, we have failed miserably in addressing and correcting the bias in the legal profession. Commissions, reports, and studies are abundant. Yet, we have not successfully eroded problems we know exist. How much longer can our profession be satisfied with well-developed websites, hollow statements in support of diversity, and checking boxes that we have completed our yearly CLE hours?

Women have made notable gains in the legal field. The trajectory is on the way up, not down, and that is a good thing.⁹⁹ But although we are in the building, we haven’t fully arrived. Female lawyers are sometimes asked if they are really lawyers, or they are asked to deliver coffee or carry

94. AM. BAR ASS’N, NAT’L LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS (2019).

95. Email from Pedro Windsor, Managing Dir., Office of Diversity & Inclusion, Am. Bar Ass’n, to Kimberly J. Norwood, Henry H. Oberschelp Professor of Law, Wash. Univ. Sch. of Law (Aug. 23, 2019, 20:27 EDT) (on file with author).

96. Allum telephone conversation, *supra* note 55.

97. For example, Washington University School of Law combines People of Color and LGBTQI folks to give an “at a glance” number of forty-one percent diversity. *Class Profile*, WASH. U. IN ST. LOUIS SCH. L., <https://law.wustl.edu/class-profile/> [<https://perma.cc/2NJ4-4LGB>].

98. *Supra* note 28 and accompanying text.

99. VAULT.COM & MINORITY CORP. COUNSEL ASS’N, *supra* note 27, at 6.

exhibits.¹⁰⁰ Female lawyers have a seat at the table but are not uncommonly ignored.¹⁰¹ Female partners face a fifty-three percent pay gap vis-à-vis their male counterparts.¹⁰² Some are scared to file lawsuits against their law firm employers because they believe such a move will sound the death bell for their career.¹⁰³ Some are referred to as “honey” or “sweetheart.”¹⁰⁴ Some are called by their first names while their male counterparts are not.¹⁰⁵ Even female United States Supreme Court justices are treated with more

100. Maria-Vittoria Carminati, *Gender Bias and Productivity: What Female Lawyers Need to Know*, ROCKET MATTER (Sept. 14, 2017), <https://www.rocketmatter.com/general/gender-bias-and-productivity-identifying-the-ways-being-a-woman-lawyer-cuts-against-your-productivity-and-what-to-do-about-it/> [<https://perma.cc/77CX-35L6>]; Adam Grant & Sheryl Sandberg, *Madam C.E.O., Get Me a Coffee*, N.Y. TIMES (Feb. 6, 2015), <https://www.nytimes.com/2015/02/08/opinion/sunday/sheryl-sandberg-and-adam-grant-on-women-doing-office-housework.html?mcubz=3> [<https://perma.cc/TDZ3-XMP5>].

101. See Juliet Eilperin, *How a White House Women's Office Strategy Went Viral*, WASH. POST (Oct. 25, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/10/25/how-a-white-house-womens-office-strategy-went-viral/> [<https://perma.cc/5X2N-FG9B>].

102. Elizabeth Olson, *Female Law Partners Face 53% Pay Gap, Survey Finds*, BIG L. BUS. (Dec. 6, 2018), <https://biglawbusiness.com/female-law-partners-face-53-percent-pay-gap-survey-finds/> [<https://perma.cc/A8QZ-76PL>].

103. Many female plaintiffs in gender bias lawsuits against their law firm employers do not want their names to be part of the public record. Why? Because those lawyers can be blackballed and find it near impossible to continue practicing law. Despite the risk here, some judges have denied plaintiffs' request to proceed anonymously. Consider the following:

On June 17, Jane Doe 4 filed a heavily redacted motion arguing that she faced imminent risk to her reputation and career, as well as stigma and resulting psychological harm by the disclosure of highly sensitive personal information, if her participation in the lawsuit were publicly disclosed. Calling her situation “analogous to that of a whistleblower,” Jane Doe 4 argued that she had a concrete fear of retaliation from Jones Day and others in the industry if her identity were to become known. She argued the need to avoid such severe and imminent harm outweighed Jones Day's and the public's interest in the public disclosure of her identity.

In a sealed order issued on Aug. 7, the court denied Jane Doe 4's motion to proceed anonymously and ordered the plaintiffs to file an amended complaint disclosing her identity. On Aug. 13, the plaintiffs filed an amended complaint. *Rather than disclose Jane Doe 4's identity, the complaint removed Jane Doe 4 as a named plaintiff*, although the plaintiffs' attorneys say she remains a member of the proposed class.

Joseph Abboud, *Limits of Justice System Prevent Scrutiny of Gender Bias*, LAW360 (Aug. 28, 2019) (emphasis added), <https://www.law360.com/corporate/articles/1193129/limits-of-justice-system-prevent-scrutiny-of-gender-bias>.

104. Bazelon, *supra* note 35, at 10.

105. RHODE, *supra* note 25, at 21.

disrespect by *both* their male colleagues and by the lawyers who appear before them!¹⁰⁶ Similar issues present in the legal academy.¹⁰⁷

Patriarchal principles rule and are often a part of the fabric of our legal institutions. Notice, then, that merely hiring more women or more Women of Color or more Black women—although necessary—will not automatically solve the problem or even change the game. Unless our legal institutions are restructured, female lawyers will continue to be marginalized and retaliated against when their behavior does not conform to the existing system.¹⁰⁸

So, we have come a long way, baby!¹⁰⁹ But we have not fully arrived. “[I]t’s still a [White] man’s game.”¹¹⁰ And we have miles to go before we can sleep.

106. See, e.g., Tonja Jacobi & Dylan Schweers, *Female Supreme Court Justices Are Interrupted More by Male Justices and Advocates*, HARV. BUS. REV. (April 11, 2017), <https://hbr.org/2017/04/female-supreme-court-justices-are-interrupted-more-by-male-justices-and-advocates> [<https://perma.cc/3LGT-BWCA>].

107. Aziz, *supra* note 24.

108. *Id.*; see also RHODE, *supra* note 25, at 16 (discussing these problems, including stereotypes of women in the workplace).

109. Older readers will recall the catchy slogan from the 1960s: “You’ve Come a Long Way, Baby” from the first cigarette marketed to women in the United States. Yeoman Lowbrow, *You’ve Come A Long Way, Baby: Virginia Slims Advertising Year by Year*, FLASHBAK (Oct. 3, 2016), <https://flashbak.com/youve-come-a-long-way-baby-virginia-slims-advertising-year-by-year-365664/> [<https://perma.cc/G53L-QSFE>].

110. See Catherine Maddux, *You’ve Come a Long Way, Baby. But It’s Still a Man’s Game*, VOA NEWS (June 17, 2016), <https://www.voanews.com/usa/youve-come-long-way-baby-its-still-mans-game> [<https://perma.cc/PDW6-S24E>].