Gender Bias as the Norm in the Legal Profession: It's Still a [White] Man's Game

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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. 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.

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.

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

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2. Id. at 186.
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. 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. 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. 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, today almost half of our tenured and tenure-track faculty are female (seventeen out of thirty-six). We hired our first female dean in 2014.

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.


law students nationwide surpassed male law students in 2017. Women now represent thirty percent of tenure-track positions on law school faculties and are thirty-five percent of law school deans. More generally, women make well over a third of all lawyers in the United States. 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.” 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.

12. LaWanda Ward, Female Faculty in Male Dominated Fields: Law, Medicine, and Engineering, NEW DIRECTIONS FOR HIGHER EDUC., Autumn 2008, at 63, 63 (2008).
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.\textsuperscript{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.\textsuperscript{17} As a natural result, the data also shows that White male students are more likely to be hired into law firms.\textsuperscript{18}

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

\textsuperscript{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.

\textsuperscript{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].

\textsuperscript{18} AM. BAR ASS‘N COMM’N ON WOMEN IN THE PROF., supra note 10, at 2.
More time demands are made of female faculty. 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. 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 professors. 


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, "[o]n the bright side of things, . . . [self-quarantine] gives me time to concentrate on writing." Caroline Kitc hyster, 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].
There is also a gender pay gap in the academy. The gap is even greater as between tenured and tenure-track faculty on the one hand and faculty. 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/2020/02/07/4d3bc64-4836-11ea-bc78-8a187afecce7_story.html [https://perma.cc/2F29-E77N]. Hopefully, this will have a direct effect on not only what but who gets published.

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:

[For 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.]

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

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://ww-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.”

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. Women are often denied informal mentoring opportunities with senior (usually all White and male) partners. 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.

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

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31. RHODE, supra note 25.

32. Id.
working fathers; there are negative assumptions about the competence of women. 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.

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.
The gender pay gap exists in the legal profession as well.\textsuperscript{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.\textsuperscript{37}

\textsuperscript{35} See, e.g., Lara Bazelon, \textit{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, \textit{Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman}, 102 IOWA L. REV. 2017, 2034 n.48 (2017), TseDale M. Melaku, \textit{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/Z4Z3-UDZ2]; Rosa Inocencio Smith, \textit{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.


B. Racial Bias

Adding race brings all of this to new lower heights.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-seven 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.\textsuperscript{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.\textsuperscript{43}

\textsuperscript{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.


\textsuperscript{41} Violante, supra note 40.

\textsuperscript{42} Id.

\textsuperscript{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,” 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. 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. 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/CSEL-BSS5].

44. *Id.*
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%. . . .\(^\text{47}\)

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.\(^\text{48}\)

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


\(^{48}\) 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 partners.\(^{52}\) 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 PLACEME NT, supra note 47, at 11, 16.

\(^{51}\) Id. at 14.

\(^{52}\) Id. at 17.


\(^{54}\) NAT’L ASS’N FOR LAW PLACEMENT, supra note 47, at 6.

Black females is not teased out.\textsuperscript{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.\textsuperscript{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.\textsuperscript{58}

At every level, the data reveal that women lawyers of color suffer far more than any other demographic.\textsuperscript{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.\textsuperscript{60} We see

\textsuperscript{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].
\textsuperscript{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.
\textsuperscript{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.\textsuperscript{51}

At every level, data exists affirming the conclusion that Black women are treated more harshly than White women in our profession.\textsuperscript{62} We see it in how they are treated by law students;\textsuperscript{63} we see it in how lawyers evaluate judges;\textsuperscript{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.\textsuperscript{65} Additionally, studies reveal that resumés with Black-sounding names decrease the chance of a callback interview with a firm by over fifty percent.\textsuperscript{66} Black hairstyles, such as braids, afros, locs, and twists, are viewed in “mainstream” professional

\textit{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 \textit{Kimberlé Williams Crenshaw, Priscilla Ocen & Jyoti Nanda, Black Girls Matter: Pushed Out, Overpolicied 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?, \textit{YOU TUBE} (June 22, 2018), https://www.youtube.com/watch?v=ViDmQ9FHe [https://perma.cc/SB7E-NDOV].

\textsuperscript{51}. See infra note 76 and accompanying text.


\textsuperscript{63}. For a comprehensive look at the treatment of Women of Color in the legal academy, see \textit{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).

\textsuperscript{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).

\textsuperscript{65}. See \textit{Gans Epner}, supra note 59, at 9.

worlds as unprofessional and can prevent a callback or hire, without regard to the neatness or cleanliness of the hair. Black female summer associates and associates complain about how their bodies, clothes, and hair are aggressively “policing” in the work environment. 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. Ms. Robinson’s lawsuit alleged violations of civil rights and

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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.

fraudulent and deceptive practices. 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. 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. 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). 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. But why? For many years, the ABA has espoused the desire to be more diverse and more inclusive. It created several commissions whose primary focus is diversity and inclusion. 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., Triedman, supra note 36; GANS EPNER, supra note 59.
throughout the Association, legal profession, and justice system.” 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. 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. 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 Commission on Racial and Ethnic Fairness, Missouri Courts, https://www.courts.mo.gov/page.jsp?id=95153 (last visited Oct. 12, 2019).
ethical rules mandating—albeit minimal—yearly bias training. The American Association of Law Schools (AALS) includes in its mission the support of one of its core values: diversity. 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. Hundreds of CEOs around the nation have pledged to “advance diversity and inclusion within the workplace. 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.


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.”

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.

We check the boxes. We attend the diversity and inclusion CLEs (and many attendees are even mentally engaged). 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


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* (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. WKL.Y. 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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{92} See supra notes 44-49 and accompanying text.

\textsuperscript{93} See, e.g., National Pipeline Diversity Initiatives Directory, A.B.A. (Oct. 29, 2018), https://www.americanbar.org/groups/diversity/diversity_pipline/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=6aad8407-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 Elizabette Privat, Wash. Univ. Sch. of Law class of 2021 (“Bridging the Gap” co-founder).
percentage of White male lawyers or Black female lawyers. That kind of data is not available. 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.) 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. Just look at the figure quoted earlier on women partners: 22.7% for “women” breaks down to 0.56% for Black women. 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. 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

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. LL., https://law.wustl.edu/class-profile/ [https://perma.cc/2NJ4-4LGB].
98. Supra note 28 and accompanying text.
exhibits. Female lawyers have a seat at the table but are not uncommonly ignored. Female partners face a fifty-three percent pay gap vis-à-vis their male counterparts. 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. Some are referred to as “honey” or “sweetheart.” Some are called by their first names while their male counterparts are not. Even female United States Supreme Court justices are treated with more


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.


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

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.

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

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