From Platitudes to Priorities: Diversity and Gender Equity in Law Firms

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

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

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

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1. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011 393-96 tbl. 615 (2011), *available at* http://www.census.gov/compendia/statab/2011/tables/11s0615.pdf; *see also* Sara Eckel, *Seed Money*, AM. LAW., Sept. 1, 2008, at 20, *available at* http://www.law.com/jsp/PubArticle.jsp?id=1202423929548 (noting that minorities account for about twenty-five percent of doctors and twenty-one percent of accountants). According to the ABA, only two professions, the natural sciences and dentistry, have less diversity than law; medicine, accounting, academia, and others do considerably better. *See* Elizabeth Chambliss, *Miles to Go: Progress of Minorities in the Legal Profession* ix (2000), *available at* www.law.harvard.edu/programs/plp/pdf/Projects_MilesToGo.pdf. Accounting firms have almost twice the number of female partners as do large law firms. Cheryl Leitschuh, *Women in the Accounting Profession: Status and Trends*, TENN. CPA J., Oct. 2007, at 4-5, *available at* http://www.tncpa.org/journal/articles/Women_Accounting.pdf.

law firm experience.[2] Part I identifies the challenges; it documents the gap between law firms' aspirations and achievements concerning equity and diversity. Part II focuses on explanations for the lack of progress, including unconscious bias, inflexible workplace structures, and risks of backlash. Part III explores the limits of conventional responses, which rely on the "business case" for diversity, legal remedies for discrimination, and modest initiatives involving training, mentoring, and networks. Part IV concludes with proposals for reform and strategies for achieving it.

I. THE GAP BETWEEN PRINCIPLE AND PRACTICE

A. GENDER

Viewed historically, the American legal profession has made substantial progress in the struggle for gender equity. Until the late 1960s, women constituted only about three percent of the profession and were largely confined to low-prestige practice settings and specialties.[3] Now, about half of new lawyers are female; they enter law firms at about the same rate as men, and are fairly evenly distributed across substantive areas.[4] In most surveys, women also express approximately the same overall level of satisfaction with practice as do men.[5]

Yet significant gender inequalities persist.[6] In the nation's major firms, women constitute about a third of the lawyers but under a fifth of the partners.[7] Attrition rates are almost twice as high among female associates as among comparable

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2. Intersectional approaches start from the premise that different identities overlap or combine to contribute to unique experiences of disadvantage and privilege. *See* ASS'N FOR WOMEN'S RIGHTS IN DEVELOPMENT (AWID), INTERSECTIONALITY: A TOOL FOR GENDER AND ECONOMIC JUSTICE, WOMEN'S RIGHTS, AND ECONOMIC CHANGE 9 (Aug. 2004).

3. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1173 (1988).

4. For new entrants, see Andrew Bruck & Andrew Cantor, *Supply, Demand and the Changing Economics of Large Firms*, 60 STAN. L. REV. 2087, 2103 (2008); Margaret Rivera, *A New Business and Cultural Paradigm for the Legal Profession*, ACC DOCKET, Oct. 2008, at 66, 68. For specialties, see Fiona Kay & Elizabeth Gorman, *Women in the Legal Profession*, 4 ANN. REV. LAW & SOC. SCI. 299, 303 (2008).

5. *See* Kay & Gorman, *supra* note 4, at 316 (summarizing studies); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 260 (2005); John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 746 (1999).

6. *See* Kay & Gorman, *supra* note 4, at 309-12; Fiona M. Kay, *Professional Monopolies and Divisive Practices in Law: 'Les Femmes Juridiques' in Civil Law, Canada*, 4 INT'L J.L. CONTEXT 187, 205 (2009). For overviews of the problem, see Anthony V. Alfieri, *Big Law and Risk Management: Case Studies of Litigation, Deals, and Diversity*, 24 GEO. J. LEGAL ETHICS 991 (2011); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011).

7. *See* Ass'n for Legal Career Prof'ls (NALP), *Women and Minorities in Law Firms by Race and Ethnicity*, NALP BULLETIN, Jan. 2010, *available at* http://www.nalp.org/race_ethn_jan2010 [hereinafter NALP, *Women and Minorities*]; Emily Barker, *Stuck in the Middle*, AM. LAW., June 1, 2009, at 74.

male associates.[8] Women are less likely to make partner even controlling for other factors, including law school grades and time spent out of the work force or part-time schedules.[9] The situation is bleaker still at the level of equity partner. Precisely how bleak is impossible to say because firms have resisted providing data and many use different definitions of equity partner in reporting diversity ratios and profits per partner.[10] In the National Association of Law Placement's 2009 survey, which permitted firms to respond anonymously, women accounted for only 16% of equity partners.[11] In the *American Lawyer's* 2010 survey of the 100 largest firms, women constituted 17% of equity partners; of the firms with multitier tracks, 45% of female partners have equity status, compared with 62% of male partners.[12] Even those percentages probably overstate women's progress in the sample as a whole, because thirty firms declined to cooperate or to provide complete data, and the response rate was likely skewed to underrepresent firms with the poorest records. Other research reports similar gender disparities.[13] In studies comparing the likelihood of making partner by sex, the rate for men ranges from two to five times greater than that for women.[14] Even women who

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8. NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW 11 (Oxford Univ. Press 2010).

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

10. For law firms' refusal, see Elie Mystal, *NALP Won't Distinguish between Equity and Non-Equity Partners: Women, Minorities, and Lovers of Truth Get Angry*, ABOVE THE LAW (Feb. 24, 2010, 1:34 PM), http://abovethelaw.com/2010/02/nalp-wont-distinguish-between-equity-and-non-equity-partners-women-minorities-and-lovers-of-truth-get-angry (quoting James Leipold, NALP's executive director). For different figures, see Mystal, *supra*, and Lauren Still Rikleen, Fernande Duffly & Nancy Gertner, *When is an Equity Partner not an Equity Partner*, NAT'L L.J., Apr. 19, 2010, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202448130645&slreturn=1&hbxlogin=1. For example, firms often report lower numbers of equity partners for the purpose of calculating profits per partner, and higher numbers for reports on representation of women and minorities. *Id.*

11. *See* NAT'L ASS'N OF WOMEN LAWYERS AND THE NAWL FOUND., REPORT OF THE FOURTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 7 (2009), *available at* http://nawl.timberlakepublishing.com/files/2009%20Survey%20Report%20FINAL.pdf.

12. Vivia Chen, *Looking Into the Equity Box*, AM. LAW., Sept. 2010, at 13-14.

13. *See* Maria Pabon Lopez, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trends*, 19 HASTINGS WOMEN'S L.J. 53, 86-87 (2008) (reporting findings that women constitute seventeen percent of Indiana equity partners).

14. A study relying on American Lawyer 100 and 200 data, together with a Vault and Minority Corporate Counsel Association data set, found that the ratio of women equity to non-equity partners was 2.546, compared to a ratio of 4.759 for men. *See* Marina Angel et al., *Statistical Evidence on the Gender Gap in Law Firm Partner Compensation* 2 (Temple Univ. Legal Studies, Research Paper No. 2010-24, 2010), *available at* http://ssrn.com/abstract=1674630. A study of young lawyers by the American Bar Foundation (ABF) found that women attained equity partner status at about half the rate of men. *See* RONIT DINOVITZER ET AL., NALP FOUND. FOR LAW CAREER RESEARCH AND EDUC. & AM. BAR FOUND., AFTER THE JD II: RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 63 (2009), *available at* http://law.du.edu/documents/directory/publications/sterling/AJD2.pdf. A study by the Federal Equal Employment Opportunity Commission found that male lawyers were five times as likely to become partners as their female counterparts. *See*

never take time out of the labor force and who work long hours have a lower chance of partnership than similarly situated men.[15] Women are also underrepresented in leadership positions such as chairs and members of management and compensation committees.[16] Gender disparities are similarly apparent in compensation.[17] Those differences persist even after controlling for factors such as productivity and differences in equity/non-equity status.[18]

Moreover, although female lawyers report about the same overall career satisfaction as their male colleagues, women experience greater dissatisfaction with most specific dimensions of practice: salary, level of responsibility, recognition for work, content of work, chances for advancement, and control over their work lives.[19] In attempting to account for this "paradox of success," theorists suggest two explanations. One involves values. Women may ascribe less significance to aspects of their work environment on which they are disadvantaged, such as compensation and promotion, than to other factors such as intellectual challenge, which evokes greater satisfaction among female than male attorneys.[20] A second theory is that women have a lower sense of entitlement, in part because their reference group is other women or because they "have made peace with second best."[21] In either case, female lawyers' dissatisfaction with certain aspects of practice, which is reflected in disproportionate rates of attrition, should be cause for concern in a profession committed to diversity and equity.

EQUAL EMP'T OPPORTUNITY COMM'N, DIVERSITY IN LAW FIRMS 9 (2003), *available at* http://www.eeoc.gov/eeoc/statistics/reports/index.cfm.

15. Mary C. Noonan & Mary Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 142 (2004); Kenneth Day-Schmidt, *Men and Women of the Bar: The Impact of Gender on Legal Careers*, 16 MICH. J. GENDER & L. 49, 96-97, 100-02, 107, 111-12 (2009).

16. For women's underrepresentation in managerial and compensation decision making, see Lopez, *supra* note 13, at 71; JOAN C. WILLIAMS & VETA T. RICHARDSON, THE PROJECT FOR ATTORNEY RETENTION & MINORITY CORPORATE COUNSEL ASS'N, NEW MILLENNIUM, SAME GLASS CEILING?: THE IMPACT OF LAW FIRM COMPENSATION SYSTEMS ON WOMEN 14 (2010), *available at* http://www.attorneyretention.org/Publications/SameGlassCeiling.pdf.

17. For studies, see Lopez, *supra* note 13, at 85; Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27, 35 (2004). In the latest survey of the National Women Lawyers, female equity partners earned eighty-five percent of what their male counterparts earned. *See* Vivia Chen, *Not So Fast*, AM. LAW., Jan. 2011, at 82.

18. Angel et al., *supra* note 14; Ronit Dinovitzer, Nancy Reichman & Joyce Sterling, *Differential Valuation of Women's Work: A New Look at the Gender Gap in Lawyer's Incomes*, 88 SOC. FORCES 819, 835-47 (2009).

19. *See* RONIT DINOVITZER ET AL., NALP FOUND. FOR LAW CAREER RESEARCH AND EDUC. & AM. BAR FOUND., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 58 (2004), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf; Lopez, *supra* note 13, at 69; Reichman & Sterling, *supra* note 17, at 47. *See generally* Heinz et al., *supra* note 5.

20. Kay & Gorman, *supra* note 4, at 317-18.

21. David Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 LAW & SOC. INQUIRY 251, 280 (1989). For discussion of the theories, see Kay & Gorman, *supra* note 4, at 317-18.

B. RACE AND ETHNICITY

Progress for racial and ethnic minorities has also been substantial, but considerably slower than progress for white women. In 1960, less than one percent of lawyers were racial or ethnic minorities.[22] Today, while blacks, Asian-Americans, Latinos, and Native Americans constitute about a third of the American population, they account for just over 10% of lawyers.[23] In major law firms, they represent approximately 12% of attorneys and 6% of the partners, a significantly lower percentage than their representation in even the most elite law schools, which constitute the primary hiring pool for these firms.[24] About half of lawyers of color leave these firms within three years.[25] Attorneys' experiences vary by race, ethnicity, and sex. One effort to compare attrition rates looked at "persistence ratios," defined as the proportion of minorities among partners compared to the proportion of minorities among summer associates. By that measure, Latinos had the highest persistence (47%), blacks were substantially less likely to remain in firms (25%), and Asian-Americans were the least likely (22%). In general, persistence declined as office size rose.[26] In another survey comparing associate to partner ratios by sex, race, and ethnicity, Asian-American women had the lowest likelihood of promotion. They represented 5% of associates but under 1% of partners; by contrast, white male associates represented 46% of associates and 77% of partners.[27] Other comparisons of attrition rates similarly found that women of color were the most likely to leave law firms; about 75% departed by their fifth year and 85% before their seventh.[28]

Compensation also varies by race and ethnicity. In the ABF study of young lawyers, the median income for lawyers in mid-size firms was highest for

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22. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 39 (1991).

23. For the percentage of minorities in the population, see U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS (2000), *available at* http://www.census.gov/prod/cen2000/dp1/2kh00.pdf. Latinas/os represent 15% of the U.S. population; Latinos represent 2.6% and Latinas represent 1.3% of U.S. attorneys. Blacks represent 13.5% of the U.S. population, with black males representing 2% and black females representing 2.7% of U.S. attorneys. Asians make up 5% of the population; Asian males represent 1.3% and Asian females represent 1.7% of the attorney population. *See* Jill L. Cruz & Melinda S. Molina, *Hispanic National Bar Association National Study on the Status of Latinas in the Legal Profession, Few and Far Between: The Reality of Latina Lawyers*, 37 PEPP. L. REV. 971, 975 n.7 (2010).

24. *See* NALP, *Women and Minorities*, *supra* note 7. In the American Lawyer survey of its 200 most profitable firms, about 13.4% of lawyers are minorities. *See* Emily Barker, *One Step Back*, AM. LAW., Mar. 2010, at 71, 73. In law schools, including the most prestigious, the percentage of minorities is around twenty-two percent. ABA SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, FIRST YEAR J.D. AND TOTAL J.D. MINORITY ENROLLMENT FOR 1971–2010 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_8.pdf.

25. LEVIT & LINDER, *supra* note 8, at 250 n.55.

26. *See* Elizabeth H. Gorman & Fiona M. Kay, Racial and Ethnic Minority Representation in Large U.S. Law Firms (2010) (unpublished manuscript) (on file with the Georgetown Journal of Legal Ethics).

27. Jopei Shih, Unpublished Survey, Stanford Law School (2010) (on file with author).

28. DEEPALI BAGATI, WOMEN OF COLOR IN U.S. LAW FIRMS 1-2 (2009).

Hispanics and lowest for blacks and Asians; in large firms, whites did best, followed by Asians and blacks with Hispanics at the bottom.[29] Breakdowns by sex show that women of color fare the worst. In a study by the American Bar Association's Commission on Women in the Profession, the median compensation in law firms (based on 2003 dollars) for white men was $314,416; for men of color, $210,569; for white women, $254,746; and for women of color, $157,290.[30]

Satisfaction surveys again reflect some paradoxical results. Of young lawyers in a large study by the American Bar Foundation, blacks were the happiest with their decision to become a lawyer and the substance of their legal work; whites and Asian-Americans were the happiest in their job settings.[31] In a survey by the *American Lawyer*, which asked mid-level associates to rank their firm as a place to work, minority men gave the highest rating (4.20 on a five point scale), followed closely by white men (4.18). White women were in the middle (4.08), and minority women gave the lowest rating (3.95).[32] The ABA Commission on Women's survey found similarly stark differences in large firms: White men graded their career satisfaction as A, white women and minority men graded theirs as B, and minority women hovered between B minus and C plus.[33]

In short, the legal profession reflects substantial gender, race, and ethnic differences in both subjective and objective measures of career achievement. But what accounts for those differences and how they can be addressed remain matters of dispute.

II. EXPLAINING THE GAP

A. CAPABILITIES AND COMMITMENT

In a parody of diversity efforts during a celebrated British television series, "Yes Minister," a stodgy white male civil servant explained the folly of such initiatives. By his logic, if women had the necessary commitment and capabilities, they would already be well-represented in leadership positions. Since they weren't well-represented, they obviously lacked those qualifications. It should come as no surprise that similar views are common among law firm leaders. After all, those in charge of hiring, promotion, and compensation decisions are those who have benefitted from the current structure, and who have the greatest stake in believing in its fairness.[34] Although many leaders are willing to concede the persistence of bias in society in general, they rarely see it in their own firms.

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29. DINOVITZER ET AL., *supra* note 14, at 75.

30. JANET E. GANS EPNER, AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY 28 (2006).

31. *See* DINOVITZER ET AL., *supra* note 19, at 64.

32. D.M. Osborne, *The Woman Question*, AM. LAW., Nov. 2007, at 109.

33. LEVIT & LINDER, *supra* note 8, at 14.

34. *See supra* note 16.

Rather, they attribute racial, ethnic, and gender differences in lawyers' career paths to differences in capabilities and commitment.[35]

For lawyers of color, the most common explanation for underrepresentation is underperformance, measured by traditional merit standards. Minorities on average have lower law school grades than their white counterparts.[36] Minorities are also underrepresented at law schools in comparison with their representation in the population generally.[37] Since, according to recent research, about 80% of male partners and around 70% of female partners believe that grades and law school rank are important in hiring, racial disparities appear to be an unintended but inevitable consequence of the merit system.[38] One in-depth study of attitudes toward diversity found that the standard narrative in large firms ran something like this:

> We understand that most big firms began in an era of overt discrimination. We regret this and for many years have attempted to do something about it. We have tried a variety of things and will continue to work very hard at the problem. However, it is very, very difficult to solve the problem without lowering our standards, which of course we can't do. All of this adds up to a metaphorical shrug.[39]

In mid-size firms, the narrative is much the same, with the added twist that they cannot compete with large firms in money or prestige in recruiting "qualified" lawyers of color.[40] In effect, firm leaders "claim to be trapped by a system they have created and choose to maintain."[41] Yet that system is highly imperfect in screening for talent; considerable research suggests that law firms grossly overestimate the effectiveness of credentials like grades and law school prestige in predicting performance.[42]

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

36. *See* Richard Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1775-76 (2006); Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 426-27, 430-36 (2004); T.T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711, 740 (2004).

37. Although racial and ethnic minorities constitute about a third of the United States population, they account for only about twenty-two percent of law school student bodies, and rarely exceed that percentage at top ranked law schools. *See* ABA SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, *supra* note 24; U.S. CENSUS BUREAU, *supra* note 23.

38. *See* MINORITY CORPORATE COUNSEL ASS'N, SUSTAINING PATHWAYS TO DIVERSITY: THE NEXT STEPS IN UNDERSTANDING AND INCREASING DIVERSITY & INCLUSION IN LARGE LAW FIRMS 16 (2009), *available at* http://mcca.com/_data/global/images/Research/5298%20MCCA%20Pathways%20final%20version%202009.pdf.

39. Conley, *supra* note 35, at 841.

40. *Id*. at 844.

41. *Id*. at 850.

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

Although concerns about merit surface for white women as well as racial and ethnic minorities, the "woman problem" is commonly explained in terms not of credentials but of commitment and client development. Because women continue to have disproportionate family responsibilities and are more likely to reduce their schedules or to take time out of the workplace than men, they are assumed to be less available, less dependable, and less worthy of extensive mentoring. In the ABA Commission on Women study, almost three-quarters of female lawyers reported that their career commitment had been questioned when they gave birth or adopted a child. Only 9% of their white male colleagues and 15% of minority male colleagues had faced similar challenges.[43] In another bar survey, although women and men worked similar hours, over a quarter of male lawyers thought their female counterparts worked less and a fifth rated the number of hours these women worked as "fair to poor."[44] Women are also often presumed to be less adept in business development and in the self-promotional abilities that underlie it.[45] To be sure, as the discussion below indicates, many bar leaders have acknowledged that part of the problem lies in women's frequent exclusion from client networks, and the vast majority of large firms have initiatives designed to increase women's marketing skills and opportunities.[46] But this way of framing the problem still leaves the focus on fixing women, not the processes by which they are evaluated and the practices that sabotage their career development.

The implications of such tunnel vision emerged in a 2009 symposium on "Weathering Tough Times" sponsored by the New York State Bar Association's Committee on Women in the Law and its Committee on Diversity and Leadership Development. One panel, "Their Point of View: Tips From the Other Side" was described as follows:

> A distinguished panel of gentlemen from the legal field will discuss the strengths and weaknesses of women in the areas of communication, negotiation, mediation, arbitration, organization and women's overall management of their legal work. The panel will give specific skill building advice as to what

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J. LAB. ECON. 678, 690 (1995) (finding little correlation between variables corresponding to law school prestige, grades, and law review membership and partner income).

43. EPNER, *supra* note 30, at 83.

44. *See* Lopez, *supra* note 13, at 65 (citing Indiana bar survey results).

45. *See* BAGATI, *supra* note 28, at 37; Tiffani N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory and the Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85, 125 (2009). In a survey of the Indiana bar, a quarter of the male attorneys and a third of female attorneys thought men were better at attracting new clients. Lopez, *supra* note 13, at 73.

46. *See* discussion *infra* text at note 189. According to a survey by the National Association of Women Lawyers, "virtually all firms . . . reported that they have women's initiatives." NAT'L ASS'N OF WOMEN LAWYERS & NAWL FOUND., REPORT OF THE THIRD ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 17 (2008), *available at* http://www.nawl.org/Publications/Surveys.htm.

> women should be doing to strengthen their practice in the above-mentioned areas.[47]

The assumption that an all-male panel was necessary to tell women how to fix their problem did not sit well with many conference participants, and a threatened boycott prompted a change in the composition and focus of participants.[48] But the original plan was telling, as was the title of another panel that remained unchanged: "What's Our Problem: Current Issues Facing Women." Panelists were described as "expert women attorneys" who "will provide guidance on essential skills necessary for women to be successful attorneys . . . . How to build credibility in your practice, develop expertise, and manage others' perceptions of you."[49] As one commentator noted, the "content is not objectionable, but the title frames the panel in a way that [suggests that] . . . whatever is wrong, it's *our* problem."[50]

These attitudes may help to explain the relatively low priority that many law firm leaders attach to diversity and their relatively rosy assessment of efforts to enhance it. In a survey by the ABA Commission on Women, only 27% of white men felt strongly that it was important to increase diversity in law firms, compared with 87% of women of color and 61% of white women.[51] In a survey by Catalyst, only 11% of white lawyers felt that diversity efforts were failing to address subtle racial bias, compared with almost half of women of color.[52] Only 15% of white men felt that diversity efforts were failing to address subtle gender bias, compared with half of women of color and four out of ten white women.[53] Given these views among the group that dominates law firm leadership, it is scarcely surprising that many firms cut back their diversity efforts during the recent economic downturn.[54]

The research summarized below, however, suggests that firm leaders underestimate the impact of unconscious bias and overestimate the effectiveness of existing responses. Those who are truly committed to a just and inclusive workplace need a better understanding of what gets in the way. That includes a deeper appreciation of how racial, ethnic, and gender stereotypes affect not just

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47. N.Y. STATE BAR ASS'N COMM. ON WOMEN IN THE LAW, SIXTH ANNUAL EDITH I. SPIVACK SYMPOSIUM 2 (Jan. 26, 2010), *available at* http://www.nysba.org/Content/NavigationMenu39/CommitteeonWomenintheLawHome/EdithSpivackSymposiumBrochure.pdf.

48. *See* Martha Neil, *Planned All-Male Bar Panel on Women Lawyers' Skills Draws Female Fire*, A.B.A. J. (Jan. 15, 2010, 3:40 PM), http://www.abajournal.com/news/article/planned_all-male_bar_panel_on_women_lawyers_skills_draws_female_fire.

49. N.Y. STATE BAR ASS'N COMM. ON WOMEN IN THE LAW, *supra* note 47, at 1.

50. Laura Weidman, What Is Our Problem . . . and Whom Does It Affect (June 1, 2010) (unpublished manuscript) (on file with author).

51. EPNER, *supra* note 30, at 19.

52. BAGATI, *supra* note 28, at 13.

53. *Id.*

54. *See* Anna Scott, *Diversity Has Been a Casualty of Law Firm Cutbacks*, S.F. DAILY J., Mar. 17, 2010, at 4.

evaluations of performance but the performance itself, and the relative value attached to specific performance measures.

B. RACIAL, ETHNIC, AND GENDER STEREOTYPES

Racial, ethnic, and gender stereotypes play a well-documented, often unconscious role in American workplaces, and law firms are no exception. The stereotypes vary across groups. For example, blacks and Latinos bump up against assumptions that they are less intelligent, less industrious, and generally less qualified; even if they graduated from an elite law school, they are assumed to be beneficiaries of affirmative action rather than meritocratic selection.[55] Blacks, especially women, risk being viewed as angry or hostile.[56] Asian-Americans are saddled with the myths of the "model minority"; they are thought to be smart and hardworking, but not sufficiently assertive to command the confidence of clients and legal teams.[57] The special stigma confronting all women of color is apparent in the frequency with which they are still mistaken for court reporters, interpreters, or secretaries.[58]

Gender stereotypes also subject women to double standards and a double bind. Despite recent progress, women, particularly racial and ethnic minorities, often lack the presumption of competence enjoyed by white men, and feel pressure to work harder to achieve the same results.[59] Male achievements are more likely to

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55. *See* Cruz & Molina, *supra* note 23, at 1010; Garner Weng, *Racial Bias in Law Practice*, CAL. LAW., Jan. 2003, at 37-38; Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1014 (2004).

56. *See* EPNER, *supra* note 30, at 10, 25; Weng, *supra* note 55, at 37-38; *infra* note 118 and accompanying text.

57. JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE 97 (2010) (citing studies); *see also* LeeAnn O'Neill, *Hitting the Legal Diversity Market Home: Minority Women Strike Out*, MODERN AM., Spring 2007, at 7, 9; BAGATI, *supra* note 28, at 37; EPNER, *supra* note 30, at 10, 25; Sonia Ospina & Erica Foldy, *A Critical Review of Race and Ethnicity in the Leadership Literature: Surfacing Context, Power and the Collective Dimensions of Leadership*, 20 LEADERSHIP Q. 876, 880 (2009).

58. *See* Cruz & Molina, *supra* note 23, at 1010; EPNER, *supra* note 30, at 18; O'Neill, *supra* note 57, at 8. In one study of Chicana lawyers, all but one had been mistaken for non-lawyer staff. *See* Gladys García-López, *"Nunca Te Toman En Cuenta [They Never Take You into Account]": The Challenges of Inclusion and Strategies for Success of Chicana Attorneys*, 22 GENDER & SOC'Y 590, 601-03, 609 (2008).

59. For competence, see Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2256 (2010); Cecilia L. Ridgeway & Paula England, *Sociological Approaches to Sex Discrimination in Employment*, *in* SEX DISCRIMINATION IN THE WORKPLACE 189, 195 (Faye J. Crosby, Margaret S. Stockdale & S. Ann Ropp eds., 2007). In national surveys, half to three quarters of female lawyers believe that they are held to higher standards than their male colleagues. *See* Deborah L. Rhode & Joan C. Williams, *Legal Perspectives on Employment Discrimination*, *in* SEX DISCRIMINATION IN THE WORKPLACE, *supra*, at 235, 245. For women's need to work harder, see Lopez, *supra* note 13, at 73. Even in experimental situations where male and female performance is objectively equal, women are held to higher standards, and their competence is rated lower. *See* Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 59 SOC. PSYCHOL. Q. 237, 237 (l996). For the special pressures faced by women of color, see García-López, *supra* note 58, at 598, 603-04. Having children makes women, but not men, appear less competent and less available to meet workplace responsibilities. Amy J.C.

be attributed to internal capabilities and female achievements to external factors, a pattern that social scientists describe as "he's skilled, she's lucky."[60] Mothers, even those working full-time, are assumed to be less available and committed, an assumption not made about fathers.[61] So too, women are still rated lower than men on most qualities associated with leadership, such as assertiveness, competiveness, and business development.[62] People more readily credit men with leadership ability and more readily accept men as leaders.[63] An overview of more than a hundred studies confirms that women are rated lower when they adopt authoritative, seemingly masculine styles, particularly when the evaluators are men, or when the role is one typically occupied by men.[64] What is assertive in a man seems abrasive in a woman, and female lawyers risk seeming too feminine or not feminine enough. Either they may appear too "soft"—unable or unwilling to engage in aggressive advocacy or make tough calls—or too "strident"—pushy, arrogant, and overly ambitious.[65] Self-promotion that is acceptable in men is viewed as unattractive in women.[66] Even the most accomplished women can be

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Cuddy, Susan T. Fiske & Peter Glick, *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 709 (2004); Kathleen Fuegen, Monica Biernat, Elizabeth Haines & Kay Deaux, *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 745 (2004).

60. Jeffrey H. Greenhaus & Saroj Parasuraman, *Job Performance Attributions and Career Advancement Prospects: An Examination of Gender and Race Effects*, 55 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 273, 276, 290 (1993); *see also* Janet K. Swim & Lawrence J. Sanna, *He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributions for Women's and Men's Successes and Failures*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 507 (1996); WILLIAMS, *supra* note 57, at 94 (citing studies).

61. *See* Reichman & Sterling, *supra* note 17, at 63-64; Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221, 2224-25, 2229-30 (2002). For problems encountered by parents of both sexes, see DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE 17-18 (2001).

62. *See* Deborah L. Rhode & Barbara Kellerman, *Women and Leadership: The State of Play*, *in* WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 1, 7 (Barbara Kellerman & Deborah L. Rhode eds., 2007); CATALYST, WOMEN "TAKE CARE," MEN "TAKE CHARGE:" STEREOTYPING OF U.S. BUSINESS LEADERS EXPOSED 10 (2005); Linda L. Carli & Alice H. Eagly, *Overcoming Resistance to Women Leaders: The Importance of Leadership Style*, *in* WOMEN AND LEADERSHIP, *supra*, at 127-29; Wald, *supra* note 59, at 2256.

63. *See* Carli & Eagly, *supra* note 62, at 128-29; Laurie A. Rudman & Stephen E. Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1315, 1326 (2000).

64. *See* D. Anthony Butterfield & James P. Grinnell, *"Re-Viewing" Gender, Leadership, and Managerial Behavior: Do Three Decades of Research Tell Us Anything*, *in* HANDBOOK OF GENDER AND WORK 223, 235 (Gary N. Powell ed., 1998); Alice H. Eagly, Mona G. Makhijani & Bruce G. Klonsky, *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 17 (1992); JEANETTE N. CLEVELAND, MARGARET STOCKDALE & KEVIN R. MURPHY, WOMEN AND MEN IN ORGANIZATIONS: SEX AND GENDER ISSUES AT WORK 106-07 (2000).

65. CECILIA L. RIDGEWAY, FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD 115 (2011); *see also* WILLIAMS, *supra* note 57, at 98; Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 576 (2002); Alice H. Eagly, *Achieving Relational Authenticity in Leadership: Does Gender Matter*, 16 LEADERSHIP Q. 459, 470 (2005); LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK 87-89 (2003); Peter Glick & Susan T. Fiske, *Sex Discrimination: The Psychological Approach*, *in* SEX DISCRIMINATION IN THE WORKPLACE, *supra* note 59, at 155, 173; Rhode & Williams, *supra* note 59, at 247.

66. *See* Carli & Eagly, *supra* note 62, at 130; WILLIAMS & RICHARDSON, *supra* note 16, at 48; Laurie A. Rudman, *To Be or Not to Be (Self-Promoting): The Consequences of Counterstereotypical Impression*

derailed by such biases. Brooksley Born, now widely acclaimed for her regulatory efforts while chair of the Commodity Futures Commission, was dismissed at the time as "strident," and a "lightweight wacko."[67]

Other cognitive biases compound the force of these traditional stereotypes. People are more likely to notice and recall information that confirms their prior assumptions than information that contradicts those assumptions; the dissonant facts are filtered out.[68] For example, when employers assume that a working mother is unlikely to be fully committed to her career, they more easily remember the times when she left early than the times when she stayed late. So too, attorneys who assume that women of color are beneficiaries of preferential treatment, not merit-based selection, will recall their errors more readily than their insights.[69] As one woman of color reported in the ABA Commission study, "there's no room for mistakes."[70] Even minor missteps that are part of the normal learning process can derail a career when the lawyer's competence is already in question.

Taken together, these biases may help account for racial and gender differences concerning performance evaluations. In a survey by the Minority Corporate Counsel Association, about three times as many lawyers of color reported unfair evaluations as white lawyers.[71] In the ABA Commission on Women study, only 1% of white men, compared with 31% of women of color, 25% of white women, and 21% of men of color, reported unfair evaluations.[72]

Not only do stereotypical assumptions skew expectations and assessments of performance, these biases influence the performance itself. That influence takes several forms. One is the "Pygmalion effect." Researchers find that when supervisors erroneously believe that certain employees are less competent, these employees eventually display less competence.[73] Individuals intuitively perceive signals about their capabilities that alter their motivation and self-confidence. They also internalize stereotypes. For example, women are often reluctant to engage in assertive and self-promoting behavior that can be important for

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Management, *in* POWER AND INFLUENCE IN ORGANIZATIONS 287, 290 (Roderick M. Kramer & Margaret A. Neale eds., 1998).

67. MICHAEL HIRSH, CAPITAL OFFENSE: HOW WASHINGTON'S WISE MEN TURNED AMERICA'S FUTURE OVER TO WALL STREET 12, 1 (2010) (quoting Robert Rubin and unnamed staffer).

68. *See* David L. Hamilton & Jeffrey W. Sherman, *Stereotypes*, *in* HANDBOOK OF SOCIAL COGNITION 2, at 1-68 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 2d ed. 1994); Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY & SOC. PSYCHOL. 267, 281-82 (1985). For confirmation bias generally, see PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT 277-89 (2010); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 169 (1980).

69. *See* Rhode & Kellerman, *supra* note 62, at 9.

70. EPNER, *supra* note 30, at 27.

71. *See* MINORITY CORPORATE COUNSEL ASS'N, *supra* note 38, at 22.

72. EPNER, *supra* note 30, at 7 (one-third of women of color but only one percent of white men reported unfair performance evaluations).

73. *See* Wang, *supra* note 55, at 1055 (summarizing various studies).

advancement because it is inconsistent with perceptions of femininity.[74] So too, minorities underperform in response to "stereotype threats." They do worse when they are encouraged to believe that their performance on certain tasks is indicative of abilities that minorities are thought to lack.[75] Moreover, biased assumptions about lawyers' commitment and competence affect the allocation of work. The result is to prevent women and minorities from getting opportunities that would demonstrate or enhance their capabilities, which then creates a cycle of self-fulfilling prophesies.[76] Even lawyers who do not share these stereotypical assumptions often worry that others will. That makes white men seem like the "safe choice" where competence is hard to measure or predict and client confidence is a concern.[77]

C. IN-GROUP BIAS

A related set of obstacles involves in-group favoritism. Extensive research documents the preferences that individuals feel for members of their own groups. Loyalty, cooperation, favorable evaluations, mentoring, and the allocation of rewards and opportunities all increase in likelihood for individuals who are similar in important respects, including sex, race, and ethnicity.[78] The result is to prevent outsiders from developing "cultural capital": access to advice, support, desirable assignments, and client development activities.[79] In law firms, racial and ethnic minorities often report isolation and marginalization, while many white women similarly experience exclusion from "old boys" networks.[80] The

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74. *See* BABCOCK & LASCHEVER, *supra* note 65, at 88; Carol Hymowitz, *Through the Glass Ceiling*, WALL ST. J., Nov. 8, 2004, at R1.

75. For an overview, see Hazel Rose Markus, Claude M. Steele & Dorothy M. Steele, *Colorblindness as a Barrier to Inclusion: Assimilation and Nonimmigrant Minorities*, DAEDELUS, Fall 2000, at 233, 250.

76. *See* RHODE, *supra* note 61, at 16; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1234 (1995).

77. The same dynamic restricts opportunities for lawyers in minority-owned firms. *See* CROSBY MARKETING COMMUNICATIONS, STUDY ON THE STATUS OF MINORITY-OWNED LAW FIRMS IN TODAY'S LEGAL ENVIRONMENT: A RESEARCH REPORT FOR DUPONT LEGAL (Mar. 29, 2004).

78. *See* RIDGEWAY, *supra* note 65, at 111; WILLIAMS & RICHARDSON, *supra* note 16, at 49-50; Ridgeway & England, *supra* note 59, at 197; Marilynn B. Brewer & Rupert J. Brown, *Intergroup Relations*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 2, at 554, 554-94 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 2, *supra*, at 357, 357-414; Barbara F. Reskin, *Rethinking Employment Discrimination and Its Remedies*, *in* THE NEW ECONOMIC SOCIOLOGY: DEVELOPMENTS IN AN EMERGING FIELD 218, 218-44 (Mauro F. Guillén et al. eds., 2000).

79. The term comes from Pierre Bourdieu, *The Forms of Capital*, *in* HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 248 (John G. Richardson ed., 1986). For a discussion in the legal context, see Cindy A. Schipani et al., *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L. & POL'Y 89, 103-05 (2009); Fiona M. Kay & Jean E. Wallace, *Mentors as Social Capital: Gender, Mentors, and Career Rewards in Legal Practice*, 79 SOC. INQUIRY 418 (2009); Kay, *supra* note 6, at 189-91.

80. For minorities, see EPNER, *supra* note 30, at 18; Wilkins & Gulati, *supra* note 42, at 568, 571. For the critical role that lack of mentoring plays in accounting for minority attrition, see Monique R. Payne-Pikus, John

ABA Commission on Women found that 62% of women of color and 60% of white women, but only 4% of white men, reported being left out of formal and informal networking opportunities.[81] In another study by the Project for Attorney Retention [PAR] and the MCCA, many female and minority lawyers similarly reported exclusion from the inner group that ran the firm and set compensation.[82]

Research on mentoring and social networks suggests part of the problem. Effective relationships depend on three primary factors: perceived similarity, perceived competence, and personal comfort.[83] Women and minorities are disadvantaged across all three dimensions. Few law firms have enough of these groups at senior levels to go around, and not all of those who have reached that status have the time and inclination to provide sufficient mentoring for others on the way up. As participants in the ABA Commission study noted, some female partners have "good intentions," but are already pressed with competing work and family obligations or "don't have a lot of power so they can't really help you."[84] Other women saw no reason to provide special assistance: They made it without such help so why couldn't everyone else?[85] Concerns about the appearance of sexual harassment or impropriety reportedly discourage some men from forming mentoring relationships with junior women, and discomfort concerning issues of race and ethnicity deters some white lawyers from crossing the color divide.[86] Assumptions about commitment and capabilities also keep mentors from investing in female or minority associates who seem unlikely to stay or to succeed.[87]

Here again, the problem can become self-perpetuating. When entering institutions with a history of exclusion and marginalization, some individuals become highly sensitive to negative social cues based on their identity. Over time, they experience "status-based rejection," which impedes forming relationships with members of privileged groups.[88] This experience makes it harder for

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Hagan & Robert L. Nelson, *Experiencing Discrimination: Race and Retention in America's Largest Law Firms*, 44 LAW & SOC'Y REV. 553, 576-77 (2010). For women, see Reichman & Sterling, *supra* note 17, at 65; Timothy L. O'Brien, *Up the Down Staircase*, N.Y. TIMES, Mar. 19, 2006, at B1; WILLIAMS & RICHARDSON, *supra* note 16, at 16-17.

81. EPNER, *supra* note 30, at 35.

82. *See* WILLIAMS & RICHARDSON, *supra* note 16, at 16-17.

83. Belle Rose Ragins, *Antecedents of Diversified Mentoring Relationships*, 51 J. VOCATIONAL BEHAV. 90, 97 (1997).

84. EPNER, *supra* note 30, at 14.

85. *See id.*; DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 16 (2001); Reichman & Sterling, *supra* note 17, at 73; Schipani et al., *supra* note 79, at 115.

86. For concerns about harassment and impropriety, see RHODE, *supra* note 85, at 16. For comfort levels, see EPNER, *supra* note 30; MINORITY CORPORATE COUNSEL ASS'N, *supra* note 38.

87. *See* EPNER, *supra* note 30, at 15-16.

88. KATHERINE J. REYNOLDS ET AL., SOCIAL IDENTITY AND SELF-CATEGORIZATION THEORIES' CONTRIBUTION TO UNDERSTANDING IDENTIFICATION, SALIENCE AND DIVERSITY IN TEAMS AND ORGANIZATIONS, IDENTITY ISSUES IN GROUPS 279, 292 (Jeffrey T. Polzer ed., 2003); *see also* Darden, *supra* note 45, at 108.

outsiders "to get to the top level to help fix the bottom."[89] Some grow weary of the struggle, particularly when it involves constant pressure to conform and to suppress important aspects of their identity.[90]

In-group favoritism is also apparent in the allocation of work and client development opportunities. Many firms operate with an informal system that channels seemingly talented associates, disproportionately white men, to the partnership track, while relegating other associates to "workhorse" positions.[91] In the ABA Commission study, 44% of women of color, 39% of white women, and 25% of minority men reported being passed over for desirable work assignments; only 2% of white men noted similar experiences.[92] PAR and MCCA's research similarly found that women and minorities are often left out of pitches for client business.[93]

Lawyers of color are also subject to "race matching"; they receive work because of their identity, not their interests, in order to create the right "look" in courtrooms, client presentations, recruiting, and marketing efforts. Although this strategy sometimes creates helpful opportunities, it can also place lawyers in "showhorse" or "mascot" roles in which they have little substantive function and develop few useful skills.[94] The practice is particularly irritating when lawyers of color are pulled from desirable work and trotted out to attract a client whom they never see again, or when they are assumed to have skills and affinities that they in fact lack.[95] Examples include a Korean associate who was given Chinese materials to review, a Japanese American asked to a meeting to solicit a Korean client, and a Latina who was assigned documents in Spanish even after she explained that she wasn't fluent in the language.[96] "Oh, you'll be fine," she was told. "Look [anything unfamiliar] up in a dictionary."[97] However, when it comes

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89. EPNER, *supra* note 30, at 31.

90. *See* Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 LAW & SOC'Y REV. 1, 42 (2007); EPNER, *supra* note 30, at 10; Cruz & Molina, *supra* note 23, at 1019; David Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1590 (2004); Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 7 (2009) (citing studies). In Catalyst's survey, 49% of minority women, 35% of minority men, and 30% of white women felt they needed to make adjustments to fit in law firm culture, compared with only 8% of white men. *See* BAGATI, *supra* note 28, at 21. For a general account of the toll taken by "covering," see KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

91. EPNER, *supra* note 30, at 21; *see also* Wilkins & Gulati, *supra* note 42, at 565-71.

92. EPNER, *supra* note 30, at 21.

93. *See* WILLIAMS & RICHARDSON, *supra* note 16, at 42.

94. EPNER, *supra* note 30, at 21; *see also* O'Neill, *supra* note 57, at 10. Simply being present and observing others in a court room or client meeting does not significantly help many lawyers of color develop or demonstrate their own skills.

95. *See* Weng, *supra* note 55, at 39; Wilkins, *supra* note 90, at 1594; Lopez, *supra* note 13, at 596.

96. *See* EPNER, *supra* note 30, at 22, 26; Wilkins, *supra* note 90, at 1595.

97. EPNER, *supra* note 30, at 26.

to conventional client development possibilities, 43% of surveyed women of color, 55% of white women, and 24% of men of color report having limited access to such opportunities, compared with only 3% of white men.[98] In the Minority Corporate Counsel study, lawyers of color were about twice as likely as their white counterparts to report exclusion from client development activities.[99]

D. WORKPLACE STRUCTURES

Escalating workplace demands and inflexible practice structures pose further obstacles to equity in law firms. Billable hour requirements have risen significantly over the last quarter century, and technological innovations that make it possible for lawyers to work at home make it increasingly impossible *not* to work at home. Expectations of constant accessibility have become the new norm, and technology has tethered practitioners to their offices. At some firms the policy is explicit: Associates must CBA—"check Blackberry always."[100] The cost is disproportionately born by women, because as noted below, they are disproportionately likely to assume primary caretaking responsibilities.

The problem is compounded by the inadequacy of structural responses. A wide gap persists between formal policies and actual practices concerning work-family conflicts. Although over 90% of American law firms report policies permitting part-time work, only about 4% of lawyers actually use them.[101] Many lawyers believe, with good reason, that "no time . . . is the right time to get pregnant," and that any reduction in hours or availability would jeopardize their careers.[102] On average, part-time status and time out of the workforce results in long-term losses in earnings as well as lower chances for partnership.[103] In one survey of University of Michigan law school graduates, just a single year out of the workforce correlated with a third lower chances of making partner and an earnings reduction of 38%.[104] Those who opt for a reduced schedule too often find that it isn't worth the price. Their schedules aren't respected, their hours

98. *Id*. at 20.

99. *See* MINORITY CORPORATE COUNSEL ASS'N, *supra* note 38, at 23.

100. Elie Mystal, *Quinn Emanuel Believes in CBA (Check Blackberry Always)*, ABOVE THE LAW (Oct. 16, 2009), http://abovethelaw.com/2009/10/quinn_emanuel_wants_associates.php.

101. Paula Patton, *Women Lawyers: Their Status, Influence, and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 173, 189 (2005).

102. *Id*. at 180.

103. David Leonhardt, *Financial Careers Come at a Cost to Families*, N.Y. TIMES, May 27, 2009, at B1 (discussing findings that pay gap for lawyer who had taken time out was about twenty-nine percent fifteen years after graduation). For other studies, see Beiner, *supra* note 9, at 326; Kenneth G. Dau-Schmidt, Marc S. Galanter, Kaushik Mukhopadhaya & Kathleen E. Hull, *Men and Women of the Bar*, 16 MICH. J. GENDER & L. 49, 95-96, 112 (2009).

104. Noonan & Corcoron, *supra* note 15, at 146.

creep up, the quality of their assignments goes down, their pay is not proportional, and they are stigmatized as "slackers."[105]

These are not only "women's issues," but women bear their greatest impact. Despite a significant increase in men's domestic work over the last two decades, women continue to shoulder the major burden.[106] In the American Bar Foundation's Survey of young lawyers, women were about seven times more likely than men to be working part-time or to be out of the labor force, primarily due to childcare.[107] In the University of Michigan study, only 1% of fathers had worked part-time or had taken parental leave, compared with 47% of women who had worked part-time and 42% who had taken a leave.[108] Part of the reason for those disparities is that the small number of fathers who opt to become full-time caretakers experience particular penalties. The limited research available finds these male lawyers suffer even greater financial and promotion costs than female colleagues who make the same choice.[109] Minorities also pay a special price for inflexible structures. Compared with their white colleagues, they are more dissatisfied with their work-life balance, in part because they are more likely to experience extended family responsibilities and are more concerned about adding the stigma of reduced schedules to their already uphill battle for credibility.[110]

Although law firm leaders generally acknowledge the problem, they often place responsibility for addressing it anywhere and everywhere else. Clients get part of the blame: Law is a service business, and their expectations of instant accessibility reportedly make reduced schedules difficult or impossible to accommodate. Associates, for their part, are faulted for not making quality of life a greater priority. Although the vast majority say they would trade time for income, few entry-level lawyers appear willing to make that choice, and their high salaries require correspondingly high billable hour requirements.[111] Of course, many mid-level associates, particularly women and minorities, do

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105. *See* Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207, 2213 (2002). For stigma, see HOLLY ENGLISH, GENDER ON TRIAL 212 (2003) (reporting perceptions about slackers); Lopez, *supra* note 13, at 95; CYNTHIA CALVERT, LINDA CHANOW & LINDA MARKS, PROJECT FOR ATT'Y RETENTION, REDUCED HOURS, FULL SUCCESS: PART-TIME PARTNERS IN U.S. LAW FIRMS 18 (2009) (reporting that even among lawyers who had achieved partnership, about forty percent feel stigma from taking part-time schedules).

106. *See generally* BUREAU OF LABOR STATISTICS, AMERICAN TIME USE SURVEY (2004), *available at* http://www.bls.gov/news.release/archives/atus_09202005.pdf; Donald G. McNeil, *Real Men Don't Clean Bathrooms*, N.Y. TIMES, Sept. 19, 2004, at E3.

107. *See* DINOVITZER ET AL., *supra* note 14, at 62.

108. Noonan & Corcoran, *supra* note 15, at 137.

109. *See* Dau-Schmidt, Galanter, Mukhopadhaya & Hull, *supra* note 103, at 112-13; LEVIT & LINDER, *supra* note 8, at 12-13.

110. For dissatisfaction rates, see MINORITY CORPORATE COUNSEL ASS'N, *supra* note 38, at 26. For extended family responsibilities, see BAGATI, *supra* note 28, at 45. For stigma, see CALVERT, CHANOW & MARKS, *supra* note 105, at 25-26.

111. Four-fifths say they would make the tradeoff. Stephanie Francis Ward, *Such a Deal: Does Perkins Coie Have the Best Time-Money Solution?*, 93 A.B.A. J. 29 (2007); *see also* Stephanie Francis Ward, *The Ultimate Time-Money Trade-Off*, 93 A.B.A. J. 24 (2007). For lawyers' unwillingness to act on those priorities, see

eventually vote with their feet, but the current business model is built on substantial attrition, and sufficiently talented lawyers seem available as replacements, particularly in this economic climate. Greed among partners is also a factor, although firm leaders seldom make this explicit. Rather, they note that increased lateral mobility and transparency concerning compensation have prevented them from sacrificing partners' income to improve overall quality of life. The risk is that disgruntled rainmaking partners will up and leave if they feel their efforts are not sufficiently rewarded, taking clients and talented associates with them.[112] But to subsidize such high income levels among partners, firms end up requiring high billable hours from associates.

These are, of course, significant concerns, but they are not as decisive as is typically assumed. The evidence available does not find substantial resistance among clients to reduced schedules. They care about responsiveness, and part-time lawyers generally appear able to provide it.[113] In one recent survey of part-time partners, most reported that they did not even inform clients of their status and that their schedules were adapted to fit client needs.[114] Accounting, which is also a service profession, and anything but indifferent to the bottom line, has developed a business model that more than offsets the costs of work/family accommodation by increasing retention.[115] Considerable evidence suggests that law practice could do the same, and reap the benefits in higher morale, lower recruitment and training expenses, and less disruption in client relationships.[116] Many women who now opt out of full-time work or the race for partnership are not simply "pulled" by family demands; they are "pushed" by inflexible unresponsive workplaces.[117]

E. BACKLASH

A final obstacle to diversity and gender equity initiatives involves backlash;

DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 32-33 (2000); Deborah L. Rhode, *Forward: Personal Satisfaction in Professional Practice*, 58 SYRACUSE L. REV. 217, 228-29 (2008).

112. *See* RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 111, at 36-37.

113. *See* CALVERT, CHANOW & MARKS, *supra* note 105, at 13, 22.

114. *See id.* at 9, 13, 21.

115. Deloitte & Touche has been a leader in developing a model that accommodates flexible and part-time schedules without forcing sacrifices in promotion and desirable work. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 493 (2001) and discussion *infra* at page 1074.

116. *See* LEVIT & LINDER, *supra* note 8, at 170; Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221, 2227-29, 2236-37; CALVERT, CHANOW & MARKS, *supra* note 105, at 10-12; RHODE, *supra* note 61, at 20-21. For an overview of the business case for flexibility in the workforce generally, see WILLIAMS, *supra* note 57, at 66-71.

117. Joyce Sterling & Gabriele Plickert, Opting Out: Is This a Return to Traditionalism or Simply a Subtle Form of Workplace Discrimination (2011) (unpublished manuscript) (on file with author). In the ABF study, opting out was correlated not with having children but with experiencing workplace integration problems, such as delays in promotion, or difficulties in obtaining flexible schedules and challenging assignments. *See id.*

the concern is that raising these issues or addressing them forcefully might add more to the problem than the solution. Women and minorities who experience bias are often reluctant to complain about it publicly. They don't want to "rock the boat," seem "too aggressive" or "confrontational," look like a "bitch," or be typecast as an "angry black."[118] When lawyers do express concerns, the consequences are frequently negative, so many are advised to: "[L]et bygones be bygones," or just "move on."[119] Channels for candid dialogue are all too rare. Most law firms do not give associates opportunities to offer feedback about their supervisors, and of lawyers who provide such evaluations, only about 5% report changes for the better.[120] The message in many law firm cultures is that "complaining never gets you anywhere . . . . [You are perceived as] not being a team player."[121]

Supervising partners also fear backlash of a different form. Many are reluctant to offer candid feedback to minority associates in their early years for fear of seeming racist or of encouraging them to leave. The result is that by midlevel, some lawyers find themselves "blindsided by soft evaluations": "[Y]our skills aren't what they are supposed to be but you didn't know because no one ever told you."[122] Firms' failure to address client development problems among minority lawyers reflects a similar form of "reckless indifferent affirmative action" that can sabotage professional careers.[123]

Yet firm leaders who appear to support "special" treatment of women and minorities also have to worry about resentment among their white male counterparts. In a study by the Minority Corporate Counsel Association, men often agreed that "diversity should take a back seat to performance and capability."[124] In their view, too much "reverse discrimination" causes backlash, and "stretch hires of minorities who are not qualified sometimes does much to undermine . . . acceptance of diversity and inclusion."[125] As one white male lawyer put it, "taking opportunities . . . from those with merit and giving [them] . . . to people based upon race, gender, or sexual identity is forcing us

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118. EPNER, *supra* note 30, at 20 ("aggressive," "bitch"); WILLIAMS & RICHARDSON, *supra* note 16, at 38 ("confrontational"); Reichman & Sterling, *supra* note 17, at 65 ("bitch"); Cruz & Molina, *supra* note 23, at 1019 ("rock the boat"); Marcia Coyle, *Black Lawyer's Life Told by White Author*, NAT'L L.J., Jan. 11, 1999, at A14 (quoting Mungin, "angry black").

119. For the advice, see Robert Kolker, *The Gay Flannel Suit*, N.Y. MAG., Mar. 5, 2007, 32, 37 (quoting David Harms); EPNER, *supra* note 30, at 21. For negative consequences following complaints about compensation, see WILLIAMS & RICHARDSON, *supra* note 16, at 38.

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

121. EPNER, *supra* note 30, at 27.

122. *Id.*; *see also* Wilkins & Gulati, *supra* note 42, at 540.

123. PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA 280 (1999); *see also* David Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999).

124. MINORITY CORPORATE COUNSEL ASS'N, *supra* note 38, at 16.

125. *Id.* at 25.

apart not bringing us together . . . . I can think of few things worse for an ostensibly color blind and meritocratic society."[126] In a letter to the editor of the *National Law Journal*, a self-described "young, white straight male attorney who happens to be politically progressive" similarly protested employment termination decisions partly attributable to "meeting an important client's newly asserted diversity demands."[127] From his perspective, "surely firing people even partially on the basis of an immutable characteristic is as unjust when done in the name of increasing diversity as it is when done to maintain homogeneity."[128] Many white lawyers appear to agree. In one ABA survey, only 42% supported affirmative action. By contrast, 92% of blacks expressed support.[129] From their vantage, the insistence on color blindness comes generations too early and centuries too late. As David Wilkins argues, diversity initiatives remain necessary to "detect and correct the myriad of subtle, but nevertheless pervasive, ways that . . . current practices differentially disadvantage certain [groups based on color]."[130]

How then can firm leaders cope with these competing perspectives and address barriers to equity without reinforcing resentment? The most common current approach is to focus on the "business case for diversity" and on institutional approaches that look least like preferential treatment.

III. THE LIMITS OF CONVENTIONAL RESPONSES

In attempting to placate progressive constituencies' calls for progress without compromising standards or exacerbating backlash, firms generally have steered a middle course. They cast diversity as a business decision and avoid initiatives that are most likely to raise charges of reverse discrimination. Legal standards have encouraged that approach, by exposing firms to risks of liability for doing too much or not enough.[131] The result has been a series of modest initiatives that are well-intentioned but that have fallen short of creating truly inclusive practice cultures.

A. THE BUSINESS CASE FOR DIVERSITY

Beginning in the late 1980s, minority bar leaders began a series of initiatives designed to increase diversity in corporate law firms. Their tactics varied, but their rhetoric was generally the same; the focus was on economic rather than ethical justifications. As the Minority Corporate Counsel Association puts it:

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126. *Id.* at 15.

127. Ben Martin, Letter to the Editor, NAT'L L.J., Nov. 6, 2006, at 23.

128. *Id.*

129. Walter La Grande, *Getting There*, A.B.A. J., Feb. 1999, at 54. For similar concerns, see Sander, *The Racial Paradox of the Corporate Law Firm*, *supra* note 36, at 1812.

130. Wilkins, *supra* note 90, at 1572-73.

131. *See infra* text accompanying notes 157-81.

> To ensure senior partner commitment and firm-wide [buy in], it is important that a law firm develop a written plan that elucidates the business case for diversity, including an analysis of the costs of not taking the issue of diversity seriously and of the interest of clients in having diverse legal counsel represent them. Hence, law firms commit to becoming diverse because their future, market share, retention of talent, continuation of existing relationships with corporate clients, and performance depend on understanding and anticipating the needs of an increasingly diverse workforce and marketplace.[132]

A 2010 report by the ABA Presidential Initiative Commission on Diversity similarly emphasized that "it makes good business sense to hire lawyers who reflect the diversity of citizens, clients and customers from around the globe. Indeed, corporate clients increasingly require lawyer diversity and will take their business elsewhere if it is not provided."[133]

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

> A. The depth and breadth of the talent pool of women lawyers establishes a clear need for the legal profession to recruit, retain, develop and advance an exceptionally rich source of talent.
>
> B. Women increasingly have been attaining roles of influence throughout society; legal employers must achieve gender diversity in their leadership ranks if they are to cultivate a set of leaders with legitimacy in the eyes of their clients and members of the profession.
>
> C. Diversity adds value to legal employers in countless ways—from strengthening the effectiveness of client representation to inserting diverse perspectives and critical viewpoints in dialogues and decision making.[134]

In support of these claims, advocates rely on a variety of evidence. For example, some social science research suggests that diverse viewpoints encourage critical thinking and creative problem solving; they expand the range of alternatives considered and counteract "group think."[135] Some studies also find a

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132. Wilkins, *supra* note 90, at 1570 n.101 (quoting Scott Mitchell, *MCAA Presents its Recent Findings: Law Firm Diversity*, DIVERSITY & B., Dec. 2001).

133. ABA PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 9 (2010).

134. CTR. FOR WOMEN IN LAW AT THE UNIV. OF TEX. SCH. OF LAW, AUSTIN MANIFESTO ON WOMEN IN LAW (May 1, 2009).

135. *See* Rhode & Kellerman, *supra* note 62, at 16; Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 220 (2009); Brayley & Nguyen, *supra* note 90, at 13; Cynthia Estlund, *Putting* Grutter *to Work: Diversity, Integration and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 22 (2005); Donald C. Hambrick, Theresa Seung Cho & Ming-Jer Chen, *The Influence of Top Management Team Heterogeneity on Firms' Competitive Moves*, 41 ADMIN. SCI. Q. 659, 665-66 (1996); Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference? The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCHOL. SCI. PUB. INT. 31, 35 (2005); Steven A. Ramirez, *Diversity and*

correlation between diversity and profitability in law firms as well as in Fortune 500 companies.[136] Other research has drawn on signaling theory to argue that diversity conveys a credible commitment to equal opportunity and responsiveness to diverse stakeholders.[137] Moreover, as the ABA Presidential Initiative Commission noted, increasing numbers of corporate clients are making diversity a priority in allocating work. Some companies have signed the *Call to Action: Diversity in the Legal Profession*, in which they pledge to "end or limit . . . relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse."[138] In widely publicized actions, Wal-Mart has required that at least one woman and one person of color be among the top five relationship attorneys that handle its business, and it has terminated relationships with two firms that failed to meet its diversity standards.[139] Some firms have similarly begun requesting general counsel to consider diversity in selecting outside lawyers.[140]

Yet to many lawyers and scholars, evidence for the business case is weaker than its proponents typically assert. Not all social science research finds strong performance benefits from diversity.[141] If poorly managed, it can heighten

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the Boardroom, 6 STAN. J.L. BUS. & FIN. 85, 99 (2000); Lynda Gratton & Lamia Walker, *Gender Equality: A Solid Business Case At Last*, FIN. TIMES, Oct. 28, 2007, http://www.ft.com/cms/s/0/792384e4-8591-11dc-8170-0000779fd2ac.html#axzz1Q8EG2OwF (finding that corporate insiders believe that groups with gender balance deliver optimal performance in most areas that "drive innovation"). *See generally* FRANK DOBBIN, JIWOOK JUNG & ALEXANDRA KALEV, CORPORATE BOARD DIVERSITY AND STOCK PERFORMANCE: THE COMPETENCE GAP OR INSTITUTIONAL INVESTOR BIAS (2010).

136. *See* Brayley & Nguyen, *supra* note 90, at 13-14; David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 51 (2003). For a review of this evidence and its methodological limitations, see Amanda K. Packel & Deborah L. Rhode, *Diversity on Corporate Boards: How Much Difference Does Difference Make*? (Rock Ctr. for Corporate Governance, Working Paper No. 89, Sept. 2010), *available at* www.calstrs.com/corporategovernance/diversity_on_corporate_boards_difference.pdf.

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

138. MINORITY CORPORATE COUNSEL ASS'N, A CALL TO ACTION: DIVERSITY IN THE LEGAL PROFESSION COMMITMENT STATEMENT, *available at* http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=803.

139. *See* Claire Tower Putnam, Comment, *When Can a Law Firm Discriminate Among Its Own Employees to Meet a Client's Request? Reflections on the ACC's Call to Action*, 9 U. PA. J. LAB. & EMP. L. 657, 660 (2007); Karen Donovan, *Pushed by Clients, Law Firms Step Up to Diversity Efforts*, N.Y. TIMES, July 21, 2006, at C6. Wal-Mart has recently also required its outside firms to certify that origination credit goes to the relationship partner of its choosing. *See* Ben Adlin, *Wal-Mart's Diversity Efforts Are Reshaping Law Firm Structure*, S.F. DAILY J., Mar. 23, 2011, at 1.

140. *See* Nate Raymond, *Dewey Asks Clients to Consider Diversity in the Partner Ranks*, N.Y. L.J., Aug. 24, 2010, at 1.

141. *See* studies discussed in Packel & Rhode, *supra* note 136; *see also* Susan E. Jackson & Aparna Joshi, *Diversity in Social Context: A Multi-Attribute, Multi-Level Analysis of Team Diversity and Performance in a Sales Organization*, 25 J. ORGANIZATIONAL BEHAV. 675, 697 (2004). For an example, see Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance* 3 (Working Paper, 2008), *available at* http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=1107721 (concluding that, once they "appl[ied] procedures to tackle omitted variables and reverse causality problems," the apparent positive correlation between board diversity and firm value or operating performance disappeared and, on average, firms with greater gender diversity on the board perform worse).

conflict and communication problems, or cause outsiders to suppress divergent views.[142] Nor do all studies find a correlation between diversity and profitability.[143] In those that do, it is unclear which way causation runs. It may well be that financial success sometimes does more to enhance diversity than the converse; organizations that are on strong financial footing are better able to invest in diversity initiatives and sound employment practices that promote both diversity and profitability.[144] Moreover, the limited research available on retention suggests that what matters is attorneys' satisfaction with their firm's diversity, not the level of diversity itself.[145]

Of course, whatever the research shows, if enough clients become serious in their demands for inclusiveness, law firms will have an economic stake in promoting it. But whether the profession has reached that point is not self-evident. As partners in one in-depth survey noted, so long as many firms resist changes that would fundamentally increase diversity, then "where are [the clients] going to go?"[146] Few seem willing to abandon those firms as long as they appear to be making a "good faith effort."[147] No evidence suggests that regional and local business clients generally view diversity as a priority, and even the largest national companies that have pledged to reduce or end representation in appropriate cases have been extremely reluctant to do so.[148] For example, Wal-Mart, despite its highly publicized termination of two firms, continues to give much of its work to others with poor diversity records.[149]

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142. *See* studies discussed in Brayley & Nguyen, *supra* note 90; *see also* DOBBIN, JUNG & KALEV, *supra* note 135; Jonathan S. Leonard, David L. Levine & Aparna Joshi, *Do Birds of a Feather Shop Together? The Effects on Performance of Employees' Similarity With One Another and With Customers*, 25 J. ORGANIZATIONAL BEHAV. 731 (2004); Wilkins, *supra* note 90, at 1588-90; K.Y. Williams & C.A. O'Reilly, *Demography and Diversity in Organizations: A Review of 30 Years of Research*, *in* 20 RESEARCH IN ORGANIZATIONAL BEHAVIOR 77, 98 (B. Staw & R. Sutton eds., 1997).

143. *See* studies discussed in Packel & Rhode, *supra* note 136; *see also* Adams & Ferreira, *supra* note 141, at 3; Frank Dobbin, Jiwook Jung & Alexandra Kalev, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?* (Working Paper, 2010), *available at* http://www.hbs.edu/units/ob/pdf/Board%20Diversity%20and%20Performance.pdf.

144. *See* Brayley & Nyugen, *supra* note 90, at 34; Packel & Rhode, *supra* note 136; Kathleen A. Farrell & Philip L. Hersch, *Additions to Corporate Boards: The Effect of Gender*, 11 J. CORP. FIN. 85 (2005); Renee B. Adams & Daniel Ferreira, *Gender Diversity in the Boardroom* 16, 19 (ECGI, Finance Working Paper No. 58, 2004), *available at* http://www.business.illinois.edu/finance/papers/2005/adams.pdf.

145. *See* Brayley & Nyugen, *supra* note 90, at 31-32.

146. Conley, *supra* note 35, at 846.

147. *Id.*

148. *See id.*

149. *See* Brayley & Nyugen, *supra* note 90, at 37 (concluding that "[t]here is no evidence here that Wal-Mart is choosing its law firms with an eye to measured levels of diversity").

Under these circumstances, there are risks in relying too heavily on economic arguments for diversity, particularly if it results in cosmetic race matching to placate particular clients. Lawyers of color often resent being "treated like a commodity . . . a token who is simply there for the firm's numbers," and when such resentment encourages attrition, firm practices become self-defeating.[150] Moreover, if, as research suggests, many white partners simply "[d]o not find the business case for diversity to be especially compelling," then overclaiming its benefits can be counterproductive.[151] As David Wilkins notes, sweeping claims without adequate factual support "are just as likely to reinforce skepticism as to combat it."[152]

That is not, however, to suggest that economic justifications of diversity are entirely lacking. As noted earlier, some initiatives, such as work-family accommodations, make business sense. So does ensuring diverse perspectives when any resulting conflict can be effectively managed and lawyers of color receive genuine opportunities for professional development.[153] The fact that we lack hard data on other benefits is a reason to avoid exaggerating their significance, but not to dismiss their relevance. In a world in which the talent pool is half women and one-fifth lawyers of color, it is reasonable to assume that firms will suffer some competitive disadvantage if they cannot effectively recruit and retain these groups. Part of the reason that such disadvantages have been hard to quantify is that adequate comparative data on diversity traditionally have been hard to come by. Now, with the emergence of more complete and accessible databases, job candidates and clients who care about racial, ethnic, and gender equity can make more informed decisions.[154] So too, even if few clients actually terminate representation for diversity-related reasons, their pressure in steering work is likely to have an impact, particularly if diversity remains a potential tie breaker in today's increasingly competitive legal market.

So too, as the discussion below suggests, many practices that would improve conditions for women and lawyers of color serve broader organizational interests. Better mentoring programs, more equitable compensation and work assignment practices, and greater accountability of supervising attorneys are all likely to have long-term payoffs, however difficult to quantify with precision. Skeptics of the business case for diversity often proceed as if the business case for the current model is self-evident. Few experts on law firm management agree.[155]

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150. MINORITY CORPORATE COUNSEL ASS'N, *supra* note 38, at 14.

151. Conley, *supra* note 35, at 850.

152. Wilkins, *supra* note 90, at 1591.

153. *See supra* text accompanying notes 108-09.

154. An example is the site *Building a Better Legal Profession*, which makes NALP data on large firms' relative performance readily available online. BUILDING A BETTER LEGAL PROFESSION, http://www.betterlegalprofession.org/index.php (last visited June 23, 2011).

155. For a sampling of criticisms, see WILLIAMS & RICHARDSON, *supra* note 16, at 51-55.

B. THE LIMITS OF LAW

The legal arguments on behalf of diversity are also subject to limitations. The possibility of discrimination lawsuits by women and lawyers of color creates some pressure for diversity initiatives, but the impact is limited by the infrequency of successful litigation and concerns about reverse discrimination. Threats of litigation also discourage firms from collecting information that might reveal patterns of bias.[156] These competing considerations provide a significant, though seldom explicit, subtext for debates over diversity.

Close to fifty years' experience with civil rights legislation reveals almost no final judgments of sex or race discrimination involving law firms.[157] Potential plaintiffs face multiple obstacles. Part of the problem is the mismatch between legal definitions of discrimination and the social patterns that produce it. To prevail in a case involving professional employment, litigants generally must establish that they were treated differently on the basis of a prohibited characteristic, such as race, ethnicity, or sex.[158] Yet in the contemporary legal workplace, most bias is not a function of demonstrably discriminatory treatment. It is rather a product of interactions shaped by unconscious assumptions and organizational practices that "cannot be traced to the sexism [or racism of an identifiable] bad actor."[159]

So too, the subjectivity of standards in promotion and compensation decisions makes it difficult for individuals to know or prove whether they have been subject to bias. Even those who believe that they have experienced discrimination have little incentive to come forward, given the high costs of litigation, the low likelihood of victory, and the risks of informal blacklisting.[160] Plaintiffs are putting their professional lives on trial, and the profiles that emerge are seldom

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156. *See* Sturm, *supra* note 115, at 467.

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

158. Title VII of the Federal Civil Rights Act prohibits

> an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964, Pub. L. 88-352 (1964) (as amended, 42 U.S.C. § 2000 (e)(2)). For an overview, see KATHERINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 89 (2010).

159. Sturm, *supra* note 115, at 460.

160. The problem is true of employment discrimination litigation generally. *See* Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 707; Linda Hamilton Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, *in* SEX DISCRIMINATION IN THE WORKPLACE, *supra* note 59, at 296, 309-10.

entirely flattering. In one widely publicized case involving a gay associate who sued Wall Street's Sullivan & Cromwell, characterizations of the plaintiff in press accounts included "smarmy," and "paranoid kid with a persecution complex."[161] In an equally notorious sex discrimination suit, Philadelphia's Wolf, Block, Schorr & Solis-Cohen denied partnership to a woman allegedly lacking in both analytic abilities and other characteristics that might compensate for the deficiency. According to one partner, "It's like the ugly girl. Everybody says she has a great personality. It turns out that [the plaintiff] didn't even have a great personality."[162]

Evidentiary barriers in these cases are often insurmountable, both because lawyers generally know enough to avoid creating paper trails of bias, and because colleagues with corroborating evidence are reluctant to expose it for fear of jeopardizing their own positions.[163] On the rare occasions when plaintiffs can produce direct evidence of sexist or racist comments, courts sometimes deny its significance. "Stray remarks" in the workplace are insufficient to establish liability if the defendant can demonstrate some legitimate reason for the unfavorable treatment.[164] Moreover, even if the plaintiff can prove that bias affected an employment decision, if the firm can establish that non-discriminatory reasons would have produced the same outcome, then the recoveries available to a plaintiff are limited to injunctive relief and attorney's fees.

A sobering example of the difficulties of proof involves Nancy Ezold's suit against Wolf Block, the first sex discrimination case to go to trial against a law firm. At the time she was rejected for partnership, the firm's litigation department had one woman out of fifty-five partners; nationally, about eleven percent of partners at large firms were female.[165] The trial court found for Ezold, based on uniformly positive evaluations by the partners for whom she had worked, and a comparison with other male associates who had been promoted despite performance concerns similar to those expressed about Ezold. The court also relied on evidence of gender stereotypes, such as some partners' belief that she was too "assertive" and too preoccupied with "women's issues."[166] The Court of Appeals reversed that decision. In its view, the performance concerns of the two-thirds of partners who voted against Ezold were not so "obvious or manifest" a pretext as to justify liability. The appellate judges also criticized the trial court for its "pick

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161. Kolker, *supra* note 119, at 36.

162. Deborah L. Rhode, *What's Sex Got to Do With It: Diversity in the Legal Profession*, *in* LEGAL ETHICS: LAW STORIES 233, 246 (Deborah L. Rhode & David Luban eds., 2005) (quoting Charles Kopp).

163. *See* Riordan v. Kaminers, 831 F.2d 690, 697 (7th Cir. 1987); Rhode & Williams, *supra* note 59, at 243.

164. Heim v. State, 8 F.3d 1541, 1546 (10th Cir. 1993); *see also* Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 544-46 (3rd Cir. 1992), *cert. denied*, 510 U.S. 826 (1993); Rhode, *supra* note 162, at 241.

165. Rhode, *supra* note 162, at 235.

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

and choose" treatment of evaluations to compare, even as they engaged in the same process themselves to overturn the ruling.[167]

The outcome was similar in one of the nation's only reported race discrimination trials involving a law firm. Larry Mungin was a lateral hire to Katten Muchin & Zavis' Washington D.C. office. As a black man with undergraduate and law degrees from Harvard, and six years' experience in bankruptcy, he seemed a promising recruit. But he proved unable to bring business to the Washington office, and failed to make partner. His discrimination claim prevailed at trial, based on evidence that the firm had paid him less than other sixth-year associates, provided inadequate work, and prevented him from making key business contacts. The Court of Appeals reversed. In its view, Mungin had not met his burden of showing that he was treated worse than other white attorneys, or that his salary was lower than other laterals of comparable experience.[168] As one commentator put it, he was simply a victim of "business as usual mismanagement."[169]

More recent claims have generally not gone to trial. Most fail at the summary judgment stage; those that survive, settle.[170] But even firms that win in court often lose in the world outside it. Both the Mungin and Ezold cases attracted widespread publicity, much of it unfavorable.[171] Among the most damning disclosures in Ezold were evaluations of white male associates who had made partner when she was rejected: "wishy washy and immature," "more sizzle than steak,"and "not real smart."[172] A telling comment on the impact of the case came during a law student's job interview shortly after the appellate decision. When she asked a Wolf Block partner whether "things were different for women at the firm following the litigation," he replied: "Yes, now we view every female applicant as a potential plaintiff."[173] In reflecting on the firm's decision not to settle the case, one firm leader concluded: "This may have been a case that wasn't worth winning."[174] Sullivan & Cromwell apparently came to that same conclusion concerning its own discrimination lawsuit, which it settled after allegations of homophobic conduct attracted widespread publicity.[175] Covington

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167. Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 528 (3rd Cir. 1992); *see also* Rhode, *supra* note 162, at 243.

168. Mungin v. Katten, 116 F.3d 1549, 1557 (D.C. Cir. 1997).

169. Wilkins, *supra* note 123, at 1927 (quoting BARRETT, *supra* note 123).

170. *See* Smith, *supra* note 157, at 789.

171. Mungin's case was the subject of a book by his Harvard roommate, Paul Barrett, which was reviewed in the National Law Journal. The account, Mungin noted, hit the firm "where it hurts." Marcia Coyle, *Black Lawyer's Life, Suit Told by White Author*, NAT'L L.J., Jan. 11, 1999, at A14 (quoting Mungin v. Katten, 116 F.3d 1549 (D.C. Cir. 1997)). Ezold's case received widespread coverage. *See* sources cited in Rhode, *supra* note 162.

172. Ezold v. Wolf, Block, Schorr & Solis-Cohen, 751 F. Supp. 1175, 1184-86 (E.D. Pa. 1990).

173. Rhode, *supra* note 162, at 248.

174. *Id.* at 245 (quoting Robert Segal).

175. *See* Kolker, *supra* note 119.

& Burling is now facing a similar dilemma in dealing with a race discrimination claim by one of its contract attorneys, who has publicized her grievances in multiple forums.[176]

For the individuals most directly affected by litigation, the impact is also mixed. Some, like Lawrence Mungin, became virtually unemployable.[177] By contrast, Nancy Ezold went on to establish a profitable practice in sex discrimination litigation.[178] Some firms have gotten a helpful wake-up call about biased evaluation processes, and some women and minority lawyers have reportedly fared better as a result.[179] But these benefits may also have been double edged. Women who received promotions after the Wolf Block litigation paid a price in credibility; their label as "Ezold partners" was hard to shake.[180] Some gay attorneys at Sullivan & Cromwell also felt that the litigation was counterproductive. They had helped build the firm's "reputation for . . . an open environment" and believed that it had been damaged "in an unfair way" that diminished their own quality of life.[181]

What further complicates the legal landscape is the uncertain status of preferential treatment that disfavors white men. Although no reverse discrimination lawsuits involving law firms have yet to surface, case law raises grounds for concern. In the employment context, preferences based on race, gender, or ethnicity are generally illegal except where they are part of an affirmative action program narrowly tailored to remedy a "conspicuous . . . imbalance in traditionally segregated job categories."[182] Client pressures typically are not a justification for such preferential treatment.[183] Although the Supreme Court has narrowly upheld considerations based on diversity in educational admission programs so long as they do not involve fixed quotas, it is by no means clear how far this

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176. *See* Young v. Covington & Burling, LLP, 689 F. Supp. 2d 69 (D.D.C. 2010); Yolanda Young, *Law Firm Segregation Reminiscent of Jim Crow*, HUFFINGTON POST (Mar. 17, 2008), http://www.huffingtonpost.com/yolanda-young/law-firm-segregation-remi_b_91881.html; Yolanda Young, *What Eric Holder's Tenure at Covington and Burling Says About Blacks and BigLaw,* HUFFINGTON POST (Jan. 26, 2010), http://www.huffingtonpost.com/yolanda-young/what-eric-holders-tenure_b_161104.html; *Yolanda Young Amends Complaint, Intends to Seek Class Certification Against Covington*, ABOVE THE LAW (Aug. 24, 2009), http://abovethelaw.com/2009/08/yolanda-young-amends-complaint-intends-to-seek-class-certification-against-covington.

177. *See* BARRETT, *supra* note 123, at 59, 154 (quoting George Galland's claim that an associate who brings such a case may "never eat lunch in this town again" and Mungin's testimony that his "career is dead").

178. *See* Rhode, *supra* note 162, at 253.

179. *See id.* at 252.

180. *Id.*

181. Kolker, *supra* note 119, at 98 (quoting David H. Braff).

182. Johnson v. Transp. Agency, 480 U.S. 616, 616 (1987); *see also* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

183. For reviews of the case law, see Putnam, *supra* note 139, at 667-68; Ernest F. Lidge III, *Law Firm Employment Discrimination in Case Assignments at the Client's Insistence: A Bona Fide Occupational Qualification?*, 38 CONN. L. REV. 159, 168-69, 177-79 (2005).

rationale would extend to employment contexts.[184] It is, of course, unlikely that white male attorneys will be lining up to test the issue, given the risks to their own reputation. Still, liability concerns may discourage some overtly preferential treatment based on race, gender, or ethnicity.

Related problems involve the law's chilling effect on institutional reform. As Susan Sturm notes:

> Fear of liability for violation of ambiguous legal norms [concerning discrimination] induces firms to adopt strategies that reduce the short term risk of legal exposure rather than strategies that address the underlying problem. They accomplish this in significant part by discouraging the production of information that will reveal problems . . . or patterns of exclusion that increase the likelihood that they will be sued . . . . [Lawyers are encouraged] to see issues as potential legal claims rather than as problems in need of systemic resolution.[185]

C. THE LIMITED CONTRIBUTIONS OF CURRENT INITIATIVES

In light of these concerns, law firms have steered a prudential course. Most have made significant efforts, but seldom have their diversity initiatives prompted fundamental structural changes or systematic monitoring. Rather, the most common strategies, in addition to the part-time policies noted earlier, involve diversity training, outreach efforts to increase the pool of minority lawyers and job candidates, networks and affinity groups, and formal mentoring programs. All are well-intentioned. Few are highly effective.[186]

1. DIVERSITY TRAINING

Surveyed lawyers tend to be at best "lukewarm" about the usefulness of diversity training, and researchers who have studied its effectiveness are even less enthusiastic.[187] A large-scale review of diversity initiatives across multiple industries found that training programs did not significantly increase the

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184. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding a law school admission program that considered racial and ethnic diversity of applicants); Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down an undergraduate program because it awarded fixed points toward admission of targeted racial and ethnic minorities). It is also unclear what standards apply in reverse gender discrimination cases. *See* Rosalie Berger Levinson, *Gender Based Affirmative Action and Reverse Gender Bias: Beyond* Gratz*,* Parents Involved*, and* Ricci, 34 HARV. J.L. & GENDER 1, 13-18 (2011).

185. Sturm, *supra* note 115, at 468, 470-71, 475-76.

186. When asked to rate the overall effectiveness of diversity practices on a four point scale, women of color in Catalyst's survey gave a mean grade of only 3.1, compared with white men's 3.7; white women and men of color gave a 3.4. *See* BAGATI, *supra* note 28, at 16.

187. Darden, *supra* note 45, at 100. For the limited research and mixed or negative findings on effectiveness, see Elizabeth Levy Paluck, *Diversity Training and Intergroup Contact: A Call to Action Research*, 62 J. SOC. ISSUES 577, 583, 591 (2006); Deborah L. Rhode, *Social Research and Social Change: Meeting the Challenge of Gender Inequality and Sexual Abuse*, 30 HARV. J.L. & GENDER 11, 13-14 (2007). For law firms' failure to systematically monitor diversity programs, see ABA PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, *supra* note 133, at 11.

representation or advancement of targeted groups.[188] Part of the problem is that such programs typically focus on individual rather than institutional behaviors, provide no incentives to implement recommended practices, and sometimes provoke backlash among involuntary participants.[189] Seldom do these programs focus on the kind of training that surveyed lawyers find most lacking, such as how to give effective feedback or manage a diverse workforce.[190]

2. Pipeline and Outreach Programs

Of equally limited value are firms' efforts to increase the pipeline of minority candidates. These efforts have focused on expanding recruitment and providing scholarships, mentoring, or other support programs to underrepresented groups. But much more could be done, and few firms have made major commitments.[191] An exception is Skadden and Arps; it has pledged $10 million over the next ten years to help prepare students from disadvantaged backgrounds for law school.[192] As Ruthe Ashby of the ABA notes, "this is the kind of money we need to make a difference . . . Now we need just 500 other firms to take action."[193]

3. Networks and Affinity Groups

Among the most common diversity strategies are networks and affinity groups for women and minorities. In one survey by the National Association of Women Lawyers, ninety-five percent of firms reported women's initiatives that included social networking.[194] Many firms also support groups for minority lawyers within or outside the firm. These vary in effectiveness. At their best, network and affinity organizations can provide useful advice, role models, contacts, and development of informal mentoring relationships.[195] In some cases, these groups

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188. Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 Harv. J.L. & Gender 279, 293-95 (2007) [hereinafter Dobbin & Kalev, *The Architecture of Inclusion*]; Frank Dobbin, Alexandra Kalev & Erin Kelly, *Diversity Management in Corporate America*, Contexts, Fall 2007, at 21, 23-25, *available at* www.wjh.harvard.edu/soc/faculty/dobbin/Contexts_2007.pdf [hereinafter Dobbin, Kalev & Kelly, *Diversity Management*].

189. *See* Darden, *supra* note 45, at 117; Donna Chrobot-Mason, Rosemary Hays-Thomas & Heather Wishik, *Understanding and Defusing Resistance to Diversity Training and Learning*, *in* Diversity Resistance in Organizations 23, 23-29 (Kecia M. Thomas ed., 2008)*;* Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 Law & Soc'y Rev. 23, 24, 34 (1998).

190. Less than one-fifth of attorneys in Catalyst's survey believed that supervisors received such training. Bagati, *supra* note 28, at 14.

191. For proposals, see ABA Presidential Initiative Comm'n on Diversity, *supra* note 133, at 24.

192. *See* Eckel, *supra* note 1, at 20.

193. *Id.*

194. *See* Nat'l Ass'n of Women Lawyers, National Survey on Retention and Promotion of Women in Law Firms 15 (2007).

195. *See* Schipani et al., *supra* note 79, at 131; Alexandra Kalev, Frank Dobbin & Erin Kelley, *Best Practices or Best Guesses?: Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 Am. Soc. Rev. 589, 594 (2006).

have been the source of reform proposals for their firms.[196] Yet many of these initiatives are what one lawyer described as "dead in the water."[197] A large-scale study similarly found that networks had no significant positive impact on career development; they may increase participants' sense of community but may not do enough to put them "in touch with what . . . or whom they need to know."[198] As other researchers note, as long as the upper levels of management of both firms and their corporate clients are dominated by white men, an affinity group that excludes them will have serious limitations; for lawyers who have "career advancement in mind, participation in a more mainstream network is highly advised."[199]

4. MENTORING PROGRAMS

Mentoring programs, by contrast, are among the most effective diversity strategies. Somewhere between one-half to two-thirds of surveyed firms report such programs for women, and generally design them to serve two objectives: psychosocial support (such as role modeling, friendship, and personal advice) and career support (such as professional advice, contacts, and advocacy).[200] Effective mentoring relationships can enhance career skills, satisfaction, retention, and advancement.[201]

Not all programs, however, achieve the desired effect. In one ABA study, two-thirds of women of color and over half of white women and men of color would have liked better mentoring.[202] As noted earlier, one problem is the inadequate number of women and minorities in senior positions to mentor junior attorneys. Another is the lack of incentives to do so; mentoring activities are not well rewarded at most firms, and high rates of associate turnover make busy senior partners reluctant to invest in training lawyers who are likely to leave. Random assignment of relationships compounds the problem, particularly when it involves cross-gender or cross-racial pairings.[203] Too many attorneys end up

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196. *See, e.g.*, Bob Yates, *Law Firms Address Retention of Women and Minorities*, CHI. LAW. (Mar. 2007).

197. Darden, *supra* note 45, at 97.

198. Dobbin, Kalev & Kelly, *Diversity Management*, *supra* note 188, at 25.

199. Schipani et al., *supra* note 79, at 135; *see also* Hetty van Emmerik, S. Gayle Baugh & Martin C. Euwema, *Who Wants to be a Mentor? An Examination of Attitudinal, Instrumental, and Social Motivational Components*, 10 CAREER DEV. INT'L. 310, 413 (2005).

200. For surveys, see NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 194, at 15; WORKING MOTHER & FLEX TIME LAWYERS, BEST LAW FIRMS FOR WOMEN (2007), *available at* http://www.flextimelawyers.com/best/trends.pdf. For benefits, see Fiona M. Kay & Jean E. Wallace, *Mentors as Social Capital: Gender, Mentors, and Career Rewards in Law Practice*, 79 SOC. INQUIRY 418, 423 (2009); Schipani et al., *supra* note 79, at 100-01.

201. *See* Payne-Pikus, Hagan & Nelson, *supra* note 80, at 560, 576-77; Kalev, Dobbin & Kelly, *supra* note 195, at 594; Rhode & Kellerman, *supra* note 62, at 30; Schipani et al., *supra* note 79, at 100-01.

202. *See* Jill Schachner Chanen, *Early Exits*, A.B.A. J. 36 (2006), *available at* http://www.abanet.org/women/woc/EarlyExits.pdfc.

203. *See* IDA O. ABBOTT, ESQ. & RITA S. BOAGS, PH.D., MINORITY CORPORATE COUNSEL ASS'N, MENTORING ACROSS DIFFERENCES: A GUIDE TO CROSS-GENDER AND CROSS-RACE MENTORING, *available at* http://www.mcca.

with mentors with whom they have little in common. Senior men often report discomfort or inadequacy in discussing "women's issues," and minorities express reluctance to raise diversity-related concerns with those who lack personal experience or empathy.[204]

Program structures present further difficulties. Most do not specify the frequency of meetings, set goals for the relationship, or require evaluation.[205] Instead, they rely on a "call me if you need anything" approach, which leaves too many junior attorneys reluctant to become a burden.[206] Other programs demand a minimum amount of contact and "reams of reports," which may make the relationship seem like just one more pro forma administrative obligation.[207] Not surprisingly, informal mentoring relationships confer more overall benefits than formal ones, and too few programs have been structured in ways to narrow the gap.[208]

IV. STRATEGIES FOR CHANGE

How then, can firms more effectively promote equity and diversity? The first step, of course, is to make that objective a priority and to establish structures that will promote it.

A. ACCOUNTABILITY

As a threshold matter, firms need to centralize responsibility for developing and overseeing diversity initiatives. The most successful approaches tend to be task forces or committees with diverse and respected members who have credibility with their colleagues and firm leadership.[209] This group's mission should be to identify problems, design responses, and monitor their effectiveness.[210] Some firms also have found it helpful to have a diversity officer track the progress of underrepresented groups at both an individual and institutional level. These officers can intervene at the "first signs of trouble" for junior lawyers, such

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com/index.cfm?fuseaction=page.viewpage&pageid=666; Leigh Jones, *Mentoring Plans Failing Associates*, NAT'L L.J., Sept. 18, 2006, at 1.

204. Jones, *supra* note 203, at 1; *see also* ABBOTT & BOAGS, *supra* note 203, at 10, 18.

205. *See, e.g.*, MINN. STATE BAR ASS'N, DIVERSITY AND GENDER EQUITY IN THE LEGAL PROFESSION: BEST PRACTICES GUIDE 70-71, 77, 78-79 (2008), *available at* http:///www.mnbar.org/committees/DiversityImplementation/DiversityBestPracticesGuideFinal.pdf.

206. *Id*. at 77.

207. Jones, *supra* note 203, at 1.

208. *See* Schipani, *supra* note 79, at 112. The key variable is satisfaction with the relationship, which tends to be higher when the relationship arises naturally. *See id*. at 126; Rhode & Kellerman, *supra* note 62, at 30.

209. *See* Dobbin & Kalev, *The Architecture of Inclusion*, *supra* note 188, at 283; JEANINE PRIME, MARISSA AGIN & HEATHER FOUST-CUMMINGS, STRATEGY MATTERS: EVALUATING COMPANY APPROACHES FOR CREATING INCLUSIVE WORKPLACES 6 (2010); Beiner, *supra* note 9, at 333.

210. *See* Sturm, *supra* note 115, at 475. For an example, see the discussion of Deloitte & Touche's Task Force on the Retention and Advancement of Women, in *id.* at 493.

as inadequate billable hours, negative evaluations, or dead-end assignments.[211] Officers can also identify patterns that suggest more systemic problems calling for broader responses. A related strategy is the use of ombudspersons or issue-specific committees with diverse memberships to address equity-related concerns, such as those involving compensation and performance appraisals.[212] Whatever oversight structure a firm chooses, one central priority should be the design of effective evaluation and reward structures. Supervising lawyers and department heads need to be held responsible for their performance on diversity-related issues.[213] Such accountability is, of course, far easier to advocate than to achieve, particularly given the limitations of research on what oversight strategies actually work. Our knowledge is mainly about what doesn't. Performance appraisals for supervising lawyers that include diversity but lack significant rewards or sanctions are unlikely to affect behavior.[214] However, we know little about what has helped firms deal with powerful partners who rate poorly on dimensions that affect diversity, or whether incentives like mentoring awards and significant bonuses are effective in changing organizational culture.[215] More experimentation and pooling of information could help firms translate rhetorical commitments into institutional priorities.

Greater external accountability could also prove important. Increasing the number of clients who act on their demands for diversity could strengthen the business case for reform. So would increasing the number of well-credentialed recruits who seriously consider factors like equity, inclusiveness, mentoring, and work/life balance when choosing a law firm.[216] To that end, bar associations, legal publications, and placement organizations could pressure firms to provide greater transparency on these issues. More comprehensive comparative data should be available on matters such as the gender, racial, and ethnic composition of equity partners and leadership positions. Firms and general counsels could

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211. Darden, *supra* note 45, at 103.

212. For recommendations of an ombudsperson, see MINORITY CORPORATE COUNSEL ASS'N, *supra* note 38, at 38. For recommendations of a diverse committee to address compensation concerns, see WILLIAMS & RICHARDSON, *supra* note 16, at 57, 59.

213. BAGATI, *supra* note 28, at 49; Rhode & Kellerman, *supra* note 62, at 27; Ridgeway & England, *supra* note 59, at 202.

214. Dobbin & Kalev, *The Architecture of Inclusion*, *supra* note 188, at 293-94; Dobbin, Kalev & Kelly, *Diversity Management*, *supra* note 188, at 24-25.

215. Many recommendations of accountability are notably vague. See, for example, MCCA's call for "innovative methods" to reward contributions to diversity, MINORITY CORPORATE COUNSEL ASS'N, *supra* note 38, at 35, and its demand that unequal opportunities in work assignments be "effectively addressed," *id.* at 27, as well as Catalyst's advocacy of strategies that will increase "intrinsic" motivation. PRIME, AGIN & FOUST-CUMMINGS, *supra* note 209, at 35. For bonuses, see Beiner, *supra* note 9, at 332-33 (noting Coca-Cola's program without details of effectiveness) and Rhode & Kellerman, *supra* note 62, at 27 (discussing backlash resulting from one "grab a girly" system).

216. For the improvements in workplace culture that might occur if recruits focused less on salary and more on quality of life, see LEVIT & LINDER, *supra* note 8, at 177; Ronit Dinovitzer & Bryant Garth, *Not That Into You*, AM. LAW., Sept. 2009, at 57.

work with organizations such as the Leadership Council on Legal Diversity, which has initiatives around four core areas: benchmarking, development, partnership, and pipelines.[217] More positive recognition should be available for those that adopt best practices or achieve specific goals concerning diversity and equity. Public shaming of cellar dwellers could also be effective in drawing attention to these issues.

B. MONITORING

A truism in organizational management is that what gets measured gets done.[218] Firm leaders need to know how policies that affect diversity and equity play out in practice. That requires collecting both quantitative and qualitative data on matters such as advancement, retention, compensation, satisfaction, mentoring, leadership opportunities, and work/family conflicts. For example, to evaluate compensation systems, firms need comparisons by race, ethnicity, and gender concerning lawyers' incomes, profits generated, and perceptions about the fairness of reward structures.[219] To assess reduced schedule policies, firms need information on utilization rates, effects on promotion, attrition, and work assignments, and satisfaction among part-time lawyers, their clients, and their colleagues.[220] Periodic surveys, focus groups, interviews with former and departing employees, and bottom-up evaluations of supervisors could all cast light on problems disproportionately experienced by women and minorities. For example, the Deloitte & Touche Task Force on the Retention and Advancement of Women commissioned Catalyst to collect such information, which revealed patterns of gender bias calling for institutional responses.[221] The ABA's Presidential Initiative Commission on Diversity recommended that firms make self-assessment part of all diversity efforts.[222]

Monitoring can be important not only in identifying problems, but also in refining solutions. Firms need insight into root causes and the effectiveness of structural reforms.[223] In some instances, it helps just to make people aware that

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217. *See* LEADERSHIP COUNCIL ON LEGAL DIVERSITY, http://www.lcldnet.org (last visited Apr. 19, 2011).

218. *See* Maureen Giovannini, *What Gets Measured Gets Done: Achieving Results Through Diversity and Inclusion*, 27 J. FOR QUALITY & PARTICIPATION 21 (2004). For the importance of monitoring generally, see Susan Bisom-Rapp, Mararet S. Stockdale & Faye J. Crosby, *A Critical look at Organizational Responses to Remedies for Sex Discrimination*, *in* SEX DISCRIMINATION IN THE WORKPLACE, *supra* note 59, at 273, 287; Krieger, *supra* note 160, at 317-19.

219. WILLIAMS & RICHARDSON, *supra* note 16, at 56.

220. RHODE, *supra* note 61, at 33. For other aspects of part-time policies that should be monitored, see CALVERT, CHANOW & MARKS, *supra* note 105, at 5-7.

221. *See* Sturm, *supra* note 115, at 496.

222. *See* ABA PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, *supra* note 133, at 23.

223. For the importance of reforms that build institutional capacity, see Susan Sturm, *Lawyers and the Practice of Workplace Equity*, WIS. L. REV. 277, 290 (2002).

their actions are being monitored.[224] Requiring individuals to justify their decisions can help reduce bias.[225] Monitoring can also help firms target their resources and experiment with innovative approaches. For example, pilot projects in group mentoring and electronic mentoring could be assessed to determine their efficiency in expanding lawyers' support structures.[226] So too, firms could benefit from sharing certain information in order to benchmark performance and to identify best practices. National groups like the Leadership Council on Legal Diversity, as well as many local bar organizations, have initiatives to promote such collaboration. Another model is the agreement by nine elite universities to work toward gender equity in science and engineering by "monitoring data and sharing results annually."[227] Even organizations that are competitive in other respects can learn from each other on matters in which they, and the profession as a whole, have a stake in improving performance.

C. BEST PRACTICES

Even without extensive monitoring and information sharing, firms can build on the research already available concerning diversity and gender equity. Best practices have been developed in areas most likely to influence fairness and inclusion in law firms, such as compensation, assignments, performance appraisals, mentoring, and reduced hour/flexible work schedules.[228] For example, an

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224. *See* Emilio J. Castilla, *Gender, Race and Meritocracy in Organizational Careers*, AM. J. SOC. 1479, 1485 (2008).

225. *See* Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1381 (2008); Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 59 SOC. PSYCHOL. Q. 237, 247 (1996).

226. Under some models of group mentoring, any individual can join a group, which serves many of the same functions as affinity organizations. *See* Schipani et al., *supra* note 79, at 127-28; Mara H. Wasburn & Alexandra W. Crispo, *Strategic Collaboration: Developing a More Effective Mentoring Model*, 27 REV. BUS. 18, 18-224 (2006); Kathryn H. Dansky, *The Effect of Group Mentoring on Career Outcomes*, 21 GROUP & ORG. STUD. 5, 9-13 (1996). Electronic mentoring (e-mentoring) provides support through on-line communications including email and chat rooms.

227. GENDER EQUITY IN ACADEMIC SCIENCE AND ENGINEERING (2001), *reprinted in* STANFORD UNIVERSITY, BUILDING ON EXCELLENCE: GUIDE TO RECRUITING AND RETAINING AN EXCELLENT AND DIVERSE FACULTY AT STANFORD UNIVERSITY (2008). This agreement by the "MIT Nine" universities has prompted sharing of information about diversity and gender equity across their institutions, not just in the sciences and engineering. For the value of such information sharing, see Sturm, *supra* note 115, at 522-38, and Sturm, *supra* note 223, at 293. The point of this example is not to imply that firms and universities face the same challenges and incentive structures concerning diversity, but simply to point out that even institutions that are competing for the same talent pool have found it helpful to collaborate in ways that benefit all partners.

228. Examples include WILLIAMS & RICHARDSON, *supra* note 16, at 55-63 (compensation); ABBOTT & BOAGS, *supra* note 203, at 21-37 (mentoring); ABA COMM'N ON WOMEN IN THE PROFESSION, FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS (2nd ed. 2008) (performance appraisals); ABA PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, *supra* note 133, at 23; RHODE, *supra* note 61, at 22-25, 33-40, 43-47, 51-59, 63-64; CALVERT, CHANOW & MARKS, *supra* note 105, at 28-34 (reduced hours); JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, NAT'L ASS'N FOR LAW PLACEMENT, SOLVING THE PART-TIME PUZZLE: THE LAW FIRM'S GUIDE TO BALANCED HOURS (2004).

effective scheduling policy should:

- Enable any lawyer, including an equity partner or lawyer on a partnership track, to adopt a flexible or reduced-hour schedule;
- Provide proportional compensation;
- Support professional development opportunities for those on reduced or flexible schedules;
- Establish appropriate coordination and evaluation structures to ensure that the concerns of lawyers, clients, and colleagues are effectively addressed.[229]

Such standards are an important step towards insuring that policies are fair, and appear fair, to all those affected.

D. LAW

The law could play a more constructive role in these efforts. Its focus should be less on the search for elusive evidence of intentional prejudice, and more on the structural conditions that promote equity and inclusion. In the infrequent cases in which lawyers allege discrimination, attention should center on the policies in place to address it. To increase firms' incentive to investigate problems, the results of such internal inquiries should be privileged in any subsequent litigation.[230] More informal dispute resolution resources should be in place, both in law firms and in agencies like the EEOC, to encourage low-cost resolution of diversity-related concerns.

E. CULTURES OF COMMITMENT

Significant change requires not simply constructing an effective reform agenda, but also building a commitment to achieve it. Diversity and equity need to be seen not as "women's" or "minority" issues, but as firm priorities, in which women and minorities have a particular stake. As two diversity consultants put it, "[i]nclusion can be built only through inclusion . . . Change needs to happen in partnership *with* the people of the organization not *to* them."[231] All firm leaders need to be engaged in creating institutional capacity for change and to be persuaded that the organization will benefit from the result.

In some respects, the current economic climate provides a timely context for persuasion. One of the few welcome byproducts of the recent financial downturn is that it has prompted many firms to reconsider the long-term viability of their economic model. In this setting, diversity issues can become a useful diagnostic

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229. *See* CALVERT, CHANOW & MARKS, *supra* note 105, at 29-33; RHODE, *supra* note 61, at 43-45.

230. *See* recommendations in Sturm, *supra* note 223, at 293; Rhode & Williams, *supra* note 59, at 259-60.

231. FREDERICK A. MILLER & JUDITH H. KATZ, THE INCLUSION BREAKTHROUGH: UNLEASHING THE REAL POWER OF DIVERSITY 37-38 (2002).

tool. Like coal miners' canaries, racial and gender disparities are a signal of deeper dysfunctions.[232] In the increasingly competitive atmosphere of contemporary practice, firms can ill afford to shortchange so much legal talent. This is, in short, a critical moment for the bar to structure more sustained, searching, and candid discussions about diversity. Symposia like this one can help initiate such conversations. At their best, these occasions can remind the bar of its aspirations to equity and the ways in which it still falls short.

232. *See* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11-12 (2002).