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# Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships

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## **DIFFERENCE BLINDNESS VS. BIAS AWARENESS: WHY LAW FIRMS WITH THE BEST OF INTENTIONS HAVE FAILED TO CREATE DIVERSE PARTNERSHIPS**

*Russell G. Pearce,\* Eli Wald\*\* & Swethaa S. Ballakrishnen\*\*\**

*This Article uses the example of BigLaw firms to explore the challenges that many elite organizations face in providing equal opportunity to their workers. Despite good intentions and the investment of significant resources, large law firms have been consistently unable to deliver diverse partnership structures—especially in more senior positions of power. Building on implicit and institutional bias scholarship and on successful approaches described in the organizational behavior literature, we argue that a significant barrier to systemic diversity at the law firm partnership level has been, paradoxically, the insistence on difference blindness standards that seek to evaluate each person on their individual merit. While powerful in dismantling intentional discrimination, these standards rely on an assumption that lawyers are, and have the power to act as, atomistic individuals—a dangerous assumption that has been disproven consistently by the literature establishing the continuing and powerful influence of implicit and institutional bias. Accordingly, difference blindness, which holds all lawyers accountable to seemingly neutral standards, disproportionately disadvantages diverse populations and normalizes the dominance of certain actors—here, white men—by creating the illusion that success or failure depends upon individual rather than structural constraints. In contrast, we argue that a bias awareness approach that encourages identity awareness and a relational framework is a more promising way to promote equality, equity, and inclusion.*

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There are little Indian girls out there who look up to me, and I never want to belittle the honor of being an inspiration to them. But while I'm talking about why I'm so different, white male show runners get to talk about their art.<sup>1</sup>

#### INTRODUCTION

A recent study found that law firm partners gave a significantly higher evaluation to an associate's memorandum when they were told the associate was white than when they were told the associate was black, and similarly described the associate's potential as far more positive when they believed the associate was white.<sup>2</sup> This powerful evidence of bias called into question law firms' strongly stated commitment to equity and inclusion.

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1. Mindy Kaling on standing out in the male-dominated comedy world and being a role model. See Shawna Malcom, *Thoroughly Modern Mindy Kaling*, PARADE MAG. (Sept. 26, 2013), <http://parade.com/167948/shawnamalcom/thoroughly-modern-mindy-kaling/>.

2. See generally ARIN N. REEVES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2014), available at [http://www.nextions.com/wp-content/files\\_mf/14151940752014040114WritteninBlackandWhiteYPS.pdf](http://www.nextions.com/wp-content/files_mf/14151940752014040114WritteninBlackandWhiteYPS.pdf).

For the past thirty years, elite service organizations, such as law firms, have embraced (to varying degrees) a legal and cultural commitment to equality<sup>3</sup> by being structurally open to hiring and promoting diverse professionals. But it has not just been a rhetorical invitation rife with hand waving—this openness has manifested itself in the form of millions of dollars worth of programs and initiatives, committed to making organizations more inclusive and diversity friendly.<sup>4</sup> And indeed, there are more diverse inhabitants in these spaces now than ever before,<sup>5</sup> especially in BigLaw,<sup>6</sup> where this commitment to equity and inclusion has afforded unprecedented opportunities to women, people of color, sexual minorities, and people with disabilities.<sup>7</sup> Even so, although the population of big firm lawyers has become more diverse in the decades following these interventions, positions of power are still predominantly stratified<sup>8</sup> with an overrepresentation of white men in senior positions, especially compared to their relative rate of entry.<sup>9</sup>

Law firms' resistance to systemic change has put in place organizations that look more diverse overall, but are still rigidly reproducing existing hierarchies of race and gender at the top. These gaps in intra-firm achievement have become even more conspicuous as more women have graduated<sup>10</sup> and entered law firms,<sup>11</sup> and people of color are emerging as

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3. See *infra* Part I.

4. See Virginia G. Essandoh, *Tear Up the Old Diversity Plan; Forget Just Doing Something. You Must Do Something Dramatically Different*, NAT'L L.J., Nov. 5, 2007 (stating that 99 percent of the Am Law top 200 firms spend tens of thousands of dollars on programs promoting diversity); see also Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 5 (2009). Examples of diversity initiatives include recruiting efforts designed to help increase diversity within the firm, diversity training initiatives focused on education and awareness, and community outreach related to diversity. See Soc'y Human Res. Mgmt., *Fortune Survey Says Diversity Keeps Competitive Edge* Letter No. 227 (Aug. 31, 2001), 2001 WL 36651531; see also *Member Diversity Initiatives*, NALP, <http://www.nalp.org/memberdiversityinitiatives> (last visited Mar. 25, 2015) (featuring diversity initiatives at law firms, which are primarily diversity scholarship programs to recruit minority students).

5. Karen Sloan, *U.S. Law Firms Slowly Growing More Diverse, Survey Shows*, NAT'L L.J. (Feb. 17, 2015), available at <http://www.nationallawjournal.com/id=1202718075884/US-Law-Firms-Slowly-Growing-More-Diverse-Survey-Shows?slreturn=20150205192418>.

6. The term "BigLaw" generally refers to the largest law firms in the world. See Lawrence Friedman & Louis Schulze, *Not Everyone Works for BigLaw: A Response to Neil J. Dilloff*, 71 MD. L. REV. ENDNOTES 41, 41 n.3 (2012), <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1018&context=endnotes>.

7. See, e.g., MINORITY CORPORATE COUNSEL ASS'N, *DO GOOD, DO WELL LIST* (2015) (showcasing law firms that have successful diversity and inclusion efforts), available at [http://www.mcca.com/\\_data/global/downloads/research/reports/2014-Do\\_Good\\_Do\\_Well-v01.pdf](http://www.mcca.com/_data/global/downloads/research/reports/2014-Do_Good_Do_Well-v01.pdf).

8. See *infra* Part I.B; Helia Garrido Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, 4 COLUM. J. RACE & L. 1, 6–9 (2013); Rebecca L. Sandefur, *Staying Power: The Persistence of Social Inequality in Shaping Lawyer Stratification and Lawyers' Persistence in the Profession*, 36 SW. U. L. REV. 539, 545–46 (2007).

9. See *infra* Part I.B; Hull, *supra* note 8, at 6–9; see also Theresa M. Beiner, *Not All Lawyers Are Equal: Difficulties That Plague Women and Women of Color*, 58 SYRACUSE L. REV. 317, 327–28 (2008).

10. PAUL TAYLOR ET AL., PEW RESEARCH CTR., *WOMEN, MEN, AND THE NEW ECONOMICS OF MARRIAGE* 2 (2010), available at <http://pewsocialtrends.org/files/2010/11/new->

the majority of the U.S. population.<sup>12</sup> For example, during the past generation, while feeder law schools'<sup>13</sup> student bodies comprised about 50 percent women<sup>14</sup> and 33 percent minorities,<sup>15</sup> the number of equity partners has remained disproportionately skewed to white men, with women representing only 16.5 percent<sup>16</sup> and minorities only 5.06 percent.<sup>17</sup> Similarly, although lesbian, gay, bisexual, and transgender (LGBT) lawyers represent 2.29 percent of associates,<sup>18</sup> they were only 1.36 percent of lawyers who made partner in 2009.<sup>19</sup> Worse, lawyers with disabilities are underrepresented at the entry level at 0.14 percent,<sup>20</sup> and at the partnership

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economics-of-marriage.pdf; see also Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 323.

11. NAT'L ASS'N WOMEN LAWYERS, REPORT OF THE THIRD ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 5 (2008), available at <http://amlawdaily.typepad.com/NAWLSurvey.pdf> (surveying the Am Law top 200 law firms and concluding that "[w]omen start out in about equal numbers to men when they enter law firms as first year associates . . . [constituting] 48% of first and second year associates, a percentage that approximates the law school population").

12. Robert Bernstein, *Most Children Younger Than Age 1 Are Minorities*, *Census Bureau Reports*, U.S. CENSUS BUREAU (May 17, 2012), <https://www.census.gov/newsroom/releases/archives/population/cb12-90.html>.

13. Feeder law schools are the law schools from which large law firms primarily recruit entry-level associates. Historically, elite Wall Street law firms recruited exclusively from Harvard, Yale, and Columbia law schools. As large law firm grew they gradually began to recruit deeper into the classes of existing feeder schools as well as expand the ranks of feeder schools. See, e.g., Olufunmilayo B. Arewa et al., *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941, 996–97 (2014).

14. We acknowledge that we are focusing only on one piece of the legal profession. For example, we are not exploring the lack of equity and inclusion in either the pipeline to law school, see, e.g., Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 283 (2014) (comparing diversity in the legal profession to similar occupations), or in the hiring and promotion of law school faculty, see, e.g., AM. ASS'N LAW SCH., THE RACIAL GAP IN THE PROMOTION TO TENURE OF LAW PROFESSORS: REPORT OF THE COMMITTEE ON THE RECRUITMENT AND RETENTION OF MINORITY LAW TEACHERS 1–2 (2005), <http://aalsfar.com/documents/racialgap.pdf>. Nonetheless, we suggest that the mythology of the atomist person pervades legal culture and that a relational perspective will be more likely to achieve equity and inclusion in any context.

15. Modupe N. Akinola & David A. Thomas, *Defining the Attributes and Processes That Enhance the Effectiveness of Workforce Diversity Initiatives in Knowledge Intensive Firms* 13 (Harvard Bus. Sch., Working Paper No. 07-019, 2008).

16. LISA D'ANNOLFO LEVEY, N.Y.C. BAR ASSOC., 2009 LAW FIRM DIVERSITY BENCHMARKING REPORT: REPORT TO SIGNATORIES OF THE STATEMENT DIVERSITY PRINCIPLES, app. at 16 (2009), available at [http://www.nycbar.org/images/stories/pdfs/final\\_appendices09.pdf](http://www.nycbar.org/images/stories/pdfs/final_appendices09.pdf).

17. LISA D'ANNOLFO LEVEY, N.Y.C. BAR ASSOC., 2007 DIVERSITY BENCHMARKING STUDY: A REPORT TO SIGNATORY LAW FIRMS 38 (2007), available at <http://www.nycbar.org/images/stories/pdfs/firmbenchmarking07.pdf>.

18. *Although Most Firms Collect GLBT Lawyer Information, Overall Numbers Remain Low*, NALP BULL. (Dec. 2009), <http://www.nalp.org/dec09glbt>.

19. *Id.*

20. LEVEY, *supra* note 17, at 23; see also Alex B. Long, *Reasonable Accommodation As Professional Responsibility, Reasonable Accommodation As Professionalism*, 47 U.C. DAVIS L. REV. 1753, 1755–56 (“The legal profession has been similarly slow to welcome individuals with disabilities into the profession. According to the U.S. Census Bureau, 54 million Americans or 19% of the civilian noninstitutionalized population has a disability of

level with 0.18 percent,<sup>21</sup> although it has been “estimated that at least ten percent of law students have a disability.”<sup>22</sup>

This sparse representation demands that we revisit the original paradigms of diversity management and reassess the ways in which firms have shouldered the agenda of inclusion. Particularly, it urges the following introspection about current and future policy: Should organizations continue to employ the methods of diversity inclusion currently in use, what will the future look like? Are we inadvertently continuing to create institutions that privilege white men and their dominance? Or can elite institutions, in line with their ideological agenda of inclusivity, reflect equal participation of all in the future?

This Article examines the case of elite law practice by using the lens of two preliminary frameworks. First is the *difference blindness* approach, which is the predominantly popular paradigm for inclusion that firms currently employ (and think of as diversity-friendly). Second is the *bias awareness* model, which we posit as a more viable alternative for sustainable equity and inclusion.

Difference blindness, the preexisting framework of elite organizations that are committed to equality, is an inclusivity paradigm that is grounded in a myth of the meritocratic journey of the atomistic individual. Originating in the color-blind approach to race discrimination,<sup>23</sup> the difference blind paradigm applies this approach to all identities and rests on an assumption that once at the firm, partners and associates behave as atomistic actors, such that their achievement is a function of individual merit and that discrimination only occurs when individuals in power intentionally engage in it. In turn, seen through this lens of difference blindness, the chronic underrepresentation of people who are not white male heterosexuals appears to be a feature of a system grounded in assumptive—and dangerous—notions of equality. In this light, the organizations and institutions are meritocratic and equal (because they structurally allow for inclusion) and it is the individuals who are at fault for not “making the cut.”

On the other hand, we set forth here a paradigm of *bias awareness*, an approach reflecting a relational understanding of achievement, merit and identity. In doing so, we suggest a set of institutional changes that might

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some kind. Yet, in a recent survey of law firms that sought disability information for approximately 110,000 lawyers, only 255, or 0.23%, were identified as having a disability.”).

21. LEVEY, *supra* note 17, at 23.

22. Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 451–52 (2011).

23. See, e.g., MICHAEL C. DORF & TREVOR W. MORRISON, CONSTITUTIONAL LAW 156–65 (2010); DEVON W. CARBADO & RACHEL F. MORAN, RACE LAW CASES IN THE AMERICAN STORY 29–35 (Austin Sarat ed., 2014); Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J. L. & SOC. POL'Y 473 (2011).

hold the key to alternative notions of relational meritocracy and equality.<sup>24</sup> Seen through the framework of *bias awareness*, we argue that the widely non-diverse institutions in place today are not much of an accident. Bias awareness calls for a reevaluation of the preexisting frameworks that difference blindness takes for granted. While committed to the same umbrella constructs that created the difference blindness approach, i.e., equality, fair treatment, and meritocracy, it sheds light on the fact that sometimes visible formal equality is substantively unequal, and ignoring implicit bias and presumptions in scenarios like this could be harmful for the grander goals that organizations seem committed to in good faith. Specifically, we suggest that a positive answer to the questions above would require leaders of elite institutions to abandon their currently predominant culture of *difference blindness* and adopt instead a paradigm of *bias awareness*.

Challenging difference blindness is a difficult task because it is grounded in the seemingly unassailable ideological presumption that merit embodies inclusiveness by treating everyone equally irrespective of irrelevant differences. Moreover, difference blindness is the very commitment that historically led white men to commit to opening their previously explicitly discriminatory organizations to others, and that provided the ideological context for the career successes of those women and people of color who have achieved leadership positions.<sup>25</sup> Nonetheless, difference blindness is based on a flawed presumption of merit because it is built on conformity to an historical ideal worker who is white, heterosexual, and male. In doing so, difference blindness creates two problematic dynamics. First, it confers a sense of agency on individuals and institutions alike that is inconsistent with true equality in diverse workspaces. Second, it impedes the consideration of persuasive evidence that the normalization of whiteness and blindness to differences makes equal opportunity impossible.

Difference blindness, for example, is what makes firms feel like their commitment to inclusivity is met so long as they do not see difference and hold everyone to the “same standards”; or that they are “doing all they can” by having diversity initiatives that encourage individuals of all backgrounds to fill the same roles and expectations. Thus, so long as the standard of the successful, ideal worker is met—the firm itself is blind to gender, color, or sexuality—everyone *is* equal and treated equally. Yet, this is simply not the

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24. This structural analysis benefits from the work of scholars who have explored the “systems and structures that produce and perpetuate racial disadvantage.” R.A. Lenhardt, *According to Our Hearts and Location: Toward a Structuralist Approach to the Study of Interracial Families*, 16 J. GENDER RACE JUSTICE 761, 761–62 (2013); see also, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1091 (1997); John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N. C. L. REV. 791 (2008); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

25. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 312 (1995) (noting that rapid expansion of business opportunities for large law firm in the 1970s and 1980s led them to expand hiring pools to include women and minorities).

case because the work of lawyers, like that of all workers, is grounded in relationships. By overemphasizing individual outcomes without paying attention to the surrounding interactional and institutional processes that produce them, we render the evaluation both incomplete and unjust.

We posit that, in particular, two related influences are crucial in ensuring that this problematic framework of blindness persists. *First* is the effect of implicit bias. Lawyers bring to their work their implicit biases that are embedded in the dominant power and prestige of identity groups in society.<sup>26</sup> To the extent that white men are the dominant group in society, leaders of law firms will bring biases in their favor into the workplace.<sup>27</sup> Exacerbating the implicit bias effect is homophily, the *second* relational phenomena, which stands in the way of equity and inclusion in lawyer workspaces. Homophily is the term for the reality that many people feel most comfortable with people who are most like them.<sup>28</sup> As a result, without the effort that bias awareness would require, most white men will tend to find it easier to mentor those like them, as a general matter giving white men superior opportunities to develop the skills and relationships they need to become a partner.

In Part I, this Article describes the good intentions of law firms and explains how their difference blindness approach has failed to provide equity and inclusion. Part II explains how reliance on a mythology of the atomistic individual ensures this failure. Part III offers a way forward grounded in a relational concept of the workplace, including specific recommendations. Together, this Article argues that the dominant legal culture of difference blindness, grounded in a myth of the meritocratic journey of the atomistic individual, prevents remedy of these biases while at the same time—ironically—relying on relational policies to breed and tolerate bias. In contrast, bias awareness, we suggest, reflects a relational understanding of individual achievement, thereby offering the potential for providing greater equity and inclusion through concrete changes in organizational culture. By exploring the challenges confronting large law firms, this Article offers a framework for analyzing and resolving the problems that elite institutions have faced, and will continue to face, in providing equal opportunity to their workers.

Even so, this Article is only a beginning. It draws largely on examples relating to race and gender but does not offer a comprehensive blueprint of all the work that needs to be done with regard to these identities. Although we argue that the integration-and-learning framework applies to all identities, this Article does not explore specific issues relating to

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26. Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1049–50 (2011).

27. Indeed, a recent study confirmed the way this effect favors white people, finding that law firm partners gave white lawyers higher evaluations than black lawyers for the same memorandum. See generally REEVES, *supra* note 2.

28. See *infra* notes 133–44 and accompanying text.



intersectionality, or sexual minorities and people with disabilities.<sup>29</sup> Last, this Article does not reach the question of the appropriate legal standard that should apply to organizations.<sup>30</sup>

### I. GOOD INTENTIONS, FAILED STRATEGY

In this part, we describe elite law firms as well intentioned on the basis of their stated commitment to equality and inclusion. Over the past thirty years, law firms around the country have backed up their commitment with resources and programs.<sup>31</sup> Applying a meritocratic vision that assumes a world of atomistic individuals who compete and are assessed on merit, law firms police intentional discriminatory acts by individual partners, proactively recruit women and minority lawyers,<sup>32</sup> and provide associates who are not white men with formal support, often from an affinity group and an assigned senior lawyer so that they will be able to demonstrate whether they merit promotion to partnership. Despite these policies, white men have continued to dominate elite law firm culture, even as women and nonwhite lawyers have gained partnership in significant numbers. However, these numbers still remain disproportionate to the percentages of these groups in feeder law schools and at entry levels in law firms.

Although this part describes elite law firms as having good intentions, we acknowledge the possibility that leaders who profess commitment to equality in public may make bigoted statements in private.<sup>33</sup> Absent useful

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29. See, e.g., James G. Leipold, *Stand and Be Recognized: The Emergence of a Visible LGBT Lawyer Demographic*, 42 SW. L. REV. 777 (2013) (discussing LGBT lawyers); Long, *supra* note 20 (discussing lawyers with disabilities); Laura Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 FORDHAM L. REV. 843 (discussing intersectionality by focusing on women of color who are affected by both to racial and gender bias).

30. See, e.g., Tanya Katerí Hernández, *One Path for 'Post-Racial' Employment Discrimination Cases—The Implicit Association Test Research As Social Framework Evidence*, 32 LAW & INEQ. 309 (2014).

31. See, e.g., ELIZABETH CHAMBLISS, N.Y. STATE BAR ASS'N, MILES TO GO IN NEW YORK: MEASURING RACIAL AND ETHNIC DIVERSITY AMONG NEW YORK LAWYERS 23 (2007); *Diversity & Inclusion*, WEIL, GOTSCHAL & MANGES LLP, <http://www.weil.com/about-weil/diversity-and-inclusion> (last visited Mar. 25, 2015); *Diversity: Morrison & Foerster LLP*, MARTINDALE, <http://www.martindale.com/Morrison-Foerster-LLP/law-firm-75374-diversity.htm> (last visited Mar. 25, 2015).

32. See Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1015 (1997) (describing the theory that affirmative action leads to minority associates being hired that are less qualified than their white peers, a stigma which penalizes qualified minority hires); LeeAnn O'Neill, *Hitting the Legal Diversity Market Home: Minority Women Strike Out*, 3 MOD. AM. 7, 10 (2007) (noting that numbers-based diversity initiatives, such as affirmative action, may result in the abilities and qualifications of women and minority attorneys to be questioned by dominant white male partners); Veronica Root, *Retaining Color*, 47 U. MICH. J.L. REFORM 575, 610–11 (2014) (describing the affirmative action stigma in elite law firms).

33. Recently, for example, the hacking of the Sony Pictures emails revealed that the white chair of Sony Pictures and an influential white producer, both of whom publicly committed to a culture of equality in their businesses and in society, made overtly bigoted comments about President Obama even as they supported his reelection to the presidency. See Matthew Zeitlin, *Scott Rudin on Obama's Favorite Movies: "I Bet He Likes Kevin*

data on this phenomena, our analysis proceeds as if the commitment to equality is made in good faith and indeed, even if it is not, the proposals we make in Part III will prove more effective than the dominant strategy described in this part.

#### A. *Good Intentions*

In many ways, elite law firms have been model organizations in promoting equity and inclusion for people outside the dominant identity group of white heterosexual men. And as the U.S. Equal Employment Opportunity Commission has noted, within the legal services industry “[l]arge, nationally known law firms generally have a higher proportion of women and minorities than other types of law firms.”<sup>34</sup>

Of course, this agenda for inclusion, like most institutional change, has not been a function of intention alone. Large law firms have invested many dollars and hours in the effort to provide their lawyers equity and inclusion,<sup>35</sup> and they have similarly been societal leaders in fighting for civil rights for all.<sup>36</sup> Large firms consistently express a strong commitment to equity and inclusion, declaring their “dedicat[ion] to attracting, retaining and promoting lawyers . . . from diverse backgrounds.”<sup>37</sup> They describe a “diverse and inclusive environment”<sup>38</sup> as “a source of strength”<sup>39</sup> and commitment to that goal as a core value.<sup>40</sup> They have backed up this rhetoric with resources and organizational initiatives, including diversity committees, diversity training, affinity groups, parental leave policies, and mentoring programs.

The dominant strategy in these elite large firms to promote diversity has been to recruit diverse entry-level classes of associates and then train and promote these junior lawyers in a seemingly meritocratic partnership tournament.<sup>41</sup> In economics, a tournament describes a strategy employers use to identify and cultivate stars, rather than to develop the careers of all entry-level employees so that each of them achieves their highest level of

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*Hart*,” BUZZFEED (Dec. 10, 2014, 9:20 PM), <http://www.buzzfeed.com/matthewzeitlin/scott-rudin-on-obama-i-bet-he-likes-kevin-hart#.paVa2Z43>.

34. EEOC, DIVERSITY IN LAW FIRMS 25 (2003), available at <http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/lawfirms.pdf>.

35. See *supra* notes 3–4 and accompanying text.

36. Rhode, *supra* note 26, at 1042–46.

37. *About Us: Diversity Policy*, DEBEVOISE & PLIMPTON, <http://www.debevoise.com/aboutus/diversity> (last visited Mar. 25, 2015).

38. *CSR: Diversity*, PAUL HASTINGS, <http://www.paulhastings.com/csr/diversity> (last visited Mar. 25, 2015).

39. *Diversity*, COVINGTON & BURLING, <http://www.cov.com/diversityoverview> (last visited Mar. 25, 2015).

40. Karen S. Ali & Marisa H. Lattimore, *Commentary Diversity Still Matters in the Post-Election Era*, LEGAL INTELLIGENCER (Apr. 20, 2009); *CSR: Diversity*, *supra* note 38.

41. The tournament of lawyers has been and is common among a subset of historically elite large law firms, but, importantly, not all of BigLaw. See Eli Wald, *Smart Growth: The Large Law Firm in the Twenty-First Century*, 80 FORDHAM L. REV. 2867, 2869–76 (2012); Eli Wald, *The Other Legal Profession and the Orthodox View of the Bar: The Rise of Colorado’s Elite Law Firms*, 80 U. COLO. L. REV. 605, 614 (2009).

performance and greatest contribution to the organization. In the tournament, law firms hire large numbers of associates in an entry-level class, ranging from 30 to 100, of whom only a few, perhaps one, two, or three, will become partners after eight to ten years of apprenticeship.<sup>42</sup> The model has, of course, evolved with time. And today, law firms do not use a pure tournament—they hire lateral partners and award non-equity partnerships and counsel positions.<sup>43</sup> Nonetheless, the primary focus of elite BigLaw hiring and promotion remains the partnership tournament.<sup>44</sup>

The tournament model has historically been touted as a quintessential method for providing meritocracy and equal opportunity in law firms.<sup>45</sup> Law firms' diversity policies and programs purport to provide all individual tournament contestants with an equal opportunity to compete, cognizant that the overwhelming majority of partners are white men and that as recently as the 1970s the partnership tournament excluded or provided only limited opportunities to lawyers who were not white men.<sup>46</sup> An assessment of this tournament model as well as the kinds of practices it sets in place in the name of diversity and inclusion are relevant sites for inquiry when we seek to understand the decoupling between intention and practice.

At the outset, as we mention above, it is useful to recall that the tournament model assumes a veil of absolute meritocracy. To the extent that winning on the basis of professional merit and excellence already aligns consistency with a commitment to equality, the tournament is golden. And this is not all false given that these intentions are such a stark shift from the erstwhile closed-door policy that riddled these elite spaces. Even so, the structural commitment to diversity usually is not enough in itself. And upon closer scrutiny, these well-intended policies and the limitations of their potential for success reveal themselves. We focus in particular on five common interventions to unpack the ways in which they lack bite: diversity committees, diversity training, affiliation networks, flexible-time policies, and mentoring programs.

The diversity committee, usually a small group of partners and associates, has nominal responsibility for examining hiring, retention, and promotion practices, as well as the culture of the firm. As we know, with regard to entry-level hiring, firms usually have a strong record of diversity and it is often a function of the strength and initiative of these firm-level

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42. See generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 103 (1991) (describing the tournament story as “one in which the firm promotes a constant percentage of each class to partner at the end of a fixed period of time”).

43. See generally Marc Galanter & William Henderson, *The Elastic Tournament: The Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008).

44. Other types of diversity issues, such as the higher compensation paid to white male partners, are beyond the scope of this Article, although this Article's analytic framework could also apply to those issues.

45. See generally GALANTER & PALAY, *supra* note 42.

46. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 294–95 (1976); ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 72–140 (1964); see also Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1843–47 (2008).

committees on diversity. However, when it comes to retention, promotion, and the culture of the firm, diversity committees tend to have nonspecific goals and little to no power to effectuate change.

Operating against the powerful presumption that the tournament model is meritocratic and beyond challenge, diversity committees are often reduced to collecting and disseminating diversity materials, hosting diversity events that tend to celebrate rather than scrutinize the firm's commitment to it, and sponsoring diversity trainings that may do more harm than good. Worse, diversity committees often unintentionally validate institutional stereotypes by featuring women and minority lawyers to the relative exclusion of powerful white male partners, thus sending a message across the firm that diversity is a matter for women and minority lawyers that does not warrant the attention and commitment of powerful firm partners.<sup>47</sup> Seen as marginal, these committees then further perpetrate the "othering" of these individuals rather than placing the onus on firms and dominant actors to see their own privilege more consciously.<sup>48</sup>

Similarly, diversity training is generally short term and often limited to teaching partners and associates how to avoid using language or taking actions that lawyers who are not heterosexual white men may find offensive.<sup>49</sup> Both occasional and discretionary, these trainings may in fact be detrimental to progress because they set up the institutional case of minority inhabitants as exceptions to a general rule, thereby undermining individual actors and their respective contributions rather than critically examining the role of dominant institutions in creating these paradigms that exclude minority lawyers. Further, such training risks misrepresenting the challenges of inequity at BigLaw: rather than exposing the complex ways in which bias is embedded in institutional culture and policies, it sends a misleading message that enhancing diversity is simply a matter of minding one's language and avoiding crude jokes.

Another popular intervention, both at large law firms and within the profession, are discretionary affiliation networks for identity groups of lawyers other than white men—including partners and associates who are members of those groups, such as women, people of color, or sexual minorities.<sup>50</sup> Like diversity training, however, such affinity groups risk affirming the status and identity of women and minority lawyers as

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47. Root, *supra* note 32, at 620–23; *see also* María Pabón López, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trends*, 19 HASTINGS WOMEN'S L.J. 53, 71 (2008) (stating that male attorneys tend to serve on committees related to the leadership and governance of the firm, while female attorneys serve on committees focused on diversity and associates); Rhode, *supra* note 26, at 1046–47.

48. Root, *supra* note 32, at 620–23.

49. *See* David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 593 (1996); *see also* Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1765–66 (2006) (describing how, for many law firms, initiatives to increase diversity do not require substantive changes within the firm structure).

50. Jane Drenzo Pigott, *Affinity Groups Help in Recruiting and Retention*, TEX. LAW. (Sept. 10, 2007), <http://www.texaslawyer.com/id=900005490543/Affinity-Groups-Help-in-Recruiting-and-Retention?slreturn=20150213155834> (subscription required).

outsiders within the firm who are the exception to the rule. It is not just that minority lawyers may be encouraged to join an affinity group, whereas white male lawyers are not similarly encouraged to join an affinity group (which, importantly, does not exist). Rather, it is that white male attorneys in the alternative may join subject-matter bar associations that allow them to enhance their skills and “merit,” or simply use the time to bill more hours and get ahead of their counterparts. In this way, non-diverse dominant actors have the privilege—and it *is* a privilege—to engage in interactions and networks without necessarily priming their primary identities of race, gender, sexuality, or disability.

The other intervention that has been popular across elite workspaces over the last decade has been the introduction of flexible work structures and leave policies, especially in the form of part-time work and family leave programs. These are no doubt a welcome intervention for all overworked associates, but the main target pool—for policy makers and receivers alike—are women. Firms see themselves as “women friendly” by offering them because it is disproportionately women—and mothers in particular—who are believed to want them. And while it is indeed women who disproportionately take advantage of these programs, their intention and employment get gendered in ways that make them the exception, deviating from the norm of an “ideal worker.”<sup>51</sup> Extensions like these then, to the extent they are seen as exceptions made for nonnormative workers, continue to create deviant, “othering” personas for minority workers while maintaining the institutional sanctity as working for the cause of inclusion.<sup>52</sup>

One more example that sets out a well-intentioned intervention with unintended consequences is the case of mentoring programs which are set up to induct new lawyers into the firm as well as to set up directions for their own development as senior lawyers. Like other diversity initiatives, seen simply from the merit perspective, mentoring programs seem like a step in the right direction or, at most, harmless. Indeed, their creation of institutional exclusion is not obvious, much less a “problem” of diversity of which partners are cognizant. And as we detail later in this Article, homophily and preexisting bias render these decisions of senior lawyers organic and natural rather than dangerous or explicitly exclusionary.

Mentoring in these firms is also rife with structural problems. In most firms, mentors can fulfill their obligations by meeting their mentees two or three times a year and discussing in general terms the partnership track and the firm culture.<sup>53</sup> At their best, mentoring programs “serve two objectives:

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51. See Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC'Y 139, 142–43 (1990).

52. Joan C. Williams et al., *Cultural Schemas, Social Class, and the Flexibility Stigma*, 69 J. SOC. ISSUES 209, 211 (2013) (discussing how employees that take advantage of flexible work arrangements, such as part-time schedules, can be viewed in the workplace as being in violation of the traditional work devotion schema and “morally lacking”).

53. Rhode, *supra* note 26, at 1071; see also Russell G. Pearce & Eli Wald, *The Relational Infrastructure of Law Firm Culture and Regulation: The Exaggerated Death of Big Law*, 42 HOFSTRA L. REV. 109, 136 (2013).

psychosocial support (such as role modeling, friendship, and personal advice) and career support (such as professional advice, contacts, and advocacy).”<sup>54</sup>

But its practice is not always as seamless. For example, while most firms have policies in place at least for notional mentoring strategies, not all partners serve as mentors because serving is often discretionary: mentors can be of the same or different identity group as the mentees and assignment is often random or made by the partner rather than the associate. And since the most effective mentoring relationships are not so much an extension of a policy memo as they are organic relationships built out of mutual affinity and investment, diversity recruits often are at a disadvantage in this system. This is especially the case since there are often not enough partners of color or powerful women to go around to replicate similarly “natural” mentorships that will assure relationship building for a comparable number of nondominant actors. In turn, this has loop-back effects because women and minorities see this as a signal that indicates their own aberration from an ideal type, a deviance which, in this atomistic environment, they code to be a failure at the individual level. Recognizing consciousness about this will help offset the unnecessary pressure the current system places on nondominant actors.

On the whole, these diversity initiatives share a few unintended yet distinctive features. First, they implicitly affirm the status and identity of white male lawyers as the dominant ideal class of lawyers and relegate women and minorities to the status of outsiders who need assistance to conform to the “normal” standards and culture of lawyering. For example, all these initiatives are discretionary, and partners are not evaluated or given incentives based upon their participation.<sup>55</sup> Accordingly, their effectiveness depends upon the associates who are not white men and whether they can gain information or other assistance from networks or mentoring. As a result, they may perceive the problem of diversity as primarily their problem and not that of partners generally or white male partners in particular.<sup>56</sup>

Second, although these initiatives are authorized by the partners or by their powerful management committees, they typically mandate only limited, if any, individual involvement by partners, let alone powerful

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54. Rhode, *supra* note 26, at 1071; *see also* Stacy D. Blake-Beard, *Taking a Hard Look at Formal Mentoring Programs: A Consideration of Potential Challenges Facing Women*, 20 J. MGMT. DEV. 331, 333 (2001). For a review on the intersectionality between race and gender in corporate mentoring relationships, *see* Stacy D. Blake-Beard, *The Costs of Living As an Outsider Within: An Analysis of the Mentoring Relationships and Career Success of Black and White Women in the Corporate Sector*, 26 J. CAREER DEV. 21 (1999).

55. *See* Tiffani N. Darden, *The Law Firm Caste System: Constructing A Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85, 122 (2009) (stating that the accountability systems in the firms studied for the article “were not sufficient to produce firm-wide participation”).

56. Rhode, *supra* note 26, at 1049.

partners.<sup>57</sup> Consequently, diversity initiatives provide a false sense of participation or involvement by all partners, while in reality the role of most partners in promoting diversity among the partnership is quite limited. Partnership policies, like governing law, prohibit intentional discrimination.<sup>58</sup> Beyond that, partners have the discretion to participate in, and a minority of partners do participate in, diversity activities.

Third, these policies and initiatives indirectly reinforce the message that success and failure at the firm is a matter of individualized atomistic effort. They foster a misleading sense that individuals control their own fates at the firm: if they only work hard enough, only prove themselves as meritorious, and if the firm only provides them with assistance—through diversity initiatives—to learn to succeed, then inequality will be overcome. Diversity initiatives therefore not only cement the notion that diversity is “their” rather than “our” problem but also reinforce a sense of atomistic individualism as the operating norm for BigLaw.

### B. *Token Success Combined with Substantial Failure*

Despite the good intentions of law firms, the results have been quite disappointing. Lawyers who are not heterosexual white males have gained positions as partners in nontrivial numbers, but those numbers are not equal to their numbers at the entry level and certainly do not indicate reasonably equitable results. Moreover, the numbers often underestimate the true extent of disparity. Law firms’ data often combines the number of equity and non-equity partners, although only equity partners share in power and profits. And preliminary data indicates that white males have an even greater representation among equity partners than they do among equity and non-equity combined.<sup>59</sup> Beyond the results themselves, lawyers who are not white men have a separate and unequal experience of the workplace in comparison to that of white men.

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57. Root, *supra* note 32, at 620–21; *see also* MINORITY CORP. COUNSEL ASS’N, CREATING PATHWAYS TO DIVERSITY: A SET OF RECOMMENDED PRACTICES FOR LAW FIRMS, 10, available at [http://www.mcca.com/\\_data/n\\_0001/resources/live/BestPracPathwaysIIExecSummary.pdf](http://www.mcca.com/_data/n_0001/resources/live/BestPracPathwaysIIExecSummary.pdf) (last visited Mar. 25, 2015) (stating that “[l]ack of senior partner commitment and involvement in the planning and execution of diversity initiative” is one of the top barriers to success in diversity initiatives).

58. *See* Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 22 (1994) (arguing that “an implied covenant of good faith and fair dealing . . . governs all partnership agreements and . . . prohibits partners from discriminating against each other”).

59. Rhode, *supra* note 26, at 1043. Rhode notes that “the American Lawyer’s 2010 survey of the 100 largest firms [indicated that] 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,” and the fact that “thirty firms declined to cooperate or to provide complete data” suggests that these numbers “overstate women’s progress.” *Id.*

### 1. The Overrepresentation of White Men in Positions of Power and Influence

The overrepresentation of white men in the partnership tournament is clear. Their advantage begins at the entry level. Although white males are only 37 percent of students at law schools generally<sup>60</sup> (and therefore probably a lower percentage at the feeder schools which have a higher percentage of students of color), they total 46 percent of associates.<sup>61</sup> Once they reach firms, the overrepresentation becomes even greater with the number of white men rising from 46 percent of associates to become 77 percent of partners.<sup>62</sup> Indeed studies have found that men are two to five times more likely to make partner than women.<sup>63</sup>

The numbers for people of color are more complex but tell a similar story of underrepresentation. Today, the percentage of partners who are people of color at large law firms is approximately 9.33 percent<sup>64</sup> and the percentage of associates is approximately 21.25 percent.<sup>65</sup> However, during the past twenty-five years the percentage of people of color at feeder law schools—the pool from which entry-level lawyers are drawn—has been approximately 30 percent at the top ten law schools<sup>66</sup> and approximately 22 to 28 percent at the top twenty-five law schools.<sup>67</sup> This data suggests that representation at the entry level has gotten close to but is still significantly less than representation at the top. At the same time, despite the availability of a deep pool of law students for twenty-five years, the percentage of partners who are people of color is far lower than the percentage of people of color at the entry level or among the pool of potential law student applicants.

The numbers also vary greatly among groups of color. Asian American associates slightly overrepresent their numbers in feeder law schools. Veronica Root notes that “from 2000 to 2013, an average of 10.89 percent of those enrolled in the top twenty-five law schools were of Asian descent, but from 2011 to 2013, an average of over twelve percent of associates and counsel in the top fifty law firms were of Asian descent.”<sup>68</sup> Nonetheless, the number of Asian American partners remains relatively low—4.93 percent in 2013<sup>69</sup>—and the percentage of Asian Americans who make

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60. As of 2010, white males comprised 37.8 percent of 1L classes at ABA-approved law schools. *Statistics: Section of Legal Education and Admissions to the Bar*, ABA, [http://www.americanbar.org/groups/legal\\_education/resources/statistics.html](http://www.americanbar.org/groups/legal_education/resources/statistics.html) (last visited Mar. 25, 2015) (data used to calculate this statistic is contained in the link entitled “2009–2013 Full-Time/Part-Time Total First-Year Enrollment by Gender and Ethnicity”).

61. Rhode, *supra* note 26, at 1045.

62. *Id.*

63. *Id.* at 1043 (citing three other studies examining the likelihood of partnership for males and females).

64. Root, *supra* note 32, at 588.

65. *Id.*

66. Akinola & Thomas, *supra* note 15, at 13.

67. Root, *supra* note 32, at 589; *see also* Rhode, *supra* note 26, at 1045 n.24.

68. Root, *supra* note 32, at 592.

69. *Id.* at 591.



partner—2.7 percent<sup>70</sup>—is significantly lower than their approximately 12 percent representation among associates.<sup>71</sup>

In contrast, blacks and Latinos are slightly underrepresented from the start. Blacks constitute approximately 6 percent of students at the top twenty-five law schools and only 3.31 percent of associates and counsel at elite firms, while Latinos constitute approximately 5.5 percent of students at the top twenty-five law schools and 3.33 percent of associates and counsel at elite firms.<sup>72</sup> At the same time, blacks and Latinos are further underrepresented at the partnership level, with 1.9 percent of partners being black and 2.3 percent being Latino.<sup>73</sup>

The percentage of women equity partners in the largest law firms reveals similar patterns of underrepresentation.<sup>74</sup> Women remain less than 20 percent of partners<sup>75</sup> at the nation's major law firms even though they have constituted approximately half of all law students at the top law schools since the early 1990s<sup>76</sup> and approximately 44 percent of entry-level lawyers at elite law firms in 2006.<sup>77</sup>

Less detailed data is available for sexual minorities and people with disabilities,<sup>78</sup> but they similarly reveal a story of underrepresentation. LGBT lawyers accounted for 2.29 percent of associates in 2009,<sup>79</sup> but only 1.36 percent of lawyers who made partner in 2009.<sup>80</sup> People with disabilities are 12.1 percent of the population as a whole,<sup>81</sup> but in law represent only 0.14 percent of associates<sup>82</sup> and 0.18 percent of partners.<sup>83</sup>

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70. Debra Cassens Weiss, *Only 3 Percent of Lawyers in BigLaw Are Black, and Numbers Are Falling*, ABA J. (May 30, 2014, 12:18 PM), [http://www.abajournal.com/news/article/only\\_3\\_percent\\_of\\_lawyers\\_in\\_biglaw\\_are\\_black\\_which\\_firms\\_were\\_most\\_diverse](http://www.abajournal.com/news/article/only_3_percent_of_lawyers_in_biglaw_are_black_which_firms_were_most_diverse).

71. Root, *supra* note 32, at 591.

72. *Id.* at 579.

73. *Diversity Scorecard: How the Firms Rate*, AM. LAW. (May 29, 2014), <http://www.americanlawyer.com/id=1202657037862?slreturn=20150101022013>.

74. See NAT'L ASS'N WOMEN LAWYERS, REPORT OF THE SIXTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3 (2011), available at <http://www.nawl.org/d/do/62> (stating in a 2011 report that equity partnerships for women have been fixed at approximately 15 percent for the past twenty years); NAT'L ASS'N WOMEN LAWYERS, REPORT OF THE EIGHTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 7 (2014), available at <http://www.nawl.org/p/bl/et/blogid=10&blogaid=56> (statistics for the Am Law top 200 firms as of 2013).

75. Rhode, *supra* note 26, at 1042.

76. Andrew Bruck & Andrew Cantor, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2103 (2008).

77. See *id.*

78. *LGBT Representation Up Again in 2013*, NALP BULL. (Jan. 2014), <http://www.nalp.org/jan14research>.

79. *Although Most Firms Collect GLBT Lawyer Information, Overall Numbers Remain Low*, NALP BULL. (Dec. 2009), <http://www.nalp.org/dec09glbt>.

80. *Id.*

81. W. LEE ERICKSON & S. VON SCHRADER, CORNELL UNIV., 2008 DISABILITY STATUS REPORT: UNITED STATES 6 (2008), available at [http://www.disabilitystatistics.org/StatusReports/2008-PDF/2008-StatusReport\\_US.pdf](http://www.disabilitystatistics.org/StatusReports/2008-PDF/2008-StatusReport_US.pdf).

82. LEVEY, *supra* note 17, at 23.

83. *Id.*

## 2. The Separate but Unequal Law Firm Workplace

Underlying the overrepresentation of white men in the partnership tournament is a workplace that favors them, from implicit biases (that law firms do little to remedy) to organic mentoring systems that help white men far more than formalistic programs help others. In contrast, women and people of color work in a different workplace than white men, both in terms of how they are viewed by others and how they view themselves. Extensive literature documents the impact of stereotypes, unequal training and mentoring, unequal access to networks, professional ideology, and harassment in the workplace for women and minorities in law firms.<sup>84</sup> Here, we add to the understanding of the causes of underrepresentation of women and minority lawyers in positions of power and influence by focusing on implicit biases and homophily. We argue that it is these two base phenomena that breed both (1) a range of dangerous professional ideologies and particular stereotypes as well as (2) a set of hazardous organizational effects like unequal training, mentoring, and networking opportunities.

Implicit biases are unintentional but fundamental biases that are pervasive across a range of institutions and environments.<sup>85</sup> Recent research has shown that most instances of discrimination and stereotypes extend from not so much obvious discrimination or rejection of minorities, but, instead, as a function of these implicit cognitive biases in favor of people from the “in-group.”<sup>86</sup> The notion of an implicit bias extends more generally from a psychological theory called schema theory.<sup>87</sup> It holds that we maintain unconscious models of reality to categorize the many bits of

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84. See generally Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1 (2010) (determining, through an empirical study, that law students hold implicit gender biases related to women in the legal profession, including associating judges with men and women with home and family); Floyd Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 MISS. L.J. 259 (2010) (examining obstacles to the representation of African American males in the legal profession including negative early educational experiences, high incarceration rates for young African American males, low college enrollment and graduation rates, declining enrollment rates at elite law schools, high attrition in law schools, lower bar exam passage rates, and discriminatory law firm hiring and promotional practices).

85. Levinson & Young, *supra* note 84, at 6; see also Ian Ayres, Op-Ed., *When Whites Get a Free Pass: Research Shows White Privilege Is Real*, N.Y. TIMES (Feb. 24, 2015), [http://www.nytimes.com/2015/02/24/opinion/research-shows-white-privilege-is-real.html?\\_r=2](http://www.nytimes.com/2015/02/24/opinion/research-shows-white-privilege-is-real.html?_r=2) (last visited Mar. 25, 2015) (describing studies where whites subjects were given preferential treatment over minorities in a variety of environments, including public accommodations and law firm evaluations, and arguing that white privilege “continues in the form of discretionary benefits, many of them unconscious ones”).

86. Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCHOLOGIST 669, 671–72 (2014).

87. Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 184–85 (2011); see also Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 279–81 (1989) (describing the concept of schemas in detail).

information we perceive at any given point in time. These categorical faculties mainly serve to allow us conscious decision and free will in what we do,<sup>88</sup> because otherwise we would be overwhelmed with having to maintain what we wanted to do while actively perceiving everything going on around us.<sup>89</sup> The schemas and biases we develop at early stages of development are used to categorize and simplify all the information we may encounter in our experience, including people. The colloquial term we use to refer to schemas that we attach to people around us is “stereotype.” Often, we unconsciously perpetuate stereotypes about ourselves and other people by either agreeing with them or acting in ways that make them true.<sup>90</sup> But stereotypes are not always conscious—most of the time we do not even remember, perceive, or act on the information that counters those beliefs. At these times, we can only consciously counter the implicit biases we have of other people by directly challenging them.<sup>91</sup>

Implicit biases tend to reflect the existing power relations in society and manifest themselves in more micro interactions—and this is nowhere clearer than it is in the workplace. And the pervasiveness of implicit bias does not depend on just white men thinking they are superior. They take shape and become reality when *everyone* begins to believe, however subconsciously, that white men are deserving of this power. For example, given that white men disproportionately hold more powerful positions in elite organizations and in society more generally, people are more likely to perceive white men as being smarter and more competent than they are and therefore worthy of their positions and status atop elite organizations. In doing so, society as a whole perpetrates these dominant scripts by legitimizing the status quo.<sup>92</sup> In turn, these implicit biases result in persistent institutional hurdles. They lead to a universal buy-in from both the dominant actors through the mechanisms of non-consciousness and privilege (here, white male partners) and the nondominant ones through mechanisms of low confidence, lack of self-esteem, and institutional socialization such as diversity initiatives to believe they are less deserving (here, women and minority lawyers).<sup>93</sup>

In one popular test of implicit bias developed by Harvard researchers,<sup>94</sup> test takers are told that the next picture they will see is of a person who is smart, competent, or reliable, and that they should press a button as soon as they see that picture. If the picture is of a white man, test takers press the

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88. Moore, *supra* note 87, at 279–80.

89. *Id.* at 280; Whitney Woodington, *The Cognitive Foundations of Formal Equality: Incorporating Gender Schema Theory to Eliminate Sex Discrimination Towards Women in the Legal Profession*, 34 L. & PSYCHOL. REV. 135, 136–37 (2010).

90. Woodington, *supra* note 89, at 138–41.

91. HOWARD ROSS, PROVEN STRATEGIES FOR ADDRESSING UNCONSCIOUS BIAS IN THE WORKPLACE (Aug. 2008), <http://cookross.com/wp-content/uploads/2015/02/Unconscious-Bias-White-Paper.pdf>; *see also* Woodington, *supra* note 89, at 138 (discussing the difficulty of altering or replacing schemas).

92. Woodington, *supra* note 89, at 144.

93. Rhode, *supra* note 26, at 1046–49.

94. *Take a Test*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/featured/task.html> (last visited Mar. 25, 2015).

button significantly faster than when the picture is of a black person or a woman.<sup>95</sup> One lesson of this test is that most people assume that white men are smarter, more competent, and more reliable, and therefore take a longer time to acknowledge the intelligence, competence, and reliability of women and people of color.<sup>96</sup> An illustration of how this micro phenomenon influences macro experiences is found in the work of David Thomas and John J. Gabarro, who concluded that women and people of color have a significantly longer path to becoming executives than their white male colleagues because it takes women and people of color more time to persuade colleagues of their competence and to gain access to networks of mentoring and sponsorship.<sup>97</sup>

Indeed, implicit bias has been found to be pervasive across a range of workplace settings. In one study, for example, employers received resumes that were substantially identical except for the names of the applicants which were “stereotypically African-American” or “stereotypically white.”<sup>98</sup> Although the resumes were essentially identical, whites received 50 percent more job interviews.<sup>99</sup> When applicants had “identical resumes and similar interview training . . . African-American applicants with no criminal record were offered jobs at a rate as low as white applicants who had criminal records.”<sup>100</sup>

Similarly, “[e]ven in experimental situations where male and female performance is objectively equal, women are held to higher standards, and their competence is rated lower.”<sup>101</sup> In elite institutions, when women speak, men often ignore or interrupt them,<sup>102</sup> and when they offer good

95. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1512 (2005); see also Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 SOC. PSYCHOL. Q. 23, 23 (1983).

96. See Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY SOC. PSYCH. 17 (2009).

97. DAVID THOMAS & JOHN J. GABARRO, *BREAKING THROUGH: THE MAKING OF MINORITY EXECUTIVES IN AMERICA* 26–27, 58–59 (1999).

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

99. See Sendhil Mullainathan, *The Measuring Sticks of Racial Bias*, N.Y. TIMES, Jan. 4, 2015, at BU6; see also Bertrand & Mullainathan, *supra* note 98. Devah Pager, a sociologist at Harvard, shows in her experimental field work that this kind of stark discrimination is typical in low-wage labor markets, where black applicants (in a live audit study) were half as likely as equally qualified white applicants to receive a job offer for an entry-level position. Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 784 (2009). In fact, black and Latino applicants fared no better than their white peers who were released from prison. *Id.* at 785–86. This kind of stark bias is routine shock to researchers of economic inequality. What is striking is that this permeates across all levels of the labor market. See, e.g., *id.* at 777 (low-wage workers); Bertrand & Mullainathan, *supra* note 98, at 14–16 (various levels of sales, administrative support, and clerical and customer services); REEVES, *supra* note 2, at 4 (lawyers).

100. Mullainathan, *supra* note 99; see also Bertrand & Mullainathan, *supra* note 98, at 785–86; Pager, *supra* note 99, at 785.

101. Rhode, *supra* note 26, at 1050 n.59 (citing Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 59 SOC. PSYCHOL. Q. 237, 237 (1996)).

102. Sheryl Sandberg & Adam Grant, *Speaking While Female*, N.Y. TIMES, Jan. 11, 2015, at SR3.

ideas, men take credit for their ideas without even acknowledging that a woman actually made the contribution.<sup>103</sup> In turn, this results in settings where women are more tentative overall—and this tentativeness can be expensive, especially because we know that women negotiate differently from men,<sup>104</sup> and all else kept equal, are judged on their social skills in ways that their male peers are not.<sup>105</sup>

But it is not just that men and women are held to different standards. When women *meet* the standards that are created for men, institutions typically reject these women as “bossy” or “bitchy,” exhibiting what gender theorists have most recently dubbed the “tightrope” between the competing poles of masculinity and femininity.<sup>106</sup> For instance, in a classic experiment that parsed this difference in reception, male and female leaders were tested against audiences of different genders and their assertiveness was compared to tentative speech (e.g., “I’m no expert,” “kind of,” “sort of”), men were equally influential in both conditions whereas women were perceived to be more competent and exerted greater influence over female audiences, but were found to be less likeable by the male audiences who found them “too aggressive.”<sup>107</sup> In a similar vein, the leadership qualities of women are also evaluated differently, with strong women labeled “strident” and the “[s]elf-promotion that is acceptable in men is viewed as unattractive in women.”<sup>108</sup> When women succeed, their achievements are generally “attributed to . . . external factors,” while the success of men is generally “attributed to internal capabilities.”<sup>109</sup>

Commentators have identified numerous implicit biases in the law firm workplace.<sup>110</sup> Lawyers who are not white men are assumed to be less able

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103. *Id.*

104. Michele Gelfand & Heidi Stayn, *Gender Differences in the Propensity to Initiate Negotiations*, in *SOCIAL PSYCHOLOGY & ECONOMICS* 239 (2013). Negotiation researchers also have shown broadly that women suffer different social costs than men in compensation negotiations and are more likely than men to not ask for a raise. See Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 *ORG. BEHAV. HUM. DEC. PROCESSES* 84, 84–87 (2007).

105. The broader literature on the backlash against agentic women stems from the concept of a “masterful” woman by Rudman. Laurie A. Rudman, *Self-Promotion As a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 *J. PERSONALITY SOC. PSYCHOL.* 629, 638 (1998). Research consistently shows that keeping all else equal, women are seen as lacking in social skills when compared to their male peers of equal standard/competence, reflecting that women and men are held to different standards of social desirability. Julie E. Phelan et al., *Competent Yet Out in the Cold: Shifting Criteria for Hiring Reflect Backlash Toward Agentic Women*, 32 *PSYCHOL. WOMEN Q.* 406, 406 (2008).

106. JOAN C. WILLIAMS & RACHEL DEMPSEY, *WHAT WORKS FOR WOMEN AT WORK: FOUR PATTERNS WORKING WOMEN NEED TO KNOW* 60–63 (N.Y.U. Press 2014).

107. Linda L. Carli, *Gender, Language, and Influence*, 59 *J. PERSONALITY SOC. PSYCHOL.* 941, 946–47 (1990).

108. Rhode, *supra* note 26, at 1051.

109. *Id.* at 1050–51.

110. See Vernā Myers, *From Counting Heads to Cultivating Minds: Why Effective Retention Requires Attention to Our Implicit Biases*, 38 *LAW PRAC.* 40, 42–43 (2012); see also Levinson & Young, *supra* note 84, at 9–13 (gender bias); REEVES, *supra* note 2, at 4–5 (racial bias in evaluations of a memorandum of law).

“to connect with and generate business from . . . ‘clients,’ the preponderance of which are led by majority populations . . . . [U]nderrepresented minorities fall victim to the misperception of being less able to bring in business with majority populations.”<sup>111</sup> Without regular training and constant vigilance, these implicit biases on the basis of race and gender would permeate the legal workplace just as they permeate other workplaces. And, indeed, law firms do not universally require regular training and evaluations for these purposes, and neither do they have in place specific mechanisms to monitor interpersonal interactions.<sup>112</sup>

Of course, not all groups face the same sorts of biases and the ways in which they differ are worth reflection. As noted above, women face the double bind that their achievements are disregarded and their leadership tends to be discounted.<sup>113</sup> Other widespread biases are that blacks and Latinos “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.”<sup>114</sup> Another common view among law firms is that “[b]lack, especially women, . . . [are] angry or hostile.”<sup>115</sup> Asian Americans face a different constellation of biases—all of which impact their identity within firms differently. For example, they “are thought to be smart and hardworking, but not sufficiently assertive to command the confidence of clients and legal teams.”<sup>116</sup> They are “underrepresented at top management levels in [knowledge-intensive firms], despite being the largest minority group represented at junior levels.”<sup>117</sup> Modupe N. Akinola and David Thomas observed widespread “[p]ersonality and behavioral stereotypes asserting that Asians are ‘submissive,’ ‘humble,’ ‘passive,’ ‘quiet,’ ‘compliant,’ and ‘obedient’ mak[ing] Asian Americans vulnerable to being viewed as lacking key leadership traits, placing them at a disadvantage when being considered for management positions.”<sup>118</sup>

While each of these independent identities play out differently for the minorities in question, the way they collude is complicated too. For instance, although intersectionality of race and gender often disadvantages women of color, Cynthia Epstein’s seminal work on women lawyers shows that black women lawyers, who would normally be seen as having “multiple negative” identities, are sometimes able to leverage advantage because they are seen as “doers” whose aggression is expected and whose

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111. Akinola & Thomas, *supra* note 15, at 10–11.

112. See NAWL FOUND., REPORT OF A NATIONAL SURVEY OF WOMEN’S INITIATIVES: THE STRATEGY, STRUCTURE AND SCOPE OF WOMEN’S INITIATIVES IN LAW FIRMS 19–20 (2012), available at <http://www.nawl.org/d/do/58>.

113. See Rhode, *supra* note 26, at 1050–52; see also *supra* notes 106–09 and accompanying text.

114. Rhode, *supra* note 26, at 1050.

115. *Id.*

116. *Id.*

117. Akinola & Thomas, *supra* note 15, at 10.

118. *Id.*

economic independence is tolerated.<sup>119</sup> Seen as simply the success of minority stakeholders would be an unjust way to interpret this research. Instead, it offers evidence to show how even when minority participants in the tournaments are successful, their success is attached to implicit biases that are deeply rooted and damaging for others who do not fit the same archetype of color and gendered identities.<sup>120</sup>

But conflated and combined implicit biases aside, it is not surprising who comes out ahead. In one of the few implicit bias studies that examined law firm conduct, researchers found that the evaluations central to the partnership tournament were biased toward white men. In that study, sixty law firm partners (thirty-nine white, twenty-one racial/ethnic minorities) were asked to evaluate the same memo written by a third year associate.<sup>121</sup> Half of the partners were told that the author was black and half that the author was white.<sup>122</sup> The name and law school background were the same.<sup>123</sup> On a 1-to-5 scale, the partners awarded an average 3.2 rating when they thought the author was black and 4.1 when they thought the author was white.<sup>124</sup> They identified far more spelling and grammar errors when they thought the author was black—an average score of 5.8 versus 2.9.<sup>125</sup> The qualitative evaluations also differed significantly. The white author was described as a “generally good writer” who “has potential” and “good analytic skills,” while the black associate received comments such as “needs lots of work,” “can’t believe he went to NYU,” and “average at best.”<sup>126</sup>

Not only does this study call into question the accuracy and reliability of the partnership tournament, but it tracks the perceptions associates have of their own evaluations. Women and people of color believe (accurately as it turns out) that they are held to a different and higher standard than white men and that law firms do nothing significant to address implicit bias in the workplace.<sup>127</sup> Specifically, “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.”<sup>128</sup> This disparate perception extends to opportunities to develop business and skills.<sup>129</sup> In one survey, “44% of women of color, 39% of white women, and 25% of minority men reported being passed over for desirable work assignments whereas only 2% of white men noted similar experiences.”<sup>130</sup> Similarly, with regard to business development, “women and minorities [report being] often left out of pitches for client

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119. Cynthia Fuchs Epstein, *Positive Effects of the Multiple Negative: Explaining the Success of Black Professional Women*, 78 AM. J. SOC. 912, 918–21 (1973).

120. *Id.*

121. REEVES, *supra* note 2, at 2.

122. *Id.*

123. *Id.*

124. *Id.* at 3.

125. *Id.*

126. *Id.*

127. *See* Rhode, *supra* note 26, at 1049–50.

128. *Id.* at 1052.

129. *Id.* at 1055.

130. *Id.*

business.” In fact, data on “conventional client development possibilities” shows that “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.”<sup>131</sup>

Similar perceptions explain why law firm mentoring programs are largely unsuccessful. For instance, the survey above “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.”<sup>132</sup> In turn, these results track the social science research on mentoring.

In significant part, the problem with mentoring results from an effect that researchers describe as homophily, the effect that people feel most comfortable with people like them and, absent significant intervention, will gravitate toward assisting those most like them.<sup>133</sup> Akinola and Thomas explain that “[i]t is well-known that the relationships that are the easiest to develop, maintain, and gain comfort from are those in which the members share common identity characteristics and similar backgrounds.”<sup>134</sup> In law firms dominated by white male partners, the effect of homophily is to privilege white male associates.

As a result of homophily, the evaluation, mentoring, and networking that matters—the day-to-day business outside of the formal and occasional programs for people who are not white men—favors white men in the partnership tournament. White men who dominate partnerships are not comfortable evaluating, mentoring, or networking with people outside of their white male identity group. Akinola and Thomas explain that “researchers have found that cross-race interactions can engender feelings of anxiety and discomfort.”<sup>135</sup> They note that “[a] variety of explanations have been proposed that highlight the sources of anxiety in cross-race relationships, among which include: the desire to avoid appearing prejudiced, . . . the threat of rejection in intergroup encounters . . . , and minimal experience interacting with individuals of different races.”<sup>136</sup>

These effects occur in law firms and influence evaluations, networking, and mentoring. In law, white men express difficulty in conversations and relationships across race and gender. They 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.”<sup>137</sup> As a result, “[u]nderrepresented minorities not only have fewer mentoring relationships but also have an increased likelihood of failed cross-race mentoring relationships which can have negative repercussions for career development.”<sup>138</sup> As G. Mitu Gulati and

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131. *Id.* at 1056.

132. *Id.* at 1054.

133. Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOCIOLOGY 415, 416 (2001).

134. Akinola & Thomas, *supra* note 15, at 23.

135. *Id.*

136. *Id.*

137. Rhode, *supra* note 26, at 1072.

138. Akinola & Thomas, *supra* note 15, at 8.



David B. Wilkins observe, “Studies of cross-racial and cross-gender mentoring relationships in the workplace repeatedly demonstrate that white men feel more comfortable in working relationships with white men.”<sup>139</sup>

Similarly, “minorities are often excluded from majority informal social networks often impeding their ability to succeed.”<sup>140</sup> Root observes that “social relationships leave ‘some black lawyers at a distance from their white colleagues’ . . . . ‘For the most part, they don’t go to church together on Sunday enough, they don’t have dinner together enough, and they don’t play enough golf together to develop sufficiently strong relationships of trust and confidence.’”<sup>141</sup> As Wilkins and Gulati note, “This natural affinity makes it difficult for blacks to form supportive mentoring relationships.”<sup>142</sup>

Not surprisingly, the effects of homophily and implicit bias compound each other and make it less likely that the white men who dominate law firm partnerships will devote their resources and those of their firm to the development of associates who are not white men.<sup>143</sup> In turn, minority candidates in the tournament have to mimic the identities of the white male archetype to be seen as “successful” and even when they do try it, assumptions about their base identities can render the attempt powerless and leave them with a backlash. Thus, as Akinola and Thomas note, “[I]t typically takes longer for underrepresented minorities, particularly blacks, to look like stars, which decreases the likelihood that they will be invested in by senior professionals.”<sup>144</sup> They are, simply, doomed if they do—and the same if they do not.

## II. WHY LAW FIRMS CLING TO AN UNSUCCESSFUL STRATEGY: THE CONTINUING ATTRACTION OF DIFFERENCE BLINDNESS AND ATOMISTIC INDIVIDUALISM

Elite law firms are among the best problem-solving organizations in the world. Why, then, do they continue to persist in strategies that do not do justice to their good faith efforts toward equity and inclusion? We suggest that they rely on an analytic framework of difference blindness that incorrectly assumes people behave atomistically in the workplace because that framework is deeply embedded in their ideology, has historically been the engine of progress on diversity, and is protected from reassessment by the psychological mechanisms of cognitive dissonance, paradigm theory, and preexisting framing. Moreover, difference blindness is consistent with

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139. Wilkins & Gulati, *supra* note 49, at 569; *see also* Root, *supra* note 32, at 618.

140. Akinola & Thomas, *supra* note 15, at 8.

141. Root, *supra* note 32, at 618 (quoting Nelson D. Schwartz & Michael Cooper, *Racial Diversity Efforts Ebb for Elite Careers, Analysis Finds*, N.Y. TIMES, May 28, 2013, at A1).

142. Wilkins & Gulati, *supra* note 49, at 569.

143. *See* Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN’S L.J. 1, 31 (2004) (discussing the incentives men have to allocate resources toward their “ingroup” and away from women (the “outgroup”) in male-dominated workplaces).

144. Akinola & Thomas, *supra* note 15, at 11 (citing Wilkins & Gulati, *supra* note 49).

the self-interest of BigLaw's dominant control group, white heterosexual men, legitimizing their power and status atop large law firms. In this sense, difference blindness plays a much needed stabilizing force sustaining the status quo in an otherwise unstable era fraught with uncertainty and risk. Consequently, moving away from difference blindness is going to be both hard and costly. In contrast, bias awareness is not only controversial—to some it smacks of overt discrimination—but also threatening to BigLaw's elite who stand to lose power, status, and money in its wake.

A. *Difference Blindness: The Strategy That Opened the Door to Diversity but Shut the Door on Equity and Inclusion*

This section explains the important liberating influence of difference blindness—a meritocratic theory assuming that lawyers are atomistic actors—in opening the legal profession to those who are not white men. Ironically, having once made formal diversity possible, it is the same construct of difference blindness that has made it impossible to truly dismantle the continuing dominance of the white male prototype of the ideal worker and to provide equity, substantive diversity, and inclusion to all.<sup>145</sup>

As Epstein points out, “despite American society’s myth and credo of equality and open mobility, the decision-making elites and elite professions have long remained clublike sanctuaries for those of like kind,”<sup>146</sup> and the legal profession is no exception. Prior to the 1960s, most large elite law firm partners were white Protestant men whose relationships with large elite entity clients were formed around family, socioeconomic and cultural class, and law school connections to business leaders.<sup>147</sup> Notwithstanding their formal commitment to meritocracy, large law firms in practice excluded Jewish and Catholic lawyers, not to mention women, even when these lawyers met their meritocratic recruitment criteria of graduating from an elite law school, at the top of the class, while serving on the law review.<sup>148</sup>

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145. See 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, 1105–09 (2011); see also Peery, *supra* note 23, at 492 (discussing the benefits of color-blindness to the majority group, including maintenance of the status quo).

146. Epstein, *supra* note 119, at 912.

147. 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, 2268 (2010); see also Wald, *supra* note 46, at 1822. Class continues to play an important role in determining entry and success of elite lawyers. Although it does not work quite the way it worked in the earlier years, the reproduction of hierarchy remains an important threat to heterogeneous spaces. For an overview, see Lauren Rivera's research on elite firms and the ways in which class and homophily in cultural capital (i.e., similar schools, interests, etc.) are serious determinants of entry into these firms. Lauren A. Rivera, *Hiring As Cultural Matching: The Case of Elite Professional Service Firms*, 77 AM. SOC. REV. 999, 1008–10 (2012).

148. See AUERBACH, *supra* note 46, at 294–95; PAUL HOFFMAN, *LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS* (1973); SMIGEL, *supra* note 46, at 37, 44–47; David Wilkins et al., *Urban Law School Graduates in Large Law Firms*, 36 SW. U. L. REV. 433, 459 (2007) (stating that Catholic lawyers were excluded from most elite law firms during the “Golden Age” of the 1960s); Wald, *supra* note 46, at 1812 (stating that

As a result, white Jewish men, sometimes together with other excluded men, created their own law firms, which were much smaller in size and number and which started by catering to businesspeople from their communities or by offering legal services, such as real estate, bankruptcy, mergers, and hostile takeovers, that white Protestant firms did not provide.<sup>149</sup> Within a generation, Jewish, Catholic, and “mixed” firms rose to prominence, competing fiercely with the old elite firms, leading the latter to gradually abandon their discriminatory hiring and promotion practices.<sup>150</sup>

At the same time, beginning in the 1960s, elite law firms, and American culture, began to support the civil rights movement and comply with resulting laws, in dismantling a business system of bigotry and exclusion enmeshed in webs of relationships.<sup>151</sup> The civil rights movement reflected two alternative visions of promoting civil rights. Martin Luther King, Jr., sought to promote civil rights via relationships grounded in equal human dignity, expressly rejecting conceptions grounded in the atomistic individual. His approach recognized that if discrimination was based on webs of relationships then those relationships would have to change in order to provide equality; it rejected individualistic perceptions on the ground that in real life no such reality existed and that all so-called individualistic measures, such as merit, were socially constructed. In contrast, elite culture, which included lawyers, embraced difference blindness, a belief that the harm of discrimination was that it treated atomistic individuals differently on the basis of their identity and not the basis of their individual merit.<sup>152</sup> Since the 1960s, the atomistic perception of difference blindness has grown stronger, with increasing skepticism of

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elite law firms in the 1960s systematically excluded all candidates except “young, white, Anglo-Saxon Protestant men from affluent socioeconomic backgrounds”).

149. Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?*, 76 UMKC L. REV. 885, 914–17 (2008); Wald, *supra* note 46, at 1833–36. People of color and women, as well as out sexual minorities, had almost no place in this world, although in rare circumstances they occasionally were able to obtain short-term positions as associates. *See, e.g.*, Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 10–11 (1991) (describing the “chilly reception” women law graduates received from law firms and their difficulty in finding law firms willing to hire them as associates until the mid-1960s); Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 ST. JOHN’S L. REV. 785, 789 (2003) (stating that as of the late 1960s, there were only three African Americans working in elite law firms in New York); Wilkins et al., *supra* note 148, at 443 (stating that the first wave of women and minority lawyers began to join elite law firms in the late 1960s and came from elite law schools and backgrounds).

150. *See* Wald, *supra* note 46, at 1844–45.

151. Of course, even from the early days of the Civil Rights Movement, individual elite lawyers had supported civil rights under law. *See, e.g.*, Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune*, 77 FORDHAM L. REV. 1479 (2009); Russell G. Pearce & Adam Winer, *From Emancipation to Assimilation: Is Secular Liberalism Still Good for Jewish Lawyers?*, in *JEWS AND THE LAW* 171, 185–86 (Ari Mermelstein et al. eds., 2014).

152. Eli Wald & Russell G. Pearce, *What’s Love Got to Do with Lawyers? Thoughts on Relationality, Love, and Lawyers’ Work*, 17 LEGAL ETHICS 334, 342 (2014).

relational perspectives, such as affirmative action or disparate impact liability.<sup>153</sup>

What has been stagnant, though, has been the commitment to meritocratic equality and inclusion. And the approach of the large law firms to increased competition and to changing cultural attitudes toward equality has predominantly, although not exclusively, been to embrace the individualistic conception of difference blindness. Beginning in the 1950s, white Protestant male firms began to accept white Jewish and Catholic lawyers, and by the 1980s, Jewish men were receiving equal treatment in firms that had been historically anti-Semitic.<sup>154</sup> This was a stark shift that signaled large law firms' commitment to inclusion. Over the years, top law schools moved from no more than a handful of women and people of color in the 1960s to significant numbers in the 1980s and, at top law schools, close to representative numbers in the 1990s. As they did, elite firms began to hire, and sometimes promote, women and people of color in increasing numbers until the 2000s, reaching the approximate numbers of today.<sup>155</sup>

Law firms' increased inclusion of women and people of color, at least at entry-level positions, rested on their embrace of the theories of difference blindness and individual merit, both of which required the predominant belief that lawyers functioned as atomistic individuals. Sanford Levinson has described the professional ideology underlying this belief.<sup>156</sup> Lawyers were to be "almost purely fungible members of [their] professional community. Such apparent aspects of the self as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer."<sup>157</sup> According to this view, all merit was individual and without regard to either facets of personal identity or to relationships.<sup>158</sup>

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153. See Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 3 (2011) (describing the increasing dominance of autonomous self-interest among the liberal and libertarian elite); Pearce & Wald, *supra* note 53, at 122. Today, the majority of white Americans assert that they "don't see any color, just people," and denounce minorities for demanding "divisive race-based programs, such as affirmative action." EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 1 (4th ed. 2013). The Supreme Court has also recently indicated that discrimination is no longer a central problem in our society by reducing protections against discrimination. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (striking down the coverage formula for section 5 of the Voting Rights Act, which required preclearance for certain states, primarily in the South, before changes were made to voting laws in order to prevent discrimination); see also *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (upholding a state constitutional amendment that bans affirmative action in connection with admission to Michigan's public universities).

154. Wald, *supra* note 46, at 1837. "By the year 2007, Jewish lawyers had become leaders of both Cravath, Swaine & Moore and Sullivan & Cromwell . . ." Pearce & Winer, *supra* note 151, at 189.

155. See *supra* notes 72–77 and accompanying text.

156. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1579 (1993).

157. *Id.*

158. See Robert L. Hayman, Jr., *Race and Reason: The Assault on Critical Race Theory and the Truth About Inequality*, 16 NAT'L BLACK L.J. 1, 19 (1999) (describing the

Law firms' ideology of difference blindness and individual merit meant that they could not discriminate; indeed, they would want a diverse pool of entering associates so that they could obtain the most meritorious winners in the partnership tournament. Law firms prohibit intentional discrimination on the part of individual partners. They seek a difference blind tournament and provide lawyers who are not white men with minimal assistance, expecting all lawyers to compete on the same terms irrespective of irrelevant identity considerations. Indeed, a large part of the "all are welcome" approach is that it makes it seem fair and just to forget the difference that hindered equality in the first place. And once lawyers are hired, firms and lawyers alike strictly apply the difference blindness theory with few exceptions.

For the most part, the policies described in Part I derive from this framework. Diversity training is only about the etiquette needed for a difference blind environment. The extension of this limited support under the current framework is that law firms do not evaluate partners based on their success in mentoring lawyers who are not white men and do not make changes in the tournament based on input from affiliation networks. As noted above, success in using mentoring and affiliation networks rests primarily on those lawyers who are not white men.

The bottom line remains: law firms believe that given their difference blindness practices, those individuals who win the partnership tournament are meritorious and atomistic. A primary effect of this ideology is to label the existing dominant culture as the meritorious one. If white men dominate partnerships, it is because they are the superior lawyers. Indeed, their whiteness and maleness plays no meaningful role in their success—it is solely a product of individual merit. In such a system, the white male identity becomes normalized as background, as not an identity at all, merely an accidental descriptor of the identity of the meritorious individuals who have won the partnership tournament. And if women and people of color are underrepresented it is only because people in those groups have failed to demonstrate merit.

But the evidence, also described above, indicates that the difference blind law firm is a fantasy. The effects of implicit bias and homophily give significant advantages to white men. Success in the workplace depends on relationships, not merely on an atomistic conception of individual merit. Associates who can create relationships with the predominantly white male partners obtain better opportunities for skills and business development, as well as more opportunities to get partners to root for their success. And biases grounded in the unequal distribution of respect and prestige in society permeate the legal workplace. Indeed, in the one study described above, when partners graded an identical memo by associates with an identical name and resume, they gave the presumed white associate a 20

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meritocratic ideal (citing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 54 (1997)).

percent higher evaluation than that of the black associate.<sup>159</sup> In line with this analysis of bias is other data that displays the lack of diversity in senior positions of power within large law firms.<sup>160</sup> For the past twenty-five years, top law schools have provided a pool of women and people of color that would have totally changed their representation among law firm partners, yet white male domination and underrepresentation of women and people of color persists.<sup>161</sup> We argue not just that the difference blindness paradigm has fallen short of its goal of creating an equal and inclusive workforce, but also that the difference blind law firm workplace is a nonexistent figment of ideological imagination that is wholly inconsistent with the factual evidence.

### *B. The Staying Power of Difference Blindness*

Given the failure of the difference blind workplace to offer all lawyers equal opportunity to succeed, why have elite law firms persisted in this strategy, especially given their reputation for excellence in solving problems? At least three reasons combine to explain the staying power of difference blindness.

First, difference blindness was an effective strategy to combat exclusion and discrimination in the legal profession. Older, powerful white partners at elite law firms gradually came to terms with the reality that increased competition meant they had to agree to hire and promote the most meritorious lawyers to retain their elite status, irrespective of the lawyers' identity considerations. Difference blindness provided these partners with the very framework needed to overcome their explicitly discriminatory mindset. That is, difference blindness was an appropriate and effective remedy to the then-prevalent problem of explicit discrimination.

Explicit discrimination, however, is no longer the primary challenge facing large law firms. Rather, as we have seen, the underrepresentation of women and minority lawyers is grounded in implicit bias, for which difference blindness is not an effective remedy and, indeed, constitutes part of the problem. As we explain below, bias awareness is the appropriate remedy to implicit bias. Importantly, however, exactly because difference blindness has become a symbol of merit and equality, large law firms and their partners refuse to abandon it. Forsaking difference blindness, let alone pursuing what in some ways is its opposite—bias awareness—must feel to some liberal-minded partners as walking out on their commitment to merit and equality, which they resist forcefully and in good faith, the evidence regarding the ineffectiveness of difference blindness as a remedy to implicit bias notwithstanding.

Second, cognitive dissonance, paradigm theory, and preexisting framing—three related theories—help further explain why very intelligent

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159. REEVES, *supra* note 2, at 3–4.

160. *See supra* Part I.B.1.

161. *See supra* Part I.B.1.

people would marginalize or ignore facts about difference blindness that are inconsistent with their fundamental beliefs regarding equality.

Cognitive dissonance describes the emotional stress and tension that occurs when any aspect of external reality, including our own actions, counters our deeply held beliefs about ourselves and the world. To reduce this stress we may deny this countering information in order to make our self-perception more consistent with who we believe ourselves to be. A core example of cognitive dissonance is a cult whose leader predicted that the world would end on a particular day. When the world did not end on that day, members did not reject their leader, rather they embraced his teaching even more strongly. Similarly, when presented with evidence that difference blindness grounded in an atomistic conception of individual behavior does not accord with reality, elite lawyers hold to that belief, perhaps even more tightly than before.

Thomas S. Kuhn's book *The Structure of Scientific Revolutions* derives a similar result using paradigm theory.<sup>162</sup> Kuhn describes how professional communities "use paradigms to maintain conformity regarding the legitimacy of questions, methods, and answers."<sup>163</sup> The "authority" of a paradigm "rests not on its truth in any abstract sense, but in its acceptance by the relevant community."<sup>164</sup> A professional community's first response to information and arguments that contradict the paradigm is to dismiss them.<sup>165</sup> If, however, the anomaly persists, it threatens the viability of the paradigm and requires the professional community to "discover a new way to resolve the anomaly using the existing paradigm; it can bracket the anomaly to be resolved in the future; or it can replace the old paradigm with a new one."<sup>166</sup>

Here, the myth of the atomistic lawyer and the corresponding version of meritocracy serve as a paradigm with deep roots in the legal profession. We have described the remarkably persistent paradigm above. Although this understanding has been criticized on the ground that lawyers cannot—or should not—in fact exclude their identity from their work,<sup>167</sup> the very existence of this paradigm demonstrates the power in the legal profession of the belief that lawyers are atomized individuals free of relational connections.

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162. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

163. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1230 (1995) (applying paradigm theory to the legal profession).

164. *Id.* at 1231.

165. KUHN, *supra* note 162, at 43–51; Pearce, *supra* note 163, at 1232.

166. Pearce, *supra* note 163, at 1232; *see also* KUHN, *supra* note 162.

167. David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 865 n.39 (1998); *see also* Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2089–91 (2005) [hereinafter Pearce, *White Lawyering*]; Russell G. Pearce, *Reflections on the American Jewish Lawyer*, 17 J.L. & RELIGION 179, 183 (2002); Russell G. Pearce, *The Jewish Lawyer's Question*, 27 TEX. TECH L. REV. 1259, 1260–61 (1996); Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 275–78 (2014).

Finally, preexisting framing theory explains just how deeply rooted preexisting frameworks determine ideological and practical workplace policies and images of ideal workers. For example, Cecilia Ridgeway argues that social relational processes of the workplace reflect a preexisting gender framework of the ideal worker molded in male assumptions, a sort of standard background frame that is hard to shake off given how inert organizations are and how deeply rooted these preexisting frameworks are.<sup>168</sup>

A study by Robert Nelson and William Bridges, which analyzed pay systems in private sector organizations, found that dominant organizational actors, largely white males, deny women and other lower status actors a powerful voice in the decision-making contexts in which the pay-setting processes develop.<sup>169</sup> Further, Ridgeway argues that this sets up a historically disadvantaged job framework with gender biased pay structures that persist in the wake of organizational inertia.<sup>170</sup>

Cognitive dissonance, paradigm theory, and preexisting framing suggest that leaders of large law firms will ignore, or attempt to minimize, the divergence between their commitment to equality and inclusion and the poor results. Deborah Rhode explains that “those in charge of hiring, promotion, and compensation decisions are those who have benefitted from the current structure”—as cognitive dissonance, paradigm theory, and preexisting framing predict—and are those “who have the greatest stake in believing in its fairness.”<sup>171</sup> Indeed, even though they “are willing to concede the persistence of bias in society in general, they rarely see it in their own firms. Rather, they attribute racial, ethnic, and gender differences in lawyers’ career paths to differences in capabilities and commitment.”<sup>172</sup> In so doing, they rely on implicit bias as facts, whether attributing lower ability to people of color or lesser commitment to women who have family responsibilities.<sup>173</sup> As discussed in Part III, if law firms were to take equity and inclusion seriously, they would recognize that these biases are not facts but rather obstacles that law firms could readily overcome if they had the will to do so. Indeed, as noted above, the existing partnership tournament systematically provides advantages to white men and handicaps to others.<sup>174</sup> Providing equal treatment beyond homophily and implicit bias would go a long way to remedying the current preferences for white men in BigLaw.

Third, despite being embedded in a good faith historical commitment to equality, BigLaw’s adherence to difference blindness, viewed from a bias awareness perspective, is certainly consistent with economic self-interest

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168. See generally CECILIA L. RIDGEWAY, *FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD* (Oxford University Press 2011).

169. See generally ROBERT NELSON & WILLIAM BRIDGES, *LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA* (1999).

170. RIDGEWAY, *supra* note 168, at 121–22.

171. Rhode, *supra* note 26, at 1046.

172. *Id.* at 1046–47.

173. *Id.* at 1046–53.

174. See *supra* notes 121–26 and accompanying text.



and an ideology of atomism and individualism. These commitments may also explain the staying power of difference blindness.

Powerful BigLaw partners—large law firms' equity partners—are predominantly heterosexual white males. Difference blindness and its constitutive presumption of merit legitimizes and justifies their status, power, and influence. To question difference blindness is to question the very status, power, influence, and compensation, of the current elite. It is therefore an attack that contradicts BigLaw's partners' self-interest in a fundamental way: it is one thing for powerful partners to agree to have their law firms invest modestly in recruiting minorities and approve small budgets to diversity committees and diversity officers. It is altogether a different story to challenge the very presumption that legitimizes the power, status, and compensation of the people atop of BigLaw.

Moreover, it is not just a question of potentially losing compensation that leads the current BigLaw elite to adhere to difference blindness. As we show above in exploring the current diversity policies pursued by BigLaw, difference blindness policies require a minimal investment of time and commitment from individual powerful partners who often concentrate on business development while staying clear of meaningful service on the diversity committee or mentoring minority lawyers. In other words, current diversity policies grounded in difference blindness reflect a deep commitment to the individualism of powerful partners who are left free to pursue their goals. Abandoning difference blindness and adopting bias awareness would require powerful partners to abandon their individualistic conception and invest their time and energy in relational approaches, undermining their core commitment to atomism and individualism. Here, the difference is not merely between the contemporary spending of limited resources on diversity compared with potentially altering the composition of the power structure, which would cost the current elite considerably. Rather, what is at stake is not just money but the organization of large law firms as an embodiment of atomism and individualism. A true commitment to bias awareness would require powerful partners to agree to learn to become more relational, a change and an investment many may not be willing to make.

Thus, the current elite atop BigLaw have a multilayered self-interest in continuing to pursue difference blindness: it sustains and justifies their power, influence, status, and compensation as well as their identity and self-conception as atomistic individualistic professionals. Transitioning to a culture of bias awareness would entail significant investments of money and time, which may result in greater loss of status and compensation down the road.

### III. TOWARD EQUITY AND INCLUSION IN THE RELATIONAL WORKPLACE: THE CASE FOR BIAS AWARENESS

Although these challenges are formidable, they are not intractable, especially for a profession that excels in problem-solving. The goal of providing equity and inclusion does not actually require radical change.

Indeed, the beginnings of relational organizational structures already exist. The change required is an evidence-based framework that employs a relational perspective. We argue that with such a framework that is both evolved in its own consciousness as well as proactive in being relational, law firms can become models for elite institutions in providing equity and inclusion in positions of power and influence. We described the preexisting frameworks of bias and their cascading effects above. Here, we turn to the positives of a relational workplace that is committed to recognizing this bias and privilege rather than holding everyone to the same standards using atomistic principles of difference blindness.

#### A. *The Relational Workplace*

The law firm, like all workplaces, is not a mere collection of atomistic individuals, as the dominant framework of law firms assumes. People do not just come into these firms and perform as atomistic individuals independent of their relationships with colleagues and clients, or of their preexisting frameworks of class, race, gender, and other social predictors.<sup>175</sup> We theoretically know this to be true, and in actuality, we see how people engage in work through relationships with peers, supervisors, support staff, and clients. However, when it comes to promotion and rewards, law firms typically assume that these relationships are only a small part of assessing performance. But believing that the contribution of a lawyer exists atomistically, even in significant part, misses the many webs of relationships—with teams, colleagues, superiors, peers, and clients—and the ways in which these interactions shape the lawyers' opportunities, craft, legal skills, business development, and reputation.

One organizational behavior approach that helps identify the complexity of workplace relationships is intergroup theory.<sup>176</sup> The experience of people in organizations depends upon “at least three sets of forces: their own unique personalities, the groups with whom they personally identify to a significant degree, and the groups with whom others associate them—

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175. In a separate contribution to this colloquium, one of us advances a capital analysis, which refers to these preexisting dynamic frameworks as social capital and identity capital. See Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 *FORDHAM L. REV.* 2509 (2015).

176. See, e.g., Clayton P. Alderfer & David A. Thomas, *The Significance of Race and Ethnicity for Understanding Organizational Behavior*, in *INTERNATIONAL REVIEW OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY* 1, 6–7 (Cary L. Cooper & Ivan T. Robertson eds., 1988); David A. Thomas & Clayton P. Alderfer, *The Influence of Race on Career Dynamics: Theory and Research on Minority Career Experiences*, in *HANDBOOK OF CAREER THEORY* 133, 145 (Michael B. Arthur et al. eds., 1989); Clayton P. Alderfer & Ken K. Smith, *Studying Intergroup Relations Embedded in Organizations*, 27 *ADMIN. SCI. Q.* 35, 38 (1982); Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 *ADMIN. SCI. Q.* 229, 260–65 (2001) [hereinafter Ely & Thomas, *Cultural Diversity*]; Robin J. Ely & David A. Thomas, *Learning from Diversity: The Effects of Learning on Performance in Racially Diverse Teams* 8 (Harv. Bus. Sch., Working Paper No. 04-017, 2003) [hereinafter Ely & Thomas, *Learning from Diversity*], available at [http://web.mit.edu/sloan/osg-seminar/f03\\_docs/ely.doc](http://web.mit.edu/sloan/osg-seminar/f03_docs/ely.doc).

whether or not they wish such an association.”<sup>177</sup> It broadly outlines two major groups in organizations as “identity groups and organization groups.”<sup>178</sup> Members of organization groups, “based on task, function and hierarchy,” . . . share ‘similar primary tasks, participate in comparable work experiences and, as a result, tend to develop common organizational views.’”<sup>179</sup> At law firms, primary organizational identities are that of a nonlawyer versus a lawyer (something associates and partners both share). Lawyers are further divided according to the separate identities of their hierarchical positions with the firm (i.e., as associate and partner respectively), as well as by subgroup identities within those positional groups based on seniority and reputation (e.g., junior partner, rainmaking partner, first year associate, senior associate, associate on partnership track, etc.). Each of these identities stick to these individuals and prime interactions in their own ways.

But identities are not just unidimensional. In addition to being situated within particular organizational identities, all these lawyers are also members of their respective identity groups (e.g., their age, race, gender, sexual orientation, nationality, disability, etc.). These groups, then, “derive[] from [salient] identities external to the organization.”<sup>180</sup> Identity group membership, which “often begins at birth and continues throughout an individual’s life ‘or, as in the case of age, changes as the result of natural development,’”<sup>181</sup> results in members of identity groups often sharing “equivalent historical experiences and, as a result, tending to develop similar world views.”<sup>182</sup> Researchers find that “[i]dentity group membership is sufficiently powerful that it influences conduct within organizations.”<sup>183</sup>

In the relational workplace, “individuals and organizations are constantly attempting, consciously and unconsciously, [on their own and in relationship,] to manage potential conflicts arising from the interface between identity and organization group memberships.”<sup>184</sup> Clayton Alderfer has also introduced to this framework the concept of embeddedness, in that “[r]elations among identity groups and among organizational groups are shaped by how these groups and their representatives are embedded in the organization and also by how the organization is embedded in its environment.”<sup>185</sup> This means that

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177. Alderfer & Smith, *supra* note 176, at 45.

178. Pearce, *White Lawyering*, *supra* note 167, at 2084.

179. *Id.*

180. *Id.*

181. *Id.* at 2085.

182. *Id.* at 2084. Some commentators focus on biological characteristics of identity groups, but we instead view them as socially constructed and including identities such as religion that generally have no biological characteristic. *Id.*; see also Ely & Thomas, *Cultural Diversity*, *supra* note 176, at 230.

183. See, e.g., Pearce, *White Lawyering*, *supra* note 167, at 2084.

184. *Id.* at 2085.

185. Clayton P. Alderfer, *Problems of Changing White Males’ Behavior and Beliefs Concerning Race Relations*, in *CHANGE IN ORGANIZATIONS* 122, 145 (Paul Goodman & assoc. eds., 1982).

“[e]mbeddedness is congruent ‘where power relations at a particular level within an organization are similar to those at other levels of the organization, or in society as a whole,’ and incongruent where they are not.”<sup>186</sup>

The failure of law firms to provide equity and inclusion, and the influences of homophily and implicit bias, are consistent with intergroup theory, in contrast to the atomistic theory of difference blindness, which cannot explain or account for them.<sup>187</sup> White men are more likely to want to work with and invest in each other, causing—without truly any intent or malafide exclusion—a tension where anyone who is not easily capable of creating the same level of interactional comfort is disadvantaged organically. Similarly, members of various identity groups bring to the workplace an implicit bias that is embedded with the congruent knowledge of the disproportionate power of white men in elite positions in society more generally. The problem with both these scenarios is that they remain couched in a paradigm of equality and therefore are both resilient and perpetuating. In contrast, awareness of bias forces these mechanisms to be dealt with more consciously.

*B. How to Construct a Workplace with Equity and Inclusion:  
Learning and Integration*

Our plea for bias awareness stems not just from the failure of the difference blindness approach to substantively introduce sustainable inclusion, but also from the continuous disregard by firms and change agents alike for understanding the danger of its premise. Complaining about the need for change without critically reconsidering the institutions we currently use to effect such change is a troubling strategy. Difference blindness literally blinds us by absolving itself from answering questions like “why are there not enough women or people of color in positions of leadership?” A true agency-filled response to this question demands that we raise consciousness and awareness regarding bias and use it in implementing organizational change. Bias awareness forces an awareness that identity groups, as well as organizational groups, influence the dynamic of relationships in the workplace and result in effects such as homophily and implicit bias. Only with this awareness can leaders of institutions counter the way that these effects prevent equity and inclusion.<sup>188</sup>

Paraphrasing the findings of Akinola and Thomas with regard to race in knowledge-intensive organizations, such as law firms, bias awareness enables organizations “to capitalize on diverse opinions and alternative perspectives presented to them through the cross-[identity] relationships . . . [They] can better capitalize on cross-cultural learning and enact this learning through [difference] consciousness actions, a critical

186. *Id.* (quoting Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 *CARDOZO L. REV.* 1613, 1632 (1993)).

187. Pearce, *White Lawyering*, *supra* note 167, at 2084.

188. David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, *HARV. BUS. REV.*, Sept.–Oct. 1996, at 80.

behavioral outcome, which can enhance the effectiveness of the diversity initiative.”<sup>189</sup> To encourage partners to promote equity and inclusion, a bias awareness approach would make them accountable, including adjusting their compensation for their successes in promoting diversity. Of course, the simple solution to apply a relational perspective of intergroup theory may seem appealing, but how can law firms actually develop strategies for achieving workplaces of equity and inclusion? How can a workplace characterized by bias awareness, as opposed to difference blindness, achieve integration and learning?

Robin Ely and David Thomas have described the integration-and-learning approach as one where “members of a work force ‘are receptive to the notion that racial differences may underlie team members’ expectations, norms, and assumptions about work and that these differences are worth exploring as a source of insights into how the group might improve its effectiveness.”<sup>190</sup> One way to extrapolate this for law firms and for identity differences beyond race would be to see ways in which partners and associates would “openly acknowledge and negotiate their differences in service of their goals.”<sup>191</sup> In their study, Ely and Thomas compared hundreds of bank branches using integration-and-learning procedures with those using difference blindness and found that the integration-and-learning branches performed at a significantly higher level in equity and inclusion, as well as in productivity and revenue.<sup>192</sup>

The reason that these businesses have become open to integration-and-learning strategies, and similar bias awareness approaches, is the newly emergent perspective that diverse workforces are not just good for diversity’s sake but are actually good for organizational effectiveness because they “lift morale, bring greater access to new segments of the marketplace, and enhance productivity.”<sup>193</sup> Even so, the Thomas and Ely paradigm does not simply respond to market logic and forces. It instead expressly demands a cultural transformation, a look at diversity more holistically by calling out firms to be more open and explicit about discussing how differences can be channeled for organizational effectiveness and efficiency. This is different from both the implicit bias-ridden “difference blindness” approach we set out above, but it is also different from the potential exploitation that stems from what Thomas and Ely dub the “access and legitimacy” approach which brands diversity as a useful tool to gain access to narrow markets or the laudable, although only modestly effective, efforts of in-house counsel to encourage law firm

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189. Akinola & Thomas, *supra* note 15, at 21.

190. Ely & Thomas, *Cultural Diversity*, *supra* note 176, at 260–65. David Wilkins and Russell Pearce have observed that their findings are relevant to lawyers. *See, e.g.*, Wilkins, *supra* note 167, at 861–67; David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1559 (1998); *see also* Pearce, *White Lawyering*, *supra* note 167, at 2084.

191. Ely & Thomas, *Learning from Diversity*, *supra* note 176, at 8.

192. *Id.* at 2, 43; *see also* Pearce, *White Lawyering*, *supra* note 167, at 2084 (describing a similar study done by Ely and Thomas one year later with similar findings).

193. Thomas & Ely, *supra* note 188, at 79.

diversity.<sup>194</sup> In turn, the emerging paradigm of integration that these scholars suggest supplants a causal mechanism that existing diversity paradigms take for granted—*assimilation*.<sup>195</sup> Instead of organizing around assimilation “[which] goes too far in pursuing sameness,” they urge us to pursue a theme of integration that manages internal differences among employees in ways that make the firm grow and value difference, instead of rejecting it.<sup>196</sup>

Their research proposes that firms, which are invested in this “third paradigm,” commit to a two-step process.<sup>197</sup> The *learning* part requires a commitment to the goal of true inclusion. They highlight, for example, the need for openness as a core value and the recognition, firmwide that “there isn’t just one way to get positive results.”<sup>198</sup> They also caution that this learning can be a long process and that organizational change does not come without explicit commitment to this new paradigm. The *integration* part dovetails with the acceptance and learning of this paradigm—they call for a firm culture where everyone feels valued, and one that is invested in personal development of the individuals. They propose a relatively non-bureaucratic structure with a well-articulated mission for this process but one can imagine this integration in any number of firm-specific ways.<sup>199</sup>

The value of the two-step process is especially clear in the law firm context where much of the commitment to diversity—where it has been prominent—has stopped with just the learning part of the process. In the last decade, many law firms have reached out in good faith to social scientists and organizational theorists to consult and rethink the ways in which they can reimagine their environs<sup>200</sup> but these efforts have still been limited in their reach because while they expose many senior white male partners to these approaches, law firms tend to follow up with limited actions to integrate these lessons into policy and practice.<sup>201</sup> Firms—especially large, prominent firms—often invest in education and trainings but the impact is often stifled because they do not follow up with strategic plans and cultural changes that would be necessary to capitalize on this

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194. See *id.* at 83; David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004); Julie Triedman, *Grinding to a Halt? Law Department Efforts to Diversify Law Firms Have Yielded Little Progress*, CORP. COUNSEL (Aug. 1, 2014), <http://www.corpcounsel.com/id=1202663175357/Grinding-to-a-Halt?slreturn=20150206082156> (subscription required).

195. Thomas & Ely, *supra* note 188, at 86.

196. *Id.* Ely and Thomas highlight one firm, Dewey & Levin, which has succeeded in attracting and retaining a diverse staff of professionals through a unique openness to new perspectives and practices provided by their diverse members. *Id.* at 85–86.

197. See generally *id.*

198. *Id.* at 86.

199. *Id.* at 85–86.

200. Wilkins & Gulati, *supra* note 49, at 592; see also Elizabeth H. Gorman, *Work Uncertainty and the Promotion of Professional Women: The Case of Law Firm Partnership*, 85 SOC. FORCES 865 (2006).

201. See Triedman, *supra* note 194.

learning.<sup>202</sup> Attending a training or being present at a seminar where the pitfalls of bias are laid out may invite you to think differently, but if the training itself is not connected closely to your work and your work environment does not change, the energies for applying the learning are likely to dissipate. So, if episodic, discretionary, individualized bias trainings, done out of the institutional context are not effective as isolated events and a deeper commitment institutionally to the two-step process is what is required, what then *does* Big Law learning and integration look like?

### C. *BigLaw Learning*

The umbrella learning that inclusive organizations demand is a slow but steady distancing from archaic, but entrenched, frameworks of hierarchy and bias. The trouble with preexisting frameworks—and all organizations and institutions are entrenched with these—is that they are sticky.<sup>203</sup> What this means for law firms is that even law firms that seek in good faith to change and to implement substantive diversity measures are stuck with the historical scripts that have shaped their institutional culture. Firms—and we emphasize that this is not about malafide intent—recognize a certain kind of skill set that has been primed over years and for better or for worse, this mimics the prototype of their original inhabitants: white male lawyers.

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202. Sexual harassment education trainings, for example, are ripe for further training, but have little impact because even though they are introduced, people either go through them without interest, or they have an interest but nothing to reinvest it into. See, for example, Harvard sociologist Frank Dobbin's review of the literature in sexual harassment. Frank Dobbin, *Sexual Harassment: The Global and the Local* (2006), available at [http://scholar.harvard.edu/files/dobbin/files/2006\\_sf\\_saguyzippel.pdf](http://scholar.harvard.edu/files/dobbin/files/2006_sf_saguyzippel.pdf) (last visited Mar. 25, 2015).

203. See RACHEL MARCUS & CAROLINE HARPER, GENDER JUSTICE AND SOCIAL NORMS: PROCESSES OF CHANGE FOR ADOLESCENT GIRLS 12 (2014), available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8831.pdf> ("Sticky gender norms permeate and are reinforced through different social institutions, such as households, markets, politics, the media, religious institutions and education systems." (citations omitted)). Cecilia Ridgeway also discusses the "stickiness" of gender norms. In explaining her primary thesis, Ridgeway offers:

The persistence of gender inequality in the face of modern legal, economic, political processes that work against it suggests that there must also be on-going social processes that continually recreate gender inequality. I have pulled together evidence from sociology, psychology, and the study of social cognition—how people perceive the social world—to develop an explanation of how gender differences and hierarchies function and end up being recreated again and again. Cecilia Ridgeway, *How Gender Inequality Persists in the Modern World*, SCHOLARS STRATEGY NETWORK (June 2013), <http://www.scholarsstrategynetwork.org/content/how-gender-inequality-persists-modern-world>. On the theory behind gender beliefs and the preexisting frameworks that attach to it, see Cecilia L. Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 GENDER SOC. 510, 523 (2004) ("Yet as we have seen, social relational contexts evoke preexisting gender beliefs that modestly but persistently bias people's behavior and their evaluations of self and other in gender-typical ways. Although these biasing effects are contextually variable and often subtle, they are widespread across the many social relational contexts through which people enact society and shape the course of their lives.").

New entrants, while welcome, are implicitly matched to these standards and accepted only to the extent they comply with what are regarded as “objective” standards. Thus, the most critical part of this learning is the unearthing of this “objectivity” as a biased, dominant paradigm that is intrinsically unfair to the diverse participants in the tournament. Not only is this so-called objectivity unnecessary to the outstanding lawyering for which large firms are renowned, but the overwhelming evidence suggests that firms which apply integration and learning would be significantly more effective both in terms of their work and the job satisfaction of their lawyers.

Accordingly, the importance of investing in the learning component of the integration-and-learning approach cannot be overstated. Large law firms and their powerful partners, just like American society at large, are culturally committed to difference blindness as the embodiment of merit and equality. Many lawyers may not be able to conceive of, let alone understand, how different identity groups impact, form, and shape workplace policies and procedures that are seemingly meritocratic. Moreover, studying and documenting the complex effects of identity groups on BigLaw’s culture and organization will reveal the very necessary reforms needed to ensure equity and inclusion. Without serious exploration and consequent learning, proponents of bias awareness may only sketch a limited blueprint for effective alternative relational policies and procedures. There are many ways of introducing this “learning” within the context of BigLaw. Recognizing that we are not currently in law practice and that the most effective strategies will emerge from BigLaw firms themselves, we offer three preliminary, broad suggestions here to begin exploring this landscape: empirical learning, consciousness raising, and community outreach.<sup>204</sup>

### 1. Empirical Learning

An integration-and-learning approach would require a data-driven approach to all aspects of a firm’s work to measure the effects, if any, on different identity groups, and to ensure equal treatment to all identity groups. It would require all law firm lawyers with managerial responsibility in every department to periodically and regularly review assignments, billable hours, evaluations, training, mentoring, access to clients, and team interactions to compare data for members of identity groups and audit<sup>205</sup> the ways in which the firm is and is not effectively promoting equity and inclusion, including the extent to which lawyers who are not white men receive support from the firm in their professional development. As the National Football League does pursuant to the

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204. Elsewhere, one of us develops the concept of identity capital exchanges at BigLaw to explore the impact of identity groups on large law firms’ culture, organization, and conception of merit. See Wald, *supra* note 175.

205. Cf. R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1530 (2011) (proposing the use of “race audit[s],” which are “voluntary, evaluative measure[s] designed to identify the sources of persistent racial inequality that can be productively deployed by localities”).



Rooney Rule to encourage teams to hire management of color, the law firm should interview partners and associates on their experiences in order to better understand the effects of identity in the workplace and to better promote equality.<sup>206</sup>

## 2. Consciousness Raising

Of course, data is important to understanding, but data is only useful in as much as it can foster institutional change. The organizational learning of these concepts requires not just initiation and interest in data collection and curation but a deep-rooted commitment to change and transformation. To unpack this commitment, we develop here one example of reunderstanding gender as part of such organizational learning, but one can hopefully see how it applies theoretically in similar ways for other forms of diversity. In critically examining the institutions we operate within, we revalue our ideas of consciousness: we question and relearn assumptions of “good” and “right” and “valuable.” And this fine-tuning of priorities is an essential part of consciousness building and an inherent component of BigLaw learning.

One of these base theories that operate in the gendering of the workplace is a cultural assumption that subtly attaches to working women across the globe, that they—not their partners, boyfriends, husbands, brothers, fathers, or other male partners—bear the brunt of managing work *and* family. Egalitarian workforces that set the same difference blindness standards for men and women do not intentionally and explicitly discriminate on the basis of gender, but they do something else that has the same ultimate effect—they set standards not designed for the average female worker.<sup>207</sup> The modern organization as we know it was an environment that was set up for the 1950s male executive who had a wife to take care of the house, and it works for the twenty-first century male law firm partner who continues to share household chores disproportionately with his female, working partner.<sup>208</sup> And while one of these images seems much more intrinsically

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206. See Bram A. Maravent, *Is the Rooney Rule Affirmative Action? Analyzing the NFL's Mandate to Its Clubs Regarding Coaching and Front Office Hires*, 13 *SPORTS LAW J.* 233, 236–45 (2006) (describing the history of the Rooney Rule). The policy, issued by the NFL's Committee on Workplace Diversity in order to “promote diversity in the league's head coaching and front office positions,” states that: “[A]ny club seeking to hire a head coach will interview one or more minority applicants for the position. The *one exception* occurs when a club has made a prior contractual commitment to promote a member of its own staff and no additional interviewing takes place.” *Id.* at 240 (quoting Press Release, NFL, NFL Clubs To Implement Comprehensive Program To Promote Diversity in Hiring (Dec. 20, 2002), <http://www.nfl.com/news/story/6046016> (emphasis added)).

207. The argument about reexamining the original kind of contexts that organizations were created for requires a honest confrontation of the social order and identity. Both Robin Ely and Debra Meyerson rely on the framework of the gendered social order offered by Joan Acker, *supra* note 51, at 146–47. See Robin J. Ely & Debra E. Meyerson, *Theories of Gender in Organizations: A New Approach to Organizational Analysis and Change*, 22 *RES. ORG. BEHAV.* 105 (2000).

208. See Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 *YALE L.J.* 1731, 1772 (1991) (“Women continue to assume about 70% of the domestic responsibilities in an average household and employed wives spend twice as much time on family obligations as employed men.”).

gendered than the other, the organization is implicated equally in both. While inclusive institutional reform encourages women to be part of the workforce, it does so by pushing them to make gender irrelevant. Women are given subtle cues that, in an egalitarian, difference blind workforce, expectations are set at the same bar for *everyone*, making women who do not meet these standards feel like it was their fault for not “cutting it” and organizations justified for “doing all they could.”<sup>209</sup> This seems like a fair solution because it sets the same bar for everyone—but the problem is no longer different standards for men and women, but instead it is that *equal standards do not take into account subtle background assumptions*. Workforces promote and advance a certain kind of committed worker *without facially discriminating on gender* yet, at the same time, assume that this worker is male and devoid of strong family demands.<sup>210</sup> Raising consciousness about this at the institutional level, instead of placing this inordinate amount of agency on the individual worker can be an important part of building more inclusive workspaces.

Another prime example of this dynamic at large law firms is the billable hour. The billable hour is commonly understood as an equal, neutral standard, which does not differentiate between men and women lawyers based on their gender. High billable hour targets, formal and informal, are thus understood as constituting the same bar for everyone wishing to make partner, often explained by external client demands and increased competition by other large law firms for entity clients. Even under this account, as noted earlier, billable hour practices will generally result in favoritism for white men as a matter of internal firm dynamics and business development, absent a systematic and critical audit of the influence of homophily and implicit bias on the day-to-day work of the firm.

Some have argued, moreover, that the conventional account of billing does not account for the basic insight that clients seek a high quality work product, not high billable targets. The fetish of the so-called equal and neutral billable hour over time forecloses the possibility of imagining alternative measures of lawyers’ time, worth, and commitment to the firm and its clients. To be sure, sometimes long hours are a prerequisite of the effective representation of clients. Yet, that large law firms cannot even imagine alternative standards—say ones of output rather than input—drives home the devastating power of difference blindness and the need to raise consciousness about its manifestations at BigLaw.

Even in cultures that are seemingly more gender-egalitarian, research confirms that women do more housework, more childcare, and bear the

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209. See Hilary Sommerlad, *The “Social Magic” of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession*, 83 *FORDHAM L. REV.* 2325, 2345 (2015).

210. Herminia Ibarra et al., *Women Rising: The Unseen Barriers*, *HARV. BUS. REV.*, Sept. 2013, at 5–6; see also Hannah Riley Bowles & Linda Babcock, *How Can Women Escape The Compensation Negotiation Dilemma? Relational Accounts Are One Answer*, 37 *PSYCHOL. WOMEN Q.* 80, 80–82 (2013).

brunt of parenthood more steeply than their male partners.<sup>211</sup> In turn, women that do well have had to “take gender out of the equation” and become more like their male peers.<sup>212</sup> This has meant choosing professional and personal lifestyles that do not prime other responsibilities and do not prime the “double bind” in the workplace.<sup>213</sup> These unreachable, “nobody can truly have it all” standards have made women adopt different strategies than men and, by extension, have made them leave elite career tracks at rates distinctly disproportional to men. Notably, the bigger problem is not that women leave but, rather, that we attach certain assumptions as to *why* they leave. Persistent explanations include women leave because they are “wired that way” or “they want to” or “can’t take it” or “just choose to.” In turn, these structural assumptions about men and women continue to absolve organizations from being responsible for this attrition.<sup>214</sup>

### 3. Community Building

But even as we recommend this unlearning of existing institutions, we stay very aware of how difficult it is to effect real institutional change in any organizations and how these processes are embedded in social context. As John Padgett and Woody Powell warn us about organizational emergence:

Organizational genesis does not mean virgin birth. All new organizational forms, no matter how radically new, are combinations and permutations of what was there before. Transformations are what make them novel. . . . Invention “in the wild” cannot be understood through

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211. Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 8–9 (1996); Coralie Matayoshi, *Equality at Work Begins at Home*, 6 HAW. B.J. 4 (2002).

212. See Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 FORDHAM L. REV. 941, 941–43 (1989); see also Ibarra et al., *supra* note 210, at 5–6; Kathleen Davis, *The One Word Men Never See in Their Performance Reviews*, FAST COMPANY (Aug. 27, 2014, 5:07 AM), <http://www.fastcompany.com/3034895/strong-female-lead/the-one-word-men-never-see-in-their-performance-reviews> (conducting a survey of performance evaluations and finding that women’s performance evaluations tend to refer to them as “abrasive,” a term never used for men’s evaluations).

213. See Heather Bennett Stanford, *Do You Want to Be an Attorney or a Mother? Arguing for a Feminist Solution to the Problem of Double Binds in Employment and Family Responsibilities Discrimination*, 17 AM. U.J. GENDER SOC. POL’Y & L. 627, 650–51 (2009).

214. Kathy Kram and Marion Hampton argue in their article about women leadership that women—and other minorities—suffer from a distinct “spiral” of visibility and vulnerability. Kathy E. Kram & Marion M. Hampton, *When Women Lead: The Visibility-Vulnerability Spiral*, in READER IN GENDER, WORK AND ORGANIZATION 213 (Robin J. Ely et al. eds., 2003). Using an object relations theory, they argue that projective identification leads to vulnerability that holds most women back from taking visible leadership roles. *Id.* But those who *do* become visible suffer from even more vulnerability because the visibility exasperates their vulnerabilities. *Id.* Organizations that are committed to learning and integrating should be open to embracing these “vulnerabilities” as part of a broader leadership style instead of dismissing them a priori.

abstracting away from concrete social context, because inventions are permutations of that context.<sup>215</sup>

While there is some research that shows that new firms are the best sites of radical institutional change,<sup>216</sup> the American legal profession in general, and BigLaw in particular, are not the ideal environment in which to expect new institutional prototypes, and suggesting change by way of new firms and kinds of practice is not exactly feasible.<sup>217</sup>

Rather than reinventing BigLaw, a more scalable intervention is inclusive community consciousness building. Building communities of consciousness requires a commitment to revisiting existing institutions—even those that *prima facie* do not look like they are unequal and threatening to new inhabitants. Instead of just looking at inclusion methods that bring new people in, we need to revisit these structures for their potential to nurture new members as equally valuable as the dominant worker. By engaging a critique of the institutions they take for granted, actors are forced to appreciate the unequal premise of their own privilege—rather than the lack of “merit” of those who are situationally incapable of taking for granted considerations like merit and achievement.<sup>218</sup>

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215. JOHN F. PADGETT & WALTER W. POWELL, *THE EMERGENCE OF ORGANIZATIONS AND MARKETS 2* (Princeton Univ. Press 2012), available at <http://press.princeton.edu/chapters/s9909.pdf>.

216. Research shows that the stickiness of old frames or expectations of work and workers get negotiated differently in new spaces with new kinds of work. Ridgeway calls these “sites of change,” or new environments with the kind of fertile conditions for reappraisal and growth. RIDGEWAY, *supra* note 168, at 185. New industries or new kinds of organizations, for instance, have less dominant versions of the historical ideal worker and so new entrants are evaluated with flexible norms and inclusion. Ridgeway uses the research example of biotechnology startups to explain her argument of “new frames” devoid of cemented preexisting frameworks. *See id.* at 174–77. But the legal profession has its own examples of such new frame organizations too. One example has been the “non-law-firm” Axiom which claims to “liberate lawyers from the tyranny of the billable hour” and reverse the law firm set-up which is “very unhappy home(s) for attorneys.” *See Sarah Ruby, New Business Model: Antidote for Law Firm Burnout*, STAN. GRADUATE SCH. OF BUS., <http://public-prod-acquia.gsb.stanford.edu/news/bmag/sbsm0711/feature-antidote.html> (last visited at Mar. 25, 2015).

217. However, it is worthy of comment that newer firm-models with flexible organization and rewards that are not intrinsically gender or race typed from the get go, are likely to be more open avenues for renegotiated hierarchy and advantage. Joe Nocera, *Silicon Valley’s Mirror Effect*, N.Y. TIMES, Dec. 27, 2014, at A17 (demonstrating that in fact, new firms, such as Silicon Valley startups, are oftentimes ridden with bias too).

218. This argument about the “ideal worker” and assumptions of the dominant worker have been made by many gender scholars in the context of the organization. Ely and Meyerson, for instance, assert that the kinds of actions required to reduce gender inequalities in organizations involve challenges to existing power relations and the dismantling of practices that have long been institutionalized as rational. Ely & Meyerson, *supra* note 207. Similarly, in her book *Tempered Radicals*, Meyerson argues that

[b]y taking on the quality of “uncontestable” truth, dominant narratives in organizations keep existing arrangements in place. Alternative stories can be an important vehicle to jar widely held understandings and open the way for learning and subsequent adaptation . . . . Small wins can be both the result of the new stories and the occasion to create them.

DEBRA MEYERSON, *TEMPERED RADICALS: HOW PEOPLE USE DIFFERENCE TO INSPIRE CHANGE AT WORK* 115 (Harv. Bus. Press 2001).

There are two parts of this community building. The first is to include the relatively new entrants (women, people of color, etc.) with openness and a spirit of inclusion. The second part of it is to expand the pool of people who feel invested in this project. As it stands, diversity learning is something that is done to or done for women or minority occupants of these elite firms. But this is simply not, and should not be, the case. The project of inclusion requires buy-in that does not marginalize women and minorities. We need to be able to build communities of resistance and support that are not staffed by only women and minority workers. We need, as Anne-Marie Slaughter suggests, see these issues not as “women” issues, but as “family issues”<sup>219</sup> that concern everyone. Similarly, we need to see these institutional changes together as a community, relationally, not as “diversity issues” but important, structural, “firm issues.”

For example, on the point of gender diversity and true inclusiveness in large, elite firms, organizational theorists and Harvard researchers Herminia Ibarra, Robin Ely, and Deborah Kolb suggest that deliberate discrimination is no longer the threat that precludes women from positions of power.<sup>220</sup> Instead, organizational structures and cultural assumptions are the threatening “second generation” forms of bias that erect powerful but subtle barriers that hold women back from leadership in the workplace.<sup>221</sup> The solution that Ibarra and her colleagues offer calls for more signposting to *both* men and women to help understand what is going on. If education about second-generation gender assumptions and implications is the real way forward, what does it hold for our case?

Our call is for the recognition that, as they stand, our Western, egalitarian difference blind workplaces are unequal frames of comparison because they compare workers with inherently different expectations. Indeed, past calls for a difference blind worker have come not only at great cost to women but also at considerable cost to men.<sup>222</sup> After all, as Joan Williams suggests, pressures on men have not changed.<sup>223</sup> “Feminism is all about choices—well, choices for whom?”<sup>224</sup> Moreover, “[e]ven feminism is putting pressure on men to live up to the ideal of work devotion. So long as that is

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219. Thu-Huong Ha, *How Can We All “Have It All”?: Anne-Marie Slaughter at TEDGlobal*, TEDBLOG (June 11, 2013, 12:55 PM), <http://blog.ted.com/2013/06/11/how-can-we-all-have-it-all-anne-marie-slaughter-at-tedglobal-2013>.

220. Ibarra et al., *supra* note 210, at 5–6.

221. *Id.*

222. Recent writings on women in the workplace tease out the effect this lack of relationality has on dominant actors as well. Authors like Sheryl Sandberg and Anne-Marie Slaughter, who have considerably different tones about the debate, both concede that the movement invites the dominant actors to be part of the conversation. Sandberg encourages them to “lean in” too as part of the movement, and Slaughter urges both men and women both to normalize family references and make them more routine in professional life so they do not seem like gendered norms. See SHERYL SANDBERG, *LEAN IN* (2013); Anne-Marie Slaughter, *Why Women Still Can’t Have It All*, ATLANTIC (June 13, 2012, 10:15 AM), <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020>.

223. Williams et al., *supra* note 52, at 220–22.

224. Tara Siegel Bernard, *The Unspoken Stigma of Workplace Flexibility*, N.Y. TIMES, June 15, 2013, at B1.

the state of play, nothing is changing for men. And if nothing is changing for men, nothing is changing for women.”<sup>225</sup> At the same time, while bias awareness can make engagement more meaningful, there also remains the potential threat that it can create an environment of political correctness without effective change.<sup>226</sup>

At large law firms, learning must include, and must be visibly understood to include, not only women lawyers but men lawyers as well; not only lawyer-mothers but lawyer-fathers, and childless lawyers as well; not only minority lawyers but white lawyers as well. And, although we have not in this Article expressly addressed the issues confronting sexual minorities and people with disabilities, the same logic would apply. Perhaps most importantly, learning must include not only the marginalized outsiders—partners without power, counsel and associates—but also the most powerful partners as well.

#### *D. BigLaw Integration: Inclusive Community Consciousness Building*

BigLaw learning is an important ideological shift necessary to effect long-term inclusive change in organizations. But while a necessary prerequisite, commitment to diversity (not just to “be diverse” or “look diverse”) is not complete without concrete action. An integration-and-learning approach meant to foster inclusive community consciousness would utilize many of the tools law firms now employ (e.g., training, mentoring, and affinity networks) under difference blindness but would deploy them in very different ways.

Organizations could introduce required training across a range of actors, white male powerful partners and white male associates included, for example, on how to work collaboratively and conduct evaluations without implicit bias, how to communicate about work across difference, and how to be an effective mentor. In practice, rather than resorting exclusively to continuing legal education–style training sessions divorced from the actual work BigLaw lawyers do, training would take place in the context of actual assignments by senior associates and partners who would train more junior colleagues in a relational team environment. In turn, large law firms would have to track and monitor the training their lawyers receive, as well as more consistently track the assignments handed out, to ensure that all firm lawyers, irrespective of identity group, receive equal training.

Mentoring in such a relational paradigm would be different too. Rather than focusing on things like skill building (without any assignments that test shared work<sup>227</sup>) and “office politics,”<sup>228</sup> one could imagine a prospective mentor-mentee relationship that could develop from a relational work environment. In such a relationship, we see mentors themselves being accountable for both (1) helping their mentee develop “competence,

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225. *Id.*

226. See Ely & Meyerson, *supra* note 207, at 133.

227. Pearce & Wald, *supra* note 53, at 136.

228. *Id.*

credibility, and confidence” as well as (2) playing the dual role of coach and counselor, giving technical advice as well as talking about their relative life experiences to offer context and emotional support.<sup>229</sup> As part of mentoring,

[t]he mentor must also help the mentee “establish[] and expand[] a network of relationships,” including the development of relationships with sponsors, peers, role models, and additional mentors. In doing so, the mentor would prepare the mentee not only for an expanded role within the firm but also for other employment if partnership is not in the mentee’s future.<sup>230</sup>

Here, too, an evidence-based approach requires accountability for the mentor and sponsors. As part of its commitment to ensure equal mentoring opportunities, BigLaw would have to track mentoring and allocate this valuable resource equally among its attorneys, with meaningful financial reward for those who excel at mentoring.

At the same time, the mentee must also take responsibility in a reciprocal relationship. Mentees cannot act as passive actors, waiting unrealistically for powerful partners to sacrifice business development time to mentor them. Just as it is the responsibility of BigLaw to ensure that its powerful partners mentor junior lawyers irrespective of group-based identity, it is the responsibility of mentees to treat the relationship with mentors as a relational reciprocal one, actively invest in it, and demonstrate to the mentor the value for him or her in the mentoring. Mentees would have to actively take advantage of mentorship opportunities, adequately prepare for them, and visibly value them.<sup>231</sup>

Affiliation groups are also quite different in an integration-and-learning approach. In contrast to the existing difference blind model, in which “outsiders,” such as minority and women lawyers, are encouraged to participate in affinity group activities that are divorced from their work at the firm, the bias awareness model offers women and minority—and indeed all—lawyers a far more robust inclusive role.<sup>232</sup> On the one hand, all firm lawyers would be encouraged to participate in affinity groups, sending a credible message to all that BigLaw values and respects affinity groups as

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229. *Id.* (quoting THOMAS & GABARRO, *supra* note 97, at 96; David A. Thomas, *The Truth About Mentoring Minorities: Race Matters*, HARV. BUS. REV., Apr. 2011, at 98).

230. *Id.* (quoting Thomas, *supra* note 229, at 104).

231. A point driven home effectively by Sheryl Sandberg in *Lean In*. See SANDBERG, *supra* note 222, at 64–76 (noting this in chapter 5, titled “Are You My Mentor?”).

232. In the education context, the Posse Foundation has been a very effective model of such inclusivity. Started in 1989, the goal of the Posse Foundation has been to recruit and retain students in colleges and universities. The idea of sending students in groups meant that they would have each other as a “back-up,” helping their retention once in institutions new to them. See generally *The Posse Foundation, Inc.*, POSSE FOUND., <http://www.possefoundation.org> (last visited Mar. 25, 2015). Their statement defines diversity as a function of being relational: “Posse’s definition of diversity is not just about cultural, ethnic or racial diversity, it includes economic, academic, religious, political and geographic diversity. It encompasses all ways that people are different from each other, and all the different ways they can learn from each other.” *Quick Facts + FAQ*, POSSE FOUND., <http://www.possefoundation.org/quick-facts#howdoesdiversity> (last visited Mar. 25, 2015).

sites of changes and as arenas in which firm lawyers are able to develop and grow their identity as firm actors and as public citizens. On the other hand, BigLaw should invest in forming meaningful relationships with affinity groups, significantly above and beyond contributing money to these organizations, to allow firm lawyers to belong to and participate in affinity groups in a manner that is relevant to their day-to-day practice at the firm. Thus, affinity group membership can become not an arena in which one's "otherness" and group identity is unintentionally affirmed, but rather a site for change in which one's differences are acknowledged and built upon to foster equal membership in the firm.

Under a difference blindness paradigm, one might object on the ground that encouraging affinity groups could lead to white male-only groups or to women bar associations being overcrowded with male members. We offer a different vision, one in which men and women lawyers, as well as white and minority attorneys, come together to explore common areas of interest, including but not limited to, gender and race; and at the same time a relational outlook in which new affinity groups emerge to redefine and reimagine group identities that are not constrained by conventional gender and race lines.

Such an integration-and-learning approach may result in innovation regarding the billable hour and business development. The billable hour is certainly a useful tool by which BigLaw can monitor the input of its lawyers. But it ought not dominate large law firms' thinking about its lawyers' value, worth, and loyalty to clients, given its gendered frame and disproportionate impact on the career trajectory of women and minority lawyers. Bias awareness suggests the development of additional assessment tools alongside the billable hour that can more accurately measure the input and output of BigLaw lawyers, such as the quality and timeliness of work product, responsiveness, effective communications with law firm's team members and the client, and client satisfaction.

Finally, BigLaw's difference blindness approach to business development, along the lines of "everybody is in the same black box of not quite knowing what to do," is long overdue for a shake-up, especially given the gendered and racial overlay of networking within law firms and outside of them with clients that very much shape and inform the success of building one's book of business.

An integration-and-learning approach grounded in bias awareness calls upon BigLaw to take stock of the various capabilities and relationships it has, both institutionally and those possessed by its individual lawyers, and extend all of its lawyers equal opportunities to develop and benefit from internal and external networks. Eli Wald, for example, argues that given the role that social (and cultural) capital plays in developing one's book of business and ultimately in one's ability to succeed as a powerful partner, large law firms must invest in allowing all of their lawyers to cultivate "capital infrastructure" after carefully cataloging their respective capital



endowments, a form of learning.<sup>233</sup> Such an approach could entail both systematically training all BigLaw lawyers to develop business and directing additional resources to benefit firm lawyers who initially possess fewer social capital connections and relationships. For example, mentoring can be tied not only to work assignments as explained above but also to meaningful opportunities to develop business for which mentor and mentee would be rewarded.

#### CONCLUSION

For a generation now, BigLaw has announced a commitment to equity and equality within its ranks and has committed significant resources to back up its rhetoric with little results to show for its efforts: while entry-level hiring is diverse, women and minority lawyers' rates of attrition are disproportionately high, resulting in their underrepresentation in positions of power and influence.

Contemporary diversity policies fail because they are grounded in two powerful paradigms: difference blindness and atomistic individualism. Difference blindness mandates that BigLaw lawyers be treated with formal equality, based on seemingly meritocratic standards that ignore irrelevant identity considerations. Atomistic individualism means lawyers in firms are expected to succeed as individuals and that each firm lawyer is responsible only for herself.

The current paradigm fails because formal equality neglects to recognize that success at BigLaw is not solely a function of individual merit. Rather, as a result of implicit bias and homophily, seemingly meritocratic standards are in fact embedded with group identity content that systematically and disproportionately burdens women and minority lawyers. Yet, notwithstanding its harmful impact on BigLaw's quest for equity and inclusion, difference blindness persists because of a complex mix of considerations, including historical path dependency, cognitive failures, and the self-interest of the powerful BigLaw elite in sustaining the status quo.

Moving forward and achieving greater equity and inclusion in positions of power and influence requires abandoning BigLaw's exclusive reliance on difference blindness and atomistic individualism and incorporating relational bias awareness policies and procedures designed to allow large law firms to become sites of inclusive community consciousness building. Applying the integration-and-learning approach, this Article suggests practical steps BigLaw firms can and should take to promote greater equity and inclusion.

Nonetheless, these steps are only a beginning. The integration-and-learning approach to law firms requires development in at least two more directions. First, our suggestions regarding practical strategies barely scratch the surface and are best explored by those in the trenches. Second, this Article has only started to explore the complexities of issues of difference. It reviews findings regarding race and gender in a significant,

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233. See Wald, *supra* note 175, at 2539.

but far from complete, way. Moreover, while the integration-and-learning approach provides a framework for examining all identity differences, this Article has not specifically addressed issues relating to sexual minorities and people with disabilities, or suggested more than a cursory consideration of intersectionalities among various identities.

Even acknowledging these complexities, the integration-and-learning approach provides law firms that want to provide equal opportunity to their workers with the tools they need to do so. The challenge of equity and inclusion is substantial but not insurmountable. As FBI Director James Comey has observed with regard to task of countering implicit bias:

We all have work to do—hard work, challenging work—and it will take time. We all need to talk and we all need to listen, not just about easy things, but about hard things, too. Relationships are hard. Relationships require work. So let's begin that work. It is time to start seeing one another for who and what we really are.<sup>234</sup>

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234. James B. Comey, Director, FBI, *Hard Truths: Law Enforcement and Race at Georgetown University* (Feb. 12, 2015), *available at* <http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race> (describing the task of overcoming implicit bias in the criminal justice system).