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Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality,

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DOUBLE JEOPARDY? AN EMPIRICAL STUDY WITH IMPLICATIONS FOR THE DEBATES OVER IMPLICIT BIAS AND INTERSECTIONALITY

JOAN C. WILLIAMS^{1*}

<i>Introduction</i>	186
I. <i>The NSF Study</i>	189
A. <i>Methodology</i>	189
B. <i>No Surprise: Women of Color Encounter Racial as well as Gender Bias</i>	194
C. <i>Black Women</i>	195
D. <i>Latinas</i>	205
E. <i>Asian American Women</i>	212
II. <i>Implications for the Debate over Implicit Bias</i>	219
III. <i>Implications for the Intersectionality Debate</i>	233
A. <i>Intersectional Plaintiffs' Fate in Courts</i>	235
B. <i>How Does the Experience of Gender Bias Differ by Race?</i>	239
<i>Conclusion</i>	241

I think gender biases work differently for women of different groups—race/ethnicity, immigration status, class of family of origin, and language. It’s not just heightened for “other” women. For

¹ Distinguished Professor of Law, Hastings Foundation Chair, and Director of the Center for WorkLife Law, University of California, Hastings College of the Law. This Article is adapted from Chapter 11 of JOAN C. WILLIAMS & RACHEL DEMPSEY, *WHAT WORKS FOR WOMEN AT WORK: FOUR PATTERNS WORKING WOMEN NEED TO KNOW* (forthcoming 2014) (on file with author). My first thanks go to Rachel Dempsey, without whose partnership the book would not exist and who co-wrote an earlier unpublished draft of this article, “Double Jeopardy? How Gender Bias Differs By Race.” I am deeply indebted, too, to Erika Hall, who did an amazing job on the National Science Foundation (NSF) interviews, and to Kathy Phillips, for taking the laboring oar in running the Diversity and Inclusion for All Working Group, before which I presented a version of this project. I received help from many others while preparing this Article, including Nicole Witt, Jessica Dummer, Hilary Hardcastle, Erika Rist, Katherine Ullman, Susan Rebecca Fisk, and Harvard JLG editors Elizabeth Jensen, Jean Ripley, and Rebecca Liu. My thanks as well to my colleague Osagie Obasogie, who gave me detailed comments at a very busy time for him, to the anonymous reviewers at the *DuBois Review* for helpful comments on a prior version of this paper, and (again for their comments) to the members of the Diversity and Inclusion for All Working Group, which was co-sponsored by WorkLife Law and—at Columbia University—the Business School, the Center for Institutional and Social Change, and Center for Intersectionality and Social Policy Studies.

* Because the consent form used in the NSF study imposed strict confidentiality requirements for the protection of the interviewees, JLG editors were not permitted to review the NSF interview transcripts during the cite-checking process. Although all quotations were double-checked by an authorized member of the author’s research team, the Harvard Journal of Law & Gender cannot independently attest to the content of the cited material.

example, the stereotype that women of certain groups have “too many babies” affects perceptions of which women take time for family leave. (Focus group participant, 2007)

INTRODUCTION

This Article reports on an empirical study undertaken with funds from the National Science Foundation, which involved interviews of sixty women of color in science, technology, math, and engineering (hereafter, the “NSF study”).² My research started with an extensive literature review of experimental social psychology studies of gender bias, which I have organized into the Four Patterns of Gender Bias and will explicate further later in the Article.³ Then, I ran two studies. In the first, I interviewed sixty-seven women whom I met through my networks and who had impressed me with their professional savvy (hereafter, the “Wise Women study”). Of these, fifty-six were white women and eleven were women of color. I then obtained a grant from NSF to do a similar study of women of color. The NSF study interviews, conducted by Erika R. Hall, then a graduate student at Northwestern University’s Kellogg School of Management, included twenty interviews of Africans or black Americans, twenty of Asians or Asian Americans, and twenty of Latinas or women born in Spanish-speaking countries. The methodology used for both studies was designed to build a bridge between experimental social psychology and women’s everyday workplace experience. While this Article focuses on the NSF study, the Wise Women study is the focus of a forthcoming book, *What Works for Women at Work: Four Patterns Working Women Need to Know*, co-written by Rachel Dempsey and myself.⁴

The NSF study has important implications for two ongoing debates within the literature: the controversy over implicit bias and the ongoing investigations of intersectionality. Regarding the first, the implicit bias debate explores a particular strain of research in cognitive psychology that measures bias by using the implicit association test, or IAT.⁵ The IAT measures the existence and strength of racial, gender, and other biases by measuring “response latency” (i.e., how long it takes to make a stereotype-consistent association, such as “black men” and “crime,” as compared with the time

² The author gratefully acknowledges the generous support of the NSF through NSF Grant #EHR 1106411, which funded the research reflected in this Article. The views expressed here are those of the author, not those of the NSF.

³ For more on the Four Patterns, see GENDER BIAS LEARNING PROJECT, <http://www.genderbiasbingo.com> (last visited Nov. 25, 2013), *archived at* <http://perma.cc/OYBVVUS67L>; THE NEW GIRLS’ NETWORK, <http://www.newgirlsnet.com> (last visited Nov. 25, 2013), *archived at* <http://perma.cc/0yJeE4BPgj4> (including an extensive bibliography of the social science behind the Four Patterns).

⁴ WILLIAMS & DEMPSEY, *supra* note 1 (discussing both the Wise Women Study and the NSF Study).

⁵ See PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit> (last visited Nov. 8, 2013), *archived at* <http://perma.cc/0j8QDxGPxun>.

needed to make a stereotype-inconsistent association, such as “black men” and “crochet”).⁶ IAT advocates often stress that, while discrimination used to be open and explicit, today it is subtle and unconscious.⁷ In fact, IAT critics take this claim at face value. To illustrate, Gregory Mitchell and Philip Tetlock assert that “prejudice, once overt, is now largely covert, indeed, so covert that possessors of the new prejudice are themselves unaware both of the contents of their own minds and of how these contents bias their judgments of protected-category groups.”⁸ Another prominent critic, Amy Wax, asserts that unconscious discrimination is the “most pervasive and important form of bias operating in society today.”⁹ Wax further argues that the law should not allow for recovery on the basis of bias that is subtle and unconscious, contending that it incentivizes employers to expend resources to eliminate bias without yielding any benefits to employees.¹⁰ After all, people cannot change behavior of which they are not even aware.¹¹

While the IAT is an important tool, it has significant weaknesses as applied to the law that can be remedied by a deeper qualitative examination of how bias plays out in everyday life. The NSF study is designed to accomplish this goal. It remedies some key problems posed by law reviews’ recent over-emphasis of the IAT. Perhaps most importantly, the NSF study provides a succinct answer to a central question raised by those who have challenged the use of implicit bias evidence in court cases. These critics have worried that experimental studies, either performed online or in university labs, do not reflect actual experiences in workplaces.¹² The NSF study suggests, however, that they do. This implication is shown by the fact that when the NSF study asked working women whether they had encountered any of the previously mentioned patterns of gender bias, 96% reported they had.

The NSF study also draws into question the common assertion that most gender and racial bias is now subtle. As this Article will show, some of

⁶ See, e.g., Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006) [hereinafter Eberhardt et al., *Looking Deathworthy*] (finding that a defendant who is perceived as more stereotypically black is more likely to be sentenced to death in cases involving a white victim); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 880 (2004) [hereinafter Eberhardt et al., *Seeing Black*] (finding that subjects primed with “black face” were faster to recognize crime related-objects than those primed with “white face”).

⁷ See, e.g., Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 316–17 (2000) (stating that while racism in America has declined, subtle forms of prejudice remain); John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 845 (2001) (stating that “overt” forms of prejudice have declined while subtle forms of prejudice continue).

⁸ Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1023–24 (2006).

⁹ Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1130 (1999).

¹⁰ *Id.* at 1180–91.

¹¹ *Id.*

¹² See, e.g., *id.* at 1140–41; Mitchell & Tetlock, *supra* note 8, at 1028–34.

the bias women reported was subtle, but much was not subtle at all. Furthermore, the NSF methodology addresses problems that have resulted from IAT advocates' tendency to blur the distinction between the relatively few and recent studies that use the IAT and the much larger universe of experimental social psychology.¹³ Conflating these two quite different universes has had negative consequences for the development of equality law. Most notably, IAT critics Mitchell and Tetlock have attacked the use of stereotyping evidence in general through a critique of the methodology (i.e. the IAT).¹⁴ Their attack has been influential.¹⁵ By reconnecting IAT studies with earlier stereotyping studies and by presenting experimental social psychology as a long-established field of study that has well-replicated findings, the NSF methodology has obvious advantages. These advantages are especially pungent given the law's reliance on precedent and its stringent rules for the admittance of expert testimony.

Regarding the intersectionality debate, the approach to stereotyping evidence developed in this Article has important implications not only for the debate about implicit bias, but also for the debate about how the experience of women of color differs from that of white women.¹⁶ An early contribution to this debate was the "double jeopardy" hypothesis, which posits that minority women's membership in two subordinated groups adds or multiplies their disadvantage.¹⁷ The double jeopardy metaphor, having originated in the 1970s, has been largely replaced by "intersectionality" theory, first advanced by law professor Kimberlé Crenshaw in 1989.¹⁸ Intersectionality theorists have further argued that the double jeopardy model is too simple¹⁹

¹³ See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1182 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1064 (2006).

¹⁴ Mitchell & Tetlock, *supra* note 8, at 1029–34.

¹⁵ See *infra* text accompanying notes 166–78.

¹⁶ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 143 (1989), for discussion of the lack of protection black women endure when their experience of discrimination differs from that of both white women and black men.

¹⁷ See, e.g., Cynthia Fuchs Epstein, *Black and Female: The Double Whammy*, 7 PSYCHOL. TODAY 57 (1973); Elizabeth Almquist, *Untangling the Effects of Race and Sex: The Disadvantaged Status of Black Women*, 56 SOC. SCI. Q. 129 (1975); Pamela Trotman Reid, *Feminism versus Minority Group Identity: Not for Black Women Only*, 10 SEX ROLES 247 (1984); Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42 (1988). Similarly, expectation states theory in social psychology posits that women of color face the aggregated performance expectations for race plus gender, weighted by relevance to the task at issue. Cecilia L. Ridgeway, *Gender, Status, and Leadership*, 57 J. SOC. ISSUES 637, 642 (2001).

¹⁸ See Crenshaw, *supra* note 16, at 140.

¹⁹ See, e.g., Ange-Marie Hancock, *When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm*, 5 PERSP. ON POL. 63, 70 (2007); Valerie Purdie-Vaughns & Richard P. Eibach, *Intersectional Invisibility: The Dis-*

with two basic points emerging: one, that gender bias is a common experience for women of color, and two, their experience of gender bias often differs from that of white women. The NSF study suggests that the first point is indeed correct: 100% of the women of color who were interviewed recognized one or more patterns of gender bias. The NSF methodology also confirms that the experiences of women of color differ from those of white women. Yet, the NSF study goes further and allows us to identify some specific ways in which the experience of gender bias differs for blacks, whites, Latinas, and Asian Americans. This new level of specificity shows the promise of a turn to social science in critical race theory.

This Article proceeds in three parts. Part I presents the findings of the NSF study, explicating how women in each group experienced gender bias, often in ways that differed from each other. Part II examines the implications of these findings for the debate in the legal scholarship over the use and value of evidence of implicit bias in employment discrimination cases. Part III then discusses the implications of the NSF study for the ongoing debate on intersectionality, a discussion that has particular implications for women of color who sue their employers for employment discrimination.

I. THE NSF STUDY

A. *Methodology*

The NSF study involved interviews of sixty women of color in science, each lasting about one hour and fifteen minutes. Most of the interviewees were professors in science, technology, engineering, or math, also known as “STEM.” Of the women interviewed, twenty were black, twenty were Asian American, and twenty were Latina.

The interview protocol was based on an extensive literature review of over 100 studies of gender bias, most of them involving paper-and-pencil studies performed in a lab. These studies were organized into four basic patterns of gender bias: Prove-It-Again!, the Tightrope, the Maternal Wall, and Tug of War.

Prove-It-Again! refers to the fact that women as a group must provide roughly twice as much evidence of competence as men in order to be seen as equally competent.²⁰ As a result, women often find they have to prove themselves over and over again. Prove-It-Again! lumps together many forms of descriptive bias that reflect assumptions about how women will behave, in-

tinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities, 59 *SEX ROLES* 377, 380 (2008).

²⁰ Karen S. Lyness & Madeline E. Heilman, *When Fit Is Fundamental: Performance Evaluations and Promotions of Upper-Level Female and Male Managers*, 91 *J. APPLIED PSYCHOL.* 777, 778–79 (2006).

cluding leniency bias,²¹ attribution bias,²² and casuistry.²³ Because the typical occupant of a high-powered job is and has always been a man, women often are not seen as good a "fit" for high-powered jobs.²⁴ This "Lack of Fit Model"²⁵ means that women often have to provide more evidence of competence than men in order to be seen as equally competent.²⁶ The Prove-It-Again! pattern has been documented by scores of studies that show, for example, that people often perceive men's successes are attributable to skill and women's to luck,²⁷ that women's mistakes tend to be noticed more and remembered longer,²⁸ that objective requirements tend to be applied rigorously to women but leniently to men,²⁹ that women tend to receive polarized evaluations,³⁰ and that people tend to value more highly whatever qualifications men have.³¹ To illustrate, for jobs requiring both education and experience, subjects will choose a man over a woman, citing experience as the reason, if he has more experience and she has more education.³² Conversely, subjects will also choose the man over the woman, citing education, if he has more education and she has more experience.³³

It is important to recognize that Prove-It-Again! stems from status differentials.³⁴ Consequently, it is triggered by race as well as gender. Blacks,

²¹ See Marilynn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS TACTICS 160, 166 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

²² See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Opportunity*, 47 STAN. L. REV. 1161 (1995), for a comprehensive introduction to attribution bias.

²³ See Michael I. Norton et al., *Casuistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 817 (2004). See generally Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 665 (1999).

²⁴ See Peter Glick, *Trait-Based and Sex-Based Discrimination in Occupational Prestige, Occupational Salary, and Hiring*, 25 SEX ROLES 351, 353 (1991).

²⁵ Madeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, 5 RES. ORGANIZATIONAL BEHAV. 269, 269 (1983).

²⁶ See Martha Foschi, *Double Standards for Competence: Theory and Research*, 26 ANNUAL REV. SOC. 21, 28 (2000) (classic study of double standards); Monica Biernat & Diane Kobrynowicz, *Gender- and Race-Based Standards of Competence: Lower Minimum Standards but Higher Ability Standards for Devalued Groups*, 72 J. PERSONALITY & SOC. PSYCHOL. 544, 550 (1997) (women have to provide roughly twice the evidence of competence as compared to men in order to be seen as equally competent).

²⁷ Janet K. Swim & Lawrence J. Sanna, *He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributions for Women's and Men's Successes and Failures*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 507, 508 (1996).

²⁸ Madeline E. Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know*, 10 J. SOC. BEHAV. & PERSONALITY 6, 6 (1995).

²⁹ Brewer, *supra* note 21, at 166.

³⁰ Patricia W. Linville & Edward E. Jones, *Polarized Appraisals of Out-Group Members*, 38 J. PERSONALITY & SOC. PSYCHOL. 689, 695 (1980).

³¹ Norton et al., *supra* note 23, at 821.

³² *Id.*

³³ *Id.*

³⁴ For a discussion of how gender functions as a status differential, see Cecilia L. Ridgeway, *Status in Groups: The Importance of Motivation*, 47 AM. SOC. REV. 76 (1982).

too, must provide roughly twice as much evidence of competence as whites in order to be seen as equally competent.³⁵ The same may well be true of Latinos, although I am not aware of any studies. With Asian Americans, the situation is somewhat more complicated, as will be discussed further later.³⁶

The Tightrope is prescriptive in nature in that it stems not from assumptions about how women do behave but from assumptions about how they *should* behave.³⁷ The Tightrope reflects that high-status jobs, including that of scientist, are seen not only as male but also as masculine.³⁸ As competence in such work overlaps heavily with traits coded as masculine, women must behave in traditionally masculine ways in order to be seen as competent. However, women who behave too masculinely often are seen as “aggressive” or, more generally, as lacking social skills.³⁹ Consequently, women have to “walk a tightrope” between appearing too feminine (liked-but-not-respected) or seen as too masculine (respected-but-not-liked).⁴⁰ Of course, in order to thrive professionally, professionals typically must be both liked *and* respected.⁴¹

The Tightrope actually consists of two quite different types of problems. First, women face “too feminine” problems when they behave in ways that display undervalued feminine traits, whether because that is the way they were brought up or because they face gender-normalizing pressures within the workplace to conform to traditionally “feminine” standards. Women who contest pressures to remain in service roles, or who otherwise resist gender pressures to adhere to narrowly cabined feminine roles, may well walk straight into the second type of problems. These problems consist of being perceived as “too masculine,” including allegations that they are “not team players” or are “prima donnas” (i.e. not as selfless as women are expected to be),⁴² or that they are “too aggressive” or have “sharp elbows”

³⁵ Biernat & Kobrynowicz, *supra* note 26, at 554.

³⁶ See *infra* text accompanying notes 109–38.

³⁷ See Burgess & Borgida, *supra* note 23, at 665–66. See generally Deborah A. Prentice & Erica Carranza, *What Women and Men Should Be, Shouldn't Be, Are Allowed to Be, and Don't Have to Be: The Contents of Prescriptive Gender Stereotypes*, 26 PSYCHOL. WOMEN Q. 269, 279–80 (2002) (providing an informative introduction to prescriptive bias); Laurie A. Rudman et al., *Status Incongruity and Backlash Effects: Defending the Gender Hierarchy Motivates Prejudice Against Female Leaders*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 165, 166 (2012) (discussing gender stereotypes as “gender rules”).

³⁸ See Glick, *supra* note 24, at 364.

³⁹ See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 234–35, 251 (1989) (describing the “catch-22” that women face as “out of a job if they behave aggressively and out of a job if they do not”).

⁴⁰ See Susan T. Fiske et al., *(Dis)respecting versus (Dis)liking: Status and Interdependence Predict Ambivalent Stereotypes of Competence and Warmth*, 55 J. SOC. ISSUES 473, 476–77 (1999).

⁴¹ See generally Susan T. Fiske et al., *Universal Dimensions of Social Cognition: Warmth and Competence*, 11 TRENDS COGNITIVE SCI. 77 (2007).

⁴² See, e.g., Ezold v. Wolf, Block, Schorr & Solis-Cohen, 751 F. Supp. 1175, 1188 (E.D. Pa. 1990) (referring to discrimination plaintiff as a “prima donna”).

(i.e. are not as amiable and yielding as women are expected to be).⁴³ Women leaders, in particular, often encounter “too masculine” problems because the attributes expected of leaders do not overlap with the attributes expected of women.⁴⁴ One particularly striking study found that women described as effective managers were also seen as bitter and selfish despite the lack of signals of such qualities in the scenarios presented to experimental subjects.⁴⁵ Women of color walk a Tightrope that differs from that walked by white women in complex ways.⁴⁶

The Maternal Wall consists of both descriptive and prescriptive bias. The descriptive bias aspect reflects the perception that if women in general do not seem a good fit for the “hard driving professional,” mothers seem an even poorer one. Consequently, motherhood triggers powerful negative competence and commitment assumptions.⁴⁷ When subjects were given identical resumes and one but not the other was a mother, the mother was 79% less likely to be hired, only half as likely to be promoted, offered an average of \$11,000 less in salary, and held to “harsher performance and punctuality standards.”⁴⁸ If women encounter descriptive bias based on the assumption they will behave like “typical” mothers, they also face strong prescriptive bias if they do fail to behave as mothers “should.” Consequently, mothers who are indisputably competent and committed face more workplace backlash than mothers who portray ambiguous information regarding their level of competence and commitment.⁴⁹

The Tug of War occurs when gender bias against women turns into conflicts among women. The most obvious example is when women perceive that there is room for only one, or a few, women at the top. They may well end up undercutting each other to be that one woman. As a result, the Tug of War can play a role in shaping office politics, especially considering women who experience gender bias early in their careers tend to distance themselves from other women and resist identification based on their gen-

⁴³ See Williams & Dempsey, *supra* note 1 (manuscript at 70–72); Pamela J. Bettis & Natalie G. Adams, Nice at Work in the Academy 2, 16 (Feb. 3, 2010) (unpublished manuscript) (on file with author). Alice Eagly and Stephen J. Karau describe the Tightrope, which they define somewhat differently than I do, as two types of prejudice facing women: negative evaluations of women’s potential for leadership and negative reactions to actual leadership behavior by women, due to the conflict with expectations for women’s behavior. See Alice Eagly & Stephen J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 *PSYCHOL. REV.* 573, 576 (2002).

⁴⁴ See Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 *PSYCHOL. BULL.* 3, 16–19 (1992).

⁴⁵ Madeline E. Heilman et al., *Has Anything Changed? Current Characterizations of Men, Women, and Managers*, 74 *J. APPLIED PSYCHOL.* 935, 941 (1989).

⁴⁶ See *id.*

⁴⁷ See *infra* note 49 and accompanying text.

⁴⁸ Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 *AM. J. SOC.* 1297, 1316–17 (2007).

⁴⁹ Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 *GENDER & SOC.* 616, 639 (2010).

der.⁵⁰ At a subtler level, as each woman tries to navigate her own path between assimilating into masculine traditions and resisting them, women's different strategies divide them. While some women are "tomboys" who just want access, to play the game the boys play, others are "femmes" who want to preserve more of the traditions of femininity.⁵¹ These varying strategies often pit women against each other. So, too, can motherhood, as reflected in "mommy wars" in which women often engage in conflict about the "right" way to be a mother.

Some provisos: the analysis that follows is an exploratory study that simplifies the experience of women of color in many ways. It lumps them into three groups—Latinas, Asian Americans, and black women—that erase many important differences within each group. This erasure is easiest to see with Asian Americans, a group that includes descendants of people from China, Japan, Korea, and India, to name just a few of the highly diverse Asian countries from which individuals have emigrated to the United States.⁵² Latinas include women from a wide range of racial and ethnic identities, ranging from Americans in Puerto Rico to Portuguese-speaking Brazilians. The group of black women includes everyone from recent immigrants to women whose ancestors were brought to the United States in the seventeenth century.⁵³ The categorization of minorities into categories like Asian American, Latina, and black often does more to describe stereotypes white people have of people of color than it does to describe identities experienced by individual people; although, of course, it is complicated considering the role that the experience of stereotypes can play in the shaping of identity. Nonetheless, these categories are widely used in the study of race bias, and I will be using them here.

In addition, because the study interviewed scientists, it involved not only Americans but also immigrants and foreigners teaching in American universities. For reasons of confidentiality, we do not distinguish between Americans and non-Americans even though the two groups' experiences are often very different. Furthermore, because the climate for women is particularly chilly in science, some of the findings reported here may not hold for women in other professions. Of course, the workplace climate for hourly

⁵⁰ See Belle Derks et al., *Do Sexist Organizational Cultures Create the Queen Bee?*, 50 BRIT. J. SOC. PSYCHOL. 519, 530 (2011).

⁵¹ Williams & Dempsey, *supra* note 1 (manuscript at 196–99).

⁵² Compare Nazli Kibria, *The Construction of 'Asian American': Reflections on Intermarriage and Ethnic Identity Among Second-Generation Chinese and Korean Americans*, 20 ETHNIC & RACIAL STUD. 523 (1997) (examining the development of a Pan-Asian identity among Chinese and Koreans Americans), with Lisa Lowe, *Heterogeneity, Hybridity, Multiplicity: Marking Asian American Differences*, in CONTEMPORARY ASIAN AMERICA: A MULTIDISCIPLINARY READER 505 (Min Zhou & J.V. Gatewood eds., 2007) (exploring the dynamics of Asian American experiences).

⁵³ While the drawbacks of lumping immigrants in with Americans are obvious considering the experiences of the two groups may well differ in important ways, there are so few women of color in science that this aggregation was necessary to protect the confidentiality of my informants.

workers no doubt differs in important ways from the situations faced by salaried professionals.

B. No Surprise: Women of Color Encounter Racial as well as Gender Bias

Although our focus is on gender bias that women of color share with white women, women of color also share similar experiences of bias with men of color that they do not share with white women. The centrality of race is highlighted by the fact that although the interviews specifically focused on gender, the informants also reported experiences of racial bias. A black woman recalled being deeply offended when a college professor joked that she must know all about rats because she came from the inner city. An Asian American woman born in the United States described a "forever foreign" experience commonplace among Asian Americans in which she keeps being asked what country she grew up in and complimented on her English. A Latina commented, "There seems to be this stereotype that, if you are from Mexico, you are lazy, and you only like to either sleep by a cactus or party. And I have battled extremely hard [against] all of these stereotypes." Another Latina recalled raising her voice only to have a colleague joke, "Oh, be careful, she's Puerto Rican, and she may be carrying a knife in her purse."

Again and again, women of color described their interactions as "demeaning" or "disrespectful," words that did not come up in the interviews with white women. One woman recounted hearing that a white male senior professor threw a board eraser at a colleague of color and said, "Hey, you, why don't you write this down?" She also heard from students that other professors in her department did not believe she would make tenure. "It was just like somewhere somebody sitting in the back and making armchair comments like that to a student. And it just—it felt so wrong." Although racial bias was not the focus of the NSF study, it is important not to erase this disrespect, which was most commonly reported by black women; no white woman interviewed for *What Works for Women at Work* reported feeling demeaned, a feeling bound to have a profound effect on one's experience at work.⁵⁴

Another distinctive theme that emerged was that many women of color reported feeling a sense of isolation. "This has been a very lonely life," said one black woman. Another reported "feeling inadequate, some depression" because "you really don't have the support you need." The most striking story was of an Asian American woman whose department chair put up on the blackboard a diagram with three circles depicting the interrelations within the department. She was way out, isolated, on the extreme edge. "I said, 'You know, if I was a little bit to the right, I'd be out of the department,'" she quipped. But, she admitted, "It gets to me. It's hurtful." A black

⁵⁴ Williams & Dempsey, *supra* note 1 (manuscript at 224–25).

woman explained why she avoided socializing with her colleagues: “If it’s too social, then I think there’s a great risk of you being put in that subservient position and being looked at that way.” No white woman from *What Works for Women at Work* reported a similar sense of anxiety that socializing with her colleagues would threaten her authority, or the same tone of desolate isolation.⁵⁵

Racism is an important factor in the lives of women of color. Nevertheless, the focus in this Article is on the experiences women of color share with white women. The interviews show they share quite a bit. As one black woman stated upon hearing the description of the four types of gender bias, “I can identify with each of the four buckets. I can identify with each.” All informants identified with one or more of these patterns.

C. Black Women

Prove-It-Again! and *Again and Again and Again*. Studies have documented the stereotype that blacks are generally perceived as less competent than whites.⁵⁶ According to experimental social psychology studies, more generic racist stereotypes of blacks—that blacks are lazy, ignorant, stupid—may also work against them in employment.⁵⁷

A complex picture emerges when one throws gender into the mix. Black women often trigger two sets of negative competence assumptions: one because they are women and another because they are black.⁵⁸ One striking study found that a job candidate with a black-sounding name needed *eight* additional years of experience in order to get the same number of callbacks as someone with an identical resume but a white-sounding name.⁵⁹

In one 2006 study, some black women responded to the study survey with comments about strong “expectations for their failure.”⁶⁰ Another study found that black women are punished more harshly than white women or black men for making a mistake.⁶¹ A study of black professional women

⁵⁵ See *id.*

⁵⁶ See, e.g., 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, 998 (2004).

⁵⁷ See Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357, 379, 385 (Daniel T. Gilbert, Susan T. Fiske, Gardner Lindzey eds., 4th ed. 1998).

⁵⁸ See Biernat & Kobryniewicz, *supra* note 26, at 554.

⁵⁹ Bertrand & Mullainathan, *supra* note 56, at 998; see also M.A. Hitt et al., *Discrimination in Industrial Employment: An Investigation of Race and Sex Bias Among Professionals*, 9 WORK & OCCUPATIONS 217, 223–27 (1982) (showing that employer expectations vary based on prospective employees’ race and gender).

⁶⁰ See Isis H. Settles, *Use of an Intersectional Framework to Understand Black Women’s Racial and Gender Identities*, 54 SEX ROLES 589, 595 (2006).

⁶¹ See Ashleigh Shelby Rosette & Robert W. Livingston, *Failure is Not an Option for Black Women: Effects of Performance on Leaders with Single Versus Dual-Subordinate Identities*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1162, 1165–66 (2012).

found that they often felt stereotyped as incompetent and unqualified.⁶² One black woman responded to the survey by saying, “It is difficult being a black woman because everyone expects you to fail, or if you didn’t fail, they think it was because of charity. Not your own merit.”⁶³

The NSF study confirmed these findings. “I absolutely agree with the statement that for African American women it is prove it again, and again, and again, and again. It’s interesting—I have to say, I’ve always thought about it more just as being African American as opposed to being a woman,” said one lawyer. Another woman agreed: “I think people expect that I got here by some fluke, by some series of affirmative action things and set-aside programs and that I may not be as strong a scientist as others.” A scientist noted that at the two yearly conferences in her field,

When I go to give presentations, it’s not that I feel like the audience doesn’t necessarily believe my results, but I do feel as though I have to, at times, defend it before I can even present it. I really don’t think it’s just because I’m a female. I think that that’s secondary to my race.

This sense that Prove-It-Again! problems stemmed from race but not gender was only expressed by black interviewees but not by Latinas or Asian Americans.⁶⁴

A black doctor who originally had been an engineer contested the “race, not gender” interpretation. She highlighted the importance of context. As a doctor, she felt that people’s initial reluctance to take her seriously was more because of her race than her gender. She attributed this reluctance to the fact that, in medicine, women are common but black people are rare. When she was in engineering, though, where women are rare, she felt her Prove-It-Again! problems stemmed from gender. Perhaps the conviction that race, not gender, explains black women’s Prove-It-Again! problems reflects that black women scientists feel more isolated as blacks than as women.

Black women’s experience of Prove-It-Again! differs significantly from that of both white women and black men. A study by social psychologists Ashleigh Shelby Rosette and Robert W. Livingston found that black women are rated more harshly when things go awry than either black men or white women.⁶⁵ “There’s just no room for error,” said a highly respected and accomplished lawyer. “It’s just so deeply ingrained in you that I don’t even

⁶² ELLA L.J. EDMONDSON BELL & STELLA M. NKOMO, *OUR SEPARATE WAYS: BLACK AND WHITE WOMEN AND THE STRUGGLE FOR PROFESSIONAL IDENTITY* 145 (2001).

⁶³ See also Anita Jones Thomas et al., *Gendered Racial Identity of Black Young Women*, 64 *SEX ROLES* 530, 537–38 (2011) (describing the pressure of overcoming stereotypes).

⁶⁴ Accord Isis H. Settles, *supra* note 60, at 598 (citing earlier studies that establish a “stronger relationship . . . between black and black-woman identity importance than between woman and black-woman identity”).

⁶⁵ Rosette & Livingston, *supra* note 61, at 1165–66 (confirming that black women are disproportionately sanctioned for mistakes).

think about it anymore. To the extent that other folks might feel that they can have a bad day . . . I never feel I have that luxury. You're just always on, and if you're not on, you'd better make people think you're on." I commented that that sounded exhausting.

"It is. It absolutely is," she replied.

A black woman lawyer echoed similar sentiments in the outstanding report *Visible Invisibility: Women of Color in Law Firms*: "'White associates are not expected to be perfect. Black associates . . . have one chance and if you mess up that chance, look out. There is no room for error.'"⁶⁶

A vice president at a major company felt the same way:

You need to be on your A game, and when you are, you can turn the liability of stereotyping into an advantage. Frequently enough, some white men do not expect someone who looks like me—or so visibly different from them—to speak the way I speak or show up the way that I do. They seem initially disarmed by the common ground that we may share. Frankly, I just don't observe the same reaction with women or people of color for the most part. If they [the white men] can see a common history or experience, you get extra brownie points. But if you're not showing up with your A game, the consequences seem more severe given the scrutiny and presumptive challenge of your intellect, vocabulary, and background. I don't have that margin for error," she continued. "And, on the other hand, to be frank, I recognize that I'm probably given more kudos than your average male or, perhaps, white woman, because I am relatively eloquent, presentable, and articulate. Regardless, the stakes are big."⁶⁷

This pattern is documented in what social scientists call "shifting standards": when we perceive that someone does well *for a woman* or *for a person of color*. Most women of any race have heard some variation of "You climb [or throw or negotiate] well for a girl."⁶⁸

Since success is so precarious for women of color, performance pressure becomes "a self-fulfilling negative prophecy," to quote a company vice president. This paradigm is called stereotype threat: when one's knowledge of the stereotype leads to decreased performance.⁶⁹ Another black NSF interviewee said, "In my more cynical moments, it's an unrealistic expectation to think that one can consistently be as good as you feel you need to be." Such

⁶⁶ JANET E. GANS EPNER, AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* 25 (2006).

⁶⁷ Williams & Dempsey, *supra* note 1 (manuscript at 228–29).

⁶⁸ Cf. Diane Kobrynowicz & Monica Biernat, *Decoding Subjective Evaluations: How Stereotypes Provide Shifting Standards*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 579, 584–87 (1993) (documenting shifting standards in perceptions of mothers versus fathers).

⁶⁹ CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO 11 (2010).

sentiments were similarly expressed by other interviewees: "I've been doing this now for almost 20 years. You never feel as though you have a comfort level where you're not on your toes because you have to prove it and prove it," said a lawyer. A vice president added:

The Prove-It-Again! is, I think, exponentially increased when you have double minority status. I certainly feel like that is the reality of my experience. Notwithstanding the 'halo' effect, you're as good as your last . . . trial, deal, or novel. Women and people of color may face the additional obstacle of a presumption of less-than-competency. More precisely, white men may have an unwarranted presumption of legitimacy. For many of our well-intentioned 'white' brothers, this presumption is not promoted or self-created. It's deeply embedded within our culture.

She recounted her experience with the 'stolen idea':

Typically, in my experience, it tends to be a male who will speak over the point, rather than allowing for the question to be addressed and attributed to you. Someone may bring up the same issue later in the conversation and restate precisely, or close enough, what you offered up to the audience, without attribution or acknowledgment that . . . they were parroting you or adding on to your thesis.

My instinctive internal reaction to these events is "Was I not clear? Was there something deficient in my communication? Was I not forceful or authoritative enough? Did I not speak with sufficient authority? Was it me? Or was it them?"

She said it gets easier to be more forceful and commanding if you work with enough men and whites "to realize they're as much of a nincompoop as you are."

Similarly, the scientists interviewed reported Prove-It-Again! problems both with colleagues and with students. As one said, "I have always had the impression when I start a class, a course, it is always an uphill kind of battle. I get the impression that students don't believe that I know what I'm supposed to know."⁷⁰ Another scientist recalled that when she was a student and assigned to work in a group, her contributions fell on deaf ears. "And it wasn't until the professor came around and said, 'Are you guys listening to what [she] is saying?' where it hit home to me that, you know, it didn't

⁷⁰ Accord Caroline Sotello Viernes Turner, *Women of Color in Academe: Living with Multiple Marginality*, 73 J. HIGHER EDUC. 74, 83 (2002) ("Faculty women of color perceive that they are more likely to have their authority challenged by students than are White male professors.").

matter what I was saying. But it was just the fact that it was coming from my mouth.”

Colleagues, too, often assumed the worst. One scientist recalled that when a student called to complain about a professor, an administrator automatically assumed that the problem professor was her. She further reported a classic Prove-It-Again! Pattern, “Even when I get really good evaluations, then the next thing that follows is, ‘Well, you’re an easy grader, and so that must be why.’” Note how casually her success was discounted and written off.

The Tightrope. The bad news is that black women are in double jeopardy on the Prove-It-Again! axis. The good news is that black women may experience fewer Tightrope problems than other groups of women. The evidence, however, remains tentative and somewhat contradictory.⁷¹

Black women may have more leeway to behave in masculine ways because black people, as a group, are seen as more masculine than whites.⁷² Thus, masculine-type behavior may seem less jarring when presented by a black woman. Another explanation may rest in the idea that black women might be less threatening to the power structure simply because they are so marginalized. As noted by a black academic, “When a black woman speaks up and asserts herself—that’s cute.”

No matter the reason, many black interviewees felt that the option of “walking the tightrope” was not even available. When, as part of the NSF study, I asked a focus group of black women scientists whether they had felt they had to choose between being liked-but-not-respected or respected-but-not-liked, several women looked at me pityingly. The option of being liked but not respected, they said, was never open to them. Their only choice was to be respected-but-not-liked. These interviewees’ observations are consistent with what has been found to be the case more broadly in the context of interracial interactions; blacks in general seek to be respected more than whites, who are more likely to seek to be liked.⁷³

However, this is not to say that black women do not face any Tightrope problems. A black woman in medicine described it in classic terms:

I’ve learned how to speak my mind without pissing people off. I don’t come across as too masculine, that bitch with the chip on her shoulder. I’ve just figured out how to hold my ground and not be pushed over but, at the same time, not be considered a witch.

⁷¹ An important question, upon which I have found no systematic evidence, concerns whether women of color face different gender norms and biases depending on whether they are interacting with white men or men of other racial groups. I can only encourage more study of this crucial issue.

⁷² See Phillip Atiba Goff et al., “Ain’t I a Woman?”: Towards an Intersectional Approach to Person Perception and Group-Based Harms, 59 *SEX ROLES* 392, 400 (2008) (finding a correlation between perceived “blackness” and perceived “masculinity”).

⁷³ Hilary B. Bergsieker et al., *To Be Liked Versus Respected: Divergent Goals in Interracial Interactions*, 99 *J. PERSONALITY & SOC. PSYCHOL.* 248, 261 (2010).

Additionally, like white women, the scientists of color interviewed reported feeling tremendous pressure to do committee work, a classic example of office housework. Such committees play an important role in academic governance, but service on them is severely undervalued. What gets professors tenure and accolades is research, not serving on committees. The most poignant story was of a black scientist whose mentors were “very adamant” that she did not “need to sit on every blasted committee.” So, in a meeting with her respective provost, she pointed out that whites as well as people of color could be tapped to serve on diversity committees. The provost cluelessly responded by inviting her to serve on another committee. “Of course I’m not going to say no to the provost. This is the man who basically has my tenure in his hands.”

Office “housework” aside, black women interviewed in the NSF study were less likely than white women to report feeling that they could not be their authentic selves because of their loyalty to feminine traditions, with two exceptions. One was self-promotion, which may present an even bigger hurdle for black than white women. A lawyer pointed out that black people are taught as children to be humble: “You do not boast because it’s not humble. And it’s important to be humble.”⁷⁴ She continued, “You hear over and over again, nobody is better than anyone else.”⁷⁵ A scientist agreed: “Even those who do it eventually, it takes a very long time to learn that. And you pay a price for it.”

The second “too feminine” problem black women commonly faced concerned clothes. If “you come from a culture—Latino, black southerner—where your grandmother wore a hat every Sunday and/or like [sic] a lot of loud, flashy colors and big, bling jewelry, there can be a dilemma about how to fit in and yet be your most authentic self,” noted a black professional in San Francisco.

Black women also reported fewer problems on the “too masculine” end of the spectrum. This result is not surprising given a truly fascinating study by Robert Livingston, Ashleigh Shelby Rosette, and Ella F. Washington, which found that black women are allowed to behave in more assertive and dominant ways than white women.⁷⁶ They found that assertive black women were not evaluated more negatively when they expressed dominance, although both white women and black men were.⁷⁷ Similar results have been found in other studies, such as one in which it was found that black women

⁷⁴ Williams & Dempsey, *supra* note 1 (manuscript at 232).

⁷⁵ *Id.*

⁷⁶ Robert W. Livingston, Ashleigh Shelby Rosette & Ella F. Washington, *Can an Agentic Black Woman Get Ahead? The Impact of Race and Interpersonal Dominance on Perceptions of Female Leaders*, 23 *PSYCHOL. SCI.* 354, 357 (2012).

⁷⁷ *Id.* at 356.

who displayed dominance were judged as more likable and more hireable than identical white women.⁷⁸

The NSF study interviews revealed many examples in which black women used an assertive, non-deferential style at work. A woman lawyer noted that black women at her firm “are actually lauded for that sort of assertiveness, aggressiveness,” but said she was “sure it isn’t the same for some of the Caucasian female associates.” A scientist agreed: “I’ve never really dealt with being thought of as a bitch, but I kind of aspire to that a little bit because I see, at this university at least, that actually it’s a very effective perception [to create].” Noting that she is “very outspoken in meetings,” she said she felt she was rewarded for assertive behavior. Said a black lawyer, “I think there’s a certain amount of sassiness, if you will, that is oddly enough even expected.” She continued, “I’ve certainly never been accused of being too feminine.”⁷⁹ “I’ve been rewarded and praised for dominance,” said another lawyer. “It’s something people admire about me.”⁸⁰

A black doctor said she was confrontational when a male doctor of color attempted to take over a room she needed for patients.

I was using three rooms. He had two. He basically walked up to me and he said, “I need three, so I’m going to take room three. You can use two.” I basically turned around and said, “No, you’re not. I’m using three rooms.” He goes, “I can’t have the third room?” I said, “No, I’m using it.” I just turned around and kept working.

Two nurses nearby said, “You should have seen the look on his face.”

Black women’s room to be more assertive, however, is not without limits. One black scientist told a truly hair-raising story that occurred after she had suffered a traumatic brain injury. The people at the hospital observed one interaction she had with people who worked for her and said that she was “unnecessarily brusque, undeferential.” “Let’s remember that these people worked for me. They were white males.” The hospital staff said, “[I]t was obvious that I needed to stay in rehabilitation longer until I started acting like a woman.” She recalled wryly, “This was in [the South]. I don’t know how to be the southern belle. I’m from [a Northern city].” She felt she had little choice but to play along. “I dropped my IQ by several points and started looking for little things to decorate myself with.”

⁷⁸ Erika Richardson, Katherine Phillips, Laurie Rudman & Peter Glick, *Double Jeopardy or Greater Latitude: Do Black Women Escape Backlash for Dominance Displays?* 2 (May 23, 2011) (unpublished manuscript) (on file with author); see also Kathryn A. Adams, *Who Has the Final Word? Sex, Race, and Dominance Behavior*, 38 J. PERSONALITY & SOC. PSYCHOL. 1, 6 (1980) (suggesting that black women exhibited more “dominance” than white women).

⁷⁹ Williams & Dempsey, *supra* note 1 (manuscript at 233).

⁸⁰ *Id.* Another black woman explained in *Visible Invisibility* that her white co-workers “expect a Black woman to be extremely aggressive and to do really well on trial.” EPNER, *supra* note 66, at 26.

Many women of color noted their awareness of the need to avoid being seen as an “angry black woman.” One black woman in medicine noted “the stereotype that if you’re aggressive, then you’re definitely the B word.” A lawyer also noted the risks of anger. “I am allowed to be passionate, even to demonstrate some level of anger, but it better not be personal. It better not be about me. If I become angry about anything personal, then that is perceived as being an angry black woman.” This quote perfectly illustrates the findings of a still-unpublished follow-up study by Robert Livingston, which found that African American women are allowed more “get it done” agency—but not more “get ahead” agency.⁸¹ Our interviews confirmed this proposition. Black women can use a direct, assertive style, but not to act in ambitious, self-promoting, or power-seeking ways. Black women have license to be assertive in achieving the goals of the group but not in seeking power for themselves.

The Maternal Wall. Black women definitely face the Maternal Wall. A 2006 survey by the American Bar Association found that the same proportion of both women of color and white women—nearly three-quarters—felt their career commitment was questioned after they gave birth to or adopted a child.⁸²

Women we spoke with reported both hostile and benevolent prescriptive bias. A black scientist recalled an incident in which a colleague was told to go home and have more babies. Another black scientist recalled her boss saying, “Wow, why are you here so early? You should be home with the baby.” He meant well, she recognized, but still it troubled her.

One black lawyer told us her boss was telling other people he was not sure she was going to come back after she had her baby:

I finally had to talk to him about that. I had to tell him, “Please stop telling people that you’re not sure I’m coming back. I’m coming back. I want to come back. I like to do the work. I need to work, and having a child really puts more pressure on me to be successful at work so that he can have the opportunities I want him to have.” He was creating problems for me that he probably wasn’t aware of.”

At the same time, the contours of Maternal Wall bias are slightly different for black women than they are for white women. Some differences stem from different family patterns. If white women’s work-family conflicts typically stem from motherhood in two-parent families, black women’s conflicts may reflect that they find it harder than white women to find a partner. “I

⁸¹ Robert Livingston, Assistant Professor, Kellogg School of Management, Northwestern University, Presentation at a Working Group on Diversity and Inclusion for All at Columbia University (Nov. 30, 2012) (study conducted with Ella F. Washington and Ashleigh Rosette, to be titled *What is Agency? An Examination of Why Black Women Can Have Moxie but Not Power*).

⁸² EPNER, *supra* note 66, at 27.

think it's easier for people to understand work-life balance issues in the context of kids, right? As opposed to 'I'm single and I want to find a mate, so that's the balance I'm trying to achieve,'" said a lawyer. Among those who were surveyed for *Visible Invisibility*, women of color were more than four times more likely to be single than were white women: 35% of women of color reported being "single, never married," as compared to 8% of white women.⁸³ Only 56% of women of color reported being married, as compared with 81% of white women.⁸⁴

Family structures of black women are often different from those of white women. "A lot of women of color don't have husbands or partners, or their husbands could be in a different kind of career with less flexibility," said one informant. Another observed that at her workplace there is a significant difference between a man with three kids and a single black woman with three kids. "The man will be treated like a breadwinner and the woman like shit," she said bluntly.

The bright side is that wider circles of care offer some women of color resources unheard of within most white families. A black woman in medicine met a family through her church.

They said, "We'll be your family away from home," and they were very true to their word. They kind of adopted themselves as my surrogate mother and father. . . . When my daughter was born, they were like, "Oh, we have another grandchild." I can say really that, for me, I've been really blessed.

One woman noted that women of color have historically not had nannies, leading to a distinctive form of prescriptive bias in which some women felt criticized for their reluctance to take this path. "We haven't done the nanny thing a lot. That's kind of new for black folks," said one scientist. One black woman scientist told us that when colleagues have asked questions about why she doesn't get a nanny so she can work more, she felt her parenting style was being questioned. In sum, black women's experience of the Maternal Wall appeared to be profoundly influenced by family patterns and traditions of family caregiving that differed from those of white women.

Tug of War. African American scientists reported a wide variety of classic gender wars. "I have seen females trying to be very accommodating and playing a certain role that made them more likable. I tended to be very professional, straightforward, and not stroking people's egos or whatnot," said a black woman. She recalled "woman wars" where someone strives to prove "she is better; she can give more, she can do more, and there were games played along those lines." "That happened over and over again," she said. Another black scientist noted that at a monthly meeting, the only other woman in her group "pretty much focuses attention on the men." She added,

⁸³ *Id.* at 72.

⁸⁴ *Id.*

"Rarely she'll look at me. I'm thinking she might be one of those type of women where, okay, there's only room for one."

The classic "tokenism effect" was also in evidence. Said a black scientist, "I have been in an organization where there was room for one woman, but one woman decided that she was it and would simply sabotage her colleagues, which unfortunately included me." The limitations placed on women as a group affected the dynamic between them.

Sometimes Tugs of War arise between black and white women based on different understandings of womanly behavior. One scientist noted strain with white administrative assistants because, she felt, black women do not share white women's habit of bonding by sharing personal information. She expressed relief that black assistants "just do not expect [her] to want to know anything about their personal business." The same was not true of their white counterparts. "I think white women share a lot of personal business, and it's a bonding with them," she said. This sharing of "personal business," what Deborah Tannen calls "troubles talk," evidently is a tradition among white women but not black women.⁸⁵

In addition to this race-specific tension, a few women we interviewed reported other kinds of pushback from administrative assistants that sounded very similar to what happens to white women. One noted that administrative staff took longer to complete work given by women than men. Another's response concurred: "My stuff won't get done first."

Another dimension of the Tug of War can emerge between older and younger women in the workplace. An African American scientist reflected on the femmes-versus-tomboys dynamic as she mused about her treatment of a younger woman. "I would always tell her, 'You need to man up, stop all that crying, because they are going to keep walking over you and keep criticizing your research and your papers if you don't stand up and take charge.'" She added, "Probably I could have told her in a different way."

Sometimes these tensions take on a disquieting racial dimension. "I went to my first job, and it was fine. I never got any feedback on my personality," remarked a lawyer. "When I came to my current company, the culture was so completely different. I immediately got feedback about being a more empathetic person and being a person who would be easier to relate to." She continued,

I certainly think that if I was a white man, I would never have been given so much feedback about being an empathetic person and how important it would be to try to make people more comfortable with me. I also think that part of what has been interpreted as my "hard edges" are attributable to me being a black woman.

⁸⁵ DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND* 100 (1990).

She said, "The feedback I've gotten about being nicer, more empathetic, all come from white women. No black woman has ever told me that, and no white man has ever told me that."

As previously discussed, racial conflict is often less subtle. One lawyer recounted a white female supervisor who, when a white colleague said she was leaving early one Friday, cordially told the colleague to go get a pedicure and enjoy herself. But when the lawyer, who is black, said she was leaving too, her supervisor bristled and started cross-examining her about whether she had gotten all her work done. This interaction was one of many instances of hyper-scrutiny and hostility by her supervisor. The interviewee ended up leaving the firm. It is hard to know whether the supervisor's behavior reflected racial hostility, but that is a key point about racism; it is often hard to tell exactly why someone is acting negatively toward you.

As will be further discussed below, a final key difference between black and white women in the experience of Tug of War bias is that the black informants judged older women who offered advice, even unwelcome advice, far less harshly than was typical of white women. One woman, in discussing some particularly off-putting advice received from older colleagues, put it gently. "They didn't mean any harm," she said. "They were trying to protect me from grief."

D. Latinas

Prove-It-Again! And Again and Again? Latinas also suffer from negative competence assumptions, and in fact one study quantifying bias indicates that they may be ranked even lower in competence than blacks.⁸⁶ Commonly held stereotypes are that Latinos "have tendencies to be lazy and to party" and that they "have a tendency to lose their temper."⁸⁷ Latina professionals sometimes feel they operate in an "immigrant shadow" in which they must counter the assumption that they have recently immigrated.⁸⁸ As one professional in an alternative study said, "I've had people say, 'I didn't know that there were any educated people in Mexico that have a graduate degree.'" ⁸⁹

Adding gender into the equation primes additional race-specific stereotypes. Today, one of the most prevalent stereotypes of Latinas is that

⁸⁶ See Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878, 891–92 (2002) [hereinafter Fiske et al., *A Model*].

⁸⁷ See Andrew W. Bribriescio, *Latino/a Plaintiffs and the Intersection of Stereotypes, Unconscious Bias, Race-Neutral Policies, and Personal Injury*, 13 J. GENDER RACE & JUST. 373, 381 (2010).

⁸⁸ Min Zhou & Jennifer Lee, *Becoming Ethnic or Becoming American? Reflecting on the Divergent Pathways to Social Mobility and Assimilation Among the New Second Generation*, 4 DU BOIS REV. 189, 200–01 (2007).

⁸⁹ Denise A. Segura, *Chicanas in White-Collar Jobs: "You Have to Prove Yourself More,"* 35 SOC. PERSP. 163, 173 (1992).

“[t]hey make good domestics.”⁹⁰ “María, the housemaid or counter girl, is now indelibly etched into the national psyche. The big and the little screens have presented us with the picture of the funny Hispanic maid, mispronouncing words and cooking up a spicy storm in a shiny California kitchen.”⁹¹ Latino men are subject to parallel but distinct stereotypes: “‘Spanish is the language of doormen, dishwashers, and fruit pickers . . . [and English is] the language of doctors, dentists, and lawyers.’”⁹² Recall from the introduction of this Article the story of the scientist who had “battled extremely hard” against the stereotype that Mexicans are lazy and “only like to either sleep by a cactus or party.” The same scientist listed the dynamics within the stereotype: “the friendly Mexican or the passive Mexican or the disorganized Mexican.”

Whereas black women tended to attribute their Prove-It-Again! problems to race, Latinas may be more likely to place gender before race in the employment context. “[Y]ou have to prove yourself more just because you are—number one—a woman, and then [because] you are Latino,” noted a Chicana professional in another study.⁹³ Another woman put the emphasis less clearly on gender over race: “Some people have these knee-jerk reactions that people of color or women of color aren’t as competent.” She recalled coming upon a group of her colleagues discussing her own experiment—without her. “Guys, are you talking about my project? Then I should probably be involved,” she said to them. She observed, “And it was a surprise to them that I should be involved in the discussions of my project because I was not considered to be able or capable of offering any useful information.”

The examples offered by interviewees of situations where they felt as though they were presumed incompetent go on and on. A scientist had her success in an experiment discounted by male colleagues who attributed her success to the fact she was using their protocol, as if the precision with which she had carried out the protocol was of no consequence. A Latina scientist remembered when audience members actually interrupted her during a presentation. A Latina lawyer recalled that she wrote a brief for a supervisor who gave her a bad review and never gave her a second chance, although he championed a male associate “who time and time again completely annoyed him and produced substandard work product. He didn’t write that person off.” The same woman recalled with rueful amusement a somewhat soused colleague telling her she had given a really good presentation at a meeting:

⁹⁰ Judith Ortiz Cofer, *The Myth of the Latin Woman: Just Met a Girl Named Maria*, in RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 295 (Paul S. Rothenberg ed., 1998).

⁹¹ *Id.*

⁹² STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 107–08 (2003).

⁹³ Segura, *supra* note 89, at 163.

He said, "Yeah, but I mean you were just so authoritative, and like you really knew your stuff," and went on and on, probably four times. . . . And then he said, "You were just really articulate." . . . It was the funniest thing, and I mean, funny in a sad, sad way.

The clear and painful assumption was that it was completely astonishing that a Latina could be so accomplished.

The Tightrope. In some ways, Latinas get the worst of both worlds. They face enhanced Prove-It-Again! bias similar to black women, but unlike black women they face major Tightrope problems. "How do you portray yourself?" asked a Latina doctor. "I mean, you are a woman, you don't have to be a man. But at the same time, if you want to fit in, do you have to behave like the men?"

Latinas' Tightrope problems cluster predominantly on the "too feminine" side.⁹⁴ Clothing is a particularly charged issue, said one scientist, who "toned down" her style so that people would take her more seriously. "I don't want them to be distracted by my earrings or by the loud print in my shirt or by my hair or whatever. I want them to concentrate on what I am saying," she said. Another scientist found this issue confusing: "So if you dress well, sometimes you get less respect."

By far the most common "too feminine" problem is the pressure Latinas feel to play the office housewife. One scientist described herself as "the mother of our research group." Another Latina scientist found herself in a similar role:

On the too feminine side of things, I think there are times when I am asked to be kind of the mother of the group. I'm the one who has to make sure that everybody fills out their paperwork, and I'm the one who takes care of things, sets up the meetings and things like that. I mean, I play many roles that could be done by a competent administrative assistant if we happen to have had a competent administrative assistant, which we don't. . . . It's assumed that I'll take care of it because nobody else will.

One of the women who found herself doing administrative work encountered difficulties in trying to escape this role. "I'm like, 'I told you I'm not going to be doing that for everybody anymore.' And everybody just kind of throws up their hands, and simple things like scheduling a conference room become my problem." She blamed herself, saying that she had trouble delegating. However, from my perspective, she did not appear to have much choice. "I mean, these kind of administrative duties eat into my time," she

⁹⁴ Other studies document that Latinas' "too feminine" problems often include sexual harassment. See, e.g., Cortina, *infra* note 119, at 167–68; cf. Isabel Molina Guzmán & Angharad N. Valdivia, *Brain, Brow, and Booty: Latina Iconicity in the U.S. Popular Culture*, 7 COMM. REV. 205, 218–19 (2004) (discussing the commodification of Latina sexuality).

said. This kind of treatment came from all kinds of sources. Not only colleagues, but students also “treat you like their mother,” said one Latina scientist, “like they can get whatever they can from you and there’s no limit.” She mused, “It’s natural to go ask for help to Mom.” But, she explained, “I have noticed that if I act like too much of a mommy, I get a lot of kids.” She suggests they go ask someone else, often to little effect. Of one student, she commented, “I think he is embarrassed, sometimes, by showing lack of knowledge to a guy but not to a girl.” Said another Latina, “Students may think they could get away with not doing certain things because you’re a woman.”

“Too masculine” problems appear less common among Latinas than “too feminine” ones. However, this overall tendency should not suggest that they do not exist. One attorney reported losing her temper with a colleague just once. “I basically chewed him out at work and, unfortunately, lost all [the] respect of my colleagues. After that, I’ve been very, very careful about that.” She said, “I just feel like you’re never going to get ahead by getting angry.” Men could get angry, she said, but women could not. “I have one partner who is known to scream and yell at his assistant, and everyone just says, ‘Oh well, that’s him.’ They’ve replaced assistant after assistant after assistant for him.” One assistant filed a complaint, and instead of addressing the problem, people around the office just said, “Well, that’s too bad she couldn’t cut it because he’s very high maintenance.” A female partner at the same firm would “get really irritated with her assistant and yell at her, and the interesting thing is that she was perceived as a bitch. . . . There was less tolerance for her behavior.”

A Latina professor iterated similar sentiments. “I got angry because there was something being done that I thought was inappropriate, and I was called to the principal’s office, to use a metaphor. And I am absolutely sure that none of my [male] colleagues that get angry at faculty meetings get called.”

It may be that the stereotype of the fiery Latina means that anger is even more perilous for Latinas than it is for women in general. One woman certainly thought so:

I’m Latin, so I’m passionate and I could go there. I do rein that in and make sure that I’m more placid with my responses. I usually, if someone says something inflammatory to me, will take a few seconds before I respond, or if it’s via e-mail, I will wait a couple of hours before I respond, just because that is such a feminine stereotype to have this emotional response to something. . . . For those that know my specific background, they’ll make comments about that: “Oooh, she’s a fiery Latina.”

The Maternal Wall. Latinas not only face high levels of Prove-It-Again! and Tightrope concerns, but they also face reported lots of Maternal Wall problems. Qualitative studies have documented the close association of La-

tinas with motherhood within people's perceptions. Interviewees in other studies have articulated their sense that being Latina meant that people assumed that they would have children, lots of them:

"[W]e like to be pregnant. We don't like to take birth control. We're 'mañana' [tomorrow] oriented. We're easy."⁹⁵

"Usually people take over the countries with wars but you Mexicans are doing it by having lots of babies."⁹⁶

Interviewees also reported experiencing the assumption that Latinas will drop out of educational and professional opportunities once they have children.⁹⁷

A Latina lawyer interviewed for the Wise Women study said she sensed, after she had triplets, "fixed expectations that I would not resume my career and not return to work."⁹⁸ The assumption struck her as odd.⁹⁹ "My career was not as disposable as other people might have seen it," she said.¹⁰⁰

Ironically, I worked at the time for a woman who was a Latina, and it was she who made the most disturbing comments about, "Oh, honey, I know you're not coming back, are you?" I think she genuinely intended to be supportive, but as my supervisor, it came across as an out-of-hand dismissal of what I knew I was capable of.¹⁰¹

She continued:

We know the workplace will have evolved when instead we hear, "Wow, your professional accomplishments are being achieved *in addition* to all the additional personal responsibilities you have. Incredible leadership skills at work there! We are going to nurture your career, because if you can do all this now, you are going to be a rock star around here in the future."

Latina scientists reported intense family pressures to have children, to have them early, and to play traditional family roles. "You're supposed to have kids in your 20s. Every good Mexican woman has kids in their 20s," said one. "We have a very firm and entrenched culture of family, of big

⁹⁵ Segura, *supra* note 89, at 173.

⁹⁶ Jody Agius Vallejo, *Latina Spaces: Middle-Class Ethnic Capital and Professional Associations in the Latino Community*, 8 CITY & COMMUNITY 129, 146 (2009).

⁹⁷ See generally *id.*

⁹⁸ Williams & Dempsey, *supra* note 1 (manuscript at 242–43).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

family, and everyone's connected to everyone's last cousin and grandma and whatever."

"Hispanic women are mothers—we take care of our families. Women are considered the matriarchs," another scientist said. She continued:

I feel like I have a very specific role in keeping the family running. And here's another complication for many women of color I know, particularly those in immigrant families; the cultural expectations that define family can extend to a caring (sic) for extended family members, such as elderly parents or grandchildren. At least one reason for that may be that our values are informed by cultural expectations, and this is even more true in immigrant families like mine. On [the] one hand, it's a beautiful thing to live out our strong family ties; on the other hand, what does this imply for women of color advancing to leadership in the workplace, especially when the period for serious career advancement tends to overlap with the 'sandwich generation' years? Whether it's an issue of feminism or not, I think you see more women of color juggling additional cultural expectations. Do we embrace them all and exhaust ourselves in the process, or distance ourselves from these multifaceted roles while risking a loss of important cultural values?

Interviewees expressed that Latina women sometimes internalized such pressures. "I think a lot of it is self-imposed," said one scientist. However, this result is not always the case. A Latina professional in another study placed the pressure firmly outside herself: "'In order to be valued we have to be wives and mothers first. That cultural pressure is the most difficult to overcome.'" ¹⁰²

For Latina women, the assumption that professionals do not have family obligations beyond their nuclear family can lead to particularly negative reactions due to the sense that these obligations are not important enough to miss work for. A Latina attorney, as quoted in a Catalyst report, described having to go to the funeral of a cousin's baby.¹⁰³ "'One partner was like, 'Who was this?'" the attorney remembered.¹⁰⁴ "'I don't think she understood.'" ¹⁰⁵

Tug of War. Some Latina scientists spoke warmly of the relations among women in their department. "We bond together. We support each other a lot. . . . And we're always rooting for each other. We're always hoping there's more of us. So the 'room for one' I definitely have not exper-

¹⁰² Segura, *supra* note 89, at 177.

¹⁰³ DEEPALI BEGATI, WOMEN OF COLOR IN U.S. LAW FIRMS—WOMEN OF COLOR IN PROFESSIONAL SERVICES SERIES 45 (2009).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

enced,” said one. “We have quite a large number of women in my department, and we try to have a good collegiality among us,” said another.

Others’ impressions, however, were not as positive. “I would say that there’s definitely a kind of divide or separation between the female faculty members, young and old. Those older ones feeling that ‘I worked to make this happen,’ whereas the younger ones are reaping the benefits, if that makes sense,” said a Latina scientist. She continued, “And there is a change, at least in my field, where women are very comfortable with being mothers as well as go-getters and being great scientists and starting out their labs.” One woman reflected on the interpersonal dynamics that fuel competition among women as she worried about being compared to another woman in her department. “She’s funded, she’s publishing in high-impact journals. I’m not right now. And I’m jealous and I’m fearful that if we were compared on the same scale, that I’ll come up way short.” Similarly, another woman commented:

I was probably mad at the women who had children, thinking, ‘Why should I, who does not have children, pick up the slack for the women who do have children? It’s a choice.’ And then, of course, you think about this for ten minutes and you realize that it’s not the women you need to be pissed off at. It’s the men who make the assignments.

Scientists who participated in the NSF study were asked specifically about conflict between support staff and scientists. Latina scientists in particular reported more of it than other groups. “Female bosses have a lot more resistance from the other females in the group, from everybody, but it happens especially if there’s a difference in race,” said one. “They say the bosses are too demanding,” said another, recalling a conversation with administrative assistants who worked with her. She said to them, “Well, the boss that you had before was equally demanding. The guy that you were working under was equally demanding.” The assistants’ reaction: “Yeah, but that’s different.” Mused another woman, “If a male boss asks, ‘Can you bring me a copy?’ they will, and if you ask the same thing, they will say, ‘Well, why am I going to bring you the copy?’” Some women just laughed this kind of treatment off. “The staff call the females by their first names, but they talk about ‘Doctor Such-and-Such’ and ‘Professor Such-and-Such’ when they refer to the men, which I find very funny,” said another Latina scientist.

Another’s statement provides an apt example of how the experience of gender bias differs by race. “I am absolutely sure that my male colleagues don’t get this type of treatment,” she said, describing the pushback she encountered from administrative staff about how files should be kept. She attributed the problem both to gender and race. “It may be an overall issue of respect. For them, having female bosses, it’s a whole new thing.” But she felt that there was a racial component as well. “Here they have this Mexican

woman telling them what to do.” She seems to be saying that neither a white woman nor a “Mexican” man would have the same experience.

The Latinas interviewed were particularly thoughtful about the advantages of being a Latina, pointing out how their heritage helped them negotiate the complexities of being women in traditionally male careers. “I think I have a huge advantage in having a very refined cultural radar,” said a Latina scientist. A Latina lawyer agreed: “I can read the cultural landscape pretty quickly and automatically discern the dynamic that’s going on and what I need to address.” She felt her cross-cultural background had sharpened her political radar. “Just reading the dynamics of a room and how you, and others, are being perceived is very helpful,” she said. Said another scientist, reflecting on her close cultural ties to another country, “You have to be like context switchers . . . reading the context and then doing what’s appropriate for that context at any point in time.” She mused, “It’s the same thing switching between masculine and feminine roles.”

E. Asian American Women

Prove It Again? Descriptive biases regarding Asian and Asian American women differ from descriptive biases regarding black women and Latinas in that, while there is generally an assumption of negative competence regarding blacks and Latinas, the stereotypes regarding Asian people are “ambivalent” (i.e. they lump positive and negative qualities).¹⁰⁶ Furthermore, there is significant overlap between the qualities associated with leaders and with Asian people.¹⁰⁷

On the one hand, Asians are seen as a “model minority” that does well educationally and economically and “stays out of trouble.”¹⁰⁸ As a whole, Asians are seen as equally (or more) competent as whites.¹⁰⁹ Common stereotypes include that Asians are quiet, law-abiding, hardworking, and intelli-

¹⁰⁶ See Monica H. Lin et al., *Stereotype Content Model Explains Prejudice for an Envied Outgroup: Scale of Anti-Asian American Stereotypes*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 34, 44 (2005). Note that Asian Americans come from very different cultures. Much of this is lost on most Americans; how much is an empirical question to which there is, as yet, no clear answer. I have embraced the operating assumption that Americans do not distinguish between Asians of different heritages not because I believe it is true, but because the reality is no doubt complicated; some Americans no doubt do distinguish between Asians of different heritage some of the time. The fact that we know so little about which Americans distinguish between different Asian heritages, and when Asians are seen in one global stereotype, and when subtypes enter in, just highlights once again the need for more empirical studies.

¹⁰⁷ Beth G. Chung-Herrera & Melenie J. Lankau, *Are We There Yet? An Assessment of Fit Between Stereotypes of Minority Managers and the Successful-Manager Prototype*, 35 J. APPLIED SOC. PSYCHOL. 2029, 2046–47 (2005).

¹⁰⁸ Paul Wong et al., *Asian Americans as a Model Minority: Self-Perceptions and Perceptions by Other Racial Groups*, 41 SOC. PERSP. 95, 95–96, 113–14 (1988) (describing how Asian Americans, as well as other racial and ethnic groups, view Asian Americans through a “model minority” lens).

¹⁰⁹ See Fiske et al., *A Model*, *supra* note 86, at 892.

gent,¹¹⁰ all qualities that make them peculiarly suited to high-status careers. If an Asian American is seen through this lens, perhaps he or she may even need to provide *less* evidence of competence than a comparable white person. This dynamic described the experience of one scientist, who said:

There's conflicting stereotypes, if you will, that come into play as an Asian American woman in STEM fields because there's an overall sort of, oh, Asians, Asians are naturally talented in STEM fields, right, bias, and then yet, a different set of sort of norms or expectations about women . . . [T]here's kind of a play off between those two different traits and so that in some sense, I have—I'm more acceptable, if you will, as an Asian woman scientist rather than a woman scientist.

Yet the results are not always so positive. Asians also are often seen as cold and lacking in social skills,¹¹¹ and this low-sociability stereotype of Asian Americans is stronger than the high-competence stereotype.¹¹² Moreover, one underlying facet of the model minority stereotype is that Asians are suited for backroom technical work but not for leadership positions.¹¹³ Thus, even the apparently complimentary aspects of the model minority stereotype ultimately end up disadvantaging Asians as compared with whites.

Gender further complicates things. In addition to stereotypes of Asians and women, there exist a third set of stereotypes specific to "Asian women." The "Lotus Blossom Baby" stereotype, which paints Asian women as sexualized and demure, sets up stereotypes of Asians as exotic "property" of white males,¹¹⁴ removing Asian American women from the realms of competence and appropriate authority in the workplace. Asian American women reported to one researcher that white employers and co-workers expected them to be "passive and deferential," and expressed surprise when they "spoke up and resisted unfair treatment."¹¹⁵ Like other women of color,

¹¹⁰ See Fiske, *supra* note 57, at 379; Grace Kao, *Group Images and Possible Selves Among Adolescents: Linking Stereotypes to Expectations by Race and Ethnicity*, 15 *SOC. F.* 407, 417–19 (2000); Colin Ho & Jay W. Jackson, *Attitude Toward Asian Americans: Theory and Measurement*, 31 *J. APPLIED SOC. PSYCHOL.* 1553, 1553–54 (2001); Amy J.C. Cuddy et al., *Warmth and Competence as Universal Dimensions of Social Perception: The Stereotype Content Model and the BIAS Map*, 40 *ADVANCES EXPERIMENTAL PSYCHOL.* 61, 77–78 (2008).

¹¹¹ Ho & Jackson, *supra* note 110, at 1564.

¹¹² Lin et al., *supra* note 106, at 44.

¹¹³ See Albert H. Yee, *Asians as Stereotypes and Students: Misconceptions That Persist*, 4 *EDUC. PSYCHOL. REV.* 95, 124–125 (1992).

¹¹⁴ See Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 *B.C. L. REV.* 771, 801–02 (1996); Minjeong Kim & Angie Y. Chung, *Consuming Orientalism: Images of Asian/American Women in Multicultural Advertising*, 28 *QUALITATIVE SOC.* 67, 75–76 (2005).

¹¹⁵ Karen D. Pyke & Denise L. Johnson, *Asian American Women and Racialized Femininities: "Doing" Gender Across Cultural Worlds*, 17 *GENDER & SOC.* 33, 46 (2003).

Asian women who trigger the “Lotus Blossom Baby” stereotype probably have to provide more evidence of competence than white women or Asian American men in order to be judged equally competent. Implicit in the racialized gender stereotypes of women of color is the notion of insatiable sexuality; Asian women are “desirous of sexual domination,”¹¹⁶ Latinas are “naturally sexual,”¹¹⁷ and African American women, if not the asexual “Mammy,” are the promiscuous “Jezebel.”¹¹⁸ Such stereotypes are particularly harmful in the context of sexual harassment and sexual assault.¹¹⁹

The “Lotus Blossom Baby” stereotype, however, does not appear to be universal. Some evidence exists that the model minority stereotype may result in Asian women needing to give *less* evidence of competence than white women. “In some sense, I’m more acceptable, if you will, as an Asian woman scientist rather than a woman scientist,” one woman observed. Which stereotype reigns may well be situational. One study showed that when Asian American subjects’ Asian identity was made salient, they performed better on a test, whereas when their gender identity was activated, they performed worse.¹²⁰

Yet those among women interviewed who felt they had been helped by the model minority stereotype were rare. Many more reported Prove-It-Again! problems. An Asian American lawyer recalled a situation in which a white man and woman both got promotions in a context where the rules didn’t allow them. “You know that the rule only applies to the people it applies to,” she observed. “Generally speaking, women, and women of color, would be strictly held to rules and then some.”

Other Asian interviewees reported that their successes were discounted in a variant of the “he’s skilled, she’s lucky” pattern. One described her department chair saying that she got grants not due to merit but to politics. “You have to be ten times better than everyone else; you always have to be more prepared,” said an Asian American lawyer. “My mentors, those practicing lawyers who have observed my growth in the profession, often say to

¹¹⁶ Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 191 (1997).

¹¹⁷ Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 820 (1993).

¹¹⁸ Andrea L. Dennis, *Because I am Black, Because I am Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 561 (1996).

¹¹⁹ See Martha Chamallas, *Jean Jew’s Case: Resisting Sexual Harassment in the Academy*, 6 YALE J.L. & FEMINISM 71, 85 (1994); Charles B. Adams, *The Impact of Race on Sexual Harassment: The Disturbing Confirmation of Thomas/Hill*, 2 HOW. SCROLL SOC. JUST. REV. 1, 16 (1993); Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1469–70 (1992); Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS. L. REV. 1235, 1244 (2006); Lilia M. Cortina, *Assessing Sexual Harassment Among Latinas: Development of an Instrument*, 7 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 164, 177–78 (2001).

¹²⁰ Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 81–82 (1999).

me, ‘One day hopefully you’re going to just trust your gut.’” She continued as follows:

I feel men are raised to just basically go with instinct and not even question it. As an Asian American woman growing up in my household, I had to validate everything, unlike my brother, and this experience has transferred to my practice of always explaining my decisions and actions before diving in. I feel women often feel that they have to validate their actions before taking them.

“I don’t know if it’s an Asian thing or a woman thing, but it was definitely a combination where I felt like I had to get [approval] on different things. I was definitely less comfortable about going rogue,” said another woman.

The Tightrope. An attorney quoted in the ABA’s *Visible Invisibility* report articulated the very thin Tightrope that Asian American women walk:

I am frequently perceived as being very demure and passive and quiet, even though I rarely fit any of those categories. When I successfully overcome those misperceptions, I am often thrown into the “dragon lady” category. It is almost impossible to be perceived as a balanced and appropriately aggressive lawyer.¹²¹

While Asian American women who are seen as too masculine risk being called dragon ladies, the default stereotype remains that Asians are quiet, obedient, and courteous.¹²² Whereas black women are seen as more masculine than white women, Asians tend to be seen as more feminine.¹²³ Thus, it is not surprising that Asian American women in the NSF study reported “too feminine” problems at a higher rate than “too masculine” ones. An Asian American lawyer noted, “There’s a mystique about the Asian woman; we’re so cute and so delicate. . . . You get to the point where you try to ‘mannify’ yourself.” An Asian attorney remarked to the authors of *Visible Invisibility*, “‘I’ve had opposing parties, opposing counsel, treat me like a little girl and part of that is the Asian thing, because they see a little Asian doll. . . . It’s really annoying and I’m tired of it.’”¹²⁴

Furthermore, Asian American women interviewed for the NSF study reported “too feminine” problems manifesting in a wide range of ways. Some problems stemmed from expectations that they would do the office housework, like the consistent reports we heard from Asian women that they were treated like perennial lab assistants even as postdocs. As with Latinas, expectations about office housework have a particular flavor; women of color are expected to perform ministerial tasks in a subservient manner.

¹²¹ EPNER, *supra* note 66, at 25.

¹²² Ho & Jackson, *supra* note 110, at 1554.

¹²³ Clara L. Wilkins et al., *Racial Stereotypes and Interracial Attraction: Phenotypic Prototypicality and Perceived Attractiveness of Asians*, 17 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 427, 429 (2011).

¹²⁴ EPNER, *supra* note 66, at 10.

Asian women also reported particular difficulty with self-promotion. "You're taught to be humble and not boast about your achievements and give credit to others," said one scientist.¹²⁵ This Asian cultural norm can feed into the perception that Asian women are too passive. "All my mentors have told me, 'You have to be more aggressive because they're not going to respect you if you're not aggressive,'" said an Asian American scientist. "But I don't like to be aggressive. I like to get along with everybody." Another said, "I'm not particularly assertive. . . . I might be a more assertive version of a stereotypical Asian woman but a less assertive version of a generic woman." One self-described "dark-complexioned" Indian graduate student was undercut when a fellow student made negative comments about her work. The head of the lab "never bothered to actually address that with her or talk to her about it or actually watch her in the lab. He just took the word of the male grad student in that lab." The negative competence assumptions seem clear, and the graduate student involved ended up leaving without getting her doctorate. Different cultural traditions sometimes meant that what Asian Americans saw as due respect for seniority was read by their colleagues as a lack of self-confidence. "In our culture, we're raised with the idea of respecting culture and seniority," said an Asian American lawyer. "How it plays out at work, for me, is that I always felt that if I was rendering an opinion, it had to be clearly supported." The result often appeared, she felt, as a lack of self-confidence. "Self-confidence just seems so second nature to some people, while it is always something I have to build and maintain consistently."

As previously mentioned, Asian women reported far fewer "too masculine" problems, which is not surprising, given that whites see Asians in general as more feminine. Yet, it is clear that Asians who do not conform with "China Doll" submission stereotypes often encounter pushback. "I was never part of the in group," said an Asian American scientist. "I'm very candid and I do not hesitate to open my mouth, and that was probably not the submissive female [they were expecting]. . . . I immediately started, I guess, having the reputation of being a dragon lady."

Within the context of this study, it is important to note that Asian American stereotypes have changed markedly over time. The model minority stereotype emerged after 1965.¹²⁶ Older stereotypes were that Chinese and Japanese were strange, dirty, tricky, crafty, and sly.¹²⁷ Today, Asian women are sometimes seen as a "conniving, predatory force,"¹²⁸ triggering pre-

¹²⁵ Accord Pyke & Johnson, *supra* note 115, at 42 ("I feel like when I'm with other Asians that I'm the *typical* passive [Asian] person and I feel like that's what's expected of me and if I do say something and if I'm the *normal* person that I am, I'd stick out like a sore thumb.").

¹²⁶ Lin et al., *supra* note 106, at 34.

¹²⁷ See Harry H.L. Kitano & Stanley Sue, *The Model Minorities*, 29 J. SOC. ISSUES 1, 6 (1973).

¹²⁸ Cho, *supra* note 116, at 185.

model minority stereotypes of Asians. My own informal explorations of the topic suggest that the dragon lady stereotype could indicate that assertive Asian women are still seen as untrustworthy and conniving, mobilizing pre-model-minority stereotypes.

Contemporary stereotypes are mixed. Asian Americans tend to be viewed as nerdy and lacking in social skills and therefore, unsuited to leadership;¹²⁹ rather, or in addition, they can be viewed as competent but disliked.¹³⁰ One study found that the more unsociable subjects felt Asians were, the more negatively subjects viewed them.¹³¹ Furthermore, the low-sociability stereotype was stronger than the high-competence stereotype.¹³²

Does this cause the “dragon lady” stereotype to be triggered sooner than the “bitch” epithet? A 2012 study found that all Asian Americans, men as well as women, tend to encounter workplace harassment if they act dominantly.¹³³ This phenomenon, of course, reinforces Asian stereotype conformity by discouraging them from acting dominant. Interestingly, the study also found that Asian Americans also tend to trigger workplace harassment if they act warm, a classic double bind.¹³⁴ Asian women face this double bind along both a race and a gender axis, which may make it particularly difficult for them to “walk both ropes.”

The Maternal Wall. Asian mothers, like other mothers, are likely to hit the Maternal Wall. “If you had a full-blown career, that’s inconsistent with being a mother. I certainly feel that sentiment,” said an Asian American scientist. One scientist commented, “I feel like people think that Asian women, they are caring, and then they will give up their professions for their children.”

Yet the model-minority stereotype might help shield some Asian American mothers from negative assumptions about their work commitment. As one lawyer quoted in *Visible Invisibility* said:

They have a very positive stereotype of Asians, and especially Asian women. They see us as hard-working; we’ll work seven days a week, 24 hours a day. We’re very smart, very dedicated. One of the Asian women who recently made partner just had twins, and

¹²⁹ See Nazli Kibria, *College and Notions of “Asian Americans”: Second-Generation Chinese Americans and Korean Americans*, in *THE SECOND GENERATION: ETHNIC IDENTITY AMONG ASIAN AMERICANS* 183, 186–87 (Pyong Gap Min ed., 2002); Bob H. Suzuki, *Revisiting the Model Minority Stereotype: Implications for Student Affairs Practice and Higher Education*, 97 *NEW DIRECTIONS FOR STUDENT SERVICES* 21, 28 (2002); Roli Varma, *Asian Americans: Achievements Mask Challenges*, 32 *ASIAN J. SOC. SERVICES* 290, 300–01 (2004).

¹³⁰ Lin et al., *supra* note 106, at 35 (Asian Americans “respected as competent but disliked”).

¹³¹ *Id.* at 43.

¹³² *Id.* at 44.

¹³³ See Jennifer L. Berdahl & Ji-A Min, *Prescriptive Stereotypes and Workplace Consequences for East Asians in North America*, 18 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL.* 141, 146–48 (2012).

¹³⁴ *Id.* at 149.

they're sure she'll keep working, while they think other women would quit.¹³⁵

Although Asian Americans are stereotyped as being family oriented, the alternative stereotype regarding their work ethic may trump that one.

The assumption that Asian mothers will continue to be dedicated to their jobs does not always reign, however. One lawyer said:

The problem I see is that they really don't understand what you're doing here. They may prize you as a lawyer, they may think you're a heck of a litigator, but deep down they're wondering, "What's she doing here? Why isn't she home with the kids like my wife is?" It's a real problem when people just don't get what you do.

Several scientists interviewed in the NSF study who are immigrants from Asia had their parents come from abroad to help take care of their children so they could work full-time. One stated:

I think Asian parents [are] more willing to come over to really provide this kind of day-to-day help. So, right now, like in [my university], we really have quite a lot of Chinese faculty. And I saw many of them do have their parents come over to help them [in] much, much higher frequency than the Caucasian faculty.

First one parent will come and stay the six months his or her visa permits. Then the other parent will come, she explained.

As with minorities from other groups, assumptions that Asian families of color conform to the nuclear pattern common in white professional families sometimes disadvantage Asian women. An Asian woman lawyer said she hesitated to ask for time off to care for her mother's cousin: "I don't know if they'd understand that context, which I know is normal within the Asian community, or at least the South Asian community, to always support extended family."

Tug of War. Asian interviewees reported fewer Tug of War experiences than other groups of women. "No, no, this is not a pattern I can relate to," commented an Asian American scientist. She had always been in groups with very few women, she said, "but we've stuck together to fight; not to fight [each other] but to actually share and be a cohort of peers with my female friends."

Another woman's comment may help explain why Tug of War experiences may be rare among Asian women. She had defused conflict with an older female faculty member by communicating the importance of the efforts of the older generation: "[Without them], I wouldn't be here. I wouldn't have made it. So I'm continuously humble." She continued, "It's the same in general when you express respect and gratitude to your grand-

¹³⁵ EPNER, *supra* note 66, at 11.

parents or even your great-grandparents if they are still alive.” This perspective illustrates a potential explanation for why Asian women reported fewer Tug of War problems than black women and Latinas: the respect for elders that is emphasized in so many Asian cultures might lead to an established means in which to navigate these relationships.

II. IMPLICATIONS FOR THE DEBATE OVER IMPLICIT BIAS

The debate over implicit bias was first spurred by Linda Hamilton Krieger’s influential 1995 article, followed by a germinal symposium issue of the *California Law Review* in 2006.¹³⁶ Since then, a flood of articles has explored implicit bias in criminal, employment, bankruptcy, and other areas of law.¹³⁷

A sustained and successful public education campaign has accompanied the attention lavished on the IAT in various law reviews. Implicit bias has been presented as a new breakthrough in social psychology.¹³⁸ IAT advo-

¹³⁶ See Krieger, *supra* note 22, at 1161; Linda Hamilton, *Symposium on Behavioral Realism*, 94 CAL. L. REV. 945 (2006).

¹³⁷ See, e.g., Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs’ Race and Judges’ Race*, 28 HARV. J. RACIAL & ETHNIC JUST. 91, 95 (2012) (studying the success rate of race-based hostile work environment claims depending on the plaintiff’s race and judge’s race); A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 626 (2012) (noting that lawyers steer black families toward Chapter 13 bankruptcy at a higher rate than they do white families); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007) (reporting on an empirical study that found that participants who read about a black story character were more likely to remember facts denoting aggression than those who read about a white story character); Justin D. Levinson, *Superbias: The Collision of Behavioral Economics and Implicit Social Cognition*, 45 AKRON L. REV. 591, 596 (2012) (studying the ways racial stereotypes influence economic phenomena); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010) (finding significant associations between “Black” and “guilty” relative to “White” and “guilty”); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 310–11 (2010) (finding that participants were more likely to view evidence as indicative of guilt in the case of a dark-skinned perpetrator); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 3 (2010) (finding that law students associated judges with men instead of women and women with the home and family); Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 249 (2012) (finding that Muslims are significantly disadvantaged in Religious Free Exercise and Accommodation claims).

¹³⁸ See, e.g., *Ten Minute Test Could Spot Killers*, BBC NEWS (May 28, 2013, 6:59 PM), <http://news.bbc.co.uk/1/hi/health/2943160.stm> (last visited Nov. 27, 2013), archived at <http://perma.cc/0RC5oEb6kWB>; Melinda Henneberger, *Hidden Biases—Mindbugs—Infect Everyone’s Brain*, PRESS OF ATLANTIC CITY, Feb. 13, 2013, at A11; Shankar Vedantam, *What Does Modern Prejudice Look Like*, NPR (Apr. 22, 2013 5:45 PM), <http://www.npr.org/blogs/codeswitch/2013/04/22/177455764/What-Does-Modern-Prejudice-Look-Like> (last visited Nov. 27, 2013), archived at <http://perma.cc/0xqGZbJAbc1>; Matthew Hutson, *Only If You Dare, Learn Your Level of Close-Mindedness*,

cates such as Mahzarin Banaji and Jerry Kang often portray themselves as offering a fresh approach to the entire field of discrimination.¹³⁹ In retrospect, implicit bias advocates have framed their message in response to academic imperatives in ways that ultimately undercut their own effectiveness as agents of change in the law. More specifically, they announced highly ambitious claims with considerable rhetorical flourish, intimating that implicit bias was a newly discovered form of bias that left prior approaches in the dust.¹⁴⁰ IAT critics are fond of citing a speech in which Banaji appeared to liken the IAT's influence on psychology to that of Galileo on astronomy.¹⁴¹ These claims represented sincere enthusiasm coupled with a successful attempt to shift the focal point away from social psychologists, trained as either sociologists or psychologists, towards cognitive psychologists whose focus is on the brain. The common "story line" was articulated by Anthony G. Greenwald and Linda Hamilton Krieger, who spoke of "the new science of unconscious mental processes" replacing an older view that human behavior is under conscious control.¹⁴²

These kinds of claims reflect a tradition within academia of somewhat mischaracterizing what has gone before in order to make one's claim for the startling originality of the Next Big Thing. No judgment: I have used this traditional ploy myself. However, such histories bear about the same relationship to what actually happened that the American Law Institute Restatements bear to the law on the ground. Both are tales told to achieve a strategic goal.

In fact, the studies and methodologies that preceded the implicit bias strain of research did not focus only on conscious-as-opposed-to-unconscious bias. Instead, prior research typically was not that interested in

STAR-LEDGER, Feb. 24, 2013, at 006; Molly McElroy, *Racial Attitudes Play Large Role in Presidential Vote*, BOSTON BANNER, May 31, 2012, at 6; Anna Mikulak, *An Intergenerational Conversation Between Mahzarin R. Banaji and Rebecca Saxe*, OBSERVER, Nov. 2013, archived at <http://perma.cc/OKAG19eHwyh>; Christopher Shea, *Ideas Market: Week in Ideas*, WALL ST. J., Oct. 29, 2011, at C.4; Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12.

¹³⁹ See, e.g., Kang & Banaji, *supra* note 13, at 1064 ("We believe that new facts recently discovered in the mind and behavioral sciences can potentially transform both lay and expert conceptions of affirmative action.").

¹⁴⁰ See, e.g., Jill D. Kester, *A Revolution in Social Psychology*, APS OBSERVER ONLINE (July/Aug. 2001), <http://www.psychologicalscience.org/observer/0701/family.html> (last visited Nov. 27, 2013) (reporting on a speech likening the IAT's influence on psychology to that of Galileo on astronomy), archived at <http://perma.cc/0cNahUyUr9Q>.

¹⁴¹ See, e.g., Kester, *supra* note 140.

¹⁴² Greenwald & Krieger, *supra* note 13, at 946-47; see also Banks, Eberhardt & Ross, *supra* note 13, at 1182 (discussing the movement away from studying explicitly endorsed beliefs about race towards indirectly measuring racial bias); Kang & Banaji, *supra* note 13, at 1064 ("We believe that new facts recently discovered in the mind and behavioral sciences can potentially transform both lay and expert conceptions of affirmative action. Specifically, the science of implicit social cognition (ISC) can help us revise the very meaning of certain affirmative action prescriptions by updating our understanding of human nature and its social development.").

whether the subjects exhibiting the bias in question were self-aware or not. Arguably, as will be discussed below, lawyers should not be either.

What the IAT offered is less a revolution in psychology than a new tool to measure bias by measuring response latency times.¹⁴³ Furthermore, it is only one tool among many for measuring bias; others include more traditional paper-and-pencil tests such as comparing matched resumes¹⁴⁴ and setting up social interactions.¹⁴⁵ Indeed, the IAT is sometimes used by psychologists who also use more traditional methodologies.¹⁴⁶

IAT advocates' presentation of implicit bias as something revolutionary reflected not only its academic ambitions but also its social change goals. IAT advocates aimed to influence not just the law but also the public. Gaining press coverage was crucial to their social change project and, again, the best strategy for doing so was to announce a scientific revolution. Their public education campaign has been very successful as implicit bias and the IAT received widespread press attention as a chic new thing.¹⁴⁷ This interest is part of a larger neurological trend¹⁴⁸ that includes such influential books as *Blink* and *Thinking, Fast and Slow*.¹⁴⁹ As anyone who has talked with reporters knows, they need to report something fresh and new rather than something dowdy and old.

The incentives in the law are very different. Because law is based on precedent, the strongest rhetorical position is to present one's arguments as long-established rather than brand new. Dowdy is the name of the game.

¹⁴³ See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464–66 (1998).

¹⁴⁴ See, e.g., Bertrand & Mullainathan, *supra* 56, at 991–92; M.A. Hitt et al., *supra* note 59, at 221 (sending resumes and cover letters to corporations while varying applicant sex and race); Jaihyun Park et al., *Subtle Bias Against Muslim Job Applicants in Personnel Decisions*, 90 J. APPLIED SOC. PSYCHOL. 2174, 2178–79 (comparing employment decisions for resumes with typical Muslim or European American applicant names).

¹⁴⁵ See generally Cecilia Ridgeway, GENDER, INTERACTION, AND INEQUALITY (1992) (citing many studies based on social interaction).

¹⁴⁶ Compare Laurie A. Rudman & Julie E. Phelan, *The Effect of Priming Gender Roles on Women's Implicit Gender Beliefs and Career Aspirations*, 4 SOC. PSYCHOL. 192, 194–95 (2010) (using the IAT), and Laurie A. Rudman, et al., *Reactions to Gender Egalitarian Men: Perceived Feminization Due to Stigma-by-Association*, 16 GROUP PROCESSES & INTERGROUP REL. 1, 4 (2012) (using the IAT), with Laurie A. Rudman & Peter Glick, *Feminized Management and Backlash Toward Agentic Women: The Hidden Costs to Women of a Kinder, Gentler Image of Middle Managers*, 77 J. PERSONALITY & SOC. PSYCHOL. 1004, 1006 (1999) (having subjects evaluate job applicants), and Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counter-stereotypical Impression Management*, 74 J. PERSONALITY & SOC. PSYCHOL. 629, 630 (1998) (analyzing interactions between subjects to study motivational influences on impression formation).

¹⁴⁷ See Kester, *supra* note 140.

¹⁴⁸ See Adam Gopnik, *Mindless: The New Neuro-Skeptics*, THE NEW YORKER (Sept. 29, 2010), http://www.newyorker.com/arts/critics/books/2013/09/09/130909crbo_books_gopnik, archived at <http://perma.cc/0eEJe4yLbh7>.

¹⁴⁹ MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

Thus, the strongest rhetorical framework within which to introduce evidence of bias in court is to insist that courts have always accepted such evidence. In light of this framework, the obvious tactic is to tie evidence from social and cognitive psychology to case law stretching back to *Reed v. Reed*.¹⁵⁰ Justice Ruth Bader Ginsburg in particular spent a lot of time and energy in the 1970s inserting insights of stereotyping into equality case law. As early as 1973, in a brief for *Kahn v. Shevin*, Justice Ginsburg and her co-authors criticized a tax exemption available to widows but not widowers, arguing that the tax “perpetuates sex stereotypes and thereby retards women’s access to equal opportunity in economic life.”¹⁵¹ This language soon found its way into Supreme Court decisions from *Orr v. Orr*, which held that states could not limit alimony to women,¹⁵² to *Nevada Department of Human Resources v. Hibbs*, which upheld the application of the Family and Medical Leave Act to state officials on the theory that “Congress sought to adjust family-leave policies in order to eliminate their reliance on, and perpetuation of, invalid stereotypes.”¹⁵³ The goal in linking social psychological evidence to this line of precedent is to signify to courts that they have embraced stereotyping evidence in assessing claims of discrimination for decades.

Confusion is widespread about the relationship between implicit bias and the older language of stereotyping. Schemas (e.g., the “good mother” who is always available to her children)¹⁵⁴ drive stereotyping (e.g., “mothers lack commitment to their jobs”),¹⁵⁵ which in turn drives both explicit prescriptive bias (e.g., “mothers should not work long hours”)¹⁵⁶ and descriptive bias that may well be unconscious (e.g., the automatic assumption that a mother who arrives late was held up by child care responsibilities).¹⁵⁷ Discussion of “stereotyping” lacks the pizzazz of announcing a new, exciting development in brain science, but it may be a wiser strategic move within the law.

The NSF study seeks to help remedy the confusion between implicit bias and the larger field of social psychology. The Four Patterns of Gender Bias approach reaches beyond IAT studies to summarize findings from decades of social science studies, using a variety of methodologies.¹⁵⁸ It is, of

¹⁵⁰ *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

¹⁵¹ Brief for Appellants at 18, *Kahn v. Shevin*, 416 U.S. 351 (1974) (No. 73-78); see also Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 *HASTINGS L.J.* 1267, 1271 (2012).

¹⁵² *Orr v. Orr*, 440 U.S. 268, 283–84 (1979) (“Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the ‘proper place’ of women and their need for special protection.”) (citing *United Jewish Org. v. Carey*, 430 U.S. 144, 173–174 (1977)).

¹⁵³ *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 734 n.10 (2003).

¹⁵⁴ Kobryniewicz & Biernat, *supra* note 68, at 584–87.

¹⁵⁵ Correll et al., *supra* note 48, at 1316.

¹⁵⁶ See Benard & Correll, *supra* note 49, at 639.

¹⁵⁷ Correll et al., *supra* note 48, at 1302–03 n. 2.

¹⁵⁸ See, e.g., Amy J. C. Cuddy & Susan T. Fiske, *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60 *J. Soc. ISSUES* 701, 711 (2004) (finding women

course, a lot harder to master decades of studies than the brief history of the IAT. This Article attempts to provide a primer that may prove useful not only to legal scholars but also to employment lawyers. Because the Four Patterns, along with interview findings, track the ways gender bias plays out *in everyday workplace interactions*, the hope is that the Four Patterns approach will prove helpful to employers' lawyers when they do investigations or design gender bias trainings, and to employees' lawyers when they interview clients or design discovery questions.¹⁵⁹

The revolutionary-new-idea framing around the IAT had concrete negative effects concerning its use in courts due to the rules of evidence. In the line of cases represented by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that, in order to introduce scientific evidence into court, the evidence needs to be supported by appropriate validation.¹⁶⁰ "General acceptance" by the relevant scientific community is one factor that strengthens the validity of a scientific technique.¹⁶¹ For this reason, too, IAT advocates would have been far better off presenting the IAT as simply a new assessment tool that was validating findings long ago established by other methods, particularly given the IAT is a relatively new tool having only been invented in 1998.¹⁶²

The best-known attack against the IAT as an evidentiary basis for discrimination lawsuits was put forth by Gregory Mitchell and Philip Tetlock in their article, *Antidiscrimination Law and the Perils of Mindreading*.¹⁶³ Their article does just what IAT advocates did; it elides the difference between "implicit bias" (i.e. bias measured by the IAT) and the much larger and more established literature on bias and stereotyping.¹⁶⁴ This move allows Mitchell and Tetlock's article to launch an attack on the IAT and intimate that methodical flaws which they attribute to the IAT prove that stereotyping evidence *in general* should not be allowed in employment discrimination cases.¹⁶⁵ For example, Mitchell and Tetlock cite an IAT study by Laurie Rudman and Peter Glick, critiquing it on the grounds that it does not show a link

were perceived as warmer but less competent after becoming mothers, similar to the Maternal Wall); Derks et al., *supra* note 50, at 530 (finding women who began their careers with low gender identity and experienced gender discrimination distanced themselves from other women more and engaged in more gender stereotyping, similar to The Tug of War); Susan T. Fiske et al., *supra* note 86, *A Model*, at 879, 897 (finding out-groups are often viewed as "warm but not competent" or "competent but not warm," similar to The Tightrope); Lyness & Heilman, *supra* note 20, at 781 (finding women had to receive higher performance ratings before being promoted than men, similar to Prove-It-Again!).

¹⁵⁹ Although outside the confines of this Article, there is an obvious need to extend the Four Patterns approach beyond gender to race and other categories.

¹⁶⁰ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993).

¹⁶¹ *Id.* at 594.

¹⁶² Greenwald et al., *supra* note 143, at 1464.

¹⁶³ See Mitchell & Tetlock, *supra* note 8, at 1030–34.

¹⁶⁴ See *id.* at 1030–35.

¹⁶⁵ See *id.* at 1056–115.

between IAT scores and judgments about “hireability.”¹⁶⁶ Perhaps their assertion is true, but many other studies using more traditional methodologies do show such a link; a famous example gave people identical resumes, one of which had an African-American-sounding name (e.g., Jamal) and one of which had a white-sounding name (e.g., Greg).¹⁶⁷ The study found that applicants with white-sounding names received 50% more callbacks for interviews than those with black-sounding names,¹⁶⁸ that both males and females experienced this racial gap,¹⁶⁹ and most troubling, that blacks needed eight additional years of experience in order to receive the same number of callbacks as whites.¹⁷⁰ Another matched-resume study found that fathers who take parental leave were less likely to be recommended for workplace rewards (“a leadership role, a promotion, a raise, a fast-track executive training program, and a challenging, high-profile project”) and more likely to be recommended for workplace penalties (“a salary reduction, a demotion, termination if the company is downsized, decreased responsibilities at work, and [encouragement] to work for another organization”).¹⁷¹

Mitchell and Tetlock also argue that lab studies are not dependable because they are not evidence of what happens in actual workplaces.¹⁷² To quote them, “[T]hose eager to import [IAT] research into the law still must establish that the correlations between IAT scores and discriminatory conduct found in artificial laboratory settings reliably predict behavior in real-world settings”¹⁷³ The NSF study, and the larger interview project of which it is a part, provide evidence that long-documented patterns of bias are, in fact, commonplace in today’s workplace. Of the sixty women interviewed for the NSF study, *every single one* reported gender bias of the types documented in laboratory studies. The interview aspect is important because it is very difficult and expensive to gather this kind of evidence through experimental methods, although some studies do.¹⁷⁴ For example, one study of mothers versus non-mothers presented the matched resumes both to college students (the “class lab” study) and sent them to businesses (the “audit” study), finding that the employers exhibited even stronger bias than the college students did.¹⁷⁵

Mitchell and Tetlock further argue that the IAT, and, by extension, experimental studies in general, are not valid evidence of bias in actual work-

¹⁶⁶ *Id.* at 1070 (citing Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 756–57 (2001)).

¹⁶⁷ Bertrand & Mullainathan, *supra* note 56, at 992.

¹⁶⁸ *Id.* at 998.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 992.

¹⁷¹ Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?* 69 J. SOC. ISSUES 322, 329 (2013).

¹⁷² Mitchell & Tetlock, *supra* note 8, at 1033–34.

¹⁷³ *Id.* at 1033.

¹⁷⁴ Correll et al., *supra* note 48, at 1330.

¹⁷⁵ *Id.* at 1309–10, 1315–17.

places because they don't involve people who know each other well.¹⁷⁶ Again the interview study provides evidence that contradicts the claim that stereotyping does not occur when people know each other well. This claim may be true in some contexts. For example, the assumption that a black worker conforms to the stereotype that blacks are lazy or violent might well be attenuated by familiarity. Yet women often encounter bias and stereotyping by people who know them very well, as the NSF shows. For one thing, there is no reason to suspect that prescriptive bias is attenuated by familiarity. For example, a supervisor who believes that a good mother is always available to her children can be expected to judge a mother who works long hours harshly whether or not he knows her.¹⁷⁷ Another example: if a co-worker only feels comfortable when women are modest and self-effacing, even a woman whom he knows well will likely encounter backlash if she is a "go-getter" rather than a "helpmeet."

Familiarity might seem to have more influence in the descriptive bias context. However, the NSF study found that Prove-It-Again! bias was commonplace among the colleagues of women scientists, even by people they knew well. I encourage social scientists to further investigate the interaction between familiarity and preexisting biases.

After first publishing their research, Mitchell and Tetlock went on to found a company that provides expert testimony in case after case for employers.¹⁷⁸ In effect, they led a movement attacking the approach championed by sociologist William Bielby, who had testified for plaintiffs about stereotyping and bias in many major class action cases.¹⁷⁹ Mitchell and Tetlock mention Bielby by name without noting that Bielby's testimony typically does not focus on IAT evidence but instead on the larger social psychological literature, using a variety of different methods.¹⁸⁰

The attack on stereotyping evidence has been remarkably successful. Mitchell and Tetlock have been part of the sweeping, and quite successful, attack on the use of stereotyping evidence in the federal courts.¹⁸¹

¹⁷⁶ See *id.*; accord David Copus, *A Lawyer's View: Avoiding Junk Science*, in *EMPLOYMENT DISCRIMINATION LITIGATION: BEHAVIORAL, QUANTITATIVE, AND LEGAL PERSPECTIVES* 450, 453 (Frank J. Landy ed., 2005).

¹⁷⁷ See Benard & Correll, *supra* note 49, at 621, 639.

¹⁷⁸ Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 *FORDHAM L. REV.* 37, 39 n.1 (2009).

¹⁷⁹ See, e.g., Expert Report of William T. Bielby at 1, *Nelson v. Wal-Mart Stores, Inc.*, 2009 WL 196567 (E.D. Ark. Jan. 27, 2009), (No. 04CV00171); Expert Report of William T. Bielby at 1, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (No. 05CV06583); Expert Report of William T. Bielby at 1, *Satchell v. Fedex Express*, 2007 WL 1114010 (N.D. Cal. April 13, 2007), (No. 03CV02878).

¹⁸⁰ Mitchell & Tetlock, *supra* note 9, at 1055; Bielby reports, *supra* note 179.

¹⁸¹ See generally Christine A. Amalfe, *The Limitations on Implicit Bias Testimony Post-Dukes*, Gibbons PC (2013), http://www.americanbar.org/content/dam/aba/events/labor_law/2013/03/employment_rightsresponsibilitiescommitteemidwintermeeting/1_amalfe.authcheckdam.pdf (stating that courts have been less receptive to implicit bias evi-

The other most influential article in the backlash against IAT is Amy Wax's *Discrimination as Accident*.¹⁸² As this Article has noted, Wax argues that the law should not allow for recovery on the basis of unconscious bias as it will incentivize employers to spend money to no good purpose given that people cannot change the behavior of which they are not aware. Her arguments stem from an understandable confusion regarding implicit bias methodology and theory. The first problem stems from Wax's claim, adopted from IAT advocates, that all bias today is subtle.¹⁸³ What these commentators mean by this assertion is that modern bias typically is not of the "pernicious, overt," "no-blacks-allowed" variety.¹⁸⁴ However, what Wax fails to recog-

dence in recent years, especially following *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), archived at <http://perma.cc/RSG5-GR2W>. For examples of cases in which evidence of stereotyping was unsuccessful, see *Peterson v. Seagate U.S. LLC*, 809 F. Supp. 2d 996 (D. Minn. 2011) (granting employer's motion to exclude implicit bias expert testimony that age stereotyping was a factor in employer's decision to terminate employees because expert did not analyze whether age stereotypes existed at employer); *E.E.O.C. v. Wal-Mart Stores Inc.*, 2010 WL 583681 (E.D. Ky. Feb. 16, 2010) (holding testimony of sociologist was irrelevant and inadmissible because testimony about subconscious gender stereotyping did not shed light on whether discriminatory effects were intentional); *E.E.O.C. v. Bloomberg L.P.*, 2010 WL 3466370, at 17 (S.D.N.Y. October 25, 2010) (excluding expert testimony about gender stereotyping, finding such testimony did not meet the requirements for expert testimony because "[g]ender stereotypes are the stuff of countless television situation comedies and are the focus of numerous media treatments on nearly a daily basis. It is unarguable that virtually all adults in our society know about gender stereotypes," and therefore such evidence did not meet the requirements for expert opinion testimony). *But see* *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 500–01, 520, 530, 544 (N.D. Cal. 2012) (granting employees' motion for class certification based in part upon implicit bias expert testimony that employer's culture fostered and reinforced stereotyped thinking, which permitted gender bias to infuse the promotion process from the top down). One Iowa state court opinion, *Pippen v. Iowa*, No. 107038, slip op. at 1–3 (Iowa Dist. Ct. Polk Cnty. Ct. Apr. 17, 2012), was sharply critical of plaintiffs' proffered social science testimony. The *Pippen* court granted judgment in favor of the employer on employees' discrimination claims based in part on the fact that employees' implicit bias expert testimony failed to prove causation. *Id.* The court noted that plaintiffs' expert "conceded that he would not use the phrase 'implicit bias' in writing a scientific article," and rhetorically asked, "How, then, should it import more gravamen in a court of law?" *Id.* at 53. The court discounted the testimony because it did not establish any connection between alleged implicit bias and the discretionary subjective employment decisions at issue in this particular workplace and was simply an "opinion of conjecture, not proof of causation." *Id.* at 54.

¹⁸² Wax, *supra* note 9.

¹⁸³ See, e.g., Dasgupta, *supra* note 7, at 316–17 ("National surveys indicate that racism in American society has declined steadily over the past 50 years. Despite this optimistic finding, other research using indirect measures suggests that subtle and implicit forms of prejudice and discrimination remain pervasive.") (citations omitted); Dovidio, *supra* note 7, at 845 ("[A]lthough overt expressions of prejudice have declined steadily and significantly over time, subtle—often unconscious and unintentional—forms continue to exist."); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 512 (1997) ("These frameworks suggest that, whereas traditional forms of prejudice are direct and overt, contemporary forms are indirect and subtle.").

¹⁸⁴ Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482 (2005).

nize is that just because many examples of modern bias are less overt does not mean that it is not real.

Moreover, while IAT advocates may be primarily focused on subtle bias, any employment lawyer can tell you that subtle bias is not, alas, all that exists today. For example, the strongest form of gender bias—bias against mothers—is often open and explicit.¹⁸⁵ “‘You don’t get people like you down here in Monroe, Louisiana, who have as much telecom experience and advertising agency experience that you do with a Master’s degree from Northwestern,’” one Louisiana employer told a mother in a 2011 case.¹⁸⁶ “‘But you’ve got a lot of personal distractions right now; you have a new baby at home and I don’t think you have the fire in you to be one of my leaders.’”¹⁸⁷

The all-bias-is-now-subtle line of argument places IAT advocates in the weak argumentative position of disputing the potential significance of milli-second differences in automatic associations.¹⁸⁸ The citation of experimental studies that document concrete workplace penalties or interview studies that show how bias plays out in everyday workplace interactions places advocates of change in a much more persuasive position. That is what paper-and-pencil studies typically do. As a single example, take Adam Butler and Amie Skattebo’s study, in which subjects filled out a survey in which they assessed the performance of men who experienced a work-family conflict; the study found that such men received lower overall performance ratings and lower reward recommendations than men who did not experience work-family conflict, and women who did.¹⁸⁹

What is defined as “subtle bias” depends on the public’s education regarding how bias works. The Four Patterns approach documents how gender bias shapes everyday office politics for women in ways that, once named, are easy to spot. For evidence of this proposition, one need not look farther than the interviews in which 96 percent of the women interviewed immediately recognized one or more of the patterns of bias that have been so painstakingly documented by decades of social science.¹⁹⁰ Regardless, the subtlety of the bias is irrelevant. Forcing an employee from a protected group to provide more evidence of competence than employees from a non-protected

¹⁸⁵ See, e.g., *Krull v. Centurytel, Inc.*, 829 F. Supp. 2d 474, 476 (W.D. La. 2011); *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (describing situation where manager admitted plaintiff was passed over for promotion because she had children and manager assumed she would not want to relocate); *Moore v. Alabama State Univ.*, 980 F. Supp. 426, 431 (M.D. Ala. 1997) (describing administrator statement that employee would not be considered for promotion because job involved too much travelling for a married mother and that a woman should stay home with her family).

¹⁸⁶ *Krull*, 829 F. Supp. 2d at 476.

¹⁸⁷ *Id.*

¹⁸⁸ See Mitchell & Tetlock, *supra* note 8, at 1032, 1039 n.49, 1047–48, 1092, 1117.

¹⁸⁹ Adam B. Butler & Amie Skattebo, *What Is Acceptable for Women May Not Be for Men: The Effect of Family Conflicts with Work on Job-Performance Ratings*, 77 J. OCCUPATIONAL & ORG. PSYCH. 553, 559 (2004).

¹⁹⁰ Williams & Dempsey, *supra* note 1 (manuscript at xxiii).

group in order to succeed is precisely the kind of discrimination Title VII should prevent.¹⁹¹ Proving discrimination by pointing to a “comparator,” such as to a similarly situated man not subject to the same adverse employment action encountered by the plaintiff, is perhaps the single most established way of proving a Title VII case.¹⁹²

Wax’s second confusion underlies her contention that people cannot control bias that is subtle and totally unconscious, which stems from IAT advocates’ message that “implicit bias” is often unconscious. Although her confusion is understandable, so is this conflation. In workplace trainings, minimizing the sense of responsibility for bias by describing it as unconscious can be used as means to increase acceptance of the material, thus reducing the likelihood that the training will increase bias rather than decrease it.¹⁹³ In court, however, this kind of “unconscious” framing proves confusing and counterproductive. From a legal standpoint, it would be more productive to describe implicit bias as “unexamined bias” rather than “unconscious bias.” After all, from the plaintiff’s viewpoint, whose fault is it if the perpetrator is clueless?¹⁹⁴

The third issue with Wax’s argument arises in her claim that unconscious bias is an “intermittent” and “elusive” phenomenon¹⁹⁵ that only occurs “sporadically in social interactions.”¹⁹⁶ No support or explanation is given for this assertion.¹⁹⁷ Perhaps what she means is that the bias literature describes *tendencies*, not inevitabilities (e.g., subjects are 79% more likely to hire a non-mother than the mother). However, a tendency does not necessarily mean that bias is sporadic; someone who has a tendency toward bias may well act on it again and again. Moreover, even if a supervisor acts on her bias only once in a way that results in an adverse employment action based on sex, that “one instance” of bias is sufficient to show sex discrimination under Title VII.¹⁹⁸

¹⁹¹ Civil Rights Act, 42 U.S.C. § 2000e (2012).

¹⁹² For a thorough discussion, see Ernest F. Lidge III, *The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 832 (2002); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 193 n.1 (2009); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011).

¹⁹³ Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 611 (2006).

¹⁹⁴ Nevertheless, cluelessness should not be a defense. See Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J. 401, 448 (2003) [hereinafter, Williams, “Cluelessness” Defense]. Under Title VII, employers must not discriminate “because of . . . sex.” Civil Rights Act, *supra* note 191. It says nothing of exemptions for “subtle discrimination,” *id.*, and employers have a legal duty to recognize and correct disparate treatment regardless.

¹⁹⁵ Wax, *supra* note 9, at 1133.

¹⁹⁶ *Id.* at 1134.

¹⁹⁷ *Id.*

¹⁹⁸ Civil Rights Act, *supra* note 191.

Despite the other issues, the most critical problem with Wax's work remains her conflation of "unconscious bias" with "unconscious disparate treatment."¹⁹⁹ As previously discussed, this conflation denotes the challenges of translating between the language of the law and the language of social psychology. Take the aforementioned Jamal/Greg study in which it was found that employment applicants with "ethnic-sounding" names must provide eight additional years of experience in order to be perceived as on par with applicants with white-sounding names.²⁰⁰ If an employer requires eight additional years of experience for equally qualified blacks as compared to whites, that is disparate treatment. Self-aware, malicious intent to discriminate should not be required.²⁰¹ For a Title VII claim to be cognizable under a theory of disparate treatment, all that should be required is that less-qualified whites are hired over more-qualified blacks.

The term "unconscious disparate treatment" makes no sense. Disparate treatment entails an adverse employment action based on sex, not a psychotherapy session. To take another example, if an employer is only half as likely to promote a mother as an identical woman without children, then the employer is discriminating based on the gender stereotype that women are less competent and committed to their jobs after they have children. This act is disparate treatment whether she is conscious or not of her underlying motivations.²⁰²

Wax's final mistake is evidenced in her contention that imposing liability on employers for unexamined bias is inappropriate as people unaware of their own biases cannot possibly correct them.²⁰³ Thus, the imposition of liability is inefficient as it increases costs for employers without improving the workplace for employees.²⁰⁴ This argument rests on quotes from actual studies to the effect that implicit bias cannot be controlled.²⁰⁵ However, other studies contradict these conclusions through evidence that implicit bias is

¹⁹⁹ Wax, *supra* note 9, at 1138.

²⁰⁰ Bertrand & Mullainathan, *supra* note 56, at 998 (discussing "matched resumes" studies with identical resumes of a black and white candidate).

²⁰¹ See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 756–57 (2005); Krieger, *supra* note 22, at 1164.

²⁰² Cf. *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118–19 (2nd Cir. 2004); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), archived at <http://perma.cc/0mKkJV1voXV>.

²⁰³ Wax, *supra* note 9, at 1196.

²⁰⁴ *Id.* at 1191.

²⁰⁵ See Mitchell & Tetlock, *supra* note 8, at 1035 n.36 (citing John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOL. 462, 463–64 (1999)); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 144 n.2 (2004); Wax, *supra* note 9, at 1158–60 (quoting John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effect*, in DUAL-PROCESS THEORIES IN SOC. PSYCHOL. 361–62, 370–71 (Shelly Chaiken & Taacov Trope eds., 1999); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 117, 119–22 (1994)).

malleable.²⁰⁶ However, this debate is not simply a citation war. IAT advocates' tight focus on implicit bias again disserves us. The IAT measures automatic association, such as the automatic association of women with an apron and men with a suit. Disrupting these automatic associations—this “implicit bias”—may well be very difficult. But the issue on the ground is not whether automatic associations *occur* but whether, once made, the stereotyping that results can be *overridden*.

Stereotypes are reversed all the time. Many whites, myself included, might experience greater fear upon encountering a black male stranger in a dark alley than upon an identical encounter with a petite, white woman.²⁰⁷ Personally, I override that reaction, telling myself that to respond that way is prejudiced. I override my automatic association by focusing my attention on the behavior of the man in question, at which point I typically recognize that the individual is in no way a threat. To say that it is going to be difficult to eliminate white people's automatic association between black men and crime does not mean that we as Americans need to resign ourselves to a society where we shoot innocent black men whose only crime is to remove their wallet from their pockets.²⁰⁸ Though stereotype *activation* is automatic, stereotype *application* can be controlled.²⁰⁹ Yet the proposed methods of controlling bias explored by IAT researchers tend to reflect cognitive psychology's intensely individualistic focus, a focus that is an uneasy match when the goal is to change working conditions in organizations. Thus, IAT researchers propose using de-biasing screensavers, displaying images of outgroup members in unfamiliar roles, and focusing on counter-stereotypical mental imagery.²¹⁰

²⁰⁶ See, e.g., Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 257 (2002) (arguing that the force of automatic stereotypes can be influenced by context, as well as the perceiver's motives and approach to the situation); Nilanjana Dasgupta, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 808 (2001) (finding that exposure to images of admired black and disliked white individuals weakens automatic pro-white preferences); Tiffany A. Ito et al., *The Influence of Facial Feedback on Race Bias*, 17 PSYCHOL. SCI. 256, 259 (2006) (finding that implicit racial bias of subjects was lessened when they were repeatedly exposed to black faces while being induced to smile); Laurie A. Rudman et al., “*Unlearning*” *Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 865 (2001) (finding implicit bias was reduced after participants attended a multicultural training course).

²⁰⁷ See generally Craig St. John & Tamara Heald-Moore, *Fear of Black Strangers*, 24 SOC. SCI. RES. 262 (1995) (discussing fear of black strangers).

²⁰⁸ Amadou Diallo was an immigrant from Guinea, shot 19 times by four plainclothes police officers who claimed to have mistaken his wallet for a gun. Susan Sachs, *U.S. Decides Not to Prosecute 4 Officers Who Killed Diallo*, N.Y. TIMES, Feb. 1, 2001, archived at <http://perma.cc/0FLY3TLC>CamA. Andre Burgess, a 17-year-old student, was shot by a Federal agent who mistook the candy bar Burgess was carrying for a handgun. David Kocieniewski, *Agent Mistakes Candy Bar for Gun and Shoots Youth*, N.Y. TIMES, Nov. 8, 1997, archived at <http://perma.cc/0wKydpkEDCN>.

²⁰⁹ Blair, *supra* note 206, at 248–50.

²¹⁰ See, e.g., Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 837 (2001) (finding that mental imagery can moderate stereotype applications); Billy

At a more basic level, we need to re-design basic business systems—hiring, assignments, evaluations, and compensation—to interrupt bias.²¹¹ It is well established, for example, that bias is less likely to be influential in structured rather than unstructured interviews.²¹² In addition, incentives matter; people who are held accountable if their decisions are influenced by bias are simply less likely to act on that bias.²¹³ Moreover, organizational and social psychologists have documented extensively that ambiguity in criteria leaves the door open to stereotyping.²¹⁴ These are just a few ways business systems can be designed to interrupt bias. Others exist, but I will limit myself to discussing two.

One stems from a study of “casuistry” in which subjects are given a scenario in which they had to choose someone for a job that required both education and experience.²¹⁵ The study found that if the man had more experience, subjects tended to choose the man and cite his experience, whereas if the man had more education, they still tended to choose the man, then citing his education.²¹⁶ The study also found that subjects’ gender bias could be controlled if subjects were required to pre-commit by saying that they considered *either* education *or* experience to be most important for the job. The important point, again, is that although bias may be automatic, its effects can be overcome.

Another approach to overcoming bias involves revisiting the enormous amount of literature on the “women don’t ask” phenomenon,²¹⁷ including the

Baker, *She Explores Inner Workings of Bias*, BOSTON GLOBE, Oct. 20, 2008, at 14 (“[Mahzarin Banaji] uses the screensaver on her office computer to display images of people from far-flung places, or in unfamiliar roles (a female construction worker, say), in an effort to rewire her associations.”); Shaki Asgari et al., *When Does Contact with Successful Ingroup Members Change Self-Stereotypes? A Longitudinal Study Comparing the Effect of Quantity vs. Quality of Contact with Successful Individuals*, 41 SOC. PSYCHOL. 203, 208 (2010) (showing frequent quality interaction with ingroup member professors reduced self-stereotyping).

²¹¹ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 489–518 (2001). See generally MICHAEL ARMSTRONG, A HANDBOOK OF HUMAN RESOURCE MANAGEMENT PRACTICE (9th ed. 2003) (listing best practices for analyzing bias).

²¹² See Allen I. Huffcutt & Philip L. Roth, *Racial Group Differences in Employment Interview Evaluations*, 83 J. APPLIED PSYCHOL. 179, 186 (1998).

²¹³ See Madeline E. Heilman & Alice H. Eagly, *Gender Stereotypes Are Alive, Well, and Busy Producing Workplace Discrimination*, 1 INDUS. & ORG. PSYCHOL. 393, 396 (2008); Madeline E. Heilman & Michelle C. Haynes, *Subjectivity in the Appraisal Process: A Facilitator of Gender Bias in Work Settings*, in BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 127, 143 (Eugene Borgida & Susan T. Fiske eds., 2008).

²¹⁴ VERONICA F. NIEVA & BARBARA A. GUTER, *WOMEN AND WORK: A PSYCHOLOGICAL PERSPECTIVE* (1988); Henry L. Tosi & Steven W. Einbender, *The Effects of the Type and Amount of Information in Sex Discrimination Research: A Meta-Analysis*, 28 ACAD. MGMT. J. 712, 721 (1985); SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (1991).

²¹⁵ Norton et al., *supra* note 23, at 817

²¹⁶ *Id.* at 821.

²¹⁷ See, e.g., LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE*, at ix (2003) [hereinafter *WOMEN DON’T ASK*] (arguing

claim that the wage gap between men and women stems not from discrimination, but from the fact that men negotiate their salaries whereas women don't.²¹⁸ But a deeper look at the "women don't ask" literature reveals a study that finds that when women *do* negotiate their starting salaries, they are seen as less likable and they are less likely to be hired.²¹⁹ I suggest that the reason women do not ask is that they correctly sense that they will be penalized if they do. It's the Tightrope paradigm; whereas a man who negotiates hard may be seen as "knowing his own worth," a woman who does the same thing may well be seen as pushy and unlikable.

Once again, this bias can be controlled by a redesign of business systems. For example, one study found that if both men and women are told that they are expected to negotiate, then the gender difference in negotiation all but disappears.²²⁰ Why? Once people are told that the expectation is that they will negotiate, women who negotiate are not seen as pushy and inappropriate. They are good girls, just following the rules.

In conclusion, law reviews' excessive focus on the IAT has derailed the debate over the use of social science to document gender and race bias. The NSF study reintroduces a distinction between the IAT and the decades of social psychology that preceded it. In this Article, and in other work,²²¹ I have sought to provide an introduction to that larger literature, which is decades old and uses a range of methodologies.²²² Many of its findings are "dowdy," "dusty," and long-documented; perfect for a legal system based on precedent. Law professors would be well advised to stop conflating de-

that women are much less likely to negotiate than men); Allyce Bess, *The Biggest Hurdle for Women that Want a Raise? They Don't Ask for One*, ST. LOUIS POST-DISPATCH, Oct. 26, 2003 (discussing WOMEN DON'T ASK, *supra*); Alan B. Krueger, *Economic Scene: Women Are Less Likely to Negotiate, and It Can Be Costly to Them*, N.Y. TIMES, Aug. 21, 2003 (also discussing WOMEN DON'T ASK, *supra*); Tessa Mayes, *Selfless Women Too Backward in Coming Forward for Promotion*, LONDON TIMES, Aug. 24, 2003 (finding that women start negotiations less often and ask for less than men); Susan Schwartz, *Women Could Get More, Just by Asking*, THE GAZETTE, Dec. 15, 2003, at D3 (discussing Babcock's theories on women's unwillingness to negotiate); UC Irvine Graduate School of Management, *Ground-Breaking Study: Women's Negotiating Style Leads to Lower Pay Offers than Men Receive*, ASCRIBE NEWSWIRE, July 21, 2003 [hereinafter *Women's Negotiating Style*] (discussing research by Lisa A. Barton on women's requested salaries).

²¹⁸ See, e.g., *Be a Man*, THE ECONOMIST, June 28, 2003; Schwartz, *supra* note 217; Bess, *supra* note 217; Krueger, *supra* note 217; *Women's Negotiating Style*, *supra* note 217; Mayes, *supra* note 217; Denise Kersten, *Women Need to Learn the Art of the Deal: Pay Gap Linked to Negotiation Skills*, USA TODAY, Nov. 17, 2003, at B07.

²¹⁹ Hannah R. Bowles et al., *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951, 960–62 (2005).

²²⁰ ANDREAS LEIBBRANDT & JOHN A. LIST, NATIONAL BUREAU OF ECONOMIC RESEARCH, *Do Women Avoid Salary Negotiations? Evidence from a Large Scale Natural Field Experiment* 10 (2012).

²²¹ See, e.g., Williams, "Cluelessness" Defense, *supra* note 194, at 405–447; JOAN C. WILLIAMS & CONSUELA A. PINTO, AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, *FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS* (2nd ed. 2008); Williams & Dempsey, *supra* note 1.

²²² See generally Peter Suedfeld, *Racism in the Brain; or Is It Racism on the Brain?*, 15 PSYCHOL. INQUIRY 298 (2004) (providing a historical summary of measurement techniques).

cares-old literature on gender and racial bias with recent literature on implicit bias and the IAT, and to delve into the research in social psychology in a more serious way. This study is designed to help with the initial jump.

III. IMPLICATIONS FOR THE INTERSECTIONALITY DEBATE

The literature on intersectionality is more than a decade older than the literature on implicit bias. The first major scholarly work on intersectionality was Kimberlé Crenshaw's groundbreaking 1989 *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*.²²³ The "tendency to treat race and gender as mutually exclusive categories of experience and analysis," Crenshaw wrote, leads black women to be "theoretically erased."²²⁴ The key insight of intersectionality theory: disadvantage is not simply additive as complex identities lead to complex, and distinct, types of discrimination.²²⁵

Traditionally, critical race theory, of which the intersectionality debate is an important strain, has focused on analysis of legal cases or on methods drawn from the humanities.²²⁶ Critical race scholars have often questioned

²²³ Crenshaw, *supra* note 16; *see also* Aída Hurtado, *Relating to Privilege: Seduction and Rejection in the Subordination of White Women and Women of Color*, 14 *SIGNS* 833 (1989).

²²⁴ *Id.* at 139.

²²⁵ The social psychological literature on complex social identities posits that sometimes such identities are additive while sometimes they are not. *See, e.g.*, Galen V. Bodenhausen & Destiny Peery, *Social Categorization and Stereotyping In Vivo: The VUCA Challenge*, 3 *SOC. & PERSONALITY PSYCHOL. COMPASS* 133, 136 (2009) (arguing that perceptions of individuals are altered in an additive fashion based on number of identity dimensions shared); Sonia Roccas & Marilynn B. Brewer, *Social Identity Complexity*, 6 *PERSONALITY & SOC. PSYCH. REV.* 88, 99–104 (2002) (exploring the complexity of social identity).

²²⁶ *See generally* Hurtado, *supra* note 223 (discussing the need for intersectional analysis); Pamela Trotman Reid & Lillian Comas-Díaz, *Gender and Ethnicity: Perspectives on Dual Status*, 22 *SEX ROLES* 397 (1990) (also discussing the need for intersectional analysis); Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 357 (Kimberlé Crenshaw et al. eds., 1995) (discussing the need for intersectional analysis specifically with respect to domestic violence); Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 453 (Austin Sarat ed., 2004) (historical analysis highlighting the need for intersectional analysis); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 *DUKE L.J.* 365 (1991) (discussing legal approaches to employment policies prohibiting cornrows); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 *J. CONTEMP. LEGAL ISSUES* 701 (2001) (discussing identity performance as a basis for discrimination); Cho, *supra* note 116 (discussing the relationship between stereotypes of Asian American women and sexual harassment); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARV. L. REV.* 1419 (1991) (discussing criminal penalties meted out against drug-addicted mothers); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (using humanistic methods to approach race and the law).

whether one can use the master's tools to dismantle the master's house, criticizing empirical methods as weighted against the voices of people of color.²²⁷ More recently, several critical race scholars have begun to embrace empiricism,²²⁸ a movement catalyzed by the annual Critical Race Theory and Empirical Methods workshop founded by law professor Osagie Obasogie and anchored by a special issue of the UC Irvine Law Review.²²⁹

The NSF study begins from social science²³⁰ and ends by confirming that the "double jeopardy" hypothesis is too simple. Of course, studies, including the NSF, reveal that some women do suffer "double jeopardy" along one axis of gender bias, Prove-It-Again! For example, because black women trigger two sets of negative competence assumptions, their mistakes tend to have even more negative consequences when compared to black men than mistakes by white women when compared to white men.²³¹ However, the double jeopardy hypothesis oversimplifies the complex dynamics of race and gender. For example, one study has found that black women in fact have somewhat more room to display dominant behaviors than white women do,²³² a finding that is confirmed by the NSF study. Note that black women's experience may differ not only from white women's, but also from that of other women of color.

As has been discussed, another important message of the NSF study is that gender bias is commonplace, perhaps nigh universal, among professional women of color. The finding that all of the women interviewed reported gender bias is important because several recent studies have documented both that an increasing proportion of gender bias litigation is brought by women of color²³³ and that women of color virtually never win discrimination suits.²³⁴ While courts have often shown themselves unwilling to create a new protected category specifically for women of color,²³⁵ the NSF study suggests an alternative approach. Women affected by one of the four patterns of discrimination can simply allege gender bias. The fact that gender bias differs somewhat for women of color does not mean that it is not

²²⁷ See, e.g., Kathy Davis, *Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful*, 9 FEMINIST THEORY 67, 74 (2008).

²²⁸ See Gómez, *supra* note 226; Leslie McCall, *Sources of Racial Wage Inequality in Metropolitan Labor Markets: Racial, Ethnic, and Gender Differences*, 66 AM. SOC. REV. 520, 521 (2001).

²²⁹ Symposium on Critical Race Theory and Empirical Methods, U. CAL. IRVINE L. REV. (forthcoming 2014).

²³⁰ For another approach to intersectionality that begins from social science, see Ange-Marie Hancock, *Intersectionality as a Normative and Empirical Paradigm*, 3 POL. & GENDER 248, 248-49 (2007).

²³¹ See Rosette & Livingston, *supra* note 61, at 1165.

²³² Livingston, Rosette & Washington, *supra* note 76, at 357.

²³³ See *infra* note 260 and accompanying text.

²³⁴ See *infra* notes 253-60 and accompanying text; see also David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 549 (2003).

²³⁵ See *infra* note 238 and accompanying text.

gender bias. After all, all gender bias is racialized, including gender bias perpetrated against white women. Surely the law does not protect against gender bias as experienced by white women but not against gender bias as experienced by women of color.

A. *Intersectional Plaintiffs' Fate in Courts*

Crenshaw first pointed out that intersectional plaintiffs tend to have less success in court in *Demarginalizing the Intersection of Race and Gender*, where she discussed the case of *DeGraffenreid v. General Motors Assembly Division*.²³⁶ The black women plaintiffs in that case alleged that General Motors' seniority system discriminated against them.²³⁷ The court refused to allow them to sue *as black women* on the grounds that that would "create a new 'super-remedy'"²³⁸ that was not within the intent of the statute. The court analyzed the plaintiffs' race and sex discrimination claims separately and found that the plaintiffs lost the race claim because the company hired black men, and the sex discrimination claim because the company hired white women.²³⁹ The erasure of experiences as women of color was very explicit.²⁴⁰

A black woman plaintiff was more successful in a subsequent case, *Jefferies v. Harrison County Community Action Association*,²⁴¹ when a court used the sex-plus theory first introduced in *Phillips v. Martin Marietta*.²⁴² The sex-plus theory allows women to sue based on sex plus another characteristic, such as in *Martin Marietta* in which the "plus" characteristic was having school-age children.²⁴³ The *Jefferies* court reversed a grant of summary judgment for the employer, and affirmed that "discrimination against black females can exist even in the absence of discrimination against black men or white women."²⁴⁴

Despite this success, study after study has found sharply lower rates of success in employment discrimination cases brought by women of color than those brought by plaintiffs in general.²⁴⁵ For example, a 2003 study by law

²³⁶ Crenshaw, *supra* note 16, at 141–42 (discussing *DeGraffenreid v. General Motors Corp.*, 413 F. Supp. 142 (E.D. Mo. 1976)).

²³⁷ *DeGraffenreid*, 413 F. Supp. at 143.

²³⁸ *Id.*

²³⁹ *Id.* at 144–45.

²⁴⁰ *See id.* at 145 ("The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of 'black women' who would have greater standing than, for example, a black male.").

²⁴¹ *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1033–35 (5th Cir. 1980).

²⁴² *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 4 (5th Cir. 1969).

²⁴³ *Id.* at 3–4; see Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1463–81 (2009).

²⁴⁴ *Jefferies*, 615 F.2d at 1032.

²⁴⁵ In addition to the studies discussed below, see Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989) (discussing the case of an arts and crafts instructor who was fired for "negative role modeling" after she became pregnant out of wedlock); Cald-

professor David Oppenheimer examined a sample of 334 employment discrimination and wrongful discharge cases decided by California courts between 1998 and 1999, finding that black women had low win rates in discrimination cases.²⁴⁶ Similarly, a small 2009 study by law professor Minna Kotkin of twenty-six employment discrimination summary judgments in the Southern and Eastern Districts of New York in the one-year period beginning in June of 2006 found that intersectional plaintiffs virtually always lost.²⁴⁷ Employers won summary judgments 96% of the time, higher than the 73% success rate that is commonly reported in employment discrimination cases in general.²⁴⁸ Likewise, a 2012 study by law professor Emma Reece Denny examined all 162 of the employment discrimination cases appealed to the Eighth Circuit between 2008 and 2010.²⁴⁹ It found that intersectional plaintiffs won summary judgments in 7.5% of the cases, as compared to a 30.3% plaintiff win rate in Eighth Circuit employment discrimination cases in general.²⁵⁰ Like the New York study, the finding was that employees virtually always lose intersectional cases; employers won in 92.5% of cases.²⁵¹ Denny also found that cases involving intersectional plaintiffs are dramatically less likely to be published than cases by non-intersectional plaintiffs (66.1% compared to 28.3 %).²⁵² In other words, the loss rate of intersectional plaintiffs is probably even higher than what has been reported in Denny's and other studies.

The most elegant study on the lower success rates of women of color who bring employment discrimination suits is by Best, Krieger, Edelman, and Eliason, among whom are both lawyers and sociologists.²⁵³ They drew upon a 2% random sample of district and circuit court opinions in federal discrimination cases between 1965 and 1999, yielding 328 circuit court opinions and 686 district court opinions.²⁵⁴ Once again, they found strong

well, *supra* note 226 (providing an overview of cases where black plaintiffs challenged workplace restrictions on particular hairstyles); Carbado & Gulati, *supra* note 226 (using hypothetical employment discrimination cases to discuss legal theories based on identity performance discrimination); Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN'S L.J. 21 (1991) (using anecdotes to illustrate the differences between interactive and double discrimination); Wei, *supra* note 114 (using two cases to illustrate how Title VII can be used to convince judges that elements of an individual's identity cannot be separated when analyzing alleged employment discrimination).

²⁴⁶ Oppenheimer, *supra* note 234, at 549.

²⁴⁷ Kotkin, *supra* note 243, at 1458; see also Emma Reece Denny, *Mo' Claims Mo' Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation*, 30 LAW & INEQUALITY 339, 354 (2012).

²⁴⁸ Kotkin, *supra* note 243, at 1440.

²⁴⁹ Denny, *supra* note 247, at 354.

²⁵⁰ *Id.* at 355.

²⁵¹ *Id.*

²⁵² *Id.* at 356.

²⁵³ Rachel Kahn Best, Linda Hamilton Krieger, Lauren B. Edelman & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991 (2011).

²⁵⁴ *Id.* at 999.

support for intersectionality theory: “[P]laintiffs making intersectional claims are less than half as likely to win” as compared with nonintersectional plaintiffs (15% compared to 31%);²⁵⁵ and they are only half as likely to obtain at least a partial victory and one-third as likely to win completely.²⁵⁶ Holding other factors equal, intersectional plaintiffs will win only 13% of the time; non-intersectional plaintiffs win 28% of the time.²⁵⁷ While white women are most likely to have a full victory (38%), nonwhite women are the least likely (11%), with nonwhite men much closer to nonwhite women than to white women (15%).²⁵⁸ The study suggested that the claims of intersectional plaintiffs are not intrinsically weaker than those of discrimination plaintiffs in general.²⁵⁹ Best and her co-authors also found that intersectional claims represent an increasing proportion of discrimination claims. In the 1970s and 1980s, they represented only about 10% of all discrimination claims, a number that climbed to more than a quarter once they began rising around 1990.²⁶⁰

One strategy for improving the success rate for women of color is to exhort courts to allow intersectional claims.²⁶¹ This approach is attractive in many ways. First, a key tenet of the intersectionality debate is that women of color should not have to carve their identities up by gender and race. As the Ninth Circuit determined in a 1994 case, “[T]he attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experience.”²⁶² This distortion should not occur. Furthermore, the fact that women of color are women does not mean that they should join with (white) feminists based on their commonalities, and forced to leave their race behind.²⁶³ For one thing, women of color experience discrimination based on race (i.e. the kind of discrimination they share with men of color) in addition to discrimination based on gender (i.e. the kind of discrimination they share with white women).

In addition, the NSF study shows, even the gender discrimination faced by women of color is subtly, or not so subtly, different from that experienced by white women.²⁶⁴ Yet the insistence that intersectional plaintiffs should not

²⁵⁵ *Id.* at 1009.

²⁵⁶ *Id.* at 1011.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 1012.

²⁵⁹ *Id.* at 1012 n.27.

²⁶⁰ *Id.* at 1008.

²⁶¹ See Denny, *supra* note 247, at 349–50.

²⁶² Lam v. Univ. of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994); see, e.g., Denny, *supra* note 247, at 339 (“The identity cannot be compartmentalized; it cannot be split in halves or thirds, nor have any clearly defined set of boundaries. I do not have several identities, I only have one, made of all the elements that have shaped its unique proportions.” (quoting Amin Maalouf, *Les Identités Meurtrières* [Deadly Identities], 4 *Al Jadid* (1998))).

²⁶³ See CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 86–90 (2005).

²⁶⁴ Many stereotypes often operate at the subgroup level. Indeed, social psychologists have found that “perceivers sometimes evaluate others on the basis of one dominant categorization and ignore or even inhibit alternative categorizations, sometimes evaluate

have to carve up their identities often disserves them in court. As previously discussed, some courts have, rightly or wrongly, been reluctant to create a "new super-remedy" for fear of endlessly proliferating new protected categories.²⁶⁵ Moreover, when a plaintiff alleges discrimination based on membership in two protected categories, this manner of pleading compounds the already-difficult problem of finding a suitable comparator. A growing literature documents that courts increasingly dismiss plaintiffs' employment suits by insisting on comparator evidence and that comparators be the near twin of the plaintiff.²⁶⁶ The comparator problem is even worse in the case of intersectional plaintiffs. Said one court, "The more specific the composite class in which the plaintiff claims membership, the more onerous the ultimate burden" of proving discrimination.²⁶⁷ Problems arise when plaintiffs try to show that the employer discriminated based on the individual's particular combination of traits. As one court explained in a case brought by an Asian American woman, "Asian women are subject to stereotypes and assumptions shared neither by Asian men nor by white women."²⁶⁸ By this analysis, evidence of discrimination against Asian men or white women would not help in proving the plaintiff's claim.²⁶⁹

Alleging discrimination based on only one protected characteristic might help some plaintiffs overcome these barriers. The NSF study highlights that the gender bias experienced by women of color is gender bias, *pure and simple*. The fact that the gender bias is racialized does not disprove that it is gender bias. After all, gender bias against white women is racialized, too, it is just racialized by whiteness. Surely Title VII does not mean that white women can sue for sex discrimination while women of color cannot. Nor does it allow only men, not women, of color to sue for race discrimination. Carving up the identities of women of color is not ideal, but in court it may be strategically advisable. Further studies of how the experience of

others on the basis of an additive combination of the different category memberships, and sometimes create a compound category with emergent properties that are not predicted from contributing categories considered separately." Roccas & Brewer, *supra* note 225, at 88 ("Social identity complexity reflects the degree of overlap perceived to exist between groups of which a person is simultaneously a member When a person acknowledges, and accepts, that memberships in multiple ingroups are not fully convergent or overlapping, the associated identity structure is both more inclusive and more complex.").

²⁶⁵ Degraffenreid v. General Motors Corp., 413 F. Supp. 142, 143 (E.D. Mo. 1976).

²⁶⁶ See, e.g., Goldberg, *supra* note 192, at 754–55; see also Lewis v. Metro. Atlanta Rapid Transit Auth., 343 Fed. Appx. 450, 454 (11th Cir. 2009) (holding that, to succeed in a discrimination claim, a plaintiff fired for misconduct must show that the employer retained another employee who engaged in "nearly identical" conduct) (quoting Burke-Fowler v. Orange County, 447 F.3d 1319, 1323 (11th Cir. 2006)); Davin v. Delta Air Lines, Inc., 678 F.2d 567, 570 (5th Cir. 1982) (holding that plaintiff fired for misconduct must show that an employee outside the protected class was retained despite "nearly identical" conduct).

²⁶⁷ Jeffers v. Thompson, 264 F. Supp. 2d 314, 327 (D. Md. 2003).

²⁶⁸ Lam v. Univ. of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994).

²⁶⁹ Goldberg, *supra* note 192, at 765–66.

gender discrimination differs by race, and how the experience of race discrimination differs by gender, would be most helpful.²⁷⁰

Lawyers litigating discrimination cases on behalf of women of color ought to allege, and courts ought to allow, women plaintiffs of color to recover *both* for their experiences of gender bias *and* for their experiences of racial bias.²⁷¹ Title VII did not forbid adverse employment actions based on sex and race against everyone else but declare open season on women of color.

B. How Does the Experience of Gender Bias Differ by Race?

The NSF study confirmed the basic hypothesis of intersectionality: being a woman of color is different from being a white woman. Not only do women of color experience racial bias white women do not face, their experience of gender bias differs from that of white women. The NSF study methodology offers a fuller understanding of how women experience gender bias, complementing experimental studies that often yield information chiefly about white women.

The NSF study also suggests that the types of bias women encounter differ according to their race. The biggest gap between white women and women of color concerned Tug of War bias, reported by 59% of women of color but only 50% of white women. The next biggest gap concerned the Tightrope, reported by 77% of women of color and 68% of white women. The Maternal Wall came third, reported by 63% of mothers of color and 56% of white mothers. Prove-It-Again! bias showed the smallest gap: 70% of women of color reported it, as compared with 64% of white women. One caveat: as previously mentioned, most of the interviewees were scientists, and as such, it is impossible to tell to what extent these differences stem from race and to what extent they stem from their particular professional environment.

Another important finding is that women of color within racial categorizations have dramatically different experiences of discrimination than other women within the same category. For example, to the extent that Asian women trigger the model minority stereotype, they may well have fewer Prove-It-Again! problems when compared not only to Latinas and blacks, but also to white women. However, to the extent that they trigger the China Doll stereotype, their experience may be closer to that of other women of color than to white women. In other words, Asian women's experiences at work may depend on whether co-workers see them as Asians or as wo-

²⁷⁰ When black women allege Prove-It-Again! bias, they are alleging a kind of bias they share both with black men *and* with white women. In a comparator context, therefore, the proper comparator groups are white men and a combined group of all women and black men.

²⁷¹ In particular, black women and Latinas should be allowed to allege Prove-It-Again! bias as to both race and gender bias.

men.²⁷² Which aspect of complex identities is triggered may well be context-dependent.

My initial hypothesis regarding the study was that black women and Latinas would experience more Prove-It-Again! bias than white women, given that they trigger two sets of negative competence assumptions (that blacks are lower in status than whites and that women are lower in status than men).²⁷³ However, there was actually a *smaller* difference between the percentages of women of color who experience Prove-It-Again! bias as compared with white women than any other type of bias. Nevertheless, the NSF study confirmed other studies reporting that Prove-It-Again! bias, once triggered, is stronger for black women who make mistakes than for white women who do the same.²⁷⁴ To that extent, the double jeopardy hypothesis seems partly true. It rings true in another way as well: Latinas and Asian Americans appear to have more “too feminine” problems than white or black women. As has been noted, studies suggest that Asians of both sexes are seen as less masculine—i.e. more feminine—than whites.²⁷⁵ The NSF study also suggests that Latinas have more “too feminine” problems than whites, raising the question of whether Latinos, like Asian Americans, are, as a group, seen as more feminine than whites.

Moreover, the “too feminine” problems experienced by all groups of women of color differed in important ways from the challenges faced by white women. White women reported being expected to take notes, bake cupcakes, answer the phone, mother students, do emotional work, and remain as “service partners” in law firms—but not one of the professional white women interviewed had been asked to do the work of an administrative assistant or mistaken for a janitor. In broad brush, it appears that women of color encounter gender pressures not only to assume under-valued feminine roles, but also to assume lower-status support roles—something not reported in the interviews with white women. In addition, women of color often are under even more pressure than white women to do one particular type of office housework: service on diversity and women’s initiatives.

Though the double jeopardy hypothesis does cover some aspects of the experience of women of color, it does not fully capture the complexities at the intersection of race and gender. Most notably, black women are less likely than white women to be penalized for having a direct, no-nonsense, don’t-suffer-fools-lightly style.²⁷⁶ That comes at a cost, of course; black women are not eligible for the cherished status reserved solely for white women. And God forbid they use an authoritative style to advocate for

²⁷² See Shih et al., *supra* note 120, at 81–82 (assessments of Asian-American women change, depending on whether racial or gender identity is made salient).

²⁷³ See Biernat & Kobrynowicz, *supra* note 26, at 552, 554.

²⁷⁴ See Rosette & Livingston, *supra* note 61, at 1165.

²⁷⁵ Adam D. Galinsky et al., *Gendered Races: Implications for Interracial Marriage, Leadership Selection, and Athletic Participation*, 24 *PSYCHOL. SCI.* 498, 501 (2013).

²⁷⁶ Livingston, Rosette & Washington, *supra* note 76, at 354.

themselves; it is accepted only when they are furthering the goals of the company or institution.²⁷⁷ Moreover, as shown by the study, black women do encounter “too masculine” problems, particularly around self-promotion, but they appear to encounter fewer such problems than do the other three groups of women. The same is not true of Asian Americans and Latinas, who appear to face “too masculine” problems much like those of white women, except that they are sanctioned not only by being called “bitches,” but also by racialized epithets such as “dragon lady” and “fiery Latina.”

Perhaps the least variation emerged around the Maternal Wall. Women of all groups reported bias triggered by motherhood. Asian women may face fewer negative competence and commitment assumptions based on motherhood but then run smack into backlash against hard-driving mothers. Different groups of women of color also face quite different expectations around motherhood by other members of their own racial groups, with blacks and Asians more likely than whites to face the expectation that they will continue their careers. Latinas, by contrast, are more likely than whites to face the expectation that they will stay home full time.

Women of color faced every type of Tug of War bias known to woman, but again the experience differs somewhat by racial group. In general, women of color were more likely than whites to be understanding and forgiving of older women who judged them for not doing womanhood “right.” The angry tone often heard from white women was, for women of color, typically replaced by understanding and empathy. Asians were less likely than any other group of women to report Tug of War problems. Conflict between administrative personnel and professionals, though it was reported by white women, may well be even more of a problem for Latinas. Finally, a disturbing finding is that Tugs of War between black and white women often take on a racial dimension, ranging from white women policing black women into the conventions of femininity to outright racism.

CONCLUSION

This Article reports on an initial study,²⁷⁸ but it suggests that the NSF study’s marriage of experimental social psychology with narrative sociology can deepen our understanding of gender bias. Too often, reliance on studies that compare “men” and “women” have led scholars to confuse “gender” with “the way white women experience gender.” The NSF study, along with the types of lab studies now being performed by Robert Livingston,²⁷⁹ Kath-

²⁷⁷ See Livingston, *supra* note 81.

²⁷⁸ The Center for WorkLife Law has formed an Advisory Committee, chaired by Judge Bernice Donald of the 6th Circuit, to help launch a study titled “Double Jeopardy?: How Gender Bias Differs by Race for Women in the Law.”

²⁷⁹ Rosette & Livingston, *supra* note 61; Livingston, Rosette & Washington, *supra* note 76; Livingston, Washington & Rosette, *supra* note 81.

erine Phillips,²⁸⁰ and Jennifer L. Eberhardt²⁸¹ hold the promise of a much more complete and nuanced understanding of the operation of gender in American society. The NSF study opens up the intriguing possibility of exploring the complex ways in which the experiences of different groups of women emerge, converge, and diverge.

The NSF study also has two important messages for the law. The first is that women of color share some experiences of bias with men of color (“racial bias”) and other experiences with white women (“gender bias”). Instead of insisting that women of color find “near twins,” courts should allow women of color plaintiffs to plead and prove gender discrimination when they are describing experiences they share with white women, race discrimination when they are describing experiences they share with men of color, and both race and gender discrimination when women of color describe experiences (as will often be the case with Latinas and black women on the Prove-It-Again! axis of gender bias) they share *both* with white women *and* with men of color.

The NSF study’s second major implication is that lawyers need to understand the difference between research based on the IAT and the much larger universe of experimental social psychology. The IAT is only about ten years old, whereas experimental social psychology is much older, giving the latter obvious advantages considering the law’s reliance on precedent and its rules concerning admission of expert testimony. The NSF study seeks to help educate lawyers about the larger experimental literature, and also to provide a methodology that helps bridge the gap between lab studies and the workplace, and provides strong evidence that patterns described time and again in experiments do, in fact, describe the experience of many women at work.

²⁸⁰ See Richardson et al., *supra* note 78.

²⁸¹ Eberhardt et al., *Looking Deathworthy*, *supra* note 6; Eberhardt et al., *Seeing Black*, *supra* note 6; Banks, Eberhardt & Ross, *supra* note 13.