

# Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data from the Workplace Experiences Survey<sup>†</sup>

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*This Article joins other voices<sup>1</sup> in challenging what I will call the “implicit bias consensus” in employment discrimination law, first crystallized in the work of Susan Sturm<sup>2</sup> and Linda Hamilton Krieger.<sup>3</sup> The implicit bias consensus has two basic components. The first is that most employment discrimination today is what Sturm christened “second generation employment discrimination” caused by implicit bias that is uncontrollable and unconscious, subtle and ambiguous.<sup>4</sup> The second component of the consensus is that Title VII is ill-suited to address second generation discrimination.<sup>5</sup>*

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<sup>†</sup> This Article is dedicated to the memory of Professor Katherine W. V. Phillips of Columbia Business School (1973–2020), whose wise and humane spirit and influential contributions to social psychology will be sorely missed. Many thanks for those busy people who were generous with their time in reading prior drafts of this Article: Stephanie Bornstein, Cynthia Thomas Calvert, Kate Mueting, and Mike Selmi. Thanks, too, for expert research assistance to Heather Lanyi, Rachel Maas, Natasha Martin, Katie Utehs Panzer, Hilary Burke Chan, and Mikayla Boginsky. Our appreciation also goes to Brianna Watson for compiling graphs.

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1. Samuel R. Bagenstos, *Implicit Bias’s Failure*, 39 BERKELEY J. EMP. & LAB. L. 37 (2018); Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415 (2000); Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193 (2018) [hereinafter Selmi, *The Paradox of Implicit Bias*]; Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997) [hereinafter Selmi, *Proving Intentional Discrimination*]; Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009) (worrying that the rhetoric of unconscious bias will subvert concrete goals in favor of an amorphous goal of eradicating unconscious bias).

2. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459 (2001).

3. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995).

4. Sturm, *supra* note 2, at 468.

5. Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 965 (2016); Sonia Goltz, Roger Reinsch & Joel Tuoriniemi, *University Women’s Experiences in Bringing Second Generation Sex Discrimination Claims: Further Support for Adoption of a Structural*

*This Article challenges the implicit bias consensus based on six different datasets from the Workplace Experiences Survey (WES), a simple ten-minute climate survey that provides a fine-grained description of how racial and gender bias play out in everyday workplace interactions. WES data and Williams's other research offer plaintiffs' lawyers a simple way to talk about racial and gender bias as falling into five basic patterns. WES data also helps them respond to the common defense argument that studies performed in social psychology labs do not describe what happens at work: the conjunction of lab studies and WES data is more powerful than either type of evidence alone, because lab studies provide objective evidence that the five basic patterns exist in the world, while WES data provide attitudinal evidence that these five patterns exist in today's workplaces. The Article explores the implications of the WES and the five-patterns model for Title VII, contesting some basic tenets of the implicit bias consensus, notably its description of bias as unconscious and uncontrollable, and the contention that Title VII is ill-suited to address contemporary forms of discrimination. The Article ends by providing a step-by-step guide to how to use bias evidence in litigation, highlighting evidence that will be useful to help plaintiffs' lawyers establish that a reasonable jury could find bias, particularly in light of the relaxed causation standard articulated in *Bostock v. Clayton County*.<sup>6</sup>*

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*Approach*, 18 TEX. J. WOMEN & L. 145, 153 (2009); Stephen M. Rich, *One Law of Race?*, 100 IOWA L. REV. 201, 231 (2014).

6. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

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## INTRODUCTION

The basic patterns of gender bias are easily described. Prove-It-Again bias means that women have to prove themselves more than men do. Tightrope bias reflects that office politics are more complicated for professional women than professional men because women risk being seen as “difficult” if they behave in assertive and confident ways and “not go-getters” if they do not. The Tug of War further complicates office politics when bias against women fuels conflicts among women. Maternal Wall bias reflects the strong negative competence and commitment assumptions triggered by motherhood. Enumerating these patterns explains in very concrete ways how professional workplaces provide an invisible escalator for (white) men both because they have to prove themselves less than other groups, and face office politics that are much simpler.

Three of these four patterns tease out patterns of inequality that stem from social status—gender is just a specific case. Consequently, these four patterns capture racial as well as gender bias. Because Prove-It-Again bias reflects assumptions that groups lower in status are less competent, it is triggered robustly by race as well as gender.<sup>7</sup> Tightrope bias reflects prescriptive stereotypes about how people *should* behave; because groups seen as lower in status are expected to behave in deferential rather than dominant ways, Tightrope bias reflects both racial and gender bias. Tug of War reflects divisions that arise because of the different ways that people of color enact their identities and the different strategies for assimilating with the dominant group (or refusing to do so), as documented in the influential work of Devon Carbado and Mitu Gulati.<sup>8</sup> In addition to these three patterns, racial bias also reflects racial stereotyping that differs by group, but nearly always advantages whites over people of color.

Note the implication: women of color face five patterns of bias. WES data also show that women of color are the most likely group to report some bias patterns, which makes the low success rate of cases involving “intersectional plaintiffs” all the more disturbing—although, as we shall see, the new Supreme Court case of *Bostock v. Clayton County* may help.<sup>9</sup>

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7. CECILIA L. RIDGEWAY, STATUS: WHY IS IT EVERYWHERE? WHY DOES IT MATTER? 110 (2019).

8. DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN “POST-RACIAL” AMERICA (2013); see also Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001).

9. Elizabeth M. Almquist, *Untangling the Effects of Race and Sex: The Disadvantaged Status of Black Women*, 56 SOC. SCI. Q. 129, 129–30 (1975); 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, 1009 (2011); Kimberle 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); Cynthia Fuchs Epstein, *Black and Female: The Double Whammy*, 7 PSYCHOL. TODAY 57 (1973); Pamela Trotman Reid, *Feminism Versus Minority Group Identity: Not for Black Women Only*, 10 SEX ROLES 247, 253 (1984); Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42, 42–43 (1988); Ange-Marie Hancock, *When Multiplication Doesn’t Equal Quick Addition: Examining Intersectionality as a Research Paradigm*, 5 PERSPS. ON POL. 63, 70 (2007); *Bostock*, 140 S. Ct. at 1737.

With help from Professor Richard M. Lee of the University of Minnesota, Professor Erika V. Hall of Emory University, Professor Katherine W. Phillips of Columbia Business School, and Rachel M. Korn and others at the Center for WorkLife Law, Williams and her team used the five-patterns model to develop the Workplace Experiences Survey (WES), a simple ten-minute bias climate survey that asks people whether they have experienced bias and where. WES also measures the impact of bias on outcome measures like employee belonging and intent to stay. We now have U.S. data sets for 550 women science professors; all the other samples contain both men and women: 3093 engineers 2827 lawyers, 1346 architects, and 227 people in tech;<sup>10</sup> two cross-industry samples are on the way. In addition to these quantitative data, we also have extensive qualitative data from survey comments, focus groups, and interviews performed in conjunction with WES surveys.<sup>11</sup>

Science gains validity through aggregation of data. These samples provide evidence that many professionals today report having experienced precisely the kinds of bias social psychologists have documented in the lab over and over again for decades. This should reassure courts<sup>12</sup> and defense experts<sup>13</sup> who have worried that what happens in social psychology labs does not reflect what happens in today's workplaces.

The power of the five-patterns model is its ability to describe bias on the ground in a concrete enough way that most people recognize that it actually happens. "You just described my life," commented one white woman during an interview.<sup>14</sup> "Happens all the time," noted an African-American man working at a trade association during a workshop (speaking of Prove-It-Again bias).<sup>15</sup> In scores of corporate trainings throughout the country, Williams has found that even not particularly receptive audiences accept the model's fine-grained description of how bias plays out in everyday workplace interactions. For example, in a workshop for department chairs at a major STEM-heavy campus who had eaten alive a sensitivity-based diversity trainer the year before, 100% of participants said they had learned at least one way of interrupting bias, and 83% said they would use the strategies they learned for interrupting going forward (among those who filled out an evaluation survey).<sup>16</sup> Virtually no pushback emerged in this and similar workshops; once people hear the five-patterns description of how bias plays out on the ground, virtually everybody

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10. Because this study focused on women of color, the numbers were smaller because there are so few underrepresented minorities in technology.

11. All of these data will be referred to collectively as "WES data."

12. *Jones v. Nat'l Council of Young Men's Christian Ass'ns of the U.S.*, 34 F. Supp. 3d 896, 900 (N.D. Ill. 2014) (explaining that implicit bias expert testimony by Anthony Greenwald was "derived solely from laboratory testing that does not remotely approximate the conditions that apply in this case").

13. See, e.g., Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1069 (2006).

14. Interview with Jane Doe, in S.F., Cal. (2014).

15. Interview with John Doe, in S.F., Cal. (2019).

16. Evaluation Survey, confidential workshop conducted by Joan C. Williams (Apr. 2016) (on file with authors).

agrees that they have seen it. This has important implications at many stages of the litigation process, from initial client intake to settlement negotiations. Perhaps most important, the widespread recognition of the existence of the five patterns in mainstream media, public discourse, the business community, and popular culture has important implications at summary judgment, and for plaintiffs' ability to introduce bias evidence without the use of expensive experts, as discussed in Part IV, but instead as stereotyping evidence. In an important sense, this Article extends the work of Stephanie Bornstein, who has argued that plaintiffs' lawyers should pay more attention to the *Price Waterhouse* stereotyping approach.<sup>17</sup>

Plaintiff-friendly law professors have been in despair not only about the increasingly rocky reception of implicit bias in courts, but also about the Supreme Court's hostility to so-called social framework testimony<sup>18</sup> that highlights that subjective decision-making is a petri dish for bias. And indeed, it is, but social framework theory was sharply criticized by the Supreme Court in *Dukes v. Wal-Mart*,<sup>19</sup> which also held that merely pointing to the existence of subjective decision-making (for example, tap-on-the-shoulder promotion systems) often will not satisfy the "commonality" required to sustain a class action under Rule 23.<sup>20</sup> Some commentators announced the end of class actions,<sup>21</sup> but post-*Wal-Mart* plaintiffs have had some success, including with evidence of implicit bias.<sup>22</sup> One simple problem, in retrospect, is that the *Wal-*

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17. Bornstein, *supra* note 5, at 932.

18. See, e.g., Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 *FORDHAM L. REV.* 37, 42–44 (2009); Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 *B.C. L. REV.* 367, 377–79 (2008); Elizabeth Tippet, *Robbing a Barren Vault: The Implication of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 *HOFSTRA LAB. & EMP. L.J.* 433, 446–48 (2012); Lesley Wexler, *Wal-Mart Matters*, 46 *WAKE FOREST L. REV.* 95, 105–11 (2011); Roger W. Reinsch & Sonia Goltz, *You Can't Get There from Here: Implications of the Wal-Mart v. Dukes Decision for Addressing Second-Generation Discrimination*, 9 *NW. J.L. & SOC. POL'Y* 264, 274 (2014) ("The Supreme Court's rejection of the social framework testimony was a big blow to the viability of class action discrimination suits."); Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 *BERKELEY J. EMP. & LAB. L.* 387, 389–92, 394 (2011). But see Michael C. Harper, *Class-Based Adjudication of Title VII Claims in the Age of the Roberts Court*, 95 *B.U. L. REV.* 1099, 1101 (2015) (arguing that *Walmart* has been "exaggerated").

19. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354–55 (2011) (declaring that the expert testimony on social framework did "nothing to advance [plaintiff's] case" and the Court could "safely disregard it"); Tanya Kateri Hernández, *One Path for "Post-Racial" Employment Discrimination Cases—The Implicit Association Test Research As Social Framework Evidence*, 32 *LAW & INEQ.* 309, 319 (2014) (noting a "possible post-*Dukes* chill on using applied social framework evidence"). As Stephanie Bornstein has aptly noted, the Court "rejected the purpose for which the evidence was used, not the validity of the evidence itself." Stephanie Bornstein, *Reckless Discrimination*, 105 *CALIF. L. REV.* 1055, 1077 (2017).

20. *Wal-Mart*, 564 U.S. at 359 ("Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question."); see also *FED. R. CIV. P.* 23.

21. Melissa Hart, *Learning from Wal-Mart*, 10 *EMP. RTS. & EMP. POL'Y J.* 355, 379–84 (2006).

22. Compare Annika L. Jones, Comment, *Implicit Bias as Social-Framework Evidence in Employment Discrimination*, 165 *U. PA. L. REV.* 1221, 1230–42 (2017) (exploring rough sledding for social framework evidence post-*Walmart*), with Anthony Kakoyannis, *Assessing the Viability of Implicit Bias Evidence in Discrimination Cases: An Analysis of the Most Significant Federal Cases*, 69 *FLA. L. REV.* 1181, 1189–1204

*Mart* class was just too big (1.5 million plaintiffs)—much bigger than in any previous class action.<sup>23</sup>

The *Wal-Mart* majority felt that the plaintiffs lacked the “glue” needed to link the plaintiffs’ cases together;<sup>24</sup> subsequent plaintiffs have supplied that glue. An instructive example is *McReynolds v. Merrill Lynch*,<sup>25</sup> where plaintiffs did not merely argue that Merrill Lynch’s assignment system was subjective, but explained that its “teaming” policy operated to create “little fraternities” of white brokers who chose to work with brokers like themselves, which meant that Black brokers found it hard to access the “teaming” that led to lucrative accounts.<sup>26</sup>

Note how *McReynolds* provided the “connective tissue” *Wal-Mart* lacked: it described precisely how in-group favoritism operated to deprive Black brokers of equal opportunities.<sup>27</sup> “Plaintiffs need to craft a story, a narrative, that explains how stereotyping has, in fact, affected the defendants’ workplace. . . . in ways a jury, or a judge, is likely to accept,” notes Michael Selmi.<sup>28</sup> Other commentators have made similar points. “What is needed is a new form of metaphorical glue,” concludes Tanya Katerí Hernández.<sup>29</sup> The five-patterns model may provide not just a narrative that the employer has maintained a system vulnerable to discrimination—the *Wal-Mart* approach—but a fine-grained description of precisely how bias influenced access to employment opportunities.

Part I describes the implicit bias consensus’s description of bias and argues that this description is ill-suited for employment law. Part II describes WES data. Part III responds to the claim that Title VII is ill-suited to address twenty-first century employment discrimination, arguing that once the focus shifts from “unconscious bias” to the five-patterns model, established patterns of proof readily accommodate evidence of racial and gender bias—particularly if courts are honest about the implications of the five-patterns model for the “same-actor” inference (that the same person who hired the plaintiff would not later fire the plaintiff) and the “personal animosity” defense (that the plaintiff’s experience reflected not discrimination but personal animosity). Part IV documents that the basic patterns of bias have been widely disseminated in popular culture and the mainstream media, which has implications for the introduction of bias evidence without expert testimony and—most important—for summary judgment, where

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(2017) (analyzing five cases and concluding some courts are allowing in social framework evidence, while others are not).

23. *Wal-Mart*, 564 U.S. at 343.

24. *Id.* at 339.

25. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 492 (7th Cir. 2012).

26. *Id.* at 489.

27. Zatz, *supra* note 18, at 388.

28. Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 506 (2011).

29. Hernández, *supra* note 19, at 315 (referencing *Wal-Mart*, 564 U.S. at 352 (“Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored?*”).

the judges' role is to assess what a reasonable jury would find.<sup>30</sup> The Article ends with a discussion of how to use the five-patterns model in litigation, from the initial client interview to closing arguments.

#### I. THE IMPLICIT BIAS CONSENSUS GIVES A DESCRIPTION OF BIAS ILL-SUITED TO THE WORKPLACE CONTEXT

Nearly twenty years ago, Susan Sturm published a highly influential article arguing that discrimination had become “more complex and elusive”<sup>31</sup> rather than of the overt old-fashioned “this is no job for a woman” or “Irish need not apply.”<sup>32</sup> She asserted that “[c]ognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality.”<sup>33</sup> Modern discrimination, she argued, typically reflects “cognitive or unconscious bias, rather than deliberate, intentional exclusion.”<sup>34</sup>

Sturm's reference to cognitive or unconscious bias refers to Linda Hamilton Krieger's pathbreaking 1995 article, *The Content of Our Categories*.<sup>35</sup> Krieger's influential article led to an alliance with Project Implicit, a special issue of the *California Law Review* exploring “the law of implicit bias,”<sup>36</sup> and to sweeping statements that unconscious bias is “today's most prevalent type of discrimination.”<sup>37</sup> “Over the last decade, implicit bias has emerged as the primary explanation for continued inequalities, and, within this emerging literature, it often seems as if all contemporary discrimination results from implicit biases,” notes Michael Selmi.<sup>38</sup>

Project Implicit championed the use of the terms “implicit bias” and “unconscious bias” to refer to the bias measured by the Implicit Association Test (IAT).<sup>39</sup> The IAT measures the speed with which the test-taker associates stereotype-congruent and stereotype-incongruent words or images.<sup>40</sup> For example, our brains will tend to associate an oven mitt more quickly with a

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30. FED. R. CIV. P. 56 (stating that the court may grant summary judgment on concluding there is no genuine issue of material fact; no summary judgment where no reasonable jury could find for the moving party); see also E-mail from Rick Marcus, Distinguished Professor of L., Univ. of California, Hastings Coll. of the L., to Joan C. Williams, Distinguished Professor of L., Univ. of California, Hastings Coll. of the L. (Aug. 10, 2020, 9:29 AM) (on file with authors).

31. Sturm, *supra* note 2, at 459.

32. *Id.* at 460.

33. *Id.*

34. *Id.*

35. Krieger, *supra* note 3, at 1164.

36. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 979 (2006).

37. See Krieger, *supra* note 3, at 1164 (arguing that unconscious bias is “today's most prevalent type of discrimination”); see also Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1130 (1999) (explaining that unconscious bias is the “most pervasive and important form of bias operating in society today”).

38. Selmi, *The Paradox of Implicit Bias*, *supra* note 1, at 194.

39. *Lectures and Workshops*, PROJECT IMPLICIT, <https://www.projectimplicit.net/lectures.html> (last visited Nov. 23, 2020).

40. Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1464–65 (1998).

picture of a woman than a baseball mitt, providing a quantitative measure of bias.

The introduction and publicizing of the IAT<sup>41</sup> brought the discussion of bias to a new level. The IAT provided a language and widespread understanding that even people of goodwill who have no wish or conscious endorsement of discrimination nonetheless can perpetuate stereotypes, bias, and ultimately discrimination. This important contribution should never be underestimated. Moreover, nothing in this Article contests the scientific validity of the IAT; our focus is solely on the usefulness of IAT evidence in litigating employment discrimination under Title VII. From the viewpoint of employment law, the IAT, and the language its advocates have used to promote it, have two basic drawbacks.

A. IN THE EMPLOYMENT CONTEXT, THE IAT FOCUSES ATTENTION ON THE WRONG PART OF THE COGNITIVE PROCESS

The IAT—which focuses on the milliseconds that measure how stereotypes affect automatic associations—is not particularly useful for employment law. The employment context is not like the police violence context, where people make split-second decisions of paramount importance that result in the killing of a Black gentleman reaching for his wallet or a twelve-year-old child waving a toy gun.<sup>42</sup> Milliseconds matter in policing, but in the workplace decision-making proceeds at a statelier pace. Workers regularly override their initial instincts and self-edit all the time in order to conform to workplace norms. Few of us blurt out that we think our boss is an idiot or our colleague is sexy; we provide a cognitive override. Thus, the implicit bias consensus focuses attention on the wrong part of the cognitive process: in the workplace, stereotype *activation* is automatic, but stereotype *application* can be controlled.

Another major drawback of the excessive focus on the IAT is the urgent focus on whether automatic associations can be changed.<sup>43</sup> Changing implicit associations is very difficult, because stereotypes are learned early and reinforced often, and any intervention to try to change stereotypes is likely to be swamped by a past life governed by them, and by a day-to-day experience that reinforces them. Luckily, avoiding employment discrimination does not require

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41. *Id.*

42. See Associated Press, *Ex State Trooper Who Shot Unarmed Black Man Reaching for Wallet Gets 3 Years in Prison*, ABC 4 NEWS (Aug. 15, 2017), <https://abcnews4.com/news/crime-news/ex-state-trooper-who-shot-unarmed-black-man-reaching-for-wallet-gets-3-years-in-prison>; Meghan Keneally & James Hill, *Cleveland Cops "Recklessly" Shot Boy, 12, Over Toy Gun, Suit Claims*, ABC NEWS (Dec. 5, 2014, 2:55 PM), <https://abcnews.go.com/US/cleveland-cops-recklessly-shot-at-boy-12-toy-gun/story?id=27402837>.

43. Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCH. REV. 242, 242–243 (2002); Selmi, *The Paradox of Implicit Bias*, *supra* note 1, at 228. For examples of how this focus on automatic associations appears in the legal literature, see Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 963–65 (2006); Nilanjana Dasgupta, *Mechanisms Underlying the Malleability of Implicit Prejudice and Stereotypes: The Role of Automaticity and Cognitive Control*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 267 (Todd D. Nelson ed., 2009).

changing automatic associations. All that's required is a double take—running your gut response through your head. A large literature shows that people can self-correct and decrease the level of bias if they are held accountable for providing this cognitive override.<sup>44</sup> When people are held accountable by, for example, making it clear that they will have to justify their decisionmaking process, they engage in more cognitive processing and can override biases.<sup>45</sup> That's where the focus should be for employment discrimination. You can think whatever you want; what Title VII prohibits is differential treatment based on race or sex.<sup>46</sup> Put differently, antidiscrimination law is concerned not with the “content of our categories”<sup>47</sup> but with whether we allow bias to affect the workplace experience of our coworkers.

In response to these and other concerns, some prominent commentators have argued that plaintiffs' employment lawyers should turn their attention from the IAT to field studies.<sup>48</sup> This throws out most of social psychology because most studies of bias are performed in labs and not in the field. Even more important, due to the small number of people of color in many job categories, field studies often will yield high enough numbers to reach statistical significance only in the context of hiring, which rules out field studies of promotion and climate issues that will often be more, or equally, important. WES data makes sole reliance on field studies unnecessary because it provides robust evidence that people report encountering precisely the same kinds of bias at work that have been found over and over again in lab studies.

#### B. THE PICTURE OF BIAS AS UNCONSCIOUS AND UNCONTROLLABLE IS MISLEADING

Because of the excessive focus on whether stereotypes are *triggered* as opposed to whether their influence is *controlled*, some IAT enthusiasts have taken Project Implicit's focus on automatic associations to extremely unfortunate characterizations of bias as uncontrollable and unknowable. “[A]ttitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection,” notes Jerry Kang, one of the most influential legal scholars championing implicit bias.<sup>49</sup> Two other authors note that implicit biases, “once activated, influence many of our behaviors and judgments in ways we cannot consciously access and often cannot control.”<sup>50</sup>

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44. See, e.g., Philip E. Tetlock, *Accountability and Complexity of Thought*, 45 J. PERSONALITY & SOC. PSYCH. 74, 74–75 (1983).

45. *Id.* at 75, 82.

46. 42 U.S.C. § 2000e-2 (2018).

47. Krieger, *supra* note 3, at 1199–1202.

48. Selmi, *The Paradox of Implicit Bias*, *supra* note 1, at 227, 233–39.

49. Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129–30 (2012).

50. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2630–31 (2013).

Yet another author asserts, “[i]mplicit biases are automatic associations held by individuals often beyond their conscious awareness or control.”<sup>51</sup>

Another basic tenet of the implicit bias consensus is that most bias, or most bias that matters, is unconscious.<sup>52</sup> What most don’t recognize is that insistent focus of Project Implicit,<sup>53</sup> the influential research group formed by psychologists championing the IAT, on whether bias is conscious or unconscious is unusual. Most social psychologists make little use of this distinction. Project Implicit does because it is an outgrowth of cognitive psychology, which is focused on brain studies and cognitive errors.<sup>54</sup> This focus deflects attention away from the social construction of knowledge, which is the traditional focus of social psychology.

To clarify, this Article discusses work in three different areas of psychology: cognitive, social, and industrial/organizational. Cognitive psychology centers on cognitive processes like thinking and memory;<sup>55</sup> social psychology centers on the social dimension of human interactions;<sup>56</sup> and industrial/organizational psychology centers workplace behavior and how to design human resource processes.<sup>57</sup> Behavioral economics is a much more recent entry into the study of bias; often its studies reproduce findings reported for decades in social psychology. We seek to shift the focus from cognitive processing to social and industrial/organizational psychology and behavioral economics because we believe, for the purposes of antidiscrimination law, it is less important to understand the cognitive processing of bias than to understand how bias plays out in everyday workplace interactions.

Several strains of research provide important insights into what we should make of claims that most bias is unconscious. One strain shows that powerful people, and those high in dominance, are more likely than others to engage in stereotyping. Susan Fiske first documented that high-power individuals are more likely to stereotype others in 1993.<sup>58</sup> Later work clarifies that increased stereotyping by those in power reflects two separate mechanisms.<sup>59</sup> Stereotyping by default, which reflects decreased attention to stereotype-inconsistent information, reflects powerful people’s sense that they are too busy to pay

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51. Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1363 (2010).

52. Greenwald & Krieger, *supra* note 43, at 947.

53. *About Us*, PROJECT IMPLICIT, [projectimplicit.net/about.html](http://projectimplicit.net/about.html) (last visited Nov. 23, 2020).

54. ROBERT J. STERNBERG & KARIN STERNBERG, COGNITIVE PSYCHOLOGY, at xxiv (7th ed. 2017).

55. *Id.*

56. DAVID G. MYERS & JEAN M. TWENGE, SOCIAL PSYCHOLOGY, at xv (13th ed. 2019).

57. MICHAEL G. AAMODT, INDUSTRIAL/ORGANIZATIONAL PSYCHOLOGY: AN APPLIED APPROACH 2 (8th ed. 2016).

58. Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCH. 621, 623–24 (1993); Eric Dépret & Susan T. Fiske, *Social Cognition and Power: Some Cognitive Consequences of Social Structure as a Source of Control Deprivation*, in CONTROL MOTIVATION AND SOCIAL COGNITION 176, 194–96 (1993).

59. See, e.g., Stephanie A. Goodwin, Alexandra Gubin, Susan T. Fiske & Vincent Y. Yzerbyt, *Power Can Bias Impression Processes: Stereotyping Subordinates by Default and by Design*, 3 GRP. PROCESSES & INTERGROUP RELS. 227 (2000).

attention to those below.<sup>60</sup> Stereotyping by design, which reflects increased attention of stereotype-consistent information, reflects powerful people's motivation to underestimate their underlings to justify their powerful position.<sup>61</sup> Other studies confirm that power increases both stereotyping<sup>62</sup> and implicit prejudice.<sup>63</sup> People who are high in dominance traits exhibit the same tendency to stereotype as do people in high-power positions.<sup>64</sup> One review article concludes: "In summary, high- and low-power individuals construe their social worlds quite differently. Studies using varied measures of power and social judgment consistently show that elevated power is associated with more automatic, less complex styles of reasoning,"<sup>65</sup> including stereotyping. In other words, stereotyping is part and parcel of being powerful; it is not useful to excuse the powerful who choose not to bring this into their consciousness on the grounds that the resulting bias is "unconscious."

Another strain of research dating back to 1978 concerns "perspective taking."<sup>66</sup> Research finds that "high power reduces perspective taking and related forms of social attention."<sup>67</sup> Privileged groups' cluelessness, research shows, is an artifact of social privilege.<sup>68</sup> Particularly important in this context are studies of role taking: the "communicative, affective, and cognitive work on the part of the interactants as they give and elicit cues, attune to and express feelings, and imagine one another's thought processes," to quote an influential study by Tony P. Love and Jenny L. Davis.<sup>69</sup> A well-known example of role taking is that women are significantly more accurate in interpreting nonverbal cues.<sup>70</sup> This turns out to be a specific instance of a more general pattern: lower

60. Dacher Keltner, Deborah H. Gruenfeld & Cameron Anderson, *Power, Approach, and Inhibition*, 110 PSYCH. REV. 265, 273 (2003).

61. *Id.*

62. Joris Lammers, Janka I. Stoker & Diederik A. Stapel, *Differentiating Social and Personal Power: Opposite Effects on Stereotyping, but Parallel Effects on Behavioral Approach Tendencies*, 20 PSYCH. SCI. 1543, 1544 (2009).

63. Ana Guinote, Guillermo B. Willis & Cristiana Martellotta, *Social Power Increases Implicit Prejudice*, 46 J. EXPERIMENTAL SOC. PSYCH. 299, 300 (2010).

64. Goodwin et al., *supra* note 59, at 237.

65. Keltner et al., *supra* note 60, at 274–75.

66. Dean Tjosvold & Sabato D. Sagaria, *Effects of Relative Power on Cognitive Perspective-Taking*, 4 PERSONALITY & SOC. PSYCH. BULL. 256, 256 (1978).

67. Steven L. Blader, Aiwa Shirako & Ya-Ru Chen, *Looking Out from the Top: Differential Effects of Status and Power on Perspective Taking*, 42 PERSONALITY & SOC. PSYCH. BULL. 723, 723 (2016); *see also* Adam D. Galinsky, Joe C. Magee, M. Ena Inesi & Deborah H. Gruenfeld, *Power and Perspectives Not Taken*, 17 PSYCH. SCI. 1068, 1068 (2006); Joris Lammers, Adam D. Galinsky, Ernestine H. Gordijn & Sabine Otten, *Illegitimacy Moderates the Effects of Power on Approach*, 19 PSYCH. SCI. 558, 563 (2008); Tjosvold & Sagaria, *supra* note 66, at 256.

68. *See, e.g.*, L. Taylor Phillips & Brian S. Lowery, *The Hard-Knock Life? Whites Claim Hardships in Response to Racial Inequity*, 61 J. EXPERIMENTAL SOC. PSYCH. 12, 14 (2015); Ashleigh Shelby Rosette & Leigh Plunkett Tost, *Perceiving Social Inequity: When Subordinate-Group Positioning on One Dimension of Social Hierarchy Enhances Privilege Recognition on Another*, 24 PSYCH. SCI. 1420, 1420–22 (2013).

69. Tony P. Love & Jenny L. Davis, *The Effect of Status on Role-Taking Accuracy*, 79 AM. SOCIO. REV. 848, 849 (2014).

70. Robert Rosenthal & Bella M. DePaulo, *Sex Differences in Eavesdropping on Nonverbal Cues*, 37 J. PERSONALITY & SOC. PSYCH. 273, 273 (1979).

status groups are more attuned to higher status groups than vice versa.<sup>71</sup> “[O]ccupying a position of high rather than low power” makes people pay less attention to others’ views<sup>72</sup> for the simple reason that those lower on the totem pole need to know more about those above, because those above have power over those below.<sup>73</sup>

A third strain of research documents that the powerful, when threatened, are more likely to embrace negative stereotypes to legitimate their own position.<sup>74</sup> People in positions of power are responsible for making justifiable decisions: a good way to justify one’s own position of power is to embrace negative stereotypes about others. This is not just a cognitive error. It is driven by social motivations to deny the existence of privilege. This is illustrated in a study by L. Taylor Phillips and Brian S. Lowery, which is part of the literature that documents that white people are motivated to believe they have benefited only from meritocratic systems and personal virtues.<sup>75</sup> In a fascinating experiment, Phillips and Lowery found that white people, when faced with evidence of white privilege, claimed that they themselves suffered from personal hardships.<sup>76</sup> The authors attribute that reaction to identity threat—claims of white privilege threaten the identity of college students whose identities are built around the idea that they have worked hard for everything they have achieved, and that their social position reflects only merit.<sup>77</sup> “[W]e found that Whites exposed to evidence of White privilege claim more *personal* life hardships, but do not deny the existence of White privilege at the *group* level. We theorized that increased hardship claims may serve to help individuals deny the extension of privilege to *themselves*.”<sup>78</sup> As further evidence of this, when the study authors did an additional experiment in which they sent reaffirming messages to the subjects, the subjects were less likely to claim personal hardship.<sup>79</sup> The authors concluded, “hardship claims help people deny they personally benefit from privilege—that White privilege extends to themselves.”<sup>80</sup> Other experiments have made similar findings about men and gender bias, leading Phillips and

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71. RIDGEWAY, *supra* note 7, at 60.

72. Blader et al., *supra* note 67, at 724; Susan T. Fiske, *Interpersonal Stratification: Status, Power, and Subordination*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 941, 959–60 (Susan T. Fiske, Daniel T. Gilbert, & Gardner Lindzey eds., 5th ed. 2010).

73. RIDGEWAY, *supra* note 7, at 60.

74. Goodwin et al., *supra* note 59, at 230; John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRIT. J. SOC. PSYCH. 1, 3–5 (1994); John C. Georgeson & Monica J. Harris, *The Balance of Power: Interpersonal Consequences of Differential Power and Expectancies*, 26 PERSONALITY & SOC. PSYCH. BULL. 1239, 1253 (2000); Ana Guinote & Adele Phillips, *Power Can Increase Stereotyping: Evidence from Managers and Subordinates in the Hotel Industry*, 41 SOC. PSYCH. 3, 4 (2010); Rosa Rodríguez-Bailón, Miguel Moya & Vincent Yzerbyt, *Why Do Superiors Attend to Negative Stereotypic Information About Their Subordinates? Effects of Power Legitimacy on Social Perception*, 30 EUR. J. SOC. PSYCH. 651, 651–53, 665–66 (2000).

75. Phillips & Lowery, *supra* note 68, at 12–13.

76. *Id.* at 14.

77. *Id.*

78. *Id.*

79. *Id.* at 16.

80. *Id.*

Lowery to conclude that “[b]eing exposed to evidence of privilege is an aversive experience that elicits self-protective reactions.”<sup>81</sup>

In other words, denying social privilege is one of the accoutrements of privilege. All this raises serious questions about Project Implicit’s focus on whether bias is conscious. To use the telling vernacular, if you’re clueless, whose fault is that? Instead of using language that seems to perpetuate and enshrine high-status groups’ felt entitlement to be clueless, we should be deploying language that provides a concrete description of how discrimination prevents meritocracy from triumphing because some groups are held to higher standards and face far trickier office politics. That is precisely what the five-patterns model does.<sup>82</sup>

In an unfortunate excess of enthusiasm, Project Implicit’s approach to bias is sometimes presented as a breakthrough that leaves older approaches in the dust.<sup>83</sup> IAT advocates such as Mahzarin Banaji and Jerry Kang sometimes portray themselves as offering a fresh approach to the entire field of psychology.<sup>84</sup> In their laudable campaign to disseminate important findings, they announced highly ambitious claims with rhetorical flourish.<sup>85</sup> These claims represent sincere enthusiasm coupled with land grab, as cognitive psychologists focused on the brain upstaged social psychologists with Ph.D.’s in sociology, social psychology, or industrial/organizational psychology. The common storyline, as articulated by Anthony Greenwald and Linda Hamilton Krieger, spoke of “the new science of unconscious mental processes” replacing an older view of human behavior under conscious control, overlooking decades of work in experimental social psychology.<sup>86</sup>

All this led predictably to an attack on the use of social psychology in general, led by Gregory Mitchell and Philip E. Tetlock, who provided expert testimony to employers seeking to defeat employment discrimination lawsuits. In *Antidiscrimination Law and the Perils of Mind Reading*, Mitchell and Tetlock do just what IAT advocates did: they elide the difference between the IAT and social psychology in general.<sup>87</sup> In this and subsequent articles, they launch an

81. *Id.* at 13; see also Nyla R. Branscombe, *Thinking About One’s Gender Group’s Privileges or Disadvantages: Consequences for Well-being in Women and Men*, 37 BRIT. J. SOC. PSYCH. 167, 167–84 (1998); Colin Wayne Leach, Aarti Iyer & Anne Pedersen, *Anger and Guilt About Ingroup Advantage Explain the Willingness for Political Action*, 32 PERSONALITY & SOC. PSYCH. BULL. 1232, 1232 (2006); Brian S. Lowery, Eric D. Knowles & Miguel M. Unzueta, *Framing Inequity Safely: Whites’ Motivated Perceptions of Racial Privilege*, 33 PERSONALITY & SOC. PSYCH. BULL. 1237, 1244 (2007); Rosette & Tost, *supra* note 68, at 1421; Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 492 (1990).

82. JOAN C. WILLIAMS & RACHEL DEMPSEY, WHAT WORKS FOR WOMEN AT WORK at xiv–xv (2014).

83. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1064 (2006).

84. See *id.*

85. See, e.g., Jill D. Kester, *A Revolution in Social Psychology*, 14 AM. PSYCH. SOC’Y OBSERVER ONLINE, July–Aug. 2001, <http://www.psychologicalscience.org/observer/0701/family.html>.

86. Greenwald & Krieger, *supra* note 43, at 946.

87. Mitchell & Tetlock, *supra* note 13, at 1068–69 (“Until the connection between measures of implicit prejudice and discriminatory behaviors of greater consequence is established, the claimed link between implicit prejudice and discriminatory behavior as expansively defined by social psychologists holds little legal significance.”).

attack on the IAT, and argue that its alleged methodological flaws prove that evidence of implicit bias should not be allowed in employment cases.<sup>88</sup> Notably, Mitchell and Tetlock argue that lab studies are not dependable because they do not describe what happens in actual workplaces: “those 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.”<sup>89</sup> WES data avoids these issues by relying on lab studies combined with self-reports that show that workers describe precisely the bias patterns documented in lab studies.

### C. RELYING ONLY ON FIELD STUDIES IS NOT THE ANSWER

Two prominent commentators who share our goal of breaking the thrall of “implicit association enthusiasm,”<sup>90</sup> advocate a shift from a focus on the IAT to a focus on field studies that document discrimination in real-world settings.<sup>91</sup> We disagree. That just shifts attention from one narrow type of evidence (the IAT) to another narrow type of evidence (field studies). That’s far too restrictive, given that most studies are done not in the field but in the lab. Anyone who has participated both in lab studies and in field studies (as we have) can explain why. Lab studies, for one thing, are typically cheap: all you need to do is make participating in a matched-resume study a course requirement in a psychology course, and then crunch the numbers. Lab studies also are powerful because they allow you to control for everything except for the variable to be studied, so they yield clean data, statistical power, and clear effects.

Field studies are a different kettle of fish. First of all, they are much more difficult to accomplish: Williams once negotiated with more than a dozen people over the course of two years at one large company, only to be told through a single email that the company had decided to discontinue its participation in the project.<sup>92</sup> John List, one of the foremost researchers in behavioral economics,

88. Gregory Mitchell & Philip E. Tetlock, *Popularity as a Poor Proxy for Utility: The Case of Implicit Prejudice*, in *PSYCHOLOGICAL SCIENCE UNDER SCRUTINY: RECENT CHALLENGES AND PROPOSED SOLUTIONS* 164, 186 (Scott O. Lilienfeld & Irwin D. Waldman eds., 2017); Mitchell & Tetlock, *supra* note 13, at 1034.

89. Mitchell & Tetlock, *supra* note 13, at 1033. Mitchell and Tetlock have led what Selmi calls a “determined and small group of academics.” Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions* 39 (2014) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2430378](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2430378); *see also* *Bell v. Bolger*, 708 F.2d 1312, 1319–20 (8th Cir. 1983) (explaining that “subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse”); *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981) (concluding that, although subjective decision making is not discriminatory per se, “obviously subjective decision making provides an opportunity for unlawful discrimination”); Selmi, *The Paradox of Implicit Bias*, *supra* note 1, at 199 n.21; Mitchell & Tetlock, *supra* note 88.

90. Bagenstos, *supra* note 1, at 38; Selmi, *The Paradox of Implicit Bias*, *supra* note 1, at 196; *see also* Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1669 (2011) (noting that IAT studies are “necessarily proof that real-world decisions are influenced by” implicit attitudes, and recommending field studies as the alternative).

91. Bagenstos, *supra* note 1.

92. E-mail from organization to Joan C. Williams, Distinguished Professor of L., Univ. of California, Hastings Coll. of the L (confidential).

estimates that only about one in ten field studies actually works out.<sup>93</sup> Second, the sample sizes gained from field studies are often small, jeopardizing the robustness of statistical analyses. The exception is hiring studies, but failure to hire is not the key problem in many professional workplaces—retention and advancement are.<sup>94</sup> Doing field studies on the effects of bias on retention and advancement immediately runs into small numbers and long time periods. This makes doing them much costlier not only in terms of funding; it often fits poorly into the academic incentives of the social psychologist or behavioral economist in question, given the academic priority for consistent publication.

## II. HOW BIAS PLAYS OUT IN EVERYDAY WORKPLACE INTERACTIONS: THE WES DATA

Lab studies provide objective evidence that certain patterns of bias exist in the world but not evidence that they exist in the workplace. The WES does not provide an objective measure of bias—it is an attitudinal survey<sup>95</sup>—but it does document that people report seeing the bias patterns documented in the lab playing out at work. What is powerful is the conjunction of the two different sorts of evidence. Mitchell and Tetlock’s worry that what happens in “artificial laboratory settings” is not happening in the workplace seems misplaced.<sup>96</sup>

Williams distilled forty years of experimental research into five basic patterns of bias that affect women and people of color.<sup>97</sup> The next step was to convert these patterns into the ten-minute WES and a shorter, related survey.<sup>98</sup> The WES has been given to 693 engineers in India<sup>99</sup> and 3093 in the United States, 2827 lawyers, 550 science professors, 1346 architects, and 227 tech workers.<sup>100</sup> In addition, we have two cross industry samples: 823 individuals

93. E-mail from John List, Kenneth C. Griffin, Distinguished Service Professor in Economics at the Univ. of Chicago, to Joan C. Williams, Distinguished Professor of L., Univ. of California, Hastings Coll. of the L. (Jan. 12, 2020, 7:43 PM) (on file with authors).

94. The legal profession is a good example. For instance, women have been half or more of law students for decades, but remain only twenty percent of law firm equity partners. DESTINY PEERY, REPORT OF THE 2018 NAWL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 2–3 (2018), <https://www.nawl.org/page/2018survey>.

95. The WES asks people to answer questions about their own experiences in the workplace. For example, “I have to prove myself over and over again to get the same level of recognition as my colleagues.”

96. Mitchell & Tetlock, *supra* note 13, at 1033.

97. Much of the stereotyping research puts together members of different groups into larger categories (for example, people of Asian descent include people from East Asian, Southeast Asian, and South Asian countries). This approach means that we lose the ability to look at important differences between groups. However, there are also important similarities in the workplace experiences of individuals in these groups, so we want to make sure to talk about these stereotypes even though the approach is not perfect.

98. The WES is designed to examine the major patterns of gender and racial bias within an industry; it was customized and used in this way to examine engineers, lawyers, and science professors. A shorter, generalized version called the Bias at Work Survey was used to collect cross-industry data in two additional studies.

99. The WES was also used in a study of 693 engineers in India. JOAN C. WILLIAMS, RACHEL M. KORN, ROBERTA RINCON & PETER FINN, WORKLIFE LAW, WALKING THE TIGHTROPE: AN EXAMINATION OF BIAS IN INDIA’S ENGINEERING WORKPLACE, 12–14 (2018), <https://worklifelaw.org/wp-content/uploads/2018/10/Walking-the-Tightrope-Bias-Indias-Engineering-Workplace.pdf>

100. JOAN C. WILLIAMS, SU LI, ROBERTA RINCON & PETER FINN, WORKLIFE LAW, CLIMATE CONTROL: GENDER AND RACIAL BIAS IN ENGINEERING? 112 (2016), <https://worklifelaw.org/publications/Climate-Control->

recruited to a publicly available survey, and 1616 individuals recruited from Cint, a paid participant pool.<sup>101</sup> Each survey participant answered questions about the experiences they had at their current or most recent employer.<sup>102</sup>

These surveys confirm that the kinds of bias documented in both lab and audit studies in social psychology, industrial-organizational psychology, and behavioral economics show up in workplaces today. One dramatic aspect of WES data is the large divergences between the experience of white men and that of other groups. WES data is particularly important in light of studies that show that even small biases add up quickly over time: one computer model started out with a workforce that was 58% women and showed that with only a 5% bias in favor of men, the percentage of women fell to 29% after just seven iterations.<sup>103</sup> When bias plays out year after year in all of the different business systems, (hiring, performance evaluations, meetings, assignments, etc.) small biases add up to big effects.

#### A. PROVE-IT-AGAIN BIAS

Women and African Americans need to provide more evidence of competence in order to be seen as equally competent.<sup>104</sup> Thus, resumes of people of color get evaluated more negatively than identical resumes of white people.<sup>105</sup> Prove-It-Again is “descriptive stereotyping”: it reflects assumptions that groups will conform to stereotypes about them.<sup>106</sup> Prove-It-Again is a status effect, so

Gender-And-Racial-Bias-In-Engineering.pdf [hereinafter WILLIAMS ET AL., CLIMATE CONTROL] (engineers study); JOAN C. WILLIAMS, KATHERINE W. PHILLIPS & ERIKA V. HALL, WORKLIFE LAW, DOUBLE JEOPARDY? GENDER BIAS AGAINST WOMEN IN SCIENCE 53 (2014), [https://worklifelaw.org/publications/Double-Jeopardy-Report\\_v6\\_full\\_web-sm.pdf](https://worklifelaw.org/publications/Double-Jeopardy-Report_v6_full_web-sm.pdf) [hereinafter WILLIAMS ET AL., DOUBLE JEOPARDY?] (science professors study); JOAN C. WILLIAMS, MARINA MULTHAUP, SU LI & RACHEL KORN, A.B.A. & MINORITY CORP. COUNSEL ASSOC., YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION 5 (2018), <https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf> [hereinafter WILLIAMS ET AL., YOU CAN'T CHANGE WHAT YOU CAN'T SEE] (lawyers study); JOAN C. WILLIAMS & RACHEL M. KORN, THE ELEPHANT IN THE (WELL-DESIGNED) ROOM: A STUDY OF GENDER AND RACIAL BIAS IN THE PROFESSION OF ARCHITECTURE (forthcoming 2020) (architects study).

101. See Appendix B for details on research design, implementation, and representative demographic group findings.

102. WES data collected by Joan C. Williams (on file with the authors).

103. Richard F. Martell, David M. Lane, & Cynthia Emrich, *Male-Female Differences: A Computer Simulation*, AM. PSYCH. 157, 157 (1996); RIDGEWAY, *supra* note 7, at 131.

104. Martha Foschi, *Double Standards for Competence: Theory and Research*, 26 ANN. REV. SOCIO. 21, 29 (2000) [hereinafter Foschi, *Double Standards for Competence*]; 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. PSYCH. 544, 550 (1997); Martha Foschi, Larissa Lai & Kirsten Sigerson, *Gender and Double Standards in the Assessment of Job Applicants*, 57 SOC. PSYCH. Q. 326, 335–37 (1994); Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 56 SOC. PSYCH. Q. 237, 251–52 (1996) [hereinafter Foschi, *Double Standards in the Evaluation*]; CECILIA L. RIDGEWAY, FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD 79 (2011).

105. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004); see also Heather J. Davidson & Michael J. Burke, *Sex Discrimination in Simulated Employment Contexts: A Meta-Analytic Investigation*, 56 J. VOCATIONAL BEHAV. 225, 237–38 (2000) (finding that evaluators discriminated against female applicants “when there was less job-relevant information available”).

106. WILLIAMS & DEMPSEY, *supra* note 82, at xxi.

it is triggered by status categories such as gender, race, social class, LGBTQ status, disability status, and more.<sup>107</sup> Susan Fiske found that, “beliefs about a group’s status and its competence [are] so closely related . . . that the two concepts virtually defined each other.”<sup>108</sup> This means that white men often get the benefit of the doubt, while women and people of color often have to prove themselves repeatedly. In this way, Prove-It-Again bias operates to create an invisible escalator for majority men—but not all majority men: one study found that a white man whose interests signaled an elite background (for example, classical music, sailing, and polo) was twelve times more likely to receive a call back than a white man whose interests signaled blue-collar origins (for example, country music, pick-up soccer, and track and field).<sup>109</sup>

Prove-It-Again bias stems from two different mechanisms: *in-group favoritism* and *lack of fit*. Although the term “in-group favoritism” was first coined in the 1950s by Gordon Allport, Marilyn Brewer first explored its workplace effects in the 1990s.<sup>110</sup> Members of the dominant group tend to favor other members of the dominant group,<sup>111</sup> which means that in professions dominated by white men from elite backgrounds, that demographic finds it easier to get sponsors, to be “in the know,” and to get the benefit of the doubt.<sup>112</sup> White men in professional/managerial jobs tend to favor other white men both because like attracts like and because high-status people tend to favor other high-status people.<sup>113</sup>

The second mechanism that plays an important part in creating Prove-It-Again bias is explained by Madeleine Heilman’s lack of fit theory, which dates

107. Biernat & Kobrynowicz, *supra* note 104, at 550; Cecilia L. Ridgeway, *Gender, Status, and Leadership*, 57 J. SOC. ISSUES 637, 647 (2001) [hereinafter Ridgeway, *Gender*]; Cecilia L. Ridgeway, *Status in Groups: The Importance of Motivation*, 47 AM. SOC. REV. 76, 76 (1982) [hereinafter Ridgeway, *Status in Groups*]. See generally BRAD SEARS & CHRISTY MALLORY, GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE 1–40 (Christine M. Duffy & Denise M. Visconti eds., 2014); Mason Ameri, Lisa Schur, Meera Adya, F. Scott Bentley, Patrick McKay & Douglas Kruse, *The Disability Employment Puzzle: A Field Experiment on Employer Hiring Behavior*, 71 INDUS. & LAB. REL. REV. 329 (2018); András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOCIO. 586, 586–626 (2011); Eva Deros & Jeroen Decoster, *Implicit Age Cues in Resumes: Subtle Effects on Hiring Discrimination*, 8 FRONT. PSYCH. 1, 1–15 (2017); Doris Weichselbaumer, *Discrimination Against Migrant Job Applicants in Austria: An Experimental Study*, 18 GER. ECON. REV. 237 (2016); Amy J. Cuddy, Michael I. Norton & Susan T. Fiske, *This Old Stereotype: The Pervasiveness and Persistence of the Elderly Stereotype*, 61 J. SOC. ISSUES 267 (2005). For resume studies, see Davidson & Burke, *supra* note 105; ALICE H. EAGLY & LINDA L. CARLI, THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS (2007); Corinne A. Moss-Racusin, John F. Dovidio, Victoria L. Brescoll, Mark J. Graham & Jo Harndelsman, *Science Faculty’s Subtle Gender Biases Favor Male Students*, 109 PROC. NAT’L. ACAD. SCI. 16474 (2012).

108. RIDGEWAY, *supra* note 7, at 78; SUSAN T. FISKE, ENVY UP, SCORN DOWN: HOW STATUS DIVIDES US (2011).

109. Lauren A. Rivera & András Tilcsik, *Class Advantage, Commitment Penalty: The Gendered Effect of Social Class Signals in an Elite Labor Market*, 81 AM. SOCIO. REV. 1097, 1125 (2016).

110. GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954); Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 160, 163–69 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

111. *Id.*

112. WILLIAMS & DEMPSEY, *supra* note 82, at 3.

113. RIDGEWAY, *supra* note 7, at 111.

back to the 1980s.<sup>114</sup> Heilman pointed out that professional workplaces assumed that men were the best fit for professional jobs, and that the consequent perceived lack of fit disadvantages women systematically.<sup>115</sup> Heilman's work provides insight into the glass ceiling, which reflects the assumption that women are a good fit for lower-level jobs, but not for top jobs.<sup>116</sup> Some studies of professionals suggest that bias ratchets up for women who reach higher levels of authority.<sup>117</sup>

Because Prove-It-Again bias is caused by status differentials, it is triggered by race as well as gender. This is a result of descriptive stereotyping: since Black people<sup>118</sup> and Latinx people<sup>119</sup> are stereotyped as less competent, if they want to be seen differently, they must prove themselves more. This effect is documented in laboratory studies: in a study by Monica Biernat and Diane Kobrynowicz, Black applicants were required to “jump through more hoops” than white applicants in order to provide evidence of their competence.<sup>120</sup>

Heilman's lack of fit analyses focused exclusively on gender, but her framework has been extended to race in the work of Erika Hall, Ashleigh Rosette, and others.<sup>121</sup> For example, 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.<sup>122</sup>

Both in-group favoritism and lack of fit provide theoretical models to explain the African-American aphorism that Black people need to “work twice as hard to get half as far.”<sup>123</sup>

114. Heilman's “lack of fit” is arguably analogous to Alice Eagly's “role incongruity.” Compare Madeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, in 5 RESEARCH IN ORGANIZATIONAL BEHAVIOR 269, 269 (L.L. Cummings & Barry M. Staw, eds. 1983) (finding that the role of a woman is incongruous with the role of a good leader), with Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCH. REV. 573, 579 (2002).

115. Heilman, *supra* note 114, at 269; see also Biernat, *supra* note 104, at 550 (showing women have to provide roughly twice the evidence of competence as compared to men in order to be seen as equally competent); Foschi, *Double Standards for Competence*, *supra* note 104, at 28 (classic study of double standards).

116. SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 71 (2017).

117. RIDGEWAY, *supra* note 7, at 115.

118. Biernat & Kobrynowicz, *supra* note 104, at 550.

119. James M. Weyant, *Implicit Stereotyping of Hispanics: Development and Validity of a Hispanic Version of the Implicit Association Test*, 27 HISP. J. BEHAV. SCI. 355, 360 (2005).

120. Biernat & Kobrynowicz, *supra* note 104, at 550.

121. Erika V. Hall, Adam D. Galinsky & Katherine W. Phillips, *Gender Profiling: A Gendered Race Perspective on Person-Position Fit*, 41 PERSONALITY & SOC. PSYCH. BULL. 853, 854 (2015); Ashleigh S. Rosette, Geoffrey J. Leonardelli & Katherine W. Phillips, *The White Standard: Racial Bias in Leader Categorization*, 93 J. APPLIED PSYCH. 758 (2008).

122. Ashleigh S. Rosette & Robert W. Livingston, *Failure Is Not an Option for Black Women: Effects of Organizational Performance on Leaders with Single Versus Dual-Subordinate Identities*, 48 J. EXPERIMENTAL PSYCHOL. 1162, 1166 (2012).

123. Christopher D. DeSante, *Working Twice as Hard to Get Half as Far: Race, Work Ethic, and America's Deserving Poor*, 57 AM. J. POL. SCI. 342, 352–54 (2013).

A recent longitudinal meta-analysis by Alice Eagly found that low-competence stereotypes of women have diminished over time.<sup>124</sup> This reflects the waning of *I Love Lucy*-type “women as dingbats” stereotypes.<sup>125</sup> Women used to be seen as less intelligent and competent than men. Now they are not, but they are still seen as less competent in masculine spheres (including professional environments)<sup>126</sup> and also as lacking in “performance capacity”: the ability to master events and successfully accomplish goals.<sup>127</sup>

Here is what Prove-It-Again bias looks like on the ground:

**Sponsorship and information advantages:** The single strongest determinant of who is in one’s social network is similarity: people tend to build social networks made up of people who are like them.<sup>128</sup> That means that if a professional workplace starts out with a dominant group of white men from elite backgrounds, those whom they sponsor (in other words, whose careers they champion) will also tend to be same-class white men, and their bonding activities may be class linked (think: golf). Valuable information such as what plum assignments are coming “down the pike” tend to be shared through social networks, too.<sup>129</sup>

**Benefit of the doubt—Halo effect:** In-group favoritism also influences who gets the benefit of the doubt.<sup>130</sup> On the ground, this will often mean that in-group members get judged on their potential, whereas other professionals are judged not on potential but on performance. This can result in lower rates of hire, worse evaluations, higher rates of layoffs, and delayed promotions for women and professionals of color.<sup>131</sup> Industrial organizational psychologists

124. Alice H. Eagly, Christa Nater, David I. Miller, Michèle Kaufmann & Sabine Sczesny, *Gender Stereotypes Have Changed: A Cross-Temporal Meta-Analysis of U.S. Public Opinion Polls From 1946 to 2018*, 75 AM. PSYCH. 301, 310–12 (2020); E-mail from Alice Eagly, Professor of Psych. and of Management and Organizations at Northwestern Univ., to Joan C. Williams, Distinguished Professor of L., Univ. of California, Hastings Coll. of the L. (Sept. 16, 2019, 10:50 PM) (on file with authors).

125. Judy Klemesrud, *TV’s Women Are Dingbats*, N.Y. TIMES, May 27, 1973, at 107, <https://www.nytimes.com/1973/05/27/archives/tvs-women-are-dingbats.html>.

126. RIDGEWAY, *supra* note 104, at 60–61.

127. *Id.*

128. ELLEN BERSCHIED & ELAINE H. WALSTER, *Rewards Others Provide: Similarity*, in INTERPERSONAL ATTRACTION 69 (1969); DONN BYRNE, THE ATTRACTION PARADIGM (1971); R.S. BURT, STRUCTURAL HOLES: THE SOCIAL STRUCTURE OF COMPETITION (2009).

129. Brewer, *supra* note 110, at 65.

130. Rocio Garcia-Retamero & Esther López-Zafra, *Prejudice against Women in Male-congenial Environments: Perceptions of Gender Role Congruity in Leadership*, 55 SEX ROLES 51 (2006); Jeffrey H. Greenhaus & Saroj Parasuraman, *Job Performance Attributions and Career Advancement Prospects: An Examination of Gender and Race Effects*, 55 ORG. BEHAV. & HUM. DECISION PROCESSES 273, 290–92 (1993); Magid Igbaria & Jack J. Baroudi, *The Impact of Job Performance Evaluations on Career Advancement Prospects: An Examination of Gender Differences in the IS Workplace*, 19 MIS Q. 107, 115 (1995); Clara Kulich, Grzegorz Trojanowski, Michelle K. Ryan, S. Alexander Haslam & Luc. D. R. Renneboog, *Who Gets the Carrot and Who Gets the Stick? Evidence of Gender Disparities in Executive Remuneration*, 32 STRATEGIC MGMT. J. 301, 317 (2011); 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. PSYCH. BULL. 507, 514–16 (1996); Shelley E. Taylor, Susan T. Fiske, Nancy L. Etcoff & Audrey J. Ruderman, *Categorical and Contextual Bases of Person Memory and Stereotyping*, 36 J. PERSONALITY & SOC. PSYCH. 778, 791 (1978).

131. Bertrand & Mullainathan, *supra* note 105, at 998; Hannah Riley Bowles & Michele Gelfand, *Status and the Evaluation of Workplace Deviance*, 21 PSYCH. SCI. 49, 52 (2010); Monica Biernat, Kathleen Fuegen &

have documented the *halo effect* (the erroneous perception that someone who is great at one thing is great at everything)<sup>132</sup> and the *horns effect* (the erroneous perception that someone who has had one failure will be a failure more globally).<sup>133</sup> Halo-horns tends to be driven by stereotypes<sup>134</sup> such that groups stereotyped as high in competence tend to get halos, whereas groups stereotyped as low in competence tend to get horns.

**He's skilled, she's lucky—It could happen to anyone, she “doesn't have it”:** *Attribution bias* plays a role in how people code successes and mistakes.<sup>135</sup> If a woman has a success, people tend to attribute the success to unstable, outside causes.<sup>136</sup> If a man has a success, people tend to attribute the success to stable, internal causes.<sup>137</sup> Obviously, if women's successes are written off as luck, they have to have more of them in order to be successful. Attribution bias also affects people of color.<sup>138</sup> Perceptions of mistakes are also driven by stereotypes of who is competent, but in the opposite direction: a woman's or a person of color's mistakes tend to be noticed more, remembered longer, and lead to global judgments.<sup>139</sup> Another name for this is *confirmation bias*, which is captured by the aphorism “we see what we expect to see.”<sup>140</sup> If white women and people of color find that colleagues tend to notice and remember their mistakes, but discount their successes, obviously these groups will have to provide more evidence of competence in order to be seen by colleagues as equally competent. One study of law firm partners found that more mistakes were found in a memo supposedly written by an African-American associate than in an identical memo written by a white associate.<sup>141</sup>

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Diane Kobrynowicz, *Shifting Standards and the Inference of Incompetence: Effects of Formal and Informal Evaluation Tools*, 36 PERSONALITY & SOC. PSYCH. BULL. 855, 866 (2010); Cara C. Bauer & Boris B. Baltes, *Reducing the Effects of Gender Stereotypes on Performance Evaluations*, 47 SEX ROLES 465, 471 (2002).

132. Edward L. Thorndike, *A Constant Error in Psychological Ratings*, 4 J. APPLIED PSYCH. 25, 25 (1920).

133. Seymour Rosenburg, Carnot Nelson & P.S. Vivekananthan, *A Multidimensional Approach to the Structure of Personality Impressions*, 9 J. PERSONALITY & SOC. PSYCH. 283, 284 (1968) (discussing personality judgements); see also Michelle C. Bligh, Jeffrey C. Kohles, Craig L. Pearce, Joseph E. Justin & John F. Stovall, *When the Romance Is Over: Follower Perspectives of Aversive Leadership*, 56 APPLIED PSYCH. 528, 536 (2007) (explaining horn effect is generally “applied to situations in which an overall negative appraisal is made based on one salient failure or negative characteristic”).

134. Boris B. Baltes & Christopher P. Parker, *Reducing the Effects of Performance Expectations on Behavioral Ratings*, 82 ORG. BEHAV. & HUM. DECISION PROCESSES 237, 263 (2000).

135. For a comprehensive introduction to attribution bias, see generally Krieger, *supra* note 3.

136. Swim & Sanna, *supra* note 130, at 508.

137. *Id.*

138. Miles Hewstone, *The ‘Ultimate Attribution Error’? A Review of the Literature on Intergroup Causal Attribution*, 20 EUR. J. SOC. PSYCH. 311, 313 (1990); Greenhaus & Parasuraman, *supra* note 130, at 276.

139. 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 3, 6 (1995).

140. Johan E. Korteling, Anne-Marie Brouwer & Alexander Toet, *A Neural Network Framework for Cognitive Bias*, 9 FRONT. PSYCH. 1, 7 (2018).

141. ARIN N. REEVES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2014), <https://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf>.

**Casualty:** People tend to value qualities when men or white people have them.<sup>142</sup> For example, in an experiment for a job that required both education and experience, when the man had more education, subjects tended to choose to hire the man and said it was because he had more education; when the man had more experience, subjects again tended to choose the man and now said it was because he had more experience.<sup>143</sup> Another study found that this “casualty” pattern is also triggered by race when qualifications are ambiguous (as they often are), for example, when an applicant was moderately qualified for the job, rather than being a strong “yes” or “no.”<sup>144</sup>

**Polarized evaluations:** Out-groups typically receive lower evaluations than similarly situated members of the in-group unless they are superstars, in which case they tend to receive exceptionally good evaluations (who knew a woman could do it?).<sup>145</sup> Obviously, if only the superstars survive and thrive, fewer members of that group will do so.

**Leniency bias:** Objective rules are applied rigorously to out-groups, but leniently to in-groups.<sup>146</sup> The important implication, often overlooked, is that objective rules are no guarantee of objectivity. This is an important point, which the intense focus of class action lawyers on eliminating subjectivity has sometimes led them to overlook.<sup>147</sup> In professional contexts, women and people of color often find they have to follow rules to the letter, but that majority men often get a pass.<sup>148</sup>

**Stereotype content:** Women are stereotyped as warmer but less competent than men,<sup>149</sup> and as more emotional than men.<sup>150</sup> Black people are stereotyped as less competent than white people.<sup>151</sup> This has measurable consequences that have been demonstrated over and over again in lab and audit studies. One study found white applicants more than twice as likely to be considered for a job than identical Black applicants.<sup>152</sup> Another often-cited identical resume study shows

142. Michael I. Norton, John M. Darley & Joseph A. Vandello, *Casualty and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCH. 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 PSYCH. PUB. POL’Y. & L. 665 (1999); Gordon Hodson, John F. Dovidio & Samuel L. Gaertner, *Processes in Racial Discrimination: Differential Weighting of Conflicting Information*, 28 PERSONALITY & SOC. PSYCH. BULL. 460 (2002).

143. Norton et al., *supra* note 142, at 821.

144. Hodson et al., *supra* note 142, at 460.

145. Patricia W. Linville & Edward E. Jones, *Polarized Appraisals of Out-Group Members*, 38 J. PERSONALITY & SOC. PSYCH. 689, 695 (1980); Biernat & Kobrynowicz, *supra* note 104, at 550.

146. Brewer, *supra* note 110, at 65.

147. Based on observations and conversations that Joan C. Williams has had with class action attorneys over the course of Williams’ career.

148. WILLIAMS & DEMPSEY, *supra* note 82, at 34 (explaining how the in-group gets more lenient treatment).

149. Susan T. Fiske, Amy J. C. Cuddy, Peter Glick & Jun Xu, *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCH. 878, 880 (2002).

150. Michele Grossman & Wendy Wood, *Sex Differences in Intensity of Emotional Experience: A Social Role Interpretation*, 65 J. PERSONALITY & SOC. PSYCH. 1010, 1022 (1993).

151. Biernat & Kobrynowicz, *supra* note 104, at 554.

152. Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES 221, 226 (2012).

that “Jamal” needed to have eight more years of experience to get called back at the same rate as “Greg.”<sup>153</sup> Latinx individuals are also stereotyped as less competent than white people.<sup>154</sup> People of Asian descent are seen as cold but competent, but the stereotype that they are cold is stronger than the stereotype that they are competent.<sup>155</sup> Moreover, their competence is viewed as limited to technical work, not leadership potential.<sup>156</sup> Despite this positive competence stereotype, however, white lawyers were still rated as better litigators than identical Asian-American lawyers in an experiment examining implicit and explicit stereotypes.<sup>157</sup>

**WES data:** All these patterns contribute to professional workplaces in which women and people of color often need to provide more evidence of competence than majority men to be seen as equally competent. These experimental findings, which have been replicated decade after decade, prove that Prove-It-Again bias exists *in the world*, while WES data show that it exists *in the workplace*. For example, in our sample of U.S. engineers, roughly one-third of white men said they have to prove themselves repeatedly to get the same level of respect and recognition as their colleagues, but nearly two-thirds of women and over two-thirds of engineers of color did.<sup>158</sup>

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153. Bertrand & Mullainathan, *supra* note 105, at 992.

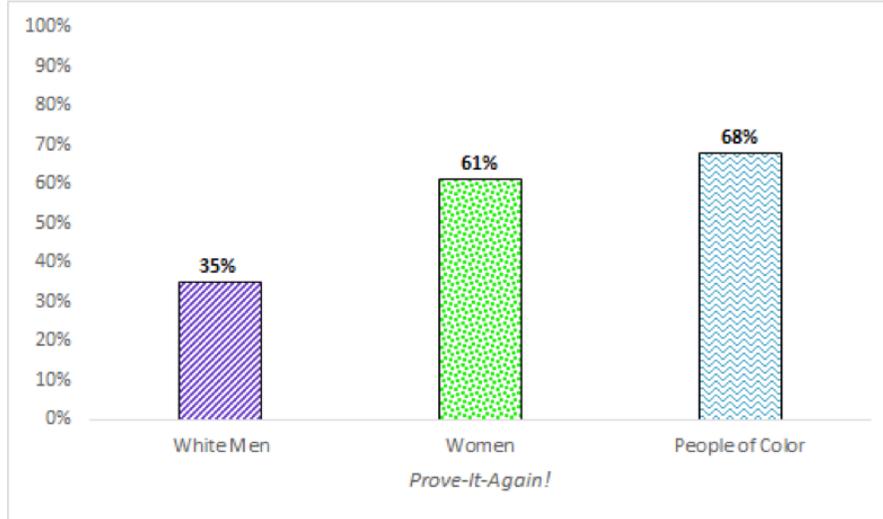
154. Weyant, *supra* note 119, at 360.

155. Monica H. Lin, Virginia S. Y. Kwan, Anna Cheung & Susan T. Fiske, *Stereotype Content Model Explains Prejudice for an Envied Outgroup: Scale of Anti-Asian American Stereotypes*, 31 PERSONALITY & SOC. PSYCH. BULL. 34, 36 (2005).

156. Lei Lai & Linda C. Babcock, *Asian Americans and Workplace Discrimination: The Interplay Between Sex of Evaluators and the Perception of Social Skills*, 34 J. ORG. BEHAV. 310, 320 (2013); Ashleigh Shelby Rosette, Rebecca Ponce de Leon, Chrysi Zhou Koval & David A. Harrison, *Intersectionality: Connecting Experiences of Gender with Race at Work*, 38 RSCH. ORG. BEHAV. 1, 7 (2008).

157. Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran & Gary Blasi, *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 911 (2010).

158. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 117.



Qualitative data provide color and detail:

“Being from an international background, not white bread American raised, we have to work harder.” —a Latinx man engineer.<sup>159</sup>

“My colleagues range from the males who don’t think women should be engineers to those that think women should perform at a higher standard.”—a white woman engineer.<sup>160</sup>

“I find I have to work 4 times as hard to get a fraction of the respect given to others who just sit at the table . . . This is no glass ceiling. It is a considerably reinforced concrete ceiling.”—a woman architect.<sup>161</sup>

Another expression of Prove-It-Again bias concerns how one’s ideas are received. In professional workplaces, having ideas accepted by the group is often a key to success.<sup>162</sup> Both women and people of color report on the WES that other people often get credit for ideas they originally offered at much higher rates than white men do. In our study of lawyers, white men reported the “stolen idea” at a level twenty-two percentage points lower than women of color, twenty percentage points lower than white women, and six percentage points lower than men of color.<sup>163</sup>

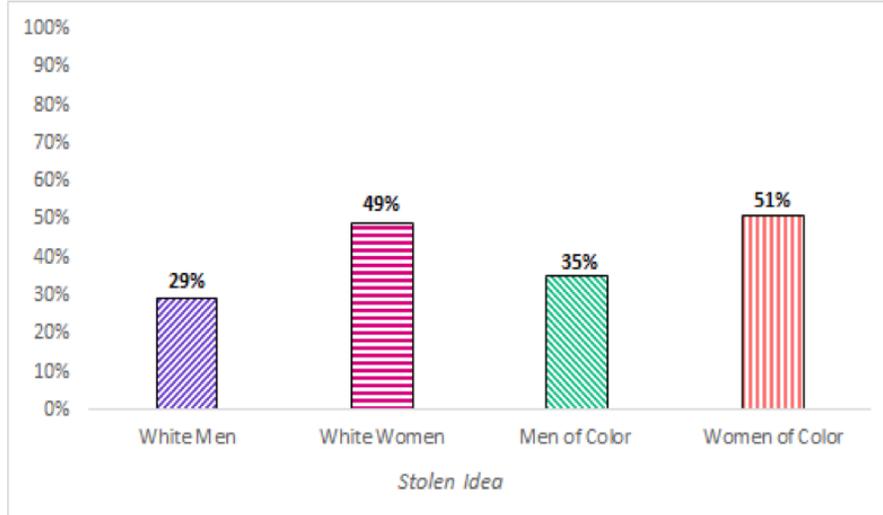
159. *Id.* at 6.

160. *Id.* at 23.

161. WILLIAMS & KORN, *supra* note 100.

162. HBR IdeaCast, *Women at Work: Make Yourself Heard*, HARV. BUS. REV. (Jan. 30, 2018), <https://hbr.org/podcast/2018/01/women-at-work-make-yourself-heard>.

163. WILLIAMS ET AL., *YOU CAN’T CHANGE WHAT YOU CAN’T SEE*, *supra* note 100, at 17–18.

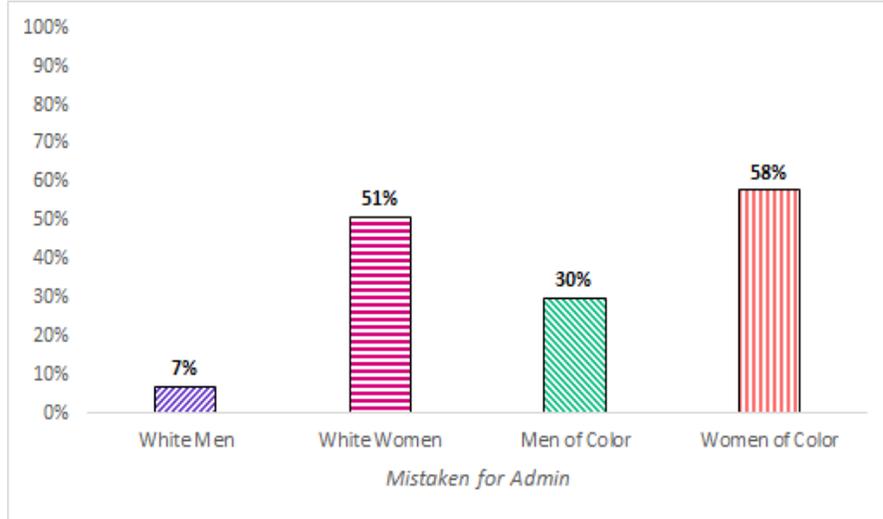


“[Y]ou say something in a meeting, you throw an idea out on the table, nobody picks up on it. Then, a little while [later] one of your male colleagues throws the exact same idea on the table and everybody goes, ‘Oh, that’s a fantastic idea.’” —a Latinx woman statistician.<sup>164</sup>

A dramatic instance of lack of fit occurs when professionals are assumed to hold lower-level jobs. White male professionals are rarely mistaken for administrative or custodial staff—it is assumed that they are professionals. In our study of lawyers, white men reported being mistaken for admins, court, or custodial staff at a level fifty-one percentage points lower than women of color, forty-four percentage points lower than white women, and twenty-three percentage points lower than men of color.<sup>165</sup>

164. WILLIAMS ET AL., DOUBLE JEOPARDY?, *supra* note 100, at 13; *see also* Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 198 (2014).

165. WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 19.



Qualitative data again add color and detail.

“Old white men *know* what a successful lawyer looks like: an old white man. When they see a woman, or a person of color, they *\*know\** that’s not a successful lawyer.” —a male lawyer.<sup>166</sup>

“I have learned that I never have the benefit of the doubt . . . and must make for myself opportunities which are given to others. I would not trade working as an engineer for anything and am incredibly motivated to continue in the hopes that things are easier for the women following after me.” —a Latinx woman engineer.<sup>167</sup>

“I do not get the benefit of the doubt as my male colleagues do. I often have to list my credentials when meeting new colleagues or upper management.” —a woman engineer of Asian descent.<sup>168</sup>

**How gender bias differs by race:**<sup>169</sup> White women were less likely than women of color to report Prove-It-Again bias. Thus, women of color may have to prove themselves more than white women do (who in turn have to prove themselves more than white men do). One-way ANOVA<sup>170</sup> testing determined there was a statistically significant difference between groups, and a post-hoc

166. *Id.* at 14.

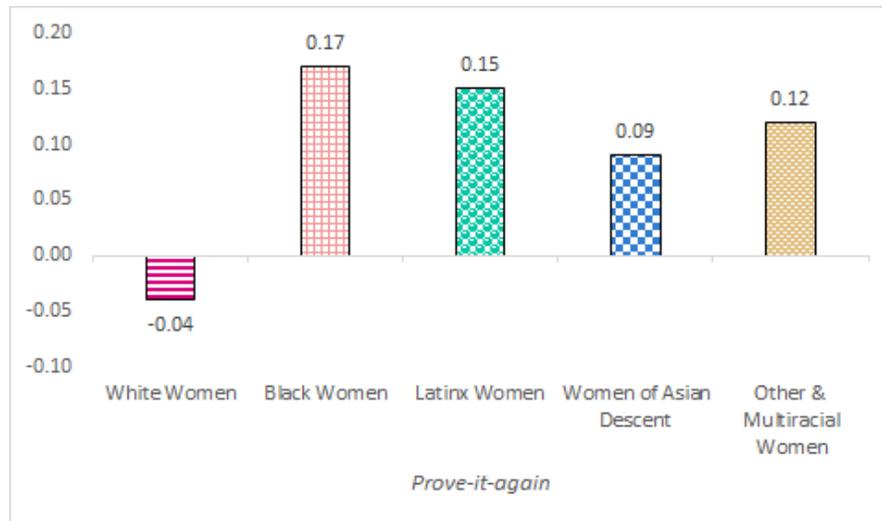
167. WILLIAMS, CLIMATE CONTROL, *supra* note 100, at 20.

168. *Id.* at 24.

169. To examine how gender bias differs by race, we standardized the data from women across studies and used one-way ANOVA testing to test for differences between racial groups. When appropriate, we used post-hoc Tukey HSD testing to examine the group differences in detail. The graphs in this Part represent levels of bias relative to other groups of women.

170. An ANOVA is a statistical test used to determine whether there are statistically significant differences between groups.

Tukey HSD test<sup>171</sup> determined that the disparity between white women and Black women was significant.<sup>172</sup>



“You don’t know if you’re working twice as hard because you’re a woman or if you’re working twice as hard because you’re African-American.” —an African-American woman mathematician.<sup>173</sup>

In our study of women science professors, we found that Black women are more likely to attribute their Prove-It-Again problems to race, whereas all other groups of women were more likely to attribute them to sex.<sup>174</sup> This has implications for lawyers interviewing Black women plaintiffs.

**Prove-It-Again data has concrete workplace effects:**<sup>175</sup> In our study of engineers in India, regression analyses revealed a link between Prove-It-Again bias and important workplace processes and outcomes.<sup>176</sup> Higher levels of Prove-It-Again bias were associated with decreases in career satisfaction and enjoyment at work and higher levels of individuals reporting that they are considering looking for a new job somewhere else.<sup>177</sup> Similarly, Prove-It-Again bias was linked to lower levels of belonging at work and lower perceptions of

171. Tukey’s HSD Test is a statistical test that uses pairwise comparisons to determine whether there are statistically significant differences between groups.

172. Data on file with authors. *See id.* (describing analyses).

173. WILLIAMS ET AL., *DOUBLE JEOPARDY?*, *supra* note 100, at 15.

174. *Id.* at 6.

175. These regression analyses were conducted on data collected from engineers in India, and we have not had the opportunity to run the same tests on data from the United States. However, we expect that the patterns of bias will have similar negative effects on workplace processes and outcomes in the United States.

176. WILLIAMS ET AL., *supra* note 99, at 16.

177. *Id.*

fairness of performance evaluations, sponsorship, networking opportunities, and compensation processes at their organizations.<sup>178</sup>

#### B. TIGHTROPE BIAS

Majority men not only have to prove themselves less than other groups, their office politics are simpler.<sup>179</sup> Experimental studies show that behaviors that signal competence, mastery, and leadership to North Americans are accepted more from men than women.<sup>180</sup> Anger also is accepted less readily from women and people of color, which makes it harder for those groups to “draw a line in the sand” when that’s necessary to establish authority or get work done well.<sup>181</sup>

Tightrope bias again stems from two mechanisms. One is that lower-status groups are expected to be deferential, not dominant. Part of being politically savvy entails “knowing your place,” or gracefully accepting your own lack of status and influence.<sup>182</sup> Group members who don’t “know their place” risk being seen as unreasonable.<sup>183</sup> In addition, higher-status groups are expected to be “assertive, independent, and agentic”—all highly valued in professional workplaces—more so than lower-status groups.<sup>184</sup>

Tightrope bias also stems from prescriptive stereotypes: expectations about how people *should* behave.<sup>185</sup> Prescriptive gender stereotypes are well documented, and Alice Eagly’s recent study found that prescriptive stereotypes

178. *Id.*

179. EAGLY & CARLI, *supra* note 107.

180. RIDGEWAY, *supra* note 7, at 114; Eagly, *supra* note 124, at 12; Victoria L. Brescoll & Eric Luis Uhlmann, *Can an Angry Woman Get Ahead? Status Conferral, Gender, and Expression of Emotion in the Workplace*, 19 PSYCH. SCI. 268, 273 (2008); Eagly & Karau, *supra* note 114, at 583–88; Laurie A. Rudman & Kimberly Fairchild, *Reactions to Counterstereotypical Behavior: The Role of Backlash in Cultural Stereotype Maintenance*, 87 J. PERSONALITY & SOC. PSYCH. 157, 171–73 (2004); 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. PSYCH. 1004, 1007–09 (1999) [hereinafter Rudman & Glick, *Reactions*]; Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 757–59 (2001) [hereinafter Rudman & Glick, *Prescriptive Gender*]; Ashleigh Shelby Rosette, Christy Zhou Koval, Anyi Ma & Robert Livingston, *Race Matters for Women Leaders: Intersectional Effects on Agentic Deficiencies and Penalties*, 27 LEADERSHIP Q. 429, 440–41 (2016); Jennifer L. Berdahl & Ji-A Min, *Prescriptive Stereotypes and Workplace Consequences for East Asians in North America*, 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 141, 149–50 (2012).

181. Brescoll & Uhlmann, *supra* note 180, at 273; Robert W. Livingston & Nicholas A. Pearce, *The Teddy-Bear Effect: Does Having a Baby Face Benefit Black Chief Executive Officers?*, 20 PSYCH. SCI. 1229, 1234 (2009); Rosette et al., *supra* note 156, at 6; Rudman & Fairchild, *supra* note 180, at 171.

182. Cecilia L. Ridgeway & Sandra Nakagawa, *Is Deference the Price of Being Seen as Reasonable? How Status Hierarchies Incentivize Acceptance of Low Status*, 80 SOCIO. PSYCH. Q. 132, 148–50 (2017).

183. Cameron Anderson, Daniel R. Ames & Samuel D. Gosling, *Punishing Hubris: The Perils of Overestimating One’s Status in a Group*, 34 PERSONALITY & SOC. PSYCH. BULL. 90, 98–100 (2008).

184. RIDGEWAY, *supra* note 104, at 66.

185. See Burgess & Borgida, *supra* note 142, 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 PSYCH. WOMEN Q. 269, 279–80 (2002); Laurie A. Rudman, Corinne A. Moss-Racusin, Julie E. Phelan & Sanne Nauts, *Status Incongruity and Backlash Effects: Defending the Gender Hierarchy Motivates Prejudice Against Female Leaders*, 48 J. EXPERIMENTAL SOC. PSYCH. 165, 166 (2012).

of women have actually *strengthened* in recent decades.<sup>186</sup> The good woman is seen as nice and “communal”: helpful, modest, interpersonally sensitive—a good team player.<sup>187</sup> The good man is seen as competent and “agentic”: direct, assertive, ambitious, competitive—a leader.<sup>188</sup> Of course, as Eagly’s other work has documented extensively, the behavior expected of men maps tightly onto the behavior expected of leaders, whereas the behavior expected of women does not.<sup>189</sup> Many studies, notably by Laurie Rudman and Victoria Brescoll, document the “backlash” or “penalties for gender deviance” faced by women who fail to conform to prescriptive stereotypes.<sup>190</sup> When women act in ways that are consistent with their professional roles, they may encounter pushback. “So, if you’re stern . . . or you say no, your immediate reaction is to call that woman a bitch, right? If you’re a man, it’s just a no,” said a focus group participant.<sup>191</sup>

Until quite recently, prescriptive bias had only been studied in the context of gender. It is beginning to be documented in the context of race, too.<sup>192</sup> One study found that assertive behavior by African-American men triggers hostility in predominantly white workplaces.<sup>193</sup> Another study found that white

186. Eagly et al., *supra* note 124, at 3.

187. *Id.* at 3; see also Madeline E. Heilman & Tyler G. Okimoto, *Why Are Women Penalized for Success at Male Tasks?: The Implied Communitarity Deficit*, 92 J. APPLIED PSYCH. 81, 82 (2007); Deborah A. Prentice & Erica Carranza, *Sustaining Cultural Beliefs in the Face of Their Violation: The Case of Gender Stereotypes*, in THE PSYCHOLOGICAL FOUNDATIONS OF CULTURE 259, 260 (Mark Schaller & Christian S. Crandall eds., 2004); Prentice & Carranza, *supra* note 185, at 279–80; Rudman et al., *supra* note 185, at 168; Rudman & Glick, *supra* note 180, at 743; Madeline E. Heilman, *Gender Stereotypes and Workplace Bias*, 32 RSCH. ORG. BEHAV. 113, 115 (2012); RIDGEWAY, *supra* note 7, at 114.

188. Prentice & Carranza, *supra* note 187, at 260; Prentice & Carranza, *supra* note 185, at 279–80; Rudman et al., *supra* note 185, at 165–66; Heilman & Okimoto, *supra* note 187, at 91; Anne M. Koenig, Abigail A. Mitchell, Alice H. Eagly & Tiina Ristikari, *Are Leader Stereotypes Masculine? A Meta-Analysis of Three Research Paradigms*, 137 PSYCH. BULL. 616, 637 (2011); Corinne A. Moss-Racusin, Julie E. Phelan & Laurie A. Rudman, *When Men Break the Gender Rules: Status Incongruity and Backlash Against Modest Men*, 11 PSYCH. MEN & MASCULINITY 140, 140–41 (2010).

189. Alice H. Eagly & Blair T. Johnson, *Gender and Leadership Style: A Meta-Analysis*, 108 PSYCH. BULL. 233, 235 (1990); EAGLY & CARLI, *supra* note 107; Eagly & Karau, *supra* note 114, at 573–98; Alice H. Eagly & Mary C. Johannesen-Schmidt, *The Leadership Styles of Women and Men*, 57 J. SOC. ISSUES 781, 785–86 (2001).

190. Victoria L. Brescoll, *Who Takes the Floor and Why: Gender, Power, and Volubility in Organizations*, 56 ADMIN. SCI. Q. 621, 622 (2011); Rudman et al., *supra* note 185, at 165–66; RIDGEWAY, *supra* note 104; Rudman & Fairchild, *supra* note 180, at 157–58; Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Against Agentic Women*, 57 J. SOC. ISSUES 743 (2002); Amanda B. Diekmann & Alice H. Eagly, *Of Men, Women, and Motivation: A Role Congruity Account*, in HANDBOOK OF MOTIVATION SCIENCE 434, 436–42 (James Y. Shah & Wendi L. Gardner eds., 2008); Eagly & Karau, *supra* note 114, at 575; Susan T. Fiske & Laura E. Stevens, *What’s So Special About Sex? Gender Stereotyping and Discrimination*, in GENDER ISSUES IN CONTEMPORARY SOCIETY 173, 175–76 (Stuart Oskamp & Mark Costanzo eds., 1993).

191. Interviews with Focus Group for Nat’l Sci. Foundation Achieving Competitive Excellence (ACE) Grant in S.F., Cal. (2007) (on file with authors).

192. 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 PSYCH. SCI. 354, 355 (2012); Rosette et al., *supra* note 156, at 6; Berdahl & Min, *supra* note 180, at 141; Amy J. C. Cuddy, Susan T. Fiske & Peter Glick, *Warmth and Competence as Universal Dimensions of Social Perception: The Stereotype Content Model and the BIAS Map*, in 40 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 61, 76–77 (2008).

193. Livingston et al., *supra* note 192, at 355.

Americans not only expect individuals of Asian descent to be passive; they also tend to dislike those who display dominant behavior.<sup>194</sup> Other studies show that dominant, self-promotional behavior by women or people of color tends to evoke “resistance and dislike from others, reducing their perceived hire-ability and others’ willingness to comply with them compared to a similar white man.”<sup>195</sup>

At an intuitive level, it is obvious that prescriptive bias is triggered by gender as well as race. Being seen as an “angry Black person” is typically not a great career move in majority white workplaces, whether one is a man or a woman.<sup>196</sup> Thus, people of color as well as women walk a tightrope: their office politics are more complicated because they not only need to be authoritative, but also need to figure out how not to trigger backlash from colleagues who don’t feel comfortable with authoritative behavior from members of their group.<sup>197</sup> White men just need to be authoritative, full stop.<sup>198</sup>

Prescriptive bias is often expressed as dislike for the individual who does not conform to stereotypes about how their group should behave, or the sense that they are unreasonable. This fact has important implications for the “personal animosity” defense.<sup>199</sup>

Here is how prescriptive bias plays out in professional workplaces:

**Competence-likeability tradeoff (aka walking the tightrope):** Women often have to navigate a very tight space between being seen as too masculine, and therefore respected but not liked, and too feminine, and therefore, liked but not respected.<sup>200</sup> But in order to get ahead, professionals typically have to be both liked and respected.<sup>201</sup> Because assertiveness is an essential quality in a

194. Berdahl & Min, *supra* note 180, at 141.

195. RIDGEWAY, *supra* note 7, at 118.

196. Rosette et al., *supra* note 180, at 440; Adia H. Wingfield, *The Modern Mammy and the Angry Black Man: African American Professionals’ Experiences with Gendered Racism in the Workplace*, 14 RACE, GENDER & CLASS 196, 201 (2007).

197. WILLIAMS & DEMPSEY, *supra* note 82, at 231.

198. Heilman & Okimoto, *supra* note 187, at 90–92.

199. See *infra* notes 606–663 and accompanying text.

200. Natalie Porter & Florence Geis, *Women and Nonverbal Leadership Cues: When Seeing Is Not Believing*, in GENDER AND NONVERBAL BEHAVIOR 39, 42 (Clara Mayo & Nancy M. Henley eds., 1981); Cuddy et al., *supra* note 192, at 101; Susan T. Fiske, Donald N. Bersoff, Eugene Borgida, Kay Deaux & Madeline E. Heilman, *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCH. 1049, 1050–51 (1991) [hereinafter Fiske et al., *Social Science*]; Fiske et al., *supra* note 192, at 77; Susan T. Fiske, Juan Xu, Amy C. Cuddy & Peter Glick, *(Dis)respecting Versus (Dis)liking: Status and Interdependence Predict Ambivalent Stereotypes of Competence and Warmth*, 55 J. SOC. ISSUES 473, 476 (1999) [hereinafter Fiske et al., *(Dis)respecting*]; Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 AM. PSYCH. 109, 109 (2001); Geoffrey Haddock & Mark P. Zanna, *Preferring “Housewives” To “Feminists”: Categorization and the Favorability of Attitudes Toward Women*, 18 PSYCH. WOMEN Q. 25, 48 (1994); Heilman, *supra* note 139, at 6; Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women’s Ascent Up the Organizational Ladder*, 57 J. SOC. ISSUES 657, 659–64 (2001); Heilman & Okimoto, *supra* note 187, at 81; Rudman & Glick, *Reactions*, *supra* note 180, at 1004; Rudman & Glick, *Prescriptive Gender*, *supra* note 180, at 743; Laurie A. Rudman & Julie E. Phelan, *Backlash Effects for Disconfirming Gender Stereotypes in Organizations*, 28 RSCH. ORG. BEHAV. 61, 69 (2008).

201. See generally Fiske et al., *Social Science*, *supra* note 200; Fiske et al., *(Dis)respecting*, *supra* note 200.

leader in a professional workplace, women again walk a tightrope: if they are seen as too assertive, they may be disliked, but if they are seen as not assertive enough, they may be seen as lacking leadership ability.<sup>202</sup> The complex office politics facing women is epitomized by Madeline Heilman's study of women managers in which subjects attributed negative personality characteristics ("bitter" and "selfish") to women who were described as effective managers (despite a complete lack of information about the women's personalities being given).<sup>203</sup> Another study found that women who give negative performance feedback tend to be disliked and seen as less competent.<sup>204</sup> Another famous matched-resume case study found that hard-driving Heidi Roizen was judged "selfish" and less hireable than Harold Roizen (whose resume was identical).<sup>205</sup>

**Pressure to display traditionally feminine behavior:** Susan Fiske and Peter Glick's work on ambivalent sexism explains that sexism entails both hostile disapproval of women who don't play traditional roles, and benevolent approval of women who do.<sup>206</sup> Thus women professionals often face expectations that they will be the peacemaker, the dutiful daughter who aligns with a powerful man but never contests his authority, or the ever-supportive office mom who takes care of everyone else.

**Backlash against assertive "agentic" behavior:** Men are expected to be assertive; that is part of the masculine stereotype.<sup>207</sup> Women are expected to be communal team-players; they are not expected to act in an agentic, assertive manner.<sup>208</sup> In fact, an "agentic penalty" has been documented when women act in a way that is deemed dominant, competitive, assertive, or angry, due to the prescriptive stereotype that women should be communal and warm.<sup>209</sup> Women who do behave in agentic ways tend to be disliked, faulted for personality

202. Eagly & Karau, *supra* note 114, at 573–98; Doré Butler & Florence L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 J. PERSONALITY & SOC. PSYCH. 48, 54–57 (1990); EAGLY & CARLI, *supra* note 107.

203. Madeline E. Heilman, Caryn J. Block, Michael C. Simon & Richard F. Martell, *Has Anything Changed? Current Characterizations of Men, Women, and Managers*, 74 J. APPLIED PSYCH. 935, 941 (1989).

204. Lisa Sinclair & Ziva Kunda, *Motivated Stereotyping of Women: She's Fine if She Praised Me But Incompetent if She Criticized Me*, 26 PERSONALITY & SOC. PSYCH. BULL. 1329, 1340 (2000).

205. Maria Katsarou, *Women & the Leadership Labyrinth: Howard vs Heidi*, LEADERSHIP PSYCH. INST., <https://www.leadershippsychologyinstitute.com/women-the-leadership-labyrinth-howard-vs-heidi/> (last visited Nov. 23, 2020).

206. Glick & Fiske, *supra* note 200, at 109; Peter Glick, Jeffrey Diebold, Barbara Bailey-Werner & Lin Zhu, *The Two Faces of Adam: Ambivalent Sexism and Polarized Attitudes Toward Women*, 23 PERSONALITY & SOC. PSYCH. BULL. 1323, 1324–25 (1997).

207. *See generally* Burgess & Borgida, *supra* note 142; Prentice & Carranza, *supra* note 185.

208. *Id.*

209. Brescoll & Uhlmann, *supra* note 180, at 268; Eagly & Karau, *supra* note 114, at 573–98; Tyler G. Okimoto & Victoria L. Brescoll, *The Price of Power: Power Seeking and Backlash Against Female Politicians*, 36 PERSONALITY & SOC. PSYCH. BULL. 923, 923–36 (2010); Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. PERSONALITY & SOC. PSYCH. 629, 629 (1998); Rudman & Fairchild, *supra* note 180, at 158; Rudman & Glick, *Reactions*, *supra* note 180, at 1004–10; Rudman & Glick, *Prescriptive Gender*, *supra* note 180, at 743–44; Livingston et al., *supra* note 192, at 354 (dominance accepted from white men).

problems, and get feedback that they come off as “aggressive,” “bulldogs,” having “sharp elbows,” “shrill,” or “bitchy.”<sup>210</sup>

This backlash can play out for both women and people of color in performance evaluations. One unpublished study of performance evaluations by the Center for WorkLife Law found that 91% of people of color and 82% of white women received comments on their performance evaluations about their personalities, while only 77% of white men did.<sup>211</sup> An informal study of tech companies found that 66% of women had received criticism about their personalities on their performance evaluations compared to only 1% of men.<sup>212</sup>

The gender literature glosses over the fact that while dominance is accepted from white men, the same is not true of Black men, who are often penalized for expressing dominance.<sup>213</sup> The most vivid study showed that Black men CEOs tend to be baby-faced, whereas white CEOs tend to have more mature faces, and concluded that this “teddy bear effect” serves to provide racial reassurance to white people that the leadership behavior of the Black CEOs was, indeed, appropriate and not too threatening.<sup>214</sup> Black men have to take steps that women and white men do not in order to get ahead in the workplace, whether by using disarming mechanisms, racial comfort strategies, or simply having the “right” appearance.<sup>215</sup> Social dominance theory helps explain why Black men can become particular targets of bias, because their status as men threatens the social dominance of white men.<sup>216</sup> This also helps explain why Black women do not present the same threat. Research on Black women indicates that agentic behavior may not carry the same penalty as it does for Black men or white women.<sup>217</sup>

Because women of Asian descent are expected to be more passive than other women, they may face an even greater penalty for agentic behavior.<sup>218</sup> People of Asian descent are stereotyped as communal team players, which means they can face pushback if they speak without softening their language, seek a leadership role, or advocate for a raise.<sup>219</sup> Other research reports that

210. Prentice & Carranza, *supra* note 185, at 280; Rudman et al., *supra* note 185, at 167.

211. Audit of the performance evaluations of a medium-sized law firm (unpublished data) (on file with authors).

212. Kieran Snyder, *The Abrasiveness Trap: High-Achieving Men and Women Are Described Differently in Reviews*, FORTUNE (Aug. 26, 2014, 2:00 AM), <https://fortune.com/2014/08/26/performance-review-gender-bias/>.

213. Livingston et al., *supra* note 192, at 355.

214. Livingston & Pearce, *supra* note 181, at 1232.

215. CARBADO & GULATI, *supra* note 8; Livingston et al., *supra* note 192, at 1229.

216. JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION (1999); Jim Sidanius & Rosemary C. Veniegas, *Gender and Race Discrimination: The Interactive Nature of Disadvantage*, in REDUCING PREJUDICE AND DISCRIMINATION 47, 50 (Stuart Oskamp ed., 2000).

217. Livingston et al., *supra* note 192, at 335; Rosette et al., *supra* note 180, at 439.

218. Rosette et al., *supra* note 180, at 439–40.

219. Berdahl & Min, *supra* note 180, at 143; Debra M. Kawahara, Monica S. Pal & Jean Lau Chin, *The Leadership Experiences of Asian Americans*, 4 ASIAN AM. J. PSYCH. 240, 241 (2013); Thomas Sy, Lynn M. Shore, Judy Strauss, Ted H. Shore, Susanna Tram, Paul Whiteley & Kristine Ikeda-Muromachi, *Leadership*

white women who display authority are most likely to be seen as having personality problems, while women of Asian descent are seen as the worst fit for leadership.<sup>220</sup> Qualitative data suggest that women of color who violate prescriptive gender norms risk triggering highly negative racial stereotypes. For example, one Asian-American woman reported that sometimes, if she did not conform to the modest/self-effacing/nice good woman stereotype, then she was treated as sly and untrustworthy—“all those Asian things.”<sup>221</sup> Notice how a transgression of gender mandates triggered ugly nineteenth-century stereotypes of people of Asian descent.<sup>222</sup>

Similarly, a Latinx woman scientist reported that she was treated as angry when she wasn't angry—she just wasn't deferential.<sup>223</sup> For her, violating prescriptive gender stereotypes again triggered a racial stereotype—the “hot-blooded Latin.”<sup>224</sup>

**Leadership and management roles:** “[M]en are more readily accepted by others in leadership roles.”<sup>225</sup> Resistance to women as leaders has been extensively documented,<sup>226</sup> and is largest in masculine-typed contexts (which includes most professional/managerial jobs).<sup>227</sup> This includes management roles because management is seen in the United States as a masculine task.<sup>228</sup> The male leadership advantage is so strong that even low-dominance men are more likely to be chosen as leaders than high-dominance women.<sup>229</sup> Men also are more likely to be seen as effective leaders in male-dominated and military contexts.<sup>230</sup> Male leaders also are more likely to be positively evaluated than female leaders, particularly in male-typed roles.<sup>231</sup> On the other hand, when women give negative feedback, they tend to be disliked and seen as less competent.<sup>232</sup>

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*Perceptions as a Function of Race-Occupation Fit: The Case of Asian Americans*, 95 J. APPLIED PSYCH. 902, 914 (2010); Lin et al., *supra* note 155, at 35.

220. Justine Tinkler, Jun Zhao, Yan Li & Cecilia L. Ridgeway, *Honorary Whites? Asian American Women and the Dominance Penalty*, 5 SOCIOUS 1, 6 (2019).

221. Confidential Interview (2012).

222. Lin et al., *supra* note 155, at 41.

223. WILLIAMS ET AL., *CLIMATE CONTROL*, *supra* note 100, at 46.

224. Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 240 (1994).

225. RIDGEWAY, *supra* note 104, at 80; Joseph Berger, Cecilia L. Ridgeway, M. Hamit Fisek & Robert Z. Norman, *The Legitimation and Delegitimation of Power and Prestige Orders*, 63 AM. SOCIO. REV. 379, 397–98 (1998); Cecilia L. Ridgeway & Joseph Berger, *Expectations, Legitimation, and Dominance Behavior in Task Groups*, 51 AM. SOCIO. REV. 603 (1986); Cecilia L. Ridgeway & Chris Bourg, *Gender as Status: An Expectation States Theory Approach*, in *THE PSYCHOLOGY OF GENDER* 217, 217–41 (Alice H. Eagly, Anne E. Beall & Robert J. Sternberg eds., 2004).

226. RIDGEWAY, *supra* note 104, at 82; EAGLY & CARLI, *supra* note 107, at 49; Alice H. Eagly & Steven J. Karau, *Gender and the Emergence of Leaders: A Meta-Analysis*, 60 J. PERSONALITY & SOC. PSYCH. 685, 685 (1991).

227. Eagly & Karau, *supra* note 226, at 685–86.

228. Heilman et al., *supra* note 203, at 941.

229. RIDGEWAY, *supra* note 104, at 83.

230. *Id.*

231. *Id.* at 85.

232. Sinclair & Kunda, *supra* note 204, at 1137.

**Interruptions and other conversational norms:** Professional workplaces often require assertiveness in meetings, which again disadvantages women and people of color. In meetings, (white) men tend to interrupt more, are more likely to gain the floor when they do interrupt, spend more time speaking, make more task suggestions, use less tentative speech, use more assertive gestures, and exercise more influence.<sup>233</sup> When women use assertive speech in mixed-groups, they are *less, not more*, influential than when they use tentative forms of speech, and they are also seen as less likable and less trustworthy.<sup>234</sup> Women and professionals of color have to figure out a way to get their ideas on the table without being seen as inappropriately pushy.<sup>235</sup> Of course, professionals who are constantly interrupted risk having their authority undermined, and will likely have a more difficult time getting their ideas accepted by the group. Matters are even more difficult for women experts trying to get their point across; women are actually less influential when they possess expertise, while male experts are more influential.<sup>236</sup>

**Anger:** Showing anger tends to increase the status of a man, but decrease the status of a woman,<sup>237</sup> in part because women's anger is often coded as her "getting emotional."<sup>238</sup> Racial stereotypes also play a role. Black people may have to put extra effort in to avoid being seen as the "angry black person."<sup>239</sup> Black men in particular are stereotyped as violent and quick to anger.<sup>240</sup> The workplace implications of this stereotype are clear: when Black men display behavior that is merely assertive, they may trigger the "violent" stereotype and be dinged as "intimidating." For example, the *New York Times* recently reported on discrimination faced by a Black bank customer and his Black financial advisor, who were told they might "intimidate" other bank employees (although their behavior was not intimidating).<sup>241</sup>

**Self-promotion:** Women often face pushback for self-promotion at work, even though self-promotion can be a good strategy to get your accomplishments noticed. Self-promotion violates the stereotype that women should be modest

233. Lynn Smith-Lovin & Charles Brody, *Interruptions in Group Discussions: The Effects of Gender and Group Composition*, 54 AM. SOC. REV. 424, 432 (1989). The studies cited compare men to women, but such studies tend to inadvertently reflect the hidden assumption that "men" means European American men. *Id.*; see also RIDGEWAY, *supra* note 104, at 77.

234. RIDGEWAY, *supra* note 104, at 81; Linda L. Carli, *Gender, Language, and Influence*, 59 J. PERSONALITY & SOC. PSYCH. 941, 949 (1990); Ridgeway, *Gender*, *supra* note 107, at 614; Susan Shackelford, Wendy Wood & Stephen Worchel, *Behavioral Styles and the Influence of Women in Mixed-Sex Groups*, 59 SOC. PSYCH. Q. 284, 290-92 (1996).

235. Ridgeway, *Gender*, *supra* note 107, at 648-49.

236. Melissa C. Thomas-Hunt & Katherine W. Phillips, *When What You Know Is Not Enough: Expertise and Gender Dynamics in Task Groups*, 30 PERSONALITY & SOC. PSYCH. BULL. 1585, 1594 (2004).

237. Brescoll & Uhlmann, *supra* note 180, at 268.

238. Grossman & Wood, *supra* note 150, at 1013.

239. Rosette et al., *supra* note 180, at 439; Wingfield, *supra* note 196, at 201.

240. Negin Ghavami & Letitia Anne Peplau, *An Intersectional Analysis of Gender and Ethnic Stereotypes: Testing Three Hypotheses*, 37 PSYCH. WOMEN Q. 113, 119 (2012).

241. Emily Flitter, *This Is What Racism Sounds Like in the Banking Industry*, N.Y. TIMES (Dec. 11, 2019), <https://www.nytimes.com/2019/12/11/business/jpmorgan-banking-racism.html?searchResultPosition=7>.

and helpful rather than competitive.<sup>242</sup> In one experiment, women (but not men) who engaged in self-promoting behavior in a mock interview were disliked (although self-promoting men and women both were seen as more competent than those who did not self-promote).<sup>243</sup> People of Asian descent may encounter a backlash if self-promotion is seen as dominant behavior from someone who is expected to be passive and deferential.<sup>244</sup>

**Who does the office housework—and who gets the glamour work?:**

Women also are under pressure to perform organizational citizenship behaviors, such as helping behaviors around the workplace that make you a good team player, but do not really count when it comes time for advancement.<sup>245</sup> Women tend to do more of that work, and they tend to get less credit when they do it.<sup>246</sup> We refer to this as doing the office housework.<sup>247</sup> There are really several quite different kinds of office housework: (1) literal housework (planning parties, ordering food, cleaning up the cups), (2) administrative work (sending the follow-up email, finding a time to meet, taking notes), (3) emotional work (being the peacemaker, doing the mentoring, comforting people), and (4) doing undervalued work that is important but does not lead to promotion.<sup>248</sup> In the law firm context, the undervalued work for litigators is doing the task list and managing the paralegals, whereas the glamour work is talking with clients and arguing in court. In architecture, the glamour work is design work; project management is the undervalued work.<sup>249</sup> Often, newly minted professionals of both sexes do large loads of less valued work, but then men are often naturally transitioned out of it, while women get stuck.<sup>250</sup>

**WES data:** WES data document Tightrope bias on the ground in professional jobs. Our study of engineers found that over two-thirds of white

242. Kimberly A. Daubman et al., *Gender and the Self-Presentation of Academic Achievement*, 27 SEX ROLES 187, 189–90 (1992); Robert J. Gould & Caroline G. Sloan, *The “Feminine Modesty” Effect: A Self-Presentational Interpretation of Sex Differences in Causal Attribution*, 8 PERSONALITY & SOC. PSYCH. BULL. 477, 478 (1982); Julie E. Phelan et al., *Competent Yet Out in the Cold: Shifting Criteria for Hiring Reflect Backlash Toward Agentic Women*, 32 PSYCH. OF WOMEN Q. 406, 407 (2008); Rudman, *supra* note 209, at 630; Rudman & Glick, *supra* note 180, at 1004; Laurie Heatherington et al., *Two Investigations of “Female Modesty” in Achievement Situations*, 29 SEX ROLES 739, 740 (1993).

243. RIDGEWAY, *supra* note 104, at 82.

244. Berdahl & Min, *supra* note 180, at 144; Rosette et al., *supra* note 181, at 5.

245. Tammy D. Allen, *Rewarding Good Citizens: The Relationship Between Citizenship Behavior, Gender, and Organizational Rewards*, 36 J. APPLIED SOCIO. PSYCH. 120, 136 (2006); Linda Babcock, Maria P. Recalde, Lise Vesterlund & Laurie Weingart, *Gender Differences in Accepting and Receiving Requests for Tasks with Low Promotability*, 107 AM. ECON. REV. 714, 744 (2017); Cassandra M. Guarino & Victor M. H. Borden, *Faculty Service Loads and Gender: Are Women Taking Care of the Academic Family?*, 58 RSCH. HIGHER EDUC. 672, 673 (2017).

246. Guarino & Borden, *supra* note 245, at 673.

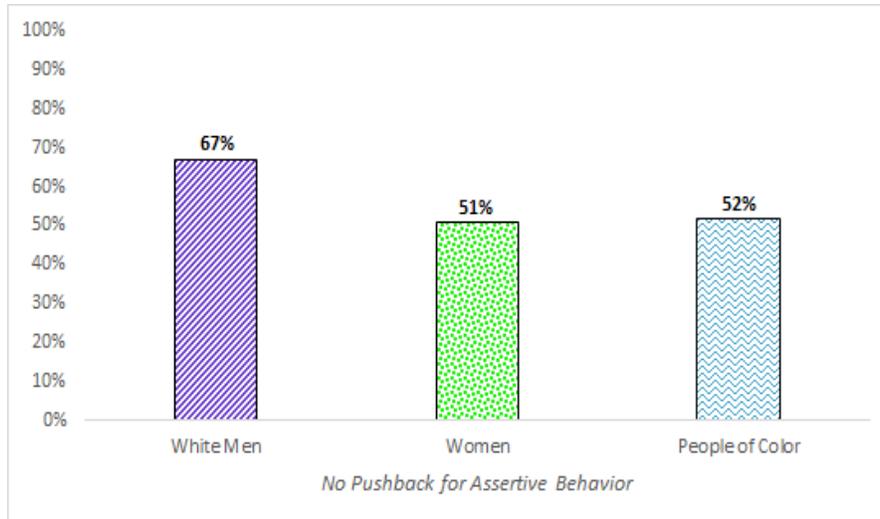
247. WILLIAMS & DEMPSEY, *supra* note 82, at 110.

248. WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 25–27; WILLIAMS, CLIMATE CONTROL, *supra* note 100, at 40; WILLIAMS & DEMPSEY, *supra* note 82, at 110; Williams, *supra* note 164, at 215.

249. WILLIAMS & KORN, *supra* note 100.

250. WILLIAMS & DEMPSEY, *supra* note 82, at 110.

men reported they seldom received pushback when they behaved assertively, whereas only about half of women and people of color agreed.<sup>251</sup>



Qualitative data illustrate the tightrope women walk.

“If [women] play a traditional female role, which is more consensus building and more gentle in terms of team dynamics and looking out for the team, they are considered just too wimpy to have what it takes to succeed in this aggressive culture. On the other hand, when they jump in and they play that kind of investment-banking aggressive, they are labeled as a bitch immediately.” — a white woman investment banker.<sup>252</sup>

“There are different rules women have to follow. You have to smile more. Your behavior is judged on a different standard. You have to be nice as opposed to assertive and bitchy.” — a white woman professor.<sup>253</sup>

“I have experienced the most push back from being an assertive and authoritative woman (and minority woman); so there is resentment of my perceived ‘masculinity’ such that people accuse me of wanting to be feared, when men [are] deemed to simply be ‘demanding’ or as having ‘high standards.’” — a Black woman lawyer who worked in-house.<sup>254</sup>

WES data also showed wide divergence between the experience of white men and those of other groups with respect to interruptions. White men engineers report being interrupted at meetings at a level nearly thirty percentage points lower than women and people of color.<sup>255</sup>

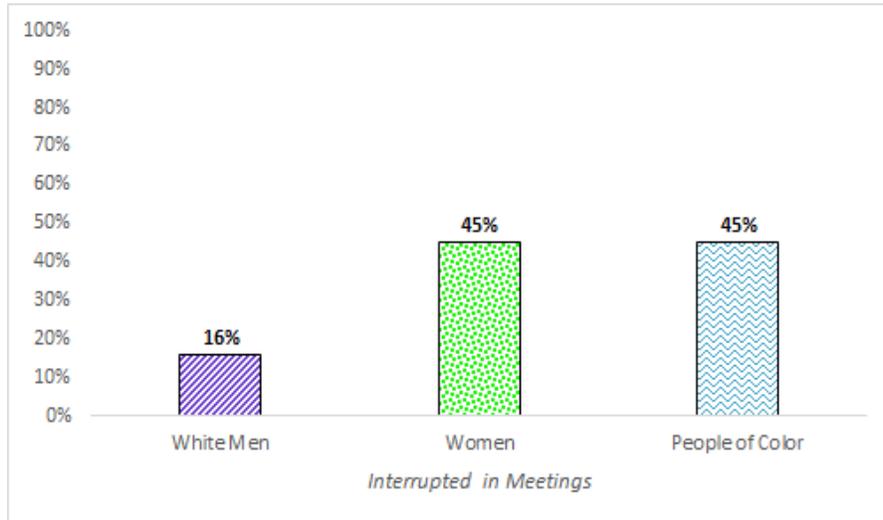
251. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 121.

252. WILLIAMS & DEMPSEY, *supra* note 82, at 61.

253. *Id.*

254. WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 23.

255. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 121.



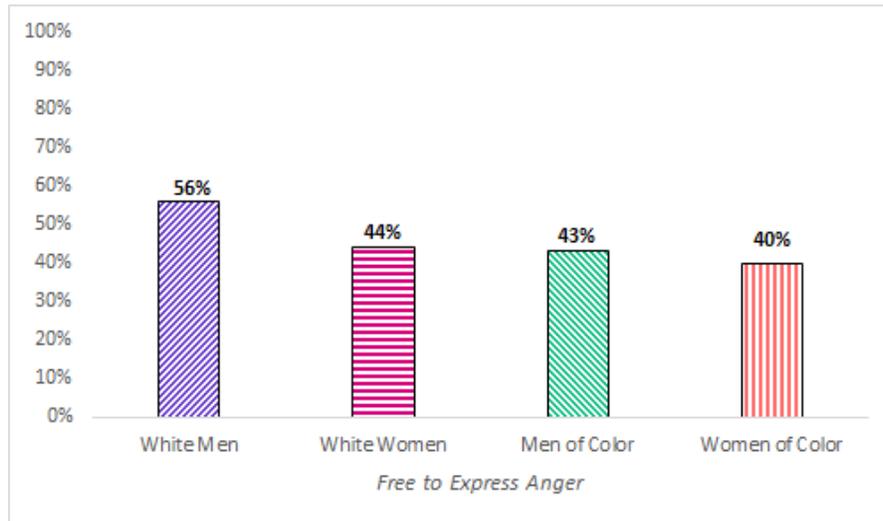
“White men don’t realize how much ‘space’ belongs to them or that they unconsciously feel that they own space. They frequently interrupt others, but if a woman on a conference call states her thoughts, she’s immediately criticized as interrupting.” —a woman of Asian descent who worked at a law firm.<sup>256</sup>

WES data also dramatize a disparity in who is allowed to express anger. Our data on lawyers showed that white men are much more likely to report being free to express anger than women and people of color.<sup>257</sup>

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256. WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 22.

257. *Id.* at 25.



“I raised my voice during a meeting, and I was reprimanded for getting emotional. But two male leaders . . . get into a yelling match in the same meeting and it’s no big deal.” —a Latinx woman engineer.<sup>258</sup>

Men could get angry, she said, but women could not. She attributed the problem to gender, not race, but the anger problem may be exacerbated for Latinx women because it triggers the “fiery Latin” stereotype.<sup>259</sup> Similarly for Black women, the anger problem may be exacerbated because it triggers the “angry Black person” stereotype.<sup>260</sup>

“When conflicts arise, I am always put in the defensive position because the assumption is that I was the initial aggressor. My defensive behavior gets more of the negative spotlight than the actions . . . of those I’m defending myself against.” —a Black woman architect.<sup>261</sup>

“In the past year, I’ve been called ‘overconfident’ and ‘not deferential enough’ by co-counsel, another Asian American woman. It was extremely frustrating as I was finally starting to feel confident and assertive and direct, acting as any normal white male attorney in a law firm would. I was subsequently removed from that case.” —a woman lawyer of Asian descent.<sup>262</sup>

“Asians are supposed to be very passive. And when you add women to that, they really don’t expect Asian women to stand up for themselves, or they expect the dragon lady, the extreme opposite. You can’t just be a normal person.

258. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 48. The low number of Latinx professionals in our datasets precludes statistically robust conclusions from WES data and we are aware of no experimental studies documenting bias against Latinx professionals.

259. Williams, *supra* note 164, at 208.

260. Rosette et al., *supra* note 180, at 439; Wingfield, *supra* note 196, at 201.

261. WILLIAMS & KORN, *supra* note 100.

262. WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 21.

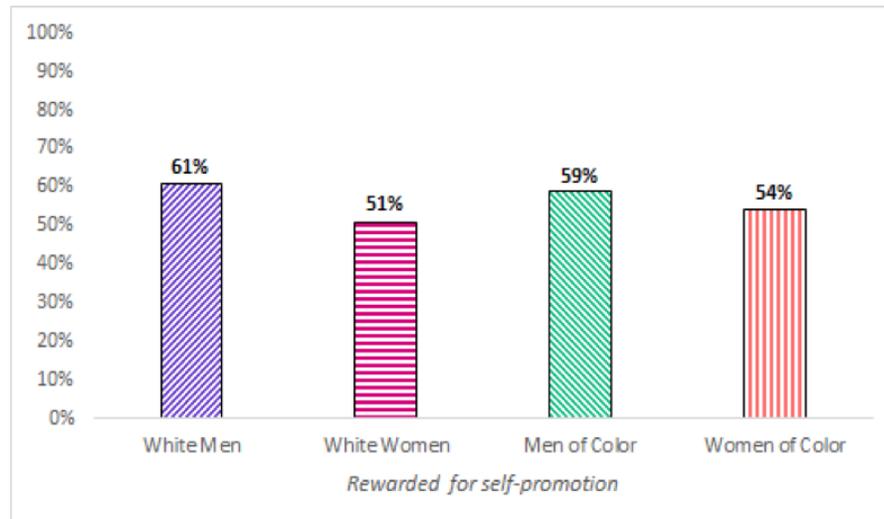
There's no expectation for you to be normal.” —a woman geophysicist of Asian descent.<sup>263</sup>

“I have heard that I am considered argumentative or aggressive, even though I don't do anything different than my male counterparts.” —a Latinx woman engineer.<sup>264</sup>

More recent interviews in tech revealed that Latinx women in tech are often belittled as “feisty” or “sassy”<sup>265</sup>—two interesting words that denote unexpectedly assertive behavior from someone who is expected to behave deferentially.<sup>266</sup> In addition, Latinx people may be seen as angry even when they aren't:

“I basically chewed him out at work and, unfortunately, I lost all [the] respect of my colleagues. After that, I've been very, very careful about that.” —a Latinx woman lawyer.<sup>267</sup>

WES data also show women of all races were less likely to feel that they were rewarded for self-promotion than white men.<sup>268</sup>



263. WILLIAMS ET AL., DOUBLE JEOPARDY, *supra* note 100, at 19.

264. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 46.

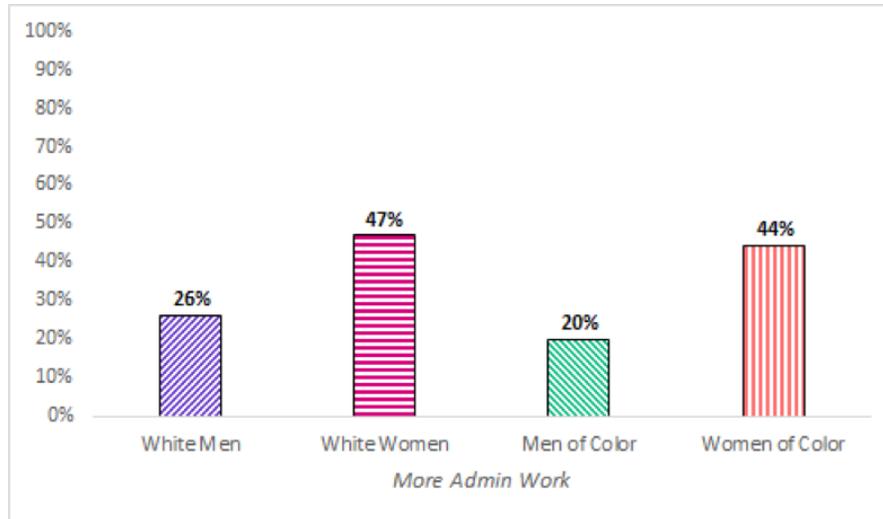
265. Telephone Interviews with women of color in technology (2019) (on file with authors).

266. *Id.*

267. Williams, *supra* note 164, at 208.

268. WILLIAMS ET AL., YOU CAN'T CHANGE WHAT YOU CAN'T SEE, *supra* note 100, at 24.

Women of all races report doing larger loads of office housework than white men.<sup>269</sup>

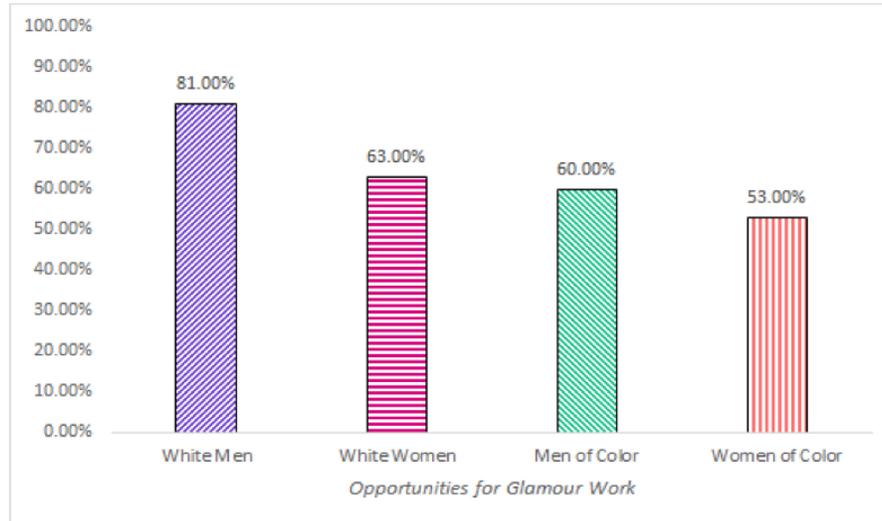


Whereas the office housework affected chiefly women (of all races), both women and men of color report less access to desirable assignments. In our study of lawyers, there was a nearly thirty percentage point gap in the experiences of white men and women of color when it came to opportunities for the glamour work.<sup>270</sup>

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269. WILLIAMS ET AL., YOU CAN'T CHANGE WHAT YOU CAN'T SEE, *supra* note 100, at 26–27.

270. *Id.*



“Despite superior educational credentials and being a lateral transfer from a far more prestigious firm, I was given an appropriate title but slotted into the subservient, support role (i.e., expected to take notes, get coffee, hang men’s jackets, etc.)” —a white woman who worked at a law firm.<sup>271</sup>

“We [racial minorities] are perceived as the help, not the leaders, when often we are more capable of leading the job . . . Constant country club behavior. Brotherhood/male fraternity type behaviors allow men to be more involved or allowed first dibs on projects . . .” —a multiracial woman architect.<sup>272</sup>

“The stupid little sexism things: asking me to sew something when I’m the only woman in a leadership team; asking why my office isn’t decorated for the holidays ‘like the front office girls’ . . .” —a Latinx woman engineer.<sup>273</sup>

Stereotypes about Latinx people being good at maintenance or domestic work puts pressure on Latinx employees to be exceptionally hard workers and do the jobs that “no one else wants,” which may mean more office housework and less glamour work opportunities in office settings.<sup>274</sup> Women of color also report less access to the glamour work than white women.<sup>275</sup>

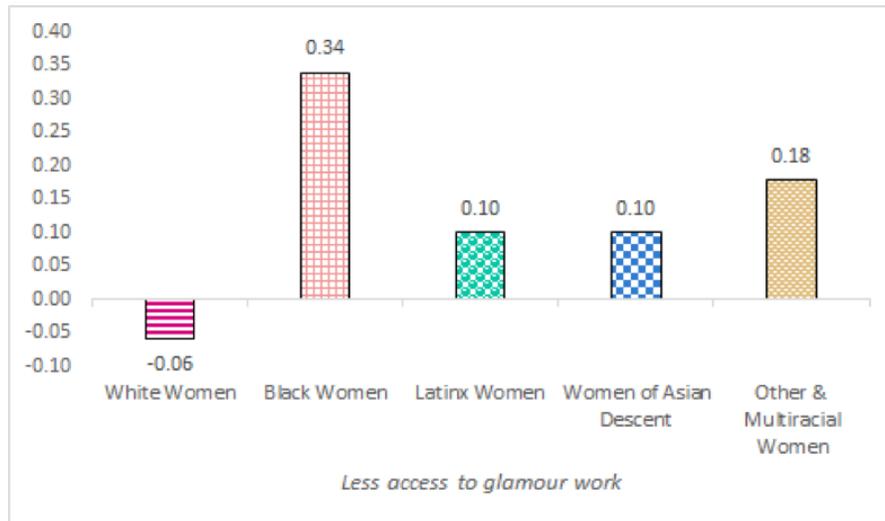
271. *Id.*

272. WILLIAMS & KORN, *supra* note 100.

273. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 48.

274. Williams, *supra* note 164, at 207.

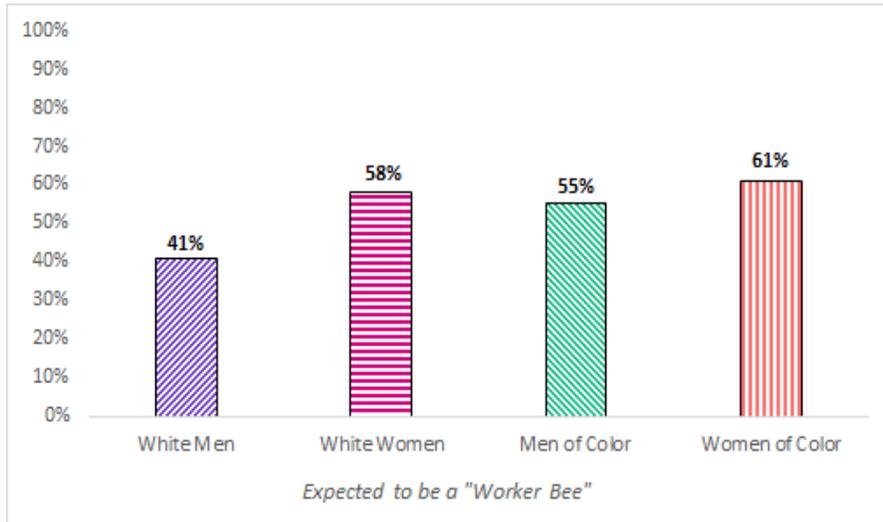
275. Data on file with authors. *See supra* notes 169–172 and accompanying text.



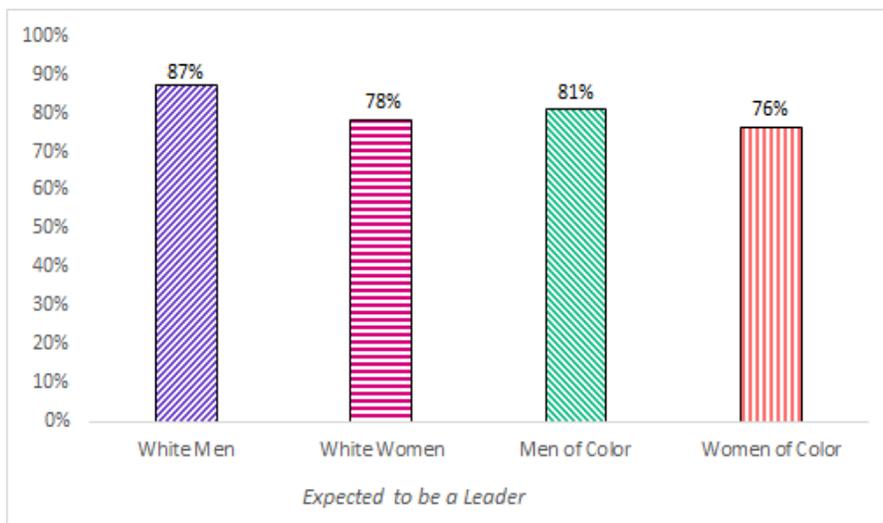
The bottom line of Tightrope bias is rarely noted. In some workplaces, women and people of color have been invited in, but expected to play a very different role than white men do: to be worker bees that work hard, keep their heads down, and avoid confrontation, leaving the glamour work and leadership roles to white men. White men report being expected to be worker bees at a level fourteen to twenty percentage points lower than women and people of color.<sup>276</sup>

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276. WILLIAMS ET AL., YOU CAN'T CHANGE WHAT YOU CAN'T SEE, *supra* note 100, at 28.



White men also reported being seen as leaders at a level significantly higher than their colleagues.<sup>277</sup>

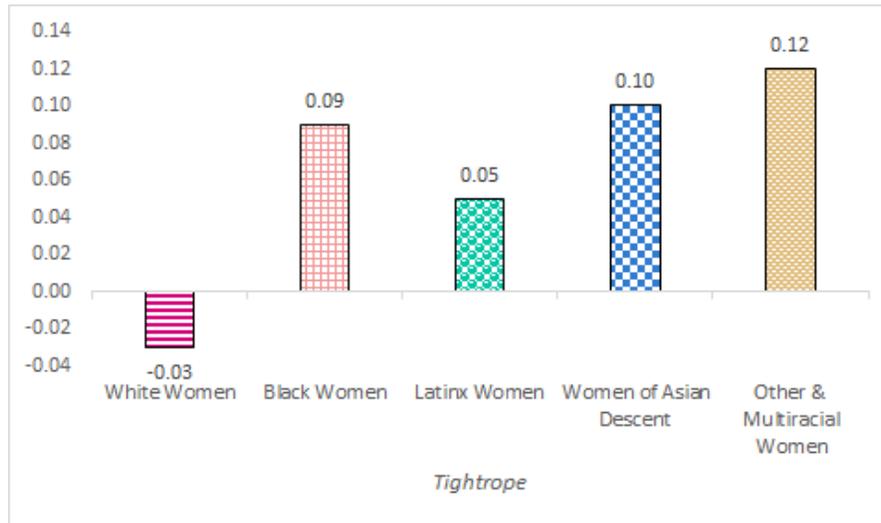


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277. *Id.* at 29.

“As an Asian-American man, I often felt firm leadership would overlook my leadership contributions and capabilities.” —an Asian-American male architect.<sup>278</sup>

**How gender bias differs by race:** Women of color report higher levels of Tightrope bias than white women.<sup>279</sup>



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In one of our studies, women of Asian descent reported the highest level of pressures to behave in feminine ways, and the highest level of pushback if they did not.<sup>281</sup> Some research suggests that Black women are expected to be agentic—they do not face the same pushback for advocating for their own careers that white women do.<sup>282</sup> Some WES qualitative evidence supports this.

“I’ve never really dealt with being thought of as a bitch, but I have—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 have.” —a Black woman science professor.<sup>283</sup>

However, in WES data, Black women report higher levels of some forms of Tightrope bias, notably that they are less able to express anger at work than white women.<sup>284</sup>

278. WILLIAMS & KORN, *supra* note 100.

279. In order to examine how gender bias differs by race, we standardized the data from women across studies and used one-way ANOVA testing to test for differences between racial groups. When appropriate, we used post-hoc Tukey HSD testing to examine the group differences in detail. The graphs in this Subpart represent levels of bias relative to other groups of women.

280. Data on file with authors. See *supra* notes 169–172 and accompanying text.

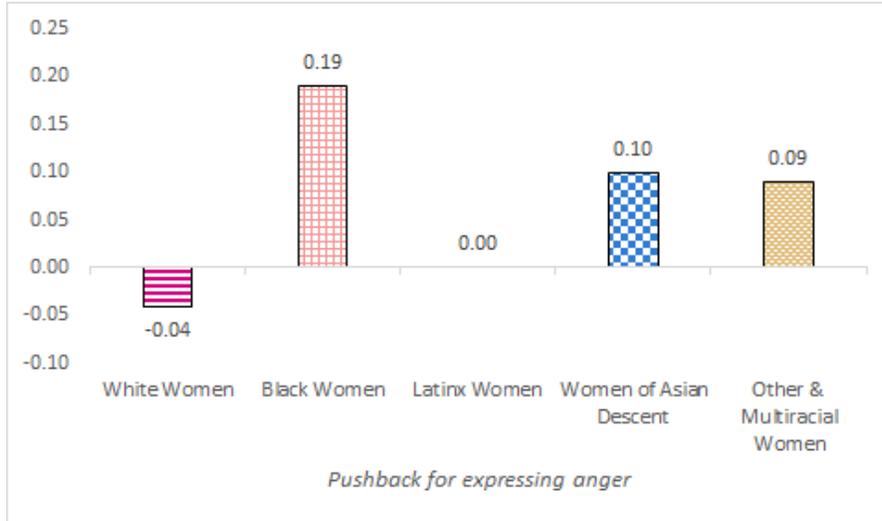
281. WILLIAMS ET AL., *DOUBLE JEOPARDY?*, *supra* note 100, at 6.

282. Livingston et al., *supra* note 192, at 357.

283. WILLIAMS ET AL., *DOUBLE JEOPARDY?*, *supra* note 100, at 21.

284. Data on file with authors. See *supra* notes 169–172 and accompanying text.

“You have to avoid the stereotype of the ‘angry Black female,’ which diminishes your opinion and the weight of your argument.” —a Black woman statistician.<sup>285</sup>



Interview evidence of science professors suggests that Latinx women may be more likely than other groups to get stuck with the office housework.

“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 . . . It’s assumed that I’ll take care of it because nobody else will.” —a Latinx woman science professor.<sup>286</sup>

“I mean, these kind of administrative duties eat into my time.” —a Latinx woman science professor.<sup>287</sup>

**Tightrope data has concrete workplace effects:**<sup>288</sup> In our study of engineers in India, Tightrope bias had the strongest and most far-reaching effects of all five patterns of bias.<sup>289</sup> Higher levels of Tightrope bias were associated with lower levels of career satisfaction and enjoyment, feeling that others are less invested in your career, less willingness to recommend ones’ organization to others as a good place to work, less happiness about one’s career continuing as it has been, greater intentions to leave, greater feelings of exclusion, and lower

285. WILLIAMS ET AL., *DOUBLE JEOPARDY?*, *supra* note 100, at 21.

286. Williams, *supra* note 164, at 207.

287. *Id.*

288. These regression analyses were conducted on data collected from engineers in India, and we have not had the opportunity to run the same tests on data from the United States. However, we expect that the patterns of bias will have similar negative effects on workplace processes and outcomes in the United States.

289. WILLIAMS ET AL., *supra* note 99, at 16–17.

feelings of belonging.<sup>290</sup> Tightrope bias was also linked to negative fairness perceptions in a number of workplace processes, including performance evaluations, assignments, sponsorship, networking, and compensation.<sup>291</sup>

### C. MATERNAL WALL BIAS

The third major pattern of bias contains both a descriptive component—that mothers *will* conform to the ideal of a mother who puts her children first—and a prescriptive component—that mothers *should*.<sup>292</sup>

**Negative competence and commitment assumptions:** Motherhood triggers very strong negative competence and commitment assumptions for women.<sup>293</sup> Maternal Wall bias has a descriptive element: that mothers are not a good fit for the professional world.<sup>294</sup> In one study, subjects were given two identical resumes with one difference: one but not the other listed membership in the PTA.<sup>295</sup> They found that the mother was 79% less likely to be hired, half as likely to be promoted, offered an average of \$11,000 less in starting salary, and held to higher performance and punctuality standards.<sup>296</sup> Many women report that, when they return from maternity leave, they need to prove themselves all over again.<sup>297</sup> Fiske and Glick document that housewives are stereotyped as low in competence, in comparison to businesswomen.<sup>298</sup> Housewives are stereotyped as more but similar in competence to the elderly and disabled individuals.<sup>299</sup> More work from Cuddy, Fiske, and Glick finds that the stereotype about working mothers is similar to housewives.<sup>300</sup>

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290. *Id.*

291. *Id.*

292. WILLIAMS & DEMPSEY, *supra* note 82, at xxi.

293. Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 GENDER & SOC'Y 616, 639 (2010); Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIO. 1297, 1333 (2007); Faye J. Crosby, Joan C. Williams & Monica Bierat, *The Maternal Wall*, 60 J. SOC. ISSUES 675, 679 (2004); Amy J. C. Cuddy, Susan T. Fiske & Peter Glick, *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004); Kathleen Fuegen, Monica Biernat, Elizabeth Haines & Kay Deaux, *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job Related Competence*, 60 J. SOC. ISSUES 737, 748 (2004); Jane A. Halpert Midge L. Wilson & Julia L. Hickman, *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORG. BEHAV. 649, 660 (1993); Michelle R. Hebl, Eden B. King, Peter Glick, Sarah L. Singletary & Stephanie Kazama, *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards That Maintain Traditional Roles*, 92 J. APPLIED PSYCH. 1499, 1504 (2007); Madeline E. Heilman & Tyler G. Okimoto, *Motherhood: a Potential Source of Bias in Employment Decisions*, 93 J. APPLIED PSYCH. 189, 196–97 (2008).

294. Williams, *supra* note 164, at 192.

295. Correll et al., *supra* note 293, at 1316–17.

296. *Id.*

297. WILLIAMS & DEMPSEY, *supra* note 82, at 135.

298. Fiske et al., *supra* note 149, at 879; *see also* Thomas Eckes, *Paternalistic and Envious Gender Prejudice: Testing Predictions from the Stereotype Content Model*, 47 SEX ROLES 99, 110 (2002); Fiske et al., *(Dis)respecting*, *supra* note 200, at 476.

299. Fiske et al., *supra* note 149, at 223.

300. Cuddy et al., *supra* note 293, at 706.

**Prescriptive bias:** Prescriptive stereotypes are that the good mother is “always available to her children.”<sup>301</sup> Consequently, mothers who are indisputably competent and committed face backlash at work as well. Known as “hostile prescriptive stereotyping,” they tend to be seen as less likable and are held to higher performance standards because they are seen as bad mothers and therefore bad people.<sup>302</sup> Stereotypes of mothers can be benevolent as well as hostile. Benevolent prescriptive stereotypes mean that colleagues often withhold work opportunities from others because “with the two young kids, it’s not a good time for her.”<sup>303</sup>

**Attribution bias** means that women have to prove themselves all over again after they have children. Thus, if a mother is late from work, the assumption will be that it is due to her children, not a traffic jam.<sup>304</sup> If a mother is out of the office for a business meeting, people may well assume that she is out of the office for child-related matters.<sup>305</sup>

**Bias against fathers:** Having children is a good career move for fathers—unless they take care of them. Fathers are held to lower performance and punctuality standards, offered higher salaries, and are more likely to be hired and promoted than identical men without children.<sup>306</sup> This reflects the assumption that fathers are breadwinners, with family responsibilities, who will work harder because they have families to support. However, fathers who take parental leave or request a flexible schedule risk serious penalty. A matched resume study found a robust flexibility stigma: fathers who take parental leave were less likely to be promoted, receive the high-profile assignments, and get recommended for raises, and they were more likely to be demoted or encouraged to look for a new job elsewhere.<sup>307</sup> Research by Joseph Vandello and colleagues documents the flexibility stigma for men who request flexible schedules: men who did so were penalized with lower ratings, lower raises, and were rated as less masculine than men who maintained full-time schedules after the birth of a child.<sup>308</sup> An important finding is that the flexibility stigma is, at the core, a femininity stigma: fathers who engage in family caregiving are penalized because they are seen as too feminine.<sup>309</sup> This means that bias against fathers can be litigated as sex discrimination. Under *Price Waterhouse v. Hopkins*, it is

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301. Diane Kobrynowicz & Monica Biernat, *Decoding Subjective Evaluations: How Stereotypes Provide Shifting Standards*, 33 J. EXPERIMENTAL SOC. PSYCH. 579, 584–87 (1993).

302. Benard & Correll, *supra* note 293, at 639; Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1372–77 (2008).

303. Benard et al., *supra* note 302, at 1385.

304. Ivy Kennelly, “*That Single-Mother Element*”: *How White Employers Typify Black Women*, 13 GENDER & SOC’Y. 168, 172 (1999); Deborah L. Rhode, Comment, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 588 (1996).

305. WILLIAMS & DEMPSEY, *supra* note 82, at 135.

306. Correll et al., *supra* note 293, at 1316–17.

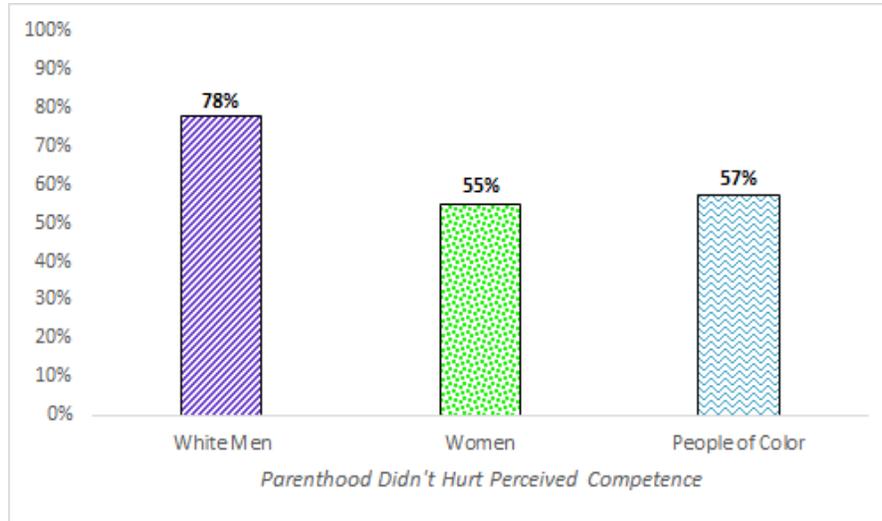
307. Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, 69 J. SOC. ISSUES 322, 329 (2013).

308. Joseph A. Vandello, Vanessa E. Hettinger, Jennifer K. Bosson & Jasmine Siddiqi, *When Equal Isn’t Really Equal: The Masculine Dilemma of Seeking Work Flexibility*, 69 J. SOC. ISSUES 303, 315–18 (2013).

309. Rudman & Mescher, *supra* note 307, at 329.

sex discrimination for an employer to penalize a female worker for being too masculine or, presumably, a male worker for being “too feminine.”<sup>310</sup>

**WES data:** WES data confirm that Maternal Wall bias is alive and well in today’s professional workplaces. White men were much less likely to report that their colleagues’ perceptions of their work competence and commitment changed after they had children. The gap between white men and women in our study of engineers<sup>311</sup> was large: twenty-three percentage points.<sup>312</sup>



The sudden change in perceptions of work commitment and competence was clear in the qualitative data as well:

“You can either be perceived as the nurturer or extremely competent, but it’s pretty hard to be perceived as both.”—a woman chemist of Asian descent.<sup>313</sup>

“Needing to set more boundaries around my time and availability [after having a baby] seemed to negatively impact my position and the perception of my abilities, despite the years I had already put in ‘proving’ myself.”—a white woman architect.<sup>314</sup>

“After having children . . . the principals in my office . . . automatically assumed that my career wasn’t as important (relative to my male counterparts, with or without children).” —a woman engineer of Asian descent.<sup>315</sup>

310. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989).

311. The majority of people of color in the engineering dataset were women. Therefore, the conclusions drawn about people of color are most applicable to women of color and may not be representative of the experiences of men of color. We supplement the engineering data with data from lawyers where possible to illustrate the experiences of men of color.

312. WILLIAMS ET AL., *CLIMATE CONTROL*, *supra* note 100, at 125.

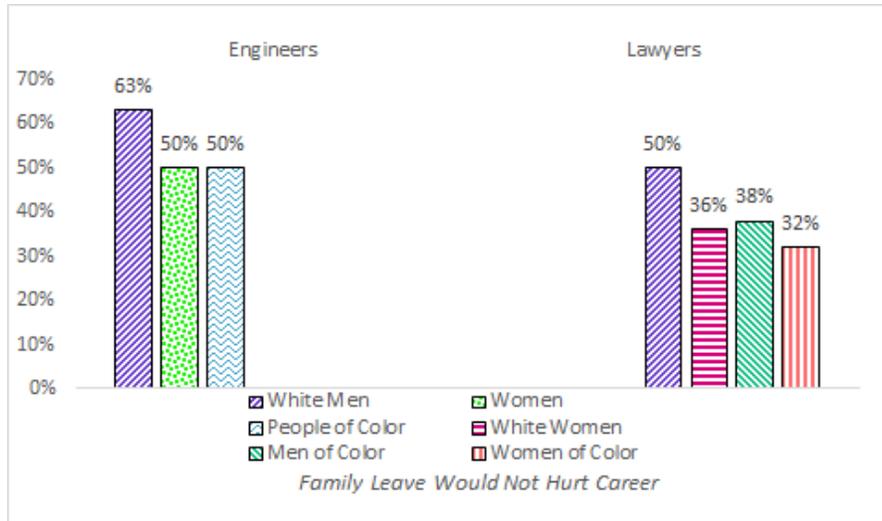
313. WILLIAMS ET AL., *DOUBLE JEOPARDY?*, *supra* note 100, at 28.

314. WILLIAMS & KORN, *supra* note 100.

315. WILLIAMS ET AL., *CLIMATE CONTROL*, *supra* note 100, at 59.

“This new manager told me directly that I would not ‘want’ a promotion because it requires more responsibility, and I am a mom so I wouldn’t want to travel.”—a white woman engineer.<sup>316</sup>

White men also report lower levels of pushback when it comes to asking for flexible work arrangements and taking family leave. In our studies of lawyers and engineers, there was a gap of approximately fifteen percentage points between white men and others.<sup>317</sup>



Lawyers, engineers, and architects all reported sharp decreases in the quality of their work environments after they had children.

“Went on reduced work schedule due to having kids—and suddenly could not get staffed on matters. Basically I have been forced to leave.”—a white woman law firm lawyer.<sup>318</sup>

“I made partner in the shortest time of any female. Things were great. I had my son. I worked part time during leave and came back in 9 weeks. My work was gone. It has taken 2 years and a change in focus to get back to the level I was.”—a white woman law firm lawyer.<sup>319</sup>

“While my last boss was awesome, fully supportive of me within company politics as well as demands of my personal life (I worked part time ~32 hours/week), I was frequently assigned tasks below my ability level.”—a white woman engineer.<sup>320</sup>

316. *Id.* at 61.

317. *Id.* at 125; WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 35.

318. WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 36.

319. *Id.* at 37.

320. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 63.

“I took leave after having a child and when I returned there was no longer meaningful work for me at the firm.” —a white woman architect.<sup>321</sup>

**How gender bias differs by race:**<sup>322</sup> White women were more likely than women of color to report that parenthood affected their perceived competence.<sup>323</sup> However, interview evidence suggests that Maternal Wall stereotypes may be heightened for Latinx and Black women, who report facing assumptions that they will have children—lots of children.<sup>324</sup>

“We like to be pregnant. We don’t like to take birth control. We’re mañana oriented. We’re easy.” —a Latinx woman.<sup>325</sup>

“Usually people take over countries with wars, but you Mexicans are doing it by having lots of babies.” —a Latinx woman, reporting on a racist comment.<sup>326</sup>

“I don’t have any data, being a Black woman with children gets complex because the assumption is once you start, you’re never going to stop. You’ll end up being a welfare queen. So I also didn’t want to deal with that.” —a Black woman microbiologist.<sup>327</sup>

“Worker bee” stereotypes of women of Asian descent sometimes means they meet hostile prescriptive stereotyping:

“I get that a lot: ‘Don’t you feel bad leaving your kids at home? Don’t you miss them?’ And I say ‘Sure, I miss them. My husband misses them too, but I have a wonderful relationship with my kids; my children are fabulous.’ And they say, ‘Oh, my wife could never do that, never leave the kids.’” —an Asian American woman lawyer.<sup>328</sup>

Note the message that she’s a bad mother; as noted above, this may lead to dislike and being held to higher performance standards.

**Maternal Wall has concrete workplace effects:**<sup>329</sup> In our study of engineers in India, higher levels of Maternal Wall bias were associated with feeling excluded in the workplace and feeling like colleagues do not support diversity.<sup>330</sup>

321. WILLIAMS & KORN, *supra* note 100.

322. In order to examine how gender bias differs by race, we standardized the data from women across studies and used one-way ANOVA testing to test for differences between racial groups. When appropriate, we used post-hoc Tukey HSD testing to examine the group differences in detail. The graphs in this Part represent levels of bias relative to other groups of women.

323. Data on file with authors. See *supra* notes 169–172 and accompanying text.

324. Denise A. Segura, *Chicanas in White-Collar Jobs: “You Have to Prove Yourself More”*, 35 SOCIO. PERSPS. 163, 173 (1992); Jody Agius Vallejo, *Latina Spaces: Middle-Class Ethnic Capital and Professional Associations in the Latino Community*, 8 CITY & CMTY. 129, 146 (2009).

325. Segura, *supra* note 324, at 173.

326. Vallejo, *supra* note 324, at 146.

327. WILLIAMS ET AL., DOUBLE JEOPARDY?, *supra* note 100, at 30.

328. JANET E. GANS EPNER, COMM’N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 34 (2006), [https://law.duke.edu/sites/default/files/centers/judicialstudies/panel\\_1-visible\\_invisibility\\_women\\_of\\_color\\_in\\_law\\_firms.pdf](https://law.duke.edu/sites/default/files/centers/judicialstudies/panel_1-visible_invisibility_women_of_color_in_law_firms.pdf).

329. These regression analyses were conducted on data collected from engineers in India, and we have not had the opportunity to run the same tests on data from the United States. However, we expect that the patterns of bias will have similar negative effects on workplace processes and outcomes in the United States.

330. WILLIAMS ET AL., *supra* note 99, at 17.

#### D. TUG OF WAR BIAS

The fourth pattern, Tug of War, occurs when bias against a group fuels conflict within the group.<sup>331</sup> Thus, gender bias can fuel conflict among women,<sup>332</sup> and racial bias can fuel conflict among people of color.<sup>333</sup>

**Threat Mechanisms:** Michelle Duguid, Denise Lewin Loyd, and Pamela Tolbert outline three threat mechanisms that lead to conflict among members of the same group.<sup>334</sup> One is “collective threat,” when an out-group member, such as a Latinx person, thinks that if another Latinx employee performs poorly, it reflects poorly on them.<sup>335</sup> The next is “competitive threat,” where, for example, a woman thinks that if another woman performs well, it will make her look worse by comparison.<sup>336</sup> The last is “favoritism threat,” where, for example, a Black woman is worried that if she supports another Black woman, it will look like favoritism.<sup>337</sup>

**Systems Justification:** As noted above, in-group favoritism means that members of the dominant group may be held to lower standards and find it easier to find sponsors and career-enhancing assignments.<sup>338</sup> Disadvantaged groups benefit less from in-group favoritism due to “systems justification”: people are motivated to see the world as just, even in the face of evidence that their own group is being harmed by inequality.<sup>339</sup> This means that sometimes people in

331. WILLIAMS & DEMPSEY, *supra* note 82, at 179.

332. Belle Derks, Colette Van Laar, Naomi Ellemers & Kim de Groot, *Gender-Bias Primes Elicit Queen-Bee Responses Among Senior Policewomen*, 22 PSYCH. SCI. 1243, 1243–44 (2011) [hereinafter Derks et al., *Gender-Bias*]; Belle Derks, Naomi Ellemers, Colette Van Laar & Kim de Groot, *Do Sexist Organizational Cultures Create the Queen Bee?*, 50 BRIT. J. SOC. PSYCH. 519, 520 (2011) [hereinafter Derks et al., *Sexist Organizational Cultures*]; Michelle Duguid, *Female Tokens in High-Prestige Work Groups: Catalysts or Inhibitors of Group Diversification?*, 116 ORG. BEHAV. & HUM. DECISION PROCESSES 104, 104–05 (2011); Michelle M. Duguid, Denise Lewin Lloyd & Pamela S. Tolbert, *The Impact of Categorical Status, Numeric Representation, and Work Group Prestige on Preference for Demographically Similar Others: A Value Threat Approach*, 23 ORG. SCI. 386, 387 (2012); Naomi Ellemers, Henriette van den Heuvel, Dick de Gilder, Anne Maass & Alessandra Bonvini, *The Underrepresentation of Women in Science: Differential Commitment or the Queen Bee Syndrome?*, 43 BRIT. J. SOC. PSYCH. 315, 325 (2004); Robin J. Ely, *The Effects of Organizational Demographics and Social Identity on Relationships Among Professional Women*, 39 ADMIN. SCI. Q. 203, 204 (1994); Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 979–80 (1977); Elizabeth J. Parks-Stamm, Madeline E. Heilman & Krystle A. Hearn, *Motivated to Penalize: Women’s Strategic Rejection of Successful Women*, 34 PERSONALITY & SOC. PSYCH. BULL. 237, 239 (2008); Graham L. Staines, Carol Tavis & Toby Epstein Jayaratne, *The Queen Bee Syndrome*, 7 PSYCH. TODAY 55, 57 (1974); Colette van Laar, Dennis Bleeker, Naomi Ellemers & Eline Meijer, *Ingroup and Outgroup Support for Upward Mobility: Divergent Responses to Ingroup Identification in Low Status Groups*, 44 EUR. J. SOC. PSYCH. 563, 573–74 (2014).

333. Duguid et al., *supra* note 332, at 387; CARBADO & GULATI, *supra* note 8, at 2; Tina R. Opie & Katherine W. Phillips, *Hair Penalties: The Negative Influence of Afrocentric Hair on Ratings of Black Women’s Dominance and Professionalism*, 6 FRONT. PSYCH. 1, 1–2 (2015).

334. Duguid et al., *supra* note 332, at 388.

335. *Id.*

336. *Id.*

337. *Id.*

338. See *supra* notes 110–134 and accompanying text.

339. Jost & Banaji, *supra* note 74, at 13–14; John T. Jost, Mahzarin R. Banaji & Brian A. Nosek, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCH. 881, 910 (2004).

disadvantaged groups internalize and perpetuate the system of inequality that disadvantages them.<sup>340</sup> Disadvantaged group members may show out-group favoritism rather than in-group favoritism: better treatment towards members of outgroups than their own groups.<sup>341</sup>

**Tokenism:** In workplaces dominated by white men, women and people of color may be viewed as “tokens”<sup>342</sup> in ways that pit members of under-represented groups against other members of their group. “Opportunities for women are very zero-sum. If one woman gets a prized position or assignment, that means another woman won’t. And so it breeds a sense of competition,” said one woman.<sup>343</sup> Tokenism also makes it difficult for the “token woman” to advocate for other members of their group.<sup>344</sup>

**Strategic Distancing:** In environments where they have a fragile hold, women or people of color may distance themselves from other members of their group.<sup>345</sup> Belle Derks, Naomi Ellemers, and colleagues document how, in workplaces where there is gender bias, joining the boy’s club can be a politically savvy move for a woman.<sup>346</sup> This is commonly called the issue of the “Queen Bee,” as if it reflects just another woman with a personality problem.<sup>347</sup> However, the research shows that “Queen Bee” behavior is actually a response to gender bias in the environment.<sup>348</sup>

**Racism:** White women are, of course, white people. Some white people are openly racist, and white people in general have a lot to learn about racism. It goes without saying that racism shapes workplaces profoundly. Just one example, from a Latinx science professor who reported trouble getting white admins to do for her what they readily did for other professors: “[O]n top of being young and a woman, I am Mexican. And whether it is clear to them conscious or unconscious, here, there is this Mexican woman telling [an administrative staff person] what to do.”<sup>349</sup>

White women also often assume a sisterhood that Black women do not feel: in our study of science professors, 76% of women in general, but only 56% of Black women felt that women in their environments often support each other—a percentage lower than any other group.<sup>350</sup>

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340. Jost et al., *supra* note 339, at 891; John T. Jost, Brett W. Pelham & Mauricio R. Carvallo, *Non-Conscious Forms of System Justification: Implicit and Behavioral Preferences for Higher Status Groups*, 38 J. EXPERIMENTAL SOC. PSYCH. 586, 587 (2002).

341. Jost et al., *supra* note 339, at 891; Jost et al., *supra* note 340, at 587.

342. Kanter, *supra* note 332, at 966.

343. WILLIAMS & DEMPSEY, *supra* note 82, at 183.

344. Duguid, *supra* note 332, at 112.

345. Duguid et al., *supra* note 332, at 387; Duguid, *supra* note 332, at 104.

346. Derks et al., *Sexist Organizational Cultures*, *supra* note 332, at 520.

347. Ellemers et al., *supra* note 332, at 325; Staines et al., *supra* note 332, at 55.

348. Derks et al., *Sexist Organizational Cultures*, *supra* note 332, at 520.

349. Interview with Erika V. Hall (June 2012) (NSF Tools for Change Project) (on file with authors).

350. WILLIAMS ET AL., *DOUBLE JEOPARDY?*, *supra* note 100, at 35.

In addition, the experience of gender bias differs by race,<sup>351</sup> which can set women of different races against each other.<sup>352</sup> For example, Black women sometimes find they can behave in dominant ways that are sanctioned in white women.<sup>353</sup> Said one science professor: “I kind of aspire to [being a bitch] . . . a little bit because I see, at this university at least, that actually it’s a very effective perception” to create.<sup>354</sup>

White women sometimes respond to Black women’s assertive behavior by trying to police them into femininity. Here’s an example:

I certainly think that if I was a white man I would not 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.<sup>355</sup>

No doubt there’s a lot more; this rich subject deserves further rigorous study.

**Bias Pass-Throughs:** Prove-It-Again, Tightrope, and Maternal Wall bias can all be passed through from women to other women. Although it may be less common, bias may also be passed from people of color to other people of color.

Studies show that college women rate the typical woman as less competent than men despite the fact they do not rate themselves that way.<sup>356</sup> Prove-It-Again bias also can be passed through from older women to younger women.<sup>357</sup> For example, older women may apply harsher standards to younger women because they believe a higher standard of competence is necessary for a woman to succeed in their workplace.<sup>358</sup>

Bias pass-through also can create conflict between women professionals and support staff: “Females are harder on their female assistants, more detail oriented, and they have to try harder to prove themselves, so they put that on you,” noted a legal secretary.<sup>359</sup> This dynamic can have far-reaching consequences. In one study, not one legal secretary preferred to work for a woman boss (although about half of admins had no sex preference).<sup>360</sup>

351. Rosette et al., *supra* note 156, at 2; WILLIAMS ET AL., DOUBLE JEOPARDY?, *supra* note 100, at 9; WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 9–12; WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 118; WILLIAMS & DEMPSEY, *supra* note 82, at 223.

352. Mamta Motwani Accapadi, *When White Women Cry: How White Women’s Tears Oppress Women of Color*, 26 COLL. STUDENT AFF. J. 208, 209–10 (2007).

353. Livingston et al., *supra* note 192, at 357.

354. WILLIAMS ET AL., DOUBLE JEOPARDY?, *supra* note 100, at 21.

355. Interview with Erika V. Hall (June 2012) (NSF Tools for Change Project) (on file with authors).

356. RIDGEWAY, *supra* note 104, at 62.

357. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 82; WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 40–43; Williams, *supra* note 164, at 211.

358. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 82; WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 40–43; Williams, *supra* note 164, at 211.

359. Felice Batlan, “If You Become His Second Wife, You Are a Fool”: *Shifting Paradigms of the Roles, Perceptions, and Working Conditions of Legal Secretaries in Large Law Firms*, in 52 STUDIES IN LAW, POLITICS, & SOCIETY 169, 200 (Austin Sarat ed., 2010).

360. *Id.* at 199–200.

Tightrope bias can also be passed through from women to other women. For example, women may be critical of other women for dressing in a manner that they deem too feminine, or using a soft-spoken voice.<sup>361</sup> Women also sometimes criticize other women for acting in a way that they deem too masculine, simply assimilating to the way men have traditionally acted in the workplace.<sup>362</sup>

The Maternal Wall can create “mommy wars.” Research shows that women hold mothers to higher standards in the workplace and penalize them when it comes to promotions, compensation, and hiring.<sup>363</sup> This may be due to identity threat, as when older women fault younger women for taking too much family leave or working part time, on the grounds that, “I worked full time my whole career and my kids are fine.”<sup>364</sup> Older women’s fear that younger women are judging them for being bad mothers is sometimes fueled by comments by younger women that they “want to raise [their] own children” (implying that the older women did not). Bias against mothers by women also can reflect collective threat: if a new mother is too family-focused, it might reflect poorly on all the women in the workplace.<sup>365</sup>

There is less research on bias pass-throughs by race. However, one study by Tina Opie and Katherine Phillips found that Black evaluators were more critical than white evaluators of professionals who wore their hair in Afrocentric styles.<sup>366</sup> This highlights the ways that out-groups can be divided against each other because of different ways of presenting their identities and/or different strategies for assimilating to the majority group (or refusing to do so).<sup>367</sup>

Status effects also can divide low-status group members against each other. Lower status people (for example, women and people of color in a majority white-male workplace”) may support high-status people because it is less risky.<sup>368</sup> Similarly, low status people often behave in low status ways in order to gain the approval of their group because they “know their place.”<sup>369</sup> These status mechanisms are utilized by low-status people to assimilate, but could cause conflict between group members.

**WES Data:** WES data confirm that the intra-group conflict documented by lab research on the Tug of War also plays out in everyday workplaces.

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361. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 84–85; *see also* WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 21–23; Williams, *supra* note 164, at 211.

362. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 80–82; *see also* WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 21–23; Williams, *supra* note 164, at 193.

363. Benard & Correll, *supra* note 293, at 623.

364. *Id.* at 624.

365. Duguid et al., *supra* note 332, at 393.

366. Opie & Phillips, *supra* note 333, at 7.

367. CARBADO & GULATI, *supra* note 8.

368. Anderson et al., *supra* note 183, at 95.

369. Ridgeway & Nakagawa, *supra* note 185, at 149.

First, the three other patterns of bias may be passed on from woman to woman, holding other women to higher standards because “that’s what it takes to succeed here as a woman.”<sup>370</sup>

“Because she struggled a lot and had to work extra hard and so expects other women to have done as much as she has.” —a woman scientist of Asian descent.<sup>371</sup>

This can be driven by collective threat: ambitious women and people of color may hold each other to higher standards for fear that poor performance by other women will reflect poorly on them.<sup>372</sup>

Tightrope bias also creates conflicts among women. Often (although not always), these are “gen(d)erational” conflicts, as older women who played by boys’ club rules come into conflict with younger women who refuse to do so.<sup>373</sup>

“I’m on kind of a backlash mission almost. I wear dresses, I bake cookies for my group meetings, I bring my child to class with me. I’ve just stuck it out there and said I’m a woman, I’m someone’s mother. And you get the whole package. It is kind of a conscious choice on my part that I’m not going to compete as a boy because I’m not a boy.”<sup>374</sup> —a white woman professor.

Note the message: the older women are doing gender wrong.<sup>375</sup> The judging goes both ways. Here are the voices of women who joined—“just turned into men” (to quote some of the younger women). These quotes also illustrate “collective threat” (the fear that other women’s behavior will reflect poorly on you).<sup>376</sup>

“Respect in engineering is earned, not just given. Too many younger women are under the impression that they should be highly respected just because they showed up to the office. Younger women have a distorted sense of what gender harassment is and often do not handle themselves appropriately in challenging situations. . . . The nonstop whining and groundless harassment complaints from younger women in my field are making it much harder for other young women to get hired and much harder for old ladies like me to get jobs. Employers are tending to paint us all with the same brush.” —a Black woman who had held an engineering role for thirty years.<sup>377</sup>

“Women do seem to need to prove themselves more, but don’t make excuses and you will be respected.” —a white woman engineer.<sup>378</sup>

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370. WILLIAMS & DEMPSEY, *supra* note 82, at 5.

371. WILLIAMS ET AL., *DOUBLE JEOPARDY?*, *supra* note 100, at 38.

372. Duguid et al., *supra* note 332, at 393.

373. WILLIAMS & DEMPSEY, *supra* note 82, at 194.

374. PENELOPE M. HUANG, *WORKLIFE LAW, GENDER BIAS IN ACADEMIA: FINDINGS FROM FOCUS GROUPS* 8 (2008), <https://worklifelaw.org/publications/gender-bias-academia.pdf>.

375. See Candace West & Don H. Zimmerman, *Doing Gender*, 1 *GENDER & SOC’Y* 125, 125–26 (1987).

376. Duguid et al., *supra* note 332, at 393–95.

377. WILLIAMS ET AL., *CLIMATE CHANGE*, *supra* note 100, at 82.

378. *Id.*

“There are different types of female engineers, those who want to be seen as women and those who want to be seen as equal.” —a white woman engineer.<sup>379</sup>

Women also spoke about Maternal Wall bias being passed through from other women:

“I really hoped that [my boss] would mentor me into her role, but even the men in the firm referred to her as the most sexist Principal in the office. She always promoted the men in her group over the women and told the (extremely talented) women in the group that they should stay home with their babies and take care of their husbands. (. . . even though she too was married with kids).” —a White woman architect.<sup>380</sup>

Other quotes illustrate the way tokenism pits women against each other.

“[O]pportunities for women are very zero-sum. If one woman gets a prized position . . . another woman won’t. And so, it breeds a sense of competition.” —an attorney.<sup>381</sup>

“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.” —a Black woman scientist.<sup>382</sup>

“Each department wants to have a female faculty,” so a department with two women will find them consistently pitted against each other: “one female will be the one to stay, the other one will not.” —a woman biophysicist of Asian descent.<sup>383</sup>

Still other quotes illustrate strategic distancing, where ambitious women distance themselves from other members of their group, and align with the boys’ club or the white majority, if that’s what it takes to succeed.<sup>384</sup> Thus, famously, Marissa Mayer (later CEO of Yahoo at a time when there were virtually no women as Silicon Valley CEOs) commented while she was still working at Google, “I am not a girl at Google, I’m a geek at Google,” deftly distancing herself from the out-group—girls—and aligning herself with the in-group—geeks.<sup>385</sup> In some cases, women strategically refuse to align with other women in order to preserve their political capital.

“I know she didn’t like the things that were going on but she accepted them and refused to stand up in any way or even admit, publicly, that there was a problem.” —a woman faculty member who left her institution.<sup>386</sup>

The quantitative data show this might also impact women’s experience with administrative support. White men report less difficulty getting support

379. *Id.*

380. WILLIAMS & KORN, *supra* note 100.

381. WILLIAMS & DEMPSEY, *supra* note 82, at 183.

382. *Id.* at 236.

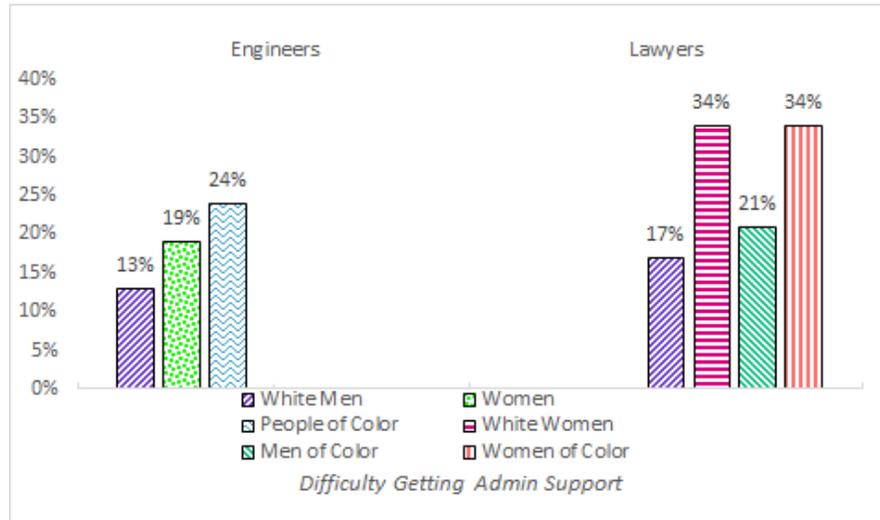
383. WILLIAMS ET AL., *DOUBLE JEOPARDY?*, *supra* note 100, at 37.

384. Derks et al., *Sexist Organizational Cultures*, *supra* note 332, at 530.

385. John D. Sutter, *Marissa Mayer: From Google ‘Geek’ to Yahoo CEO*, CNN (July 17, 2012, 8:25 PM), <https://www.cnn.com/2012/07/16/tech/web/marissa-mayer-bio/index.html>.

386. Susan K. Gardner, *Women Faculty Departures from a Striving Institution: Between a Rock and a Hard Place*, 36 REV. HIGHER EDUC. 349, 361 (2013).

from administrative personnel. This pattern was particularly evident with lawyers, where there was a seventeen-percentage point disparity between the experiences of white men and women.<sup>387</sup>



**How gender bias differs by race:**<sup>388</sup> While 76% of women professors reported that other women at work generally supported them, only 56% of Black professors agreed.<sup>389</sup> While all groups of women reported more difficulty than men in getting administrative support, Latinx women and women of Asian descent reported more difficulty than other groups of women.<sup>390</sup> Qualitative data suggest that, for Latinx women, there may be a racial component. As previously mentioned, said one Latinx woman science professor, describing how much resistance she got from admins to do work for her, “conscious or unconscious . . . [t]here is this Mexican woman telling them what to do.”<sup>391</sup>

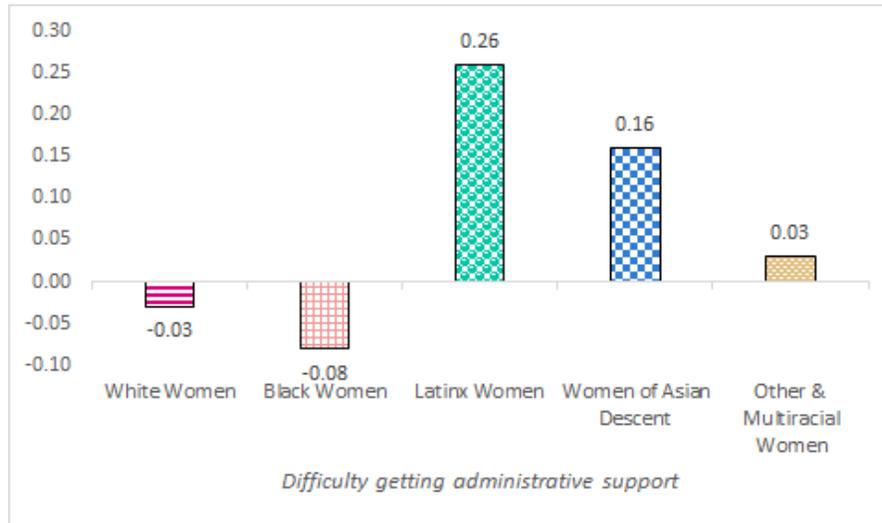
387. WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100, at 42; *see also* WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 76 (discussing percentages of administrative tasks for women engineers versus white male engineers).

388. In order to examine how gender bias differs by race, we standardized the data from women across studies and used one-way ANOVA testing to test for differences between racial groups. When appropriate, we used post-hoc Tukey HSD testing to examine the group differences in detail. The graphs in this Part represent levels of bias relative to other groups of women.

389. WILLIAMS ET AL., DOUBLE JEOPARDY?, *supra* note 100, at 35.

390. Data on file with authors. *See supra* notes 169–172 and accompanying text.

391. Williams, *supra* note 164, at 211–12.



**Tug of War data has concrete workplace effects:**<sup>392</sup> In our study of engineers in India, higher levels of Tug of War bias were associated with feeling excluded in the workplace and feeling like colleagues do not support diversity, in addition to lower feelings of belonging, lower perceptions of compensation fairness, and higher reports of considering looking for a new position somewhere else.<sup>393</sup>

#### E. RACIAL STEREOTYPES

People of color face additional forms of bias in the workplace based on racial and ethnic stereotypes. The implication is that men of color (like white women) face four patterns of bias, while women of color face five patterns.

Black women in our research reported being demeaned and disrespected in the workplace, an experience that was not reported by any white women interviewed.<sup>394</sup> Black women also reported a sense of isolation and loneliness in the workplace, in part because “you really don’t have the support you need,” said a Black woman microbiologist.<sup>395</sup> This lack of inclusion was also clear in the 2018 Women in the Workplace Survey: Black and African-American women reported feeling included in their workplaces at the lowest rate of any group.<sup>396</sup>

392. These regression analyses were conducted on data collected from engineers in India, and we have not had the opportunity to run the same tests on data from the United States. However, we expect that the patterns of bias will have similar negative effects on workplace processes and outcomes in the United States.

393. WILLIAMS ET AL., *supra* note 99, at 15–18.

394. WILLIAMS & DEMPSEY, *supra* note 82, at 224; Williams, *supra* note 164, at 194.

395. WILLIAMS & DEMPSEY, *supra* note 82, at 225; Williams, *supra* note 164, at 194.

396. Sonya George, *The Gender Gap Is Just the Tip of the Iceberg for Black Women*, GREAT PLACE TO WORK (June 3, 2020), <https://www.greatplacetowork.com/resources/blog/diagnosing-quit-and-stay-among-black-women>.

The disrespect, isolation, and lack of inclusion that Black women face in the workplace lead to a completely different kind of work environment than white individuals face; Black women reported being mentally checked out at their jobs at a rate 75% higher than white men and 20% higher than white women.<sup>397</sup>

Because white people have less contact with Black people in the United States, they are more likely to rely on stereotypes when judging Black individuals, both in general and in the workplace.<sup>398</sup> Black people face stereotypes about being lazy and violent,<sup>399</sup> as in one case in which a supervisor referred to an African-American worker as “lazy,” “worthless,” “just here to get paid.”<sup>400</sup> Reporting<sup>401</sup> documents that Black professionals may be faulted for being “intimidating” or “threatening”—a carry-over of the association of Black Americans with violence.<sup>402</sup>

Black women may also face trouble advancing in the workplace because of stereotypes that they are only suited for low-status jobs.<sup>403</sup> This stereotype may help explain why hiring discrimination against African Americans has not declined since the 1980s.<sup>404</sup> In addition, due to stereotypes that Black women are more dominant, they may be seen as better fit for masculine-typed jobs,<sup>405</sup> and less of a fit for feminine-typed jobs, like nurse or administrative assistant, that provide important opportunities for upwardly mobile workers.<sup>406</sup>

Black women in the workplace have to contend with other stereotypes that have roots in slavery.<sup>407</sup> The “Mammy” stereotype refers to a Black woman who does the domestic work, like housekeeping, nannying, and cooking, while being non-threatening and playing a caretaker role.<sup>408</sup> In the workplace, a woman who triggers the “Mammy” stereotype is seen as being in a support role, and may

397. *Id.*

398. ELLA L. J. EDMONDSON BELL & STELLA M. NKOMO, *OUR SEPARATE WAYS: BLACK AND WHITE WOMEN AND THE STRUGGLE FOR PROFESSIONAL IDENTITY* (1986).

399. Ghavami & Peplau, *supra* note 240, at 124.

400. Chappell v. Bilco Co., No. 3:09CV00016 JLH, 2011 WL 9037, at \*9 (E.D. Ark. Jan. 3, 2011), *aff'd*, 675 F.3d 1110 (8th Cir. 2012).

401. Emily Flitter, *This Is What Racism Sounds Like in the Banking Industry*, N.Y. TIMES, <https://www.nytimes.com/2019/12/11/business/jpmorgan-banking-racism.html?searchResultPosition=7> (Dec. 14, 2019).

402. Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 283 (2007).

403. Rosette et al., *supra* note 156, at 8.

404. Lincoln Quillian, Devah Pager, Ole Hexel & Arntfinn H. Midtboen, *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring Over Time*, 114 PROC. NAT'L ACAD. SCI., 10870, 10870 (2017).

405. Adam D. Galinsky, Erika V. Hall & Amy J. C. Cuddy, *Gendered Races: Implications for Interracial Marriage, Leadership Selection, and Athletic Participation*, 24 PSYCH. SCI. 498, 500 (2013); Hall et al., *supra* note 121, at 854.

406. Barbara Kilbourne, Paula England & Kurt Beron, *Effects of Individual, Occupational, and Industrial Characteristics on Earnings: Intersections of Race and Gender*, 72 SOC. FORCES 1149, 1159–61 (1994); Cecelia L. Ridgeway & Tamar Kricheli-Katz, *Intersecting Cultural Beliefs in Social Relations: Gender, Race, and Class Bind and Freedoms*, 27 GENDER & SOC'Y 294, 308 (2013).

407. Anita Jones Thomas, Karen McCurtis Witherspoon & Suzette L. Speight, *Toward the Development of the Stereotypic Roles for Black Women Scale*, 30 J. BLACK PSYCH. 426, 428 (2004).

408. *Id.* at 428–29.

struggle to move into higher-profile work.<sup>409</sup> The “Sapphire” stereotype, based on a character in a 1950s TV show, is a Black woman who is threatening, aggressive, loud, and argumentative.<sup>410</sup> A woman who triggers the “Sapphire” stereotype at work is seen as someone who is manipulative and not someone you can count on.<sup>411</sup> The “Jezebel” stereotype is a Black woman who is seductive and promiscuous.<sup>412</sup> A woman who triggers the “Jezebel” stereotype may be seen as having used her sexuality to get ahead at work, and will not be judged based on her competence or merit; this stereotype also opens the door to sexual harassment.<sup>413</sup> These stereotypes have a measurable impact: research participants who were shown stereotypical images of Black women showed more implicit racial prejudice when viewing a mock interview of a Black woman.<sup>414</sup>

Black women face another set of stereotypes associated with appearance in the workplace: simply wearing their hair in a natural hairstyle is enough to trigger negative competence stereotypes.<sup>415</sup> Black women with natural, Afrocentric hairstyles were rated as less professional than Black women with Eurocentric hairstyles.<sup>416</sup> Further research supports this finding: Black women with natural hairstyles were less likely to receive recommendations for job interviews than white women or Black women with straightened hair.<sup>417</sup>

Fewer studies have focused on the experiences of Latinx individuals in the workplace. Latinx individuals face a pervasive stereotype about laziness.<sup>418</sup> “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,” explained a woman science professor of Mexican heritage.<sup>419</sup> This means that Latinx individuals may have to put in more work than white individuals in order to be viewed as equally hardworking. Latinx men are stereotyped as “hot-blooded” and “prone to emotional outbursts,”<sup>420</sup> while women report being seen as “fiery.”<sup>421</sup> The

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409. Wendy Reynolds-Dobbs, Kecia M. Thomas & Matthew S. Harrison, *From Mammy to Superwoman: Images that Hinder Black Women’s Career Development*, 35 J. CAREER DEV. 129, 139–40 (2008).

410. Thomas et al., *supra* note 407, at 429.

411. BELL & NKOMO, *supra* note 398.

412. Thomas et al., *supra* note 407, at 429.

413. Reynolds-Dobbs et al., *supra* note 409, at 137.

414. Sonja M. Brown Givens & Jennifer L. Monahan, *Priming Mammies, Jezebels, and Other Controlling Images: An Examination of the Influence of Mediated Stereotypes on Perceptions of an African American Woman*, 7 MEDIA PSYCH. 87, 96–100 (2005).

415. Keith B. Maddox, *Perspectives on Racial Phenotypicity Bias*, 8 PERSONALITY & SOC. PSYCH. REV. 383, 390 (2004).

416. Opie & Phillips, *supra* note 333, at 1.

417. Christy Zhou Koval & Ashleigh Shelby Rosette, *The Natural Hair Bias in Job Recruitment*, SOC. PSYCH. & PERSONALITY SCI., Aug. 2020.

418. 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); 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).

419. Williams, *supra* note 164, at 194.

420. Rivera, *supra* note 224, at 240.

421. Williams, *supra* note 164, at 208.

“hot blooded” stereotype can open Latinx women up to sexual harassment.<sup>422</sup> Latinx workers also face the stereotype of forever being an immigrant and unable to speak English, which means they may face a harder time being seen as a good fit in the workplace.<sup>423</sup> Finally, Latinx individuals may be stereotyped as prone to violence—one Latinx woman neuroscientist remarked on a comment she got after raising her voice: “Oh, be careful, she’s Puerto Rican, and she may be carrying a knife in her purse.”<sup>424</sup>

One particularly pervasive stereotype that people of Asian descent face is the myth of the “Model Minority.”<sup>425</sup> This myth perpetuates the idea that people of Asian descent are uncommonly hardworking, competent, and economically successful.<sup>426</sup> Although this stereotype contains positive content, in practice it can have negative effects. The idea that people of Asian descent are harder working and more competent actually makes it more difficult for them to get ahead in the workplace because they are watched more closely, and potentially punished, for any signs that they are not living up to the myth.<sup>427</sup> At the same time, individuals who differ from the stereotype of the Model Minority may instead face heightened invisibility and isolation in the workplace, because they do not fit the mold for expected behavior.<sup>428</sup> Another important negative consequence of the Model Minority myth is that it has been used against Black and Latinx people in an attempt to discredit their experiences by pointing to a successful non-white group.<sup>429</sup>

People of Asian descent also face the “forever foreigner” stereotype: the idea that they are not true Americans.<sup>430</sup> One science professor noted that she often got compliments on her English, noting wryly, “I grew up in Pittsburgh, Pennsylvania . . . I should speak English surprisingly well.”<sup>431</sup> Note the

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422. *Id.*

423. Irene Browne & Joya Misra, *The Intersection of Gender and Race in the Labor Market*, 29 ANN. REV. SOCIO. 487, 504–05 (2003); Ediberto Román, *Who Exactly Is Living La Vida Loca: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37, 50–51 (2000); Segura, *supra* note 324, at 173.

424. Williams, *supra* note 164, at 194.

425. Myrtle P. Bell, David A. Harrison & Mary E. McLaughlin, *Asian-American Attitudes Toward Affirmative Action in Employment: Implications for the Model Minority Myth*, 33 J. APPLIED BEHAV. SCI. 356, 360 (1997); Grace Kao, *Asian Americans as Model Minorities? A Look at Their Academic Performance*, 103 AM. J. EDUC. 121, 122–23 (1995); STACEY J. LEE, UNRAVELING THE “MODEL MINORITY” STEREOTYPE: LISTENING TO ASIAN AMERICAN TRUTH (1996).

426. Bell et al., *supra* note 425; Kao, *supra* note 425; LEE, *supra* note 425.

427. Rosette et al., *supra* note 156, at 10; Williams, *supra* note 164, at 212–13.

428. Ming Che Tu, Shangyun Zhou, Stephanie N. Wong & Sumie Okazaki, *Realities of the American Dream: Vocational Experiences and Intersecting Invisibility of Low-Income Chinese Immigrant Laborers*, 113 J. VOCATIONAL BEHAV. 88, 98–100 (2019).

429. Paul Wong, Chienping Faith Lai, Richard Nagasawa & Tieming Lin, *Asian Americans as a Model Minority: Self-Perceptions and Perceptions by Other Racial Groups*, 41 SOCIO. PERSPS. 1, 3 (2017); Kat Chow, *‘Model Minority’ Myth Again Used As A Racial Wedge Between Asians And Blacks*, NPR: CODE SWITCH (Apr. 19, 2017, 8:32 AM), <https://www.npr.org/sections/codeswitch/2017/04/19/524571669/model-minority-myth-again-used-as-a-racial-wedge-between-asians-and-blacks>.

430. Mia Tuan, *Forever Foreigners or Honorary Whites? The Asian Ethnic Experience Today*, 78 SOC. FORCES 816, 817 (1999).

431. WILLIAMS ET AL., DOUBLE JEOPARDY?, *supra* note 100, at 47.

assumption she was not an American.<sup>432</sup> Sometimes this is explicit, as when people of Asian descent get asked, “where are you really from?” with the assumption being that they are perpetually outsiders.<sup>433</sup> These experiences can lead to a feeling of isolation and invisibility in the workplace.<sup>434</sup>

As has been noted, people of Asian descent are stereotyped as competent but not warm or sociable.<sup>435</sup> More specifically, these stereotypes include being quiet, nerdy, good at math, and lacking social skills.<sup>436</sup> These stereotypes mean that people of Asian descent are seen as having good technical skills, but not a good fit for leadership positions.<sup>437</sup> A 2015 analysis of five large companies in Silicon Valley found that only 1 in 285 women of Asian descent was an executive, compared to 1 in 87 white men.<sup>438</sup> This is well documented as a “Bamboo Ceiling” that exists for women of Asian descent: they can only advance so far in the workplace, and face challenges when trying to rise to the top positions.<sup>439</sup> Another issue for advancement involves the stereotype of Asian women as being very feminine: they may have a harder time getting masculine-type jobs, and may be forever stuck in lower positions.<sup>440</sup> In our Double Jeopardy Report, women of Asian descent who were in faculty positions were treated like “perennial lab assistants even as postdocs.”<sup>441</sup>

Women of Asian descent face two other stereotypes that impact the way they are perceived in the workplace. The “Lotus Blossom Baby” is a woman who is passive, demure, and sexualized.<sup>442</sup> The “Dragon Lady” is a woman who is assertive and seen as untrustworthy.<sup>443</sup> The former stereotype opens women of Asian descent to sexual harassment,<sup>444</sup> the latter to backlash.<sup>445</sup>

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432. Alisia G. T. T. Tran & Richard M. Lee, *You Speak English Well! Asian Americans' Reactions to an Exceptionalizing Stereotype*, 61 J. COUNSELING PSYCH. 484, 484–85 (2014).

433. Brian E. Armenta, Irene J. K. Park, Su Yeong Kim, Richard M. Lee, Stephanie T. Pituc, Kyoung-Rae Jung, José A. Soto & Seth J. Schwartz, *Where Are You From? A Validation of the Foreigner Objectification Scale and the Psychological Correlates of Foreigner Objectification Among Asian Americans and Latinos*, 19 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 131, 131–32 (2013).

434. SHIRLEY HUNE, *ASIAN PACIFIC AMERICAN WOMEN IN HIGHER EDUCATION: CLAIMING VISIBILITY AND VOICE* (1998); Caroline Sotello Viernes Turner, *Women of Color in Academe: Living With Multiple Marginality*, 73 J. HIGHER EDUC. 74, 80 (2002).

435. Fiske et al., *supra* note 149, at 880; Lin et al., *supra* note 155, at 38.

436. Ghavami & Peplau, *supra* note 240, at 120.

437. Lai & Babcock, *supra* note 156, at 312; Rosette et al., *supra* note 156, at 6.

438. BUCK GEE, DENISE PECK & JANET WONG, *HIDDEN IN PLAIN SIGHT: ASIAN AMERICAN LEADERS IN SILICON VALLEY* 14 (2015), [https://cdn.ymaws.com/www.ascendleadership.org/resource/resmgr/research/hiddeninplainsight\\_paper\\_042.pdf](https://cdn.ymaws.com/www.ascendleadership.org/resource/resmgr/research/hiddeninplainsight_paper_042.pdf).

439. JANE HYUN, *BREAKING THE BAMBOO CEILING: CAREER STRATEGIES FOR ASIANS* 5–6 (2005).

440. Hall et al., *supra* note 121, at 865.

441. Williams, *supra* note 164, at 215.

442. 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).

443. *Id.*

444. Williams, *supra* note 164, at 213.

445. *Id.* at 217.

## F. CONCLUSION

If Sturm's description of bias as subtle and ambiguous was true in 2001, this is no longer true today. The same patterns of bias have been documented repeatedly in the lab—and the studies of Williams and her teams have documented over and over again that they also occur in the workplace. Defense experts<sup>446</sup> and some courts<sup>447</sup> have worried that the decades of lab studies do not reflect what actually happens in today's workplace. WES data show that people report they do.<sup>448</sup>

## III. THE IMPLICIT BIAS CONSENSUS GIVES AN INACCURATE DESCRIPTION OF TITLE VII LAW

Another major element of the implicit bias consensus is that Title VII is ill-suited to address second generation workplace discrimination, a claim that has proved remarkably resilient despite detailed counterevidence dating back twenty years.<sup>449</sup> “Most scholars writing about this type of discrimination agree that the law is incapable of responding to all but intentional, conscious, and overt discrimination,” noted a 2003 article,<sup>450</sup> a contention oft-repeated.<sup>451</sup> That near-consensus began when Sturm concluded that implicit bias's “complexity resists definition and resolution through across-the-board, relatively specific commands and an after-the-fact enforcement mechanism.”<sup>452</sup> The consensus crystallized in the articles in the special issue of the *California Law Review* organized by Linda Krieger; in the contribution by Samuel R. Bagenstos, he concluded that “[u]nconscious bias, interacting with today's ‘boundaryless workplace,’ generates inequalities that our current antidiscrimination law is not

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446. Mitchell & Tetlock, *supra* note 13, at 1069.

447. See, e.g., *Jones v. Nat'l Council of Young Men's Christian Ass'ns of the United States*, 34 F. Supp. 3d 896, 900 (N.D. Ill. 2014) (holding that implicit bias expert testimony by Anthony Greenwald was “derived solely from laboratory testing that does not remotely approximate the conditions that apply in this case”).

448. Appendix C contains further data on how bias plays out in specific workplace processes including hiring and promotions.

449. Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1188 (2003); McGinley, *supra* note 1, at 491; Selmi, *Proving Intentional Discrimination*, *supra* note 1, at 283.

450. Derum & Engle, *supra* note 449, at 1188.

451. For a recent example, see Rich, *supra* note 5, at 231 (“The constitutional discriminatory purpose doctrine requires evidence of malice, or animus, a standard that is ill-suited to address ‘second generation discrimination’ that frequently results from unconscious stereotyping.” (footnote omitted)).

452. Sturm, *supra* note 2, at 469.

well equipped to solve.”<sup>453</sup> Katherine Bartlett, a year later, concluded that implicit bias is not readily reachable through “legal coercion.”<sup>454</sup>

Two basic arguments typically support the claim that Title VII is ill-suited to address twenty-first century discrimination. The first is that Title VII law is designed to address explicit, “first generation” discrimination. The second is that Title VII addresses only intentional discrimination, whereas most discrimination today is not intentional. This Part addresses both these arguments, then shows how five-patterns evidence fits well into long-established patterns of Title VII gender and race litigation—particularly if courts are honest about the implications of five-patterns data for the “same-actor” inference and the “personal animosity” defense.

#### A. THE FIRST GENERATION DISCRIMINATION/SECOND GENERATION PERIODIZATION IS INACCURATE, AS IS THE CLAIM THAT TITLE VII ADDRESSES ONLY FIRST GENERATION DISCRIMINATION

Sturm describes first generation discrimination as explicit discrimination based on race or sex.<sup>455</sup> One problem with this categorization is that an astonishing amount of discrimination today remains explicit discrimination proved through direct evidence, for example, comments in which employers or their representatives state that they are treating someone differently because of their race or sex.<sup>456</sup> Sturm acknowledged that explicit discrimination still exists, footnoting the insight to her discussions with plaintiffs’ employment lawyers.<sup>457</sup> But her influential thesis—that Title VII addresses only explicit discrimination—is unconvincing. In fact, Title VII from very early in its history responded to the fact that most employers eliminated policies that discriminated explicitly based on sex and race shortly after Title VII went into effect.

After the passage of Title VII in 1964,<sup>458</sup> some employers substituted neutral rules that were transparently designed to perpetuate racial discrimination. In response, the Supreme Court held in *Griggs v. Duke Power*

453. Samuel R. Bagenstos, *The Structural Turn and Limits of Antidiscrimination Law*, 94 Calif. L. Rev. 1, 3 (2004). Notably, some commentators have always disagreed. “If people are treated differently, and worse, because of their race or another protected trait, then the principle of antidiscrimination has been violated, even if the source of the differential treatment is implicit rather than unconscious bias,” noted Christine Jolls and Cass R. Sunstein in the same special issue of the *California Law Review*. Jolls & Sunstein, *supra* note 36, at 972; *see also* McGinley, *supra* note 1, at 446 (Title VII is capable of holding liable employers who discriminated unconsciously; Title VII began to fall in that direction shortly after enactment); Selmi, *Proving Intentional Discrimination*, *supra* note 1, at 283; Derum & Engle, *supra* note 449, at 1188.

454. Katherine Bartlett, *Making Good on Good Intentions*, 95 VA. L. REV. 1893, 1900 (2009). This continues to be repeated up to the current day. *See* Bornstein, *supra* note 5, at 964–65; Goltz et al., *supra* note 5, at 188; Rich, *supra* note 5, at 231.

455. Sturm, *supra* note 2, at 466.

456. *See, e.g.*, *Costa v. Desert Palace*, 299 F.3d 838, 845 (9th Cir. 2002) (explaining that a man must be paid more because “[h]e has a family to support”); *Taylor v. Amcor Flexibles, Inc.*, 669 F. Supp. 2d 501, 511 (D.N.J. 2009), *aff’d*, 507 F. App’x 231 (3d Cir. 2012) (discounting as “stray remarks” an African-American plaintiff’s supervisor’s comment, shortly after he was hired, “to the effect that Black men know how to post-up in the low post [in basketball], but do not know the medical packaging business”).

457. Sturm, *supra* note 2, at 468.

458. 42 U.S.C. § 2000d (2019).

that plaintiffs could prove discrimination under Title VII by proving the existence of a disproportionate impact on an individual based on race or sex that was not justified by business necessity.<sup>459</sup> Already, six years after the passage of Title VII, courts had begun to adapt the statute to address non-explicit race discrimination.

Even disparate treatment cases often involve non-explicit discrimination: in 1973, the Supreme Court explained in *McDonnell Douglas v. Green* how plaintiffs could prove employment discrimination through circumstantial evidence and the bulk of Title VII litigation has always involved circumstantial evidence.<sup>460</sup> To quote Michael Selmi, “legal doctrines of proof have been adjudicating subtle discrimination without reference to unconscious bias for more than forty years.”<sup>461</sup>

If there was ever any doubt that Title VII could reach non-explicit discrimination, that doubt was put to rest in the 1989 case of *Price Waterhouse v. Hopkins*. *Hopkins* involving a woman who was denied partnership in a major accounting firm because she did not conform to the other partners’ stereotypes about how women should behave.<sup>462</sup> “[I]n forbidding employers to discriminate against individuals because of their sex,” the Court held, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes . . . . As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched stereotype associated with their group.”<sup>463</sup> Stereotypes produce automatic associations that give rise to bias,<sup>464</sup> which is evidence of discrimination. That fits into Title VII just fine.

***The assertion that Title VII is not useful because it requires “intentional discrimination,” whereas second generation discrimination typically does not involve malicious intent, reflects a misunderstanding: “intentional discrimination” under Title VII is a term of art.***

Krieger and Sturm also argue that Title VII is ill-suited to address unconscious bias because Title VII disparate treatment cases require proof of intentional discrimination. “Discrimination—at least in the race and national origin contexts—is construed as resulting from hostile animus towards and accompanying negative beliefs about an individual because of his or her membership in a particular group,” Krieger asserted.<sup>465</sup> This mischaracterization of Title VII is oft-repeated, for example by Tristin Green in 2005, who said “intent to discriminate [is] frequently construed as conscious bias or animus.”<sup>466</sup> Krieger argues that the hostile animus requirement makes Title VII ill-suited to

459. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

460. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–07 (1973).

461. Selmi, *The Paradox of Implicit Bias*, *supra* note 1, at 198.

462. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231–32 (1988).

463. *Id.* at 251 (quoting *Sporgis v. United Air Lines Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

464. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5, 6 (1989).

465. Krieger, *supra* note 3, at 1177.

466. Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 655 (2005).

its intended purpose because “a broad class of discriminatory employment decisions results not from discriminatory motivation, but from a variety of unconscious and unintentional categorization-related judgment errors.”<sup>467</sup>

Krieger notes that most individual disparate treatment cases turn on whether or not a plaintiff can prove that the employer’s asserted “legitimate, nondiscriminatory reason” for the adverse employment action against the plaintiff was a pretext for discrimination.<sup>468</sup> To prove pretext, Krieger asserts, requires the court, “in essence, finding that the employer has lied to the plaintiff and the court. Within the pretext paradigm, it is simply not possible for an employment decision to be both motivated by the employer’s articulated reasons and tainted by intergroup bias; the trier of fact must decide between the two.”<sup>469</sup> Krieger decries pretext theory’s “rigid dichotomization of [the] ‘real reasons’ and ‘cover-ups’ for discrimination,”<sup>470</sup> contending that pretext requires the plaintiff to prove that the employer’s proffered legitimate business reason is a “sham.”<sup>471</sup>

While it is true that disparate treatment requires intentional discrimination, this does not mean that Title VII typically requires a situation where an employer has a self-conscious intent to discriminate against a protected employee, and has engaged in a cover-up to hide that nefarious intent. “Intent” is a term of art in Title VII law that means that race or gender has been taken into consideration by the decisionmaker, or that “the employee’s protected trait enter[ed] the causal chain.”<sup>472</sup> In the 1977 landmark case of *Teamsters v. United States*, the Supreme Court noted that, “[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.”<sup>473</sup> In practice today, discrimination typically is proved through differences in treatment, using comparator evidence, stereotyping evidence, or both: “intentional discrimination only requires proof of differential treatment, rather than proof of animus or illicit motive, and thus focuses primarily on questions of causation while devoting comparatively little attention to subjective mental states.”<sup>474</sup> Indeed, as used in discrimination law, “the concept of intent is only tangentially related to animus or illicit motive,” Selmi notes.<sup>475</sup> He continues: “In defining intentional discrimination, the question is not what the particular decisionmaker subjectively intended, but whether the record allows for an inference that an impermissible factor such as race served as the impetus for the

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467. Krieger, *supra* note 3, at 1239.

468. *Id.* at 1178.

469. *Id.* at 1178–79.

470. *Id.* at 1218.

471. *Id.* at 1178.

472. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodations, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1377 (2009).

473. Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

474. Selmi, *Proving Intentional Discrimination*, *supra* note 1, at 285; *see also* Bornstein, *supra* note 19, at 1064.

475. Selmi, *Proving Intentional Discrimination*, *supra* note 1, at 288.

challenged action.”<sup>476</sup> To quote Stephanie Bornstein, *McDonnell Douglas*’s “proof structure opens the door for a definition of intent that goes well beyond the decisionmaker’s conscious choice to act in a biased manner.”<sup>477</sup> “If, for example, a supervisor assumes incorrectly that a male employee is better suited for promotion than a female employee, the female employee may prove intentional discrimination even though the supervisor would say he did not intend to disadvantage the female candidate.”<sup>478</sup>

Moreover, in *Reeves v. Sanderson Plumbing Products, Inc.*,<sup>479</sup> a unanimous Supreme Court “made it clear that only under unusual circumstances will it tolerate grants of summary judgment [for the employer] where the plaintiff presents . . . evidence of a prima facie case and that the defendant’s explanation is pretextual,” noted Ann twenty years ago.<sup>480</sup> This means that Title VII plaintiffs before many (though not all) courts can win by proving that they were treated differently because of sex or race and that the employer has offered no persuasive alternative reason to explain the behavior. Blanket statements that Title VII requires that plaintiffs prove malicious intent,<sup>481</sup> or point to explicit bias,<sup>482</sup> or engage in a cover-up,<sup>483</sup> are best understood as a *cri de coeur* from plaintiff-friendly law professors, but such statements exaggerate the inadequacy of Title VII (which does not perhaps serve plaintiffs’ interests well).<sup>484</sup> Once we shift from talking about automatic associations to talking about the ways bias means that members of protected groups are treated differently from members of nonprotected groups, evidence of bias fits seamlessly into Title VII comment.

The Supreme Court’s most recent Title VII case further widens the scope of Title VII. *Bostock v. Clayton County* is best known for its landmark holding that Title VII covers discrimination based on LGBTQ+ status.<sup>485</sup> But it also forged important inroads for other Title VII plaintiffs in three different ways. *Bostock* once again made clear that “intent” for Title VII purposes involves

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476. *Id.* at 294.

477. Bornstein, *supra* note 19, at 1081.

478. *Id.*

479. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000).

480. McGinley, *supra* note 1, at 462.

481. Bornstein, *supra* note 19, at 1083; Green, *supra* note 466, at 655; Selmi, *Proving Intentional Discrimination*, *supra* note 1, at 287; Zatz, *supra* note 472, at 1432.

482. Sturm, *supra* note 2, at 554.

483. Krieger, *supra* note 3, at 1167.

484. Case law provides important resources for plaintiffs’ lawyers who need to respond to defense arguments that intentional discrimination does not include unconscious bias. *See, e.g.*, *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58–59 (1st Cir. 1999) (“The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus. . . . The ultimate question is whether the employee has been treated disparately ‘because of race.’ This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias.”); *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1235–36 (9th Cir. 1984) (holding that disparate treatment occurs where decisionmaker applies subjective policy in racially discriminatory and subtle manner even absent malice); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1273 (10th Cir. 1988) (“One familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts.” (quoting *Sweeney v. Bd. of Trs. of Keene State Coll.*, 604 F.2d 106, 114 (1st Cir. 1979))).

485. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

differential treatment due to sex, not intent in the vernacular sense of self-aware motivation: “conversational conventions do not control Title VII’s legal analysis.”<sup>486</sup> The Court explained that the employer in a prior case “may have perceived itself as discriminating based on motherhood, not sex, given that its hiring policies as a whole *favored* women. But . . . the Court set all this aside as irrelevant.”<sup>487</sup> If an employer treats someone differently due (in part, as we will see below) to their sex, it doesn’t matter what the employer’s self-aware motivation was. “[I]t is irrelevant what an employer might call its discriminatory practice,”<sup>488</sup> noted the Court. Title VII before *Bostock* did not require a plaintiff to prove that an employer had conscious bias or animus—but even if it did, Title VII certainly does not require that now.

*Bostock* also loosened Title VII’s causation requirement in ways that have dramatic implications for Title VII plaintiffs. In the past, Title VII cases have sometimes foundered when courts required plaintiffs to prove that their treatment reflected that their membership in a protected class was the sole reason for their mistreatment.<sup>489</sup> The Court rejected this argument explicitly, holding that but-for causation does not require a single cause. “At bottom, the employers’ argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow . . . . [T]hat suggestion is at odds with everything we know about the statute.”<sup>490</sup> The Court noted that

the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision . . . . An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision.<sup>491</sup>

The implication is that cases that used to be relegated to Title VII’s mixed motive theory—unbeloved of plaintiffs’ employment lawyers because that theory sharply limits damages<sup>492</sup>—now can be litigated as pretext cases (which allow for damages).<sup>493</sup> Thus, cases plaintiffs’ lawyers could not afford to bring before *Bostock* become more attractive, given that the plaintiffs’ bar typically is paid on a contingency basis (and so needs to bring cases that give rise to damage awards). In addition, as already mentioned and discussed further below,<sup>494</sup> this aspect of *Bostock* may well help intersectional plaintiffs.

Finally, *Bostock*’s rejection of the common defense argument that someone who harasses both men and women is not harassing “because of sex” also has

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486. *Id.* at 1745.

487. *Id.* at 1746.

488. *Id.* at 1744.

489. Alan Kabat, *High Court’s Title VII Ruling Reaches Beyond LGBTQ Rights*, LAW360 (June 17, 2020), <https://www.law360.com/articles/1283674/high-court-s-title-vii-ruling-reaches-beyond-lgbtq-rights>.

490. *Bostock*, 140 S. Ct. at 1748.

491. *Id.* at 1739, 1741.

492. The Civil Rights Act of 1991, 42 U.S.C. § 1981a (1991).

493. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1964).

494. See *infra* notes 818–829 and accompanying text.

implications for employment law beyond sexual harassment, notably for cases involving sex discrimination against fathers.<sup>495</sup> The Court’s language suggests a new understanding that someone who discriminates against both men and women may nonetheless be discriminating based on sex, because the employer may be penalizing both men and women for failing to conform to the employer’s preferred templates for masculinity and femininity. This is discrimination based on sex, said the Court: “an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability.”<sup>496</sup> This passage should help the lower courts understand that when an employer discriminates against both men and women due to caregiving responsibilities, the employer is discriminating based on sex—something lower courts have had a hard time wrapping their heads around.<sup>497</sup>

B. ONCE THE FOCUS SHIFTS FROM AUTOMATIC ASSOCIATIONS TO THE FIVE PATTERNS OF WORKPLACE BIAS, TITLE VII DOCTRINE READILY ACCOMMODATES EVIDENCE OF MODERN FORMS OF GENDER BIAS

Title VII readily accommodates evidence of gender bias once the focus shifts from automatic associations to documented patterns of workplace bias. Prove-It-Again bias provides the most obvious example. It requires a comparison across groups, which makes it a natural for the kind of “comparator[] evidence” that a similarly situated member of a non-protected group was treated differently than the plaintiff.<sup>498</sup> What the five-patterns model adds to Title VII litigation is a rigorous, evidence-based protocol for identifying all the evidence that can add up to protected groups being treated differently because of their race or sex (as set forth in Appendix A). This is an important point that contradicts the common assumption that bias evidence is only relevant as stereotyping evidence under a *Price Waterhouse* theory. Tightrope bias also fits as stereotyping evidence, and has since the Supreme Court decided *Price Waterhouse v. Hopkins* in 1989, but it, too, gives rise to comparisons, as when women or people of color are faulted for anger when white men displaying similar anger are seen as admirably authoritative.<sup>499</sup> An extremely important and often overlooked aspect of *Price Waterhouse* is that, although Ann Hopkins actually did introduce expert testimony from the prominent social psychologist Susan Fiske, the Court held that expert testimony was not necessary. Said the Court:

Indeed, we are tempted to say that Dr. Fiske’s expert testimony was merely icing on Hopkins’ cake. It takes no special training to discern sex stereotyping in a description of an aggressive female employees as requiring “a course at charm school[,]” [n]or . . . does it require expertise in psychology to know that, if an employee’s flawed “interpersonal skills” can be corrected by a soft-

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495. *Bostock*, 140 S. Ct. at 1741, 1752.

496. *Id.* at 1742.

497. *Ayanna v. Dechert*, 914 F. Supp. 2d 51, 57 (D. Mass. 2012).

498. LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 8.04 (2019).

499. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.<sup>500</sup>

Given how expensive experts are, this was welcome language for plaintiffs. Law professors' assumption that the only use of evidence of implicit bias and stereotyping is through expert witness testimony may reflect a lack of understanding of the economics of the bar representing individual employment discrimination plaintiffs, who typically cannot afford experts.

Not surprisingly, courts have applied *Price Waterhouse* to rule in favor of plaintiffs alleging backlash for assertive ("agentive") behavior. In *Margolis v. Tektronix*, the Ninth Circuit reversed a summary judgment for the employer in a case in which the plaintiff alleged that gender stereotyping affected a decision to lay her off.<sup>501</sup> She alleged that her supervisor "would rarely hear women in staff meetings," gave her inferior work assignments, and told her that others found her "pushy and aggressive," which she took to mean "pushy and aggressive for a woman."<sup>502</sup> The court accepted the stereotyping argument.

While her supervisor's comments might not have been as blatant as the sex stereotypes in [*Hopkins*], the subjective nature of the skills matrix—prepared specifically for the workforce reduction—left ample room for such stereotypes to affect [the plaintiff's] scores, especially in areas such as "leadership" and "teamwork," whereas aggressiveness by a female might be impermissibly penalized.<sup>503</sup>

In *Casella v. MBNA*, the District Court for the District of Maine denied summary judgment for the employer in a case in which the plaintiff was not hired for a customer relationship management program on the grounds that she needed to be "more motherly, soft, and kind, rather than aggressive, strong, and arrogant."<sup>504</sup> When she asked why she was not selected, one of the decision-makers "told her that she was 'too cocky,' 'overly arrogant,' and that she should not be 'so aggressive' and 'strong' and that she reminded him of himself."<sup>505</sup> Another decision-maker told her that she "needed to become more softer, more motherly; [and] that if [she] was a man, it was acceptable, it's not acceptable out of a woman."<sup>506</sup> A third person (not a decisionmaker) helpfully gave her the advice that "women are actually looked at as mothers, that they need to be a little softer, a little kinder . . . more motherly" and suggested that she change her personality.<sup>507</sup>

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500. *Id.* at 256.

501. *Margolis v. Tektronix, Inc.*, 44 F. App'x 138, 141–42 (9th Cir. 2002).

502. *Id.* at 141.

503. *Id.*

504. *Casella v. MBNA Mktg. Sys.*, No. CIV.8-176-B-W, 2009 WL 1621411, at \*1 (D. Me. June 9, 2009).

505. *Id.* at \*14 n.24.

506. *Id.*

507. *Id.*

*Collins v. Cohen Pontani Lieberman & Pavane* combined comparator evidence with stereotyping evidence and a retaliation claim.<sup>508</sup> After two years at her law firm, the then-managing partner Mr. Cohen told the plaintiff “that she would never become a partner at the firm because she made the partners ‘uncomfortable,’ and because the partners prided themselves on being ‘collegial’ and like a ‘family.’”<sup>509</sup> The defendant’s managing partner, with whom she worked closely, told the plaintiff “that the other partners thought she was ‘difficult’ and that she had not expressed enough gratitude for a raise.”<sup>510</sup> (We have often heard from women and people of color that they are expected to be grateful for things that white men aren’t expected to be grateful for.) When the plaintiff asked the managing partner for help in dealing with a paralegal she found uncooperative (a classic Tug of War problem), “he told her that she was not ‘sweet’ enough and needed to use more ‘sugar.’”<sup>511</sup> The comparator evidence reflected a gendered allocation of the office housework and glamour work; the plaintiff alleged that women litigators were “relegated to non-partnership track support roles,” and that this had affected her ability to get good work.<sup>512</sup> To quote the court, “[a] reasonable jury could find that Pavane’s statement indicates that (1) he holds stereotypes that women should be ‘sweet’ and non-aggressive, and (2) that Parvane believed that Plaintiff did not fit this stereotype. Pavane’s comment could therefore support a jury finding that [the firm’s] failure to provide Plaintiff with sufficient work was motivated by Plaintiff’s failure to fulfill sex stereotypes of ‘sweet[ness],’ and therefore constituted discrimination,” citing *Price Waterhouse*.<sup>513</sup>

In *Kahn v. Fairfield University*, the plaintiff sued when a man was appointed to a dean position she had held on an acting basis.<sup>514</sup> A professor who was a member of the search committee advocated reconsideration of her candidacy, arguing that sex discrimination had been involved.<sup>515</sup> While some committee members “made conclusory statements that [the plaintiff] was ‘arrogant’ or ‘difficult to work with,’ they had difficulty providing a basis for such conclusions,” observed the court.<sup>516</sup> Once again the plaintiff was faulted by staff that reported to her, who complained about her “overbearing work style,”<sup>517</sup> reflecting the Tug of War pattern of conflict between women professionals and support personnel. In this case, bias was not the whole story: the plaintiff required staff to work overtime without extra compensation.<sup>518</sup> But bias may

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508. *Collins v. Cohen Pontani Lieberman & Pavane*, No. 04 CV 8983 KMW MHD, 2008 WL 2971668, at \*10 n.24 (S.D.N.Y. July 31, 2008).

509. *Id.* at \*2.

510. *Id.*

511. *Id.* at \*9.

512. *Id.* at \*16.

513. *Id.* at \*9.

514. *Kahn v. Fairfield Univ.*, 357 F. Supp. 2d 496, 498–99 (D. Conn. 2005).

515. *Id.* at 499.

516. *Id.* at 506.

517. *Id.* at 505.

518. *Id.*

have played a role, given that the Dean of the College of Arts and Sciences rated her outstanding, including on “[m]aintains open communication and sensitivity to staff interaction.”<sup>519</sup> He also reported complaints from people with whom she worked on successful grant applications, who said that they “felt condescended to or lectured to . . . [and] felt in some way belittled.”<sup>520</sup> This is ambiguous: did they just not like being told what to do by a woman? The court felt this was enough to defeat the employer’s summary judgment.<sup>521</sup>

While Tightrope evidence is most evident in backlash claims, courts and lawyers also have long tracked whether women or people of color have less access to the desirable work assignments at work.<sup>522</sup> Plaintiffs’ lawyers need to continue educating courts that women of all races often face higher loads of office housework.

Maternal Wall bias is also readily litigable under Title VII. *Bostock* rewrote legal history in a way that’s great for plaintiffs, asserting that discrimination against mothers has been illegal under Title VII from the start, or at least from 1971, when the Court decided *Phillips v. Martin Marietta*.<sup>523</sup> This is not the way that federal courts were interpreting Title VII in the late 1990s. In *Piantanida v. Wyman Ctr. Inc.*, the Eighth Circuit in 1997 held that discrimination against mothers was not actionable because it was discrimination based on parenthood—a gender neutral category not covered by Title VII.<sup>524</sup> In the charming case of *Troupe v. May Dept. Stores Co.*, Judge Richard Posner gave summary judgment for the employer on the grounds that the plaintiff had not come forward with evidence of a pregnant Mr. Troupe, one of a series of cases in which mothers’ cases were dismissed for lack of comparator evidence.<sup>525</sup>

In response, the area of “family responsibilities discrimination” law was purposely designed by Williams and Cynthia Thomas Calvert around a *Price Waterhouse* model, with the goal of presenting stereotyping evidence as common sense, without the need for expensive expert witnesses. The 2004 landmark case of *Back v. Hastings-on-Hudson*<sup>526</sup> adopted this approach (citing a law review article co-authored by Williams<sup>527</sup>), arguing that “it takes no special training to discern stereotyping in the view that a woman cannot ‘be a good

519. *Id.*

520. *Id.*

521. *Id.* at 506–07.

522. *See, e.g.*, *EEOC v. Schott N. Am., Inc.*, No. 06CV1246, 2009 WL 310897, at \*2–3 (M.D. Pa. Feb. 5, 2009).

523. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737, 1743 (2020).

524. *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (1997).

525. *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 738 (1994). For a full discussion, see Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 105–06 (2003).

526. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004) (“Back does not allege a violation of Title VII, nor does she allege that the defendants violated her constitutional rights to have and care for children. We therefore consider only whether she has alleged facts that can support a finding of gender discrimination under the Equal Protection Clause. To make out such a claim, the plaintiff must prove that she suffered purposeful or intentional discrimination on the basis of gender.” (footnote omitted)).

527. *See Williams & Segal, supra* note 525, at 152 & n.506.

mother’ and have a job that requires long hours, or in the statement that a mother who received tenure ‘would not show the same level of commitment [she] had shown because [she] had little ones at home’ . . . . These are not the kind of ‘innocuous words’ that we have previously held to be insufficient, as a matter of law, to provide evidence of discriminatory intent.”<sup>528</sup> The *Back* court rejected the employer’s argument that Back should lose because she had not shown evidence of a “similarly situated” man<sup>529</sup>—as is often the case in sex-segregated jobs, there was no man in sight. The stereotyping approach was adopted in the Equal Employment Opportunity Commission’s *2007 Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, which embraced the stereotyping theory and stated explicitly that comparator evidence could be helpful but was not necessary in a caregiving discrimination case.<sup>530</sup> By 2012, perhaps due in part to Calvert’s work in providing technical backup to attorneys across the country on caregiver discrimination cases through the WorkLife Law Attorney Network,<sup>531</sup> caregiver discrimination was one of the fastest growing areas of employment law and plaintiffs were winning three-fourths of cases filed in federal courts.<sup>532</sup>

Class actions that combine evidence of Maternal Wall bias, sexual harassment, and glass ceiling bias (for example, Prove-It-Again and Tightrope) may provide a model for class actions going forward. Michael Selmi has argued that the first large Maternal Wall class action, *Velez v. Novartis*,<sup>533</sup> represents the path forward from *Dukes v. Wal-Mart*.<sup>534</sup> “What was significant about the *Novartis* litigation is that the plaintiffs were able to weave together a coherent narrative about corporate culture through a collection of individual stories with similar themes that demonstrated how sexist attitudes had reached the top echelon of management and thus could be seen as creating a companywide policy. The narrative was then bolstered by the statistical presentation, rather than having the statistical presentation do all the work.”<sup>535</sup> In effect, *Novartis* returned to the pre-implicit bias approach to class actions, where statistics were combined with anecdotal evidence to present a strong story line. Law professors tend to remember the language in the landmark case of *Teamsters v. United*

528. *Back*, 365 F.3d at 120.

529. *Id.* at 121.

530. See U.S. EQUAL EMP. OPPORTUNITY COMM’N, NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), <https://www.eeoc.gov/policy/docs/caregiving.html>.

531. Plaintiffs’ employment lawyers who wish to inquire about joining the WorkLife Law Attorney Network should consult the WorkLife Law webpage. *Attorney-Network Application*, WORKLIFE LAW, <https://worklifelaw.org/projects/attorney-network-application/> (last visited Nov. 23, 2020).

532. CYNTHIA THOMAS CALVERT, WORKLIFE LAW, CAREGIVERS IN THE WORKPLACE: FAMILY RESPONSIBILITIES DISCRIMINATION LITIGATION UPDATE 24 (2016), <https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf>. “Looking only at FRD trials in federal court, the win rate for plaintiffs is 75%.” *Id.* Win rate was defined as defeating employer’s summary judgment as well as winning at trial. *Id.* at 21 n.47.

533. See generally *Valez v. Novartis Pharmaceuticals Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007).

534. Selmi, *supra* note 28, at 505 n.114.

535. *Id.* at 505.

*States*<sup>536</sup>—highlighting that cases can be made with statistical evidence alone—but forget that the plaintiffs in *Teamsters* provided testimony of *forty* instances of discrimination.<sup>537</sup> Statistical evidence makes it *possible* for a judge to find for the plaintiffs; anecdotal evidence will typically be needed to make the judge *want* to find for them.

The law firm of Sanford Heisler has turned this approach into a business plan, filing lawsuit after gender discrimination lawsuit combining evidence of discrimination against women because they are mothers with evidence of discrimination against women because they are women (typically, glass ceiling bias and sexual harassment evidence). To cite just one example, in *Barrett v. Forest Labs*, settled in 2015, the firm represented a class of current or former female employees.<sup>538</sup> The case involved pay discrimination (pointing to the higher pay of comparator men) as well as promotion discrimination, focusing on how men were promoted with lower metrics, how women often saw their ratings fall after they returned from maternity leave, and how women were placed on probation in contexts where men were not.<sup>539</sup> For example, one woman said she was placed on probation even though other team members had similar performance numbers, and that a male team member who had committed “a serious infraction” was not disciplined, but instead told by his manager, “Don’t worry, I have your back.”<sup>540</sup> This is classic leniency bias, presented as comparator (not stereotyping) evidence.

Plaintiffs also alleged sexual harassment of a singularly coarse variety. One woman’s manager mouthed, “[y]ou need to fuck her” to a male colleague.<sup>541</sup> Another woman alleged that several of her clients made sexually explicit comments and, on one occasion, one “leaned into [her], pulled her breast out from her shirt, and attempted to lick it.”<sup>542</sup> When she reported these incidents to her manager he reminded her of how important it was to make a sale, and insisted that he did not wish to know about clients’ indiscretions that he would be obligated to report to management, because they would lose sales.<sup>543</sup> A third woman was told she should “‘fuck’ a doctor.”<sup>544</sup> After another woman reported sexual harassment by a colleague, she was ordered to work even more closely with her harasser going forward.<sup>545</sup>

The plaintiffs also alleged pregnancy discrimination, pointing to both men and non-pregnant women as comparators and to sharp plummets in performance ratings after women became pregnant, returned from maternity leave, or

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536. Int’l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

537. *Id.* at 338.

538. *Barrett v. Forest Labs., Inc.*, 39 F. Supp. 3d 407, 417 (S.D.N.Y. 2014).

539. Second Amended Class Action Complaint at 95, *Barrett v. Forest Labs., Inc.*, No. 1:12-CV-05224-RA (S.D.N.Y. Mar. 20, 2013).

540. *Barrett*, 39 F. Supp. 3d at 418.

541. *Id.* at 419.

542. *Id.* at 423.

543. *Id.*

544. *Id.*

545. *Id.* at 424.

requested job sharing.<sup>546</sup> One manager said “he was not going to hire women anymore because they all get pregnant and go on maternity leave”; another said, “everybody who works for me gets pregnant.”<sup>547</sup> Another woman’s manager commented, after she inquired about job sharing, “[m]aybe this job isn’t for you if you’re not committed,” gave her a low performance rating, twice extended her probation, and set unrealistic sales goals and assigned her office housework (“administrative tasks which he did not assign to any other of his direct reports.”)<sup>548</sup> Another woman’s work was hyper-scrutinized after she unsuccessfully requested a job sharing position, and was told she “had no place at Forest.”<sup>549</sup> After she inquired of HR, her manager made cracks to the effect that she should just copy HR on everything going forward. In fact, the company repeatedly ignored a wide variety of complaints, which was duly noted by the court.

In denying the employer’s motion to dismiss, the court held that the plaintiffs, despite their failure to introduce any statistical evidence whatsoever, had plausibly alleged both pattern-or-practice and individual suits with respect to pay discrimination and a pattern-or-practice claim with respect to pay and promotion discrimination.<sup>550</sup>

Stereotyping theory has commonly been understood to be limited to “loose lips”:<sup>551</sup> statements that reflect stereotyping. Prove-It-Again evidence need not include such statements. Indeed, in the context of Maternal Wall litigation, some courts have allowed plaintiffs to proceed on a stereotyping theory even without untoward remarks. In *EEOC v. Bob Evans Farms*, a server was a part-time employee with no set guarantee of number of hours.<sup>552</sup> The employer used an automatic scheduling system to create employee schedules and hours. The employee, who was pregnant with her second child, testified that she was able to work and, in a conversation with her supervisor, she stated she wanted to work until her delivery even though he stated that her delivery was “imminent” and “could happen any day.”<sup>553</sup> He removed her immediately from the automatic scheduling system and set her availability to “zero.”<sup>554</sup> The court awarded summary judgment to the plaintiff, on the grounds that there was no genuine issue of material fact with respect to pregnancy discrimination.<sup>555</sup> Despite the lack of explicit statements on the part of the employer, the court held that this was a direct evidence case.<sup>556</sup> The court highlighted that the supervisor’s actions

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546. Second Amended Class Action Complaint at 95, *Barrett v. Forest Labs., Inc.*, No. 1:12-CV-05224-RA (S.D.N.Y. Mar. 20, 2013).

547. *Barrett*, 39 F. Supp. 3d at 447, 456.

548. Second Amended Class Action Complaint at 64–65, *Barrett v. Forest Labs., Inc.*, No. 1:12-CV-05224-RA (S.D.N.Y. Mar. 20, 2013).

549. *Barrett*, 39 F. Supp. 3d at 420.

550. *Id.* at 417.

551. Williams & Segal, *supra* note 525, at 107.

552. *EEOC v. Bob Evans Farms*, 275 F. Supp. 3d 635, 640 (W.D. Pa. 2017).

553. *Id.* at 641.

554. *Id.* at 642.

555. *Id.* at 670.

556. *Id.*

in removing the plaintiff from automatic scheduling was because she was pregnant and his belief that she needed leave because of childbirth.<sup>557</sup> The court also said that expecting the plaintiff to call in to obtain work in order to demonstrate that she was able to work despite her pregnancy was an adverse employment action.<sup>558</sup>

In short, Title VII (while far from perfect) is not ill-suited to accommodate the types of gender bias evidence that form the basis of modern Title VII claims.

C. ONCE THE FOCUS SHIFTS FROM AUTOMATIC ASSOCIATIONS TO THE FIVE PATTERNS OF WORKPLACE BIAS, TITLE VII DOCTRINE READILY ACCOMMODATES EVIDENCE OF MODERN FORMS OF RACIAL BIAS

Prove-It-Again bias is triggered by race as well as gender; again, it fits readily into the classic Title VII focus on comparators. As in the gender context, comparative evidence is relevant not only for identifying comparators but as evidence of Prove-It-Again stereotyping. Although *Price Waterhouse's* stereotyping approach to proving a Title VII claim originated in the context of gender, some courts have applied it in race discrimination cases, notably in the much-discussed 1998 First Circuit case, *Thomas v. Eastman Kodak*.<sup>559</sup> The plaintiff was the only African-American woman in her department whose problems began when she was assigned to a new supervisor.<sup>560</sup> She had worked for ten years as a customer support representative, with managers who reported that “they were never dissatisfied with her performance, that they were ‘delighted’ with Thomas, and that her work was excellent and ‘far superior’ to that of some of [her colleagues].”<sup>561</sup> She received awards and bonuses, but all that ended when Claire Flannery took over as her supervisor.<sup>562</sup>

Flannery treated Thomas with the kind of disrespect often reported by Black women professionals.<sup>563</sup> An example: her new supervisor accompanied Thomas to a customer training session in order to observe Thomas’s work, but instead the supervisor took the session over and conducted the entire training herself.<sup>564</sup> Another time, Flannery told Thomas the incorrect time for a training session and refused to take responsibility for doing so, leaving the customer angry with the plaintiff.<sup>565</sup> “On a third occasion, Flannery became quite angry and attempted physically to block Thomas leaving a [departmental] meeting which had been scheduled at the same time is an important training session for one of Thomas’s customers.”<sup>566</sup> Thomas also encountered an office-housework/glamour work problem: Flannery failed to give her the same type of

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557. *Id.* at 657.

558. *Id.*

559. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999).

560. *Id.* at 64.

561. *Id.* at 43.

562. *Id.* at 43, 45.

563. *See supra* note 412 and accompanying text.

564. *Thomas*, 183 F.3d at 45.

565. *Id.*

566. *Id.*

developmental opportunities and failed to give her the same time to develop her presentations as white colleagues received (thereby subverting Thomas's success on glamour-work assignments).<sup>567</sup> Thomas also presented evidence of Prove-It-Again bias: Flannery denied Thomas the opportunity to apply for sales jobs and discouraged her from applying for a management position on the grounds that Thomas had not completed her Master's degree, although none of the other managers applying for that position had even a bachelor's.<sup>568</sup> The coup de grace was when Flannery gave Thomas "inaccurately low scores on her annual performance appraisals" that caused her overall rating to drop from a six in 1989, to a three in 1990—which Thomas refused to sign.<sup>569</sup> Thomas was ultimately laid off due to her low performance ratings.

The employer made much of the fact that Thomas had no evidence explicitly tying the treatment of Thomas to race.<sup>570</sup> Yet, the First Circuit cited *Price Waterhouse* and noted that, "[s]tereotypes or cognitive biases based on race are as incompatible with Title VII's mandate as stereotypes based on age or sex; here too, 'the entire spectrum of disparate treatment' is prohibited."<sup>571</sup> Acknowledging that Thomas's case involved "a more subtle type of disparate treatment" than cases involving direct evidence, the issue was whether "an employer evaluates employees of one race less favorably than employees of another race who have performed equivalently, and if race, rather than some other factor, is the basis for the difference in evaluations, then the disfavored employee [has] been subjected to" race discrimination.<sup>572</sup> In reversing the District Court's grant of summary judgment for the employer, the court noted that Flannery treated Thomas differently than her coworkers.<sup>573</sup> The court noted, in useful language, that it was unimportant "whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."<sup>574</sup>

In a third case, robust stereotyping evidence unfortunately was ignored by the court. In *Twymon v. Wells Fargo*, the plaintiff not only had comparator evidence that objective rules were applied more rigorously to her than to white employees; she also reported Tightrope bias—that she was expected to behave in deferential, rather than dominant, ways because she was Black.<sup>575</sup> She said she was consistently directed "to be accommodating and nice," while her white colleagues were allowed to behave badly.<sup>576</sup> Phil Hall, the Director of Employee Relations told her that "intelligence and outspokenness in black employees is not welcomed" and that "qualities that would make a Caucasian a golden child,

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567. *Id.*

568. *Id.*

569. *Id.* at 45–46.

570. *Id.* at 47.

571. *Id.* at 59.

572. *Id.* at 58.

573. *Id.* at 63.

574. *Id.* at 58.

575. *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 936 (8th Cir. 2006).

576. *Id.* at 931.

being aggressive and intelligent and outspoken and a go-getter, would do exactly the reverse to a person of color.”<sup>577</sup> Twymon said that Hall advised her to develop a deferential persona as a “good black” who “would be accepted by the Caucasians at Wells Fargo.”<sup>578</sup> She responded by asking if she should act like an Uncle Tom, to which Hall responded in the affirmative—a classic Tug of War dynamic.<sup>579</sup> Someone in human resources told her she was not “[m]idwest nice,” and she received comments on her personality on her performance appraisal from the Senior Vice President of Human Resources, who “admitted she did not include such comments on white employees’ evaluations.”<sup>580</sup> Wells Fargo alleged a violation of computer policy as the legitimate nondiscriminatory reason Twymon lost her job.<sup>581</sup> The Eighth Circuit unfortunately wrote off the stereotyping evidence as “stray comments” and affirmed the trial court’s summary judgment in favor of the employer.<sup>582</sup>

In a 2010 case, the plaintiff fared better. In *Kimble v. Wisconsin Department of Workforce Development*, the Eastern District of Wisconsin did an outstanding job of identifying patterns of bias.<sup>583</sup> The court noted that the plaintiff’s supervisor viewed him “veiled with images of incompetency.”<sup>584</sup> The supervisor hyper-scrutinized the plaintiff’s spelling and grammar and did not seem focused on the fact that, as the section chief at the Milwaukee office of the Civil Rights Bureau, his chief job was to effectively manage his office and ensure good productivity and morale of his office, both of which he did well (as a supervisor acknowledged).<sup>585</sup> This all is part of Prove-It-Again bias, as was the supervisor’s largely unsubstantiated criticism of the plaintiff’s writing. The court also noted two instances of the stolen idea, where the plaintiff’s ideas were ignored until someone else repeated them, that the plaintiff’s supervisor blamed the plaintiff for faults she overlooked in others, and attributed a mistake someone else had made to him.<sup>586</sup> This court drew from the literature on implicit bias and took these Prove-It-Again patterns seriously.

Stereotyping theory has been severely underutilized in race discrimination cases: a 2016 study found only fifty-eight cases that had ever referenced race or racial stereotypes.<sup>587</sup> Stereotyping theory may hold the potential to help turn around a troubling fact: a careful empirical study in 2006 by Wendy Parker found that federal employment race discrimination cases were less likely to settle and that defendants were more likely to win a pretrial judgment in race

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577. *Id.*

578. *Id.*

579. *Id.*

580. *Id.*

581. *Id.* at 935.

582. *Id.* at 934.

583. *Kimble v. Wis. Dep’t of Workforce Dev.*, 690 F. Supp. 2d 765, 771 (E.D. Wis. 2010).

584. *Id.* at 776.

585. *Id.* at 777–78.

586. *Id.*

587. Bornstein, *supra* note 5, at 964 n.249.

than in gender discrimination cases.<sup>588</sup> Race discrimination cases also were less likely to settle than employment discrimination cases in general.<sup>589</sup> These findings are particularly sobering given that a 2017 meta-analysis of field experiments found that there has been no decrease in racial discrimination for Black Americans since 1989.<sup>590</sup> White people still receive more than a third more job callbacks than Black people do, even accounting for education and other relevant factors.<sup>591</sup>

In short, while some courts have proved less receptive than they should be to evidence of racial stereotyping and bias, the types of evidence typically available in race cases fit readily into Title VII.

#### D. COURTS SHOULD CONSIDER THE IMPLICATIONS OF THE FIVE-PATTERNS MODEL FOR THE SAME-ACTOR AND PERSONAL ANIMOSITY DEFENSES

While Title VII is up to the task of accommodating workplace bias, courts have definitely taken some wrong turns. Other commentators<sup>592</sup> have been aptly critical in the way some courts misuse the “stray remarks” dicta from *Price Waterhouse*<sup>593</sup> and discount evidence of discrimination on the grounds that the employer honestly believed the reason given for the challenged employment action (even if the reason is ultimately found to be foolish or factually baseless).<sup>594</sup> Here we will focus on the “same-actor inference,” which reflects the belief that someone who hired the plaintiff would not later fire them, and the “personal animosity” defense, in which courts have discounted evidence of bias on the grounds that the plaintiff’s troubles reflected personal dislike, not discrimination.

*Same-actor inference.* The “same-actor inference” stems from the Fourth Circuit case of *Proud v. Stone*.<sup>595</sup> *Proud* involved the hiring and subsequent firing of an accountant within a four-and-a-half month period by the same supervisor.<sup>596</sup> The *Proud* court ignored the obviously relevant evidence of

588. Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 895, 932 (2006).

589. *Id.* at 932.

590. Janelle Boule, *The Racism Right Before Our Eyes*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/opinion/racism-housing-jobs.html> (citing Quillian et al., *supra* note 404).

591. *Id.*

592. SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW 70 (2017); Krieger, *supra* note 3, at 1174; Laina Rose Reinsmith, *Proving an Employer’s Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine after Reeves v. Sanders Plumbing Products*, 55 VAND. L. REV. 219, 247 (2002); Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination*, 77 MO. L. REV. 149, 149 (2012). See, e.g., Taylor v. Amcor Flexibles, Inc., 669 F. Supp. 2d 501, 511 (D.N.J. 2009), *aff’d*, 507 F. App’x 231 (3d Cir. 2012) (discounting as “stray remarks” an African-American plaintiff’s supervisor comment, shortly after he was hired, “to the effect that Black men know how to post-up in the low post [in basketball], but do not know the medical packaging business”).

593. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989).

594. SPERINO & THOMAS, *supra* note 592, at 75 n.91, 196 (referencing *Clack v. Rock-Tenn Co.*, 304 F. App’x 399, 403 n.2 (6th Cir. 2008)); Krieger, *supra* note 3, at 1184.

595. *Proud v. Stone*, 945 F.2d 796, 796–98 (4th Cir. 1991).

596. *Id.* at 797.

plaintiff's poor performance, focusing instead on the fact that the same person had hired and fired the plaintiff, holding that "same hirer and firer" evidence gave rise to a strong inference that the adverse employment action was not discriminatory.<sup>597</sup> To quote the court, "it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job."<sup>598</sup> As Part II explained, this rationale embeds the inaccurate view that bias reflects dislike of particular groups, which leaves out many kinds of bias, notably Prove-It-Again, Maternal Wall, Tug of War and benevolent approval of women or people of color who "know their place" (Tightrope).

Subsequent courts greatly expanded the scope of the doctrine. As of 2008, eight out of eleven federal circuits considered same-actor evidence an almost irrebuttable presumption.<sup>599</sup> As of 2015, the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Circuits held that the same-actor inference was a strong, "nearly irrebuttable" presumption against discrimination, often leading to courts granting employers' motions for summary judgment.<sup>600</sup> The remaining circuits have adopted a more sensible approach: they consider same-actor evidence to be relevant information that, combined with other evidence, may create an inference of discrimination (or fail to do so).<sup>601</sup>

To make matters worse, some courts have dramatically expanded the scope of the same-actor inference post-*Proud*. Whereas the time lapse between hiring and firing in *Proud* was a few months,<sup>602</sup> some courts have extended the allowable lapse as long as seven years (although others have refused to do so).<sup>603</sup> Whereas *Proud* involved a single decision-maker, other courts have applied the same-actor inference in the (commonplace) situation involving multiple decision-makers, where people other than the person who hired the plaintiff also played a role in deciding to fire her or him.<sup>604</sup> Still other courts have applied the same-actor inference where the same-actor was not involved at all, on the grounds that the decision in question was made by someone from the plaintiff's own social group.<sup>605</sup>

The same-actor inference makes sense when a decision to fire is made by the same person who hired the plaintiff, without intervening poor job

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597. *Id.* ("In cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.")

598. *Id.* (quoting John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1017 (1991)).

599. See Andrea L. Miller, *The Use (and Misuse) of the Same-Actor Inference in Family Responsibilities Discrimination Litigation: Lessons from Social Psychology on Flexibility Stigma*, 41 WM. MITCHELL L. REV. 1032, 1073 (2015).

600. *Id.*

601. *Id.*

602. Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1125 (2008).

603. Miller, *supra* note 599, at 1035.

604. *Id.* at 1066–67, 1070–71.

605. *Id.* at 1072.

performance, only a short time after the plaintiff was hired—but only as evidence to be weighed with other relevant evidence. As others have discussed, any more sweeping doctrine is inconsistent with the evidence from psychology. Linda Krieger and Susan Fiske first discussed the inconsistency between the same-actor doctrine and social psychology in 2006, pointing out that the influence of stereotypes is situational, so that it varies from situation to situation. “[E]mpirical research suggests that dispositionism, the common-sense model of behavioral consistency on which the same actor inference is based, is deeply flawed, and that human behavior is far less consistent across situations than lay people tend to believe.”<sup>606</sup> This is true, but vague.

One article that goes beyond the generalized statement that bias depends on the situation is Andrea L. Miller’s excellent discussion of why the same-actor inference makes no sense in the context of Maternal Wall bias.<sup>607</sup> Miller goes far beyond Krieger and Fiske’s critique of dispositionism to pinpoint many different areas of social science research relevant to the same-actor inference in the context of Maternal Wall bias.<sup>608</sup> Moral credentialing research documents that members of the dominant group who feel they have taken the nondiscriminatory action (such as hiring a woman or person of color) may feel “morally credentialed” as unbiased, which can cause them to fail to provide the necessary cognitive override to avoid bias in the future.<sup>609</sup> Bias can also flourish in pressured situations where time is short and attention is divided<sup>610</sup> and where one’s membership in a subordinate social group is highlighted.<sup>611</sup>

The five-patterns model provides a lot more concreteness. The most obvious irrationality of same-actor defense concerns Maternal Wall bias. Women may encounter it when they have been hired when they are non-mothers or not pregnant but later get pregnant or have children. For example, in *Moore v. Alabama*, one plaintiff’s male supervisor looked straight at her pregnant belly and said, “I was going to put you in charge of that office, but look at you now.”<sup>612</sup> Other Maternal Wall cases involve mothers who have children but not young children, as in *Chadwick v. WellPoint, Inc.*, where a woman’s problems began when she had triplets, despite the fact that she had not encountered Maternal Wall discrimination when she only had her one older child.<sup>613</sup>

A central message of Maternal Wall bias is that women are often perceived differently before and after they have children. Indeed, WorkLife Law in its 2016 litigation update noted that women often encounter Maternal Wall discrimination only after the birth of their second child.<sup>614</sup> WES data also

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606. Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1048 (2006).

607. Miller, *supra* note 599, at 1066–67.

608. *Id.*

609. *Id.* at 1067.

610. *Id.* at 1048.

611. *Id.* at 1050.

612. *Moore v. Ala. State Univ.*, 980 F. Supp. 426, 431 (M.D. Ala. 1997).

613. *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 42 (1st Cir. 2009).

614. CALVERT, *supra* note 532, at 33–34.

highlight the Tug of War dynamic that can lead to Maternal Wall discrimination if women discriminate against each other for handling motherhood the “wrong way.”<sup>615</sup> The most dramatic example is from *Walsh v. National Computer Systems, Inc.*, in which a plaintiff’s supervisor became truly abusive when the plaintiff got pregnant, took maternity leave, and then took time off work to take her child to the pediatrician because the child got persistent ear infections.<sup>616</sup> Ironically, the abusive supervisor herself had a child who had lost some hearing due to persistent ear infections.<sup>617</sup> One can only imagine the identity threat: the supervisor presumably had a lot invested in proving (to herself and others) that she did the right thing in failing to take time off with her child, that this was the only responsible way to be a good worker, and that her child’s hearing loss was unavoidable.

The Tug of War also is relevant when the same-actor inference reflects an assumption that a member of a protected class would never discriminate against another member of the same protected class. Natasha T. Martin provided the first comprehensive discussion of this topic in 2008 with an important analysis of why the doctrine does not make sense in the context of race.<sup>618</sup> Notably, she points out that the Supreme Court has said expressly that the “fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost because of [his status in the protected class].”<sup>619</sup> The Supreme Court reiterated this point in *Oncale v. Sundowner Offshore Services*, noting “we have rejected any conclusive presumption that an employer will not discriminate against members of his own race.”<sup>620</sup> This would seem to dispose of the presumption, or even the inference, that the plaintiff cannot bring a case when he is discriminated against by a member of his own social group. The same holds true for gender: *Oncale* held that a man had a cause of action for sexual harassment against another man.<sup>621</sup> All this would seem to preclude lower courts from using a presumption that one member of a protected group will not discriminate against another as a matter of legal precedent.

The Tug of War helps explain why one member of a protected group might discriminate against another. Devon Carbado and Mitu Gulati’s theory of “working identity” posits that members of subordinated groups often need to perform “identity work” to re-sculpt their identities into a version acceptable to members of the majority group.<sup>622</sup> Recall Robert Livingston’s study that found that whereas white CEOs tend to have mature faces, Black CEOs tend to have

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615. See *supra* text accompanying notes 378–380.

616. *Walsh v. Nat’l Computer Sys., Inc.*, 332 F.3d 1150, 1154–55 (8th Cir. 2003).

617. WorkLife Law filed an amicus brief in the *Walsh* case. See Brief for Shireen A. Walsh as Amici Curiae Supporting Appellee, *Walsh v. Nat’l Comput. Sys., Inc.*, 332 F.3d 1150 (8th Cir. 2003). The facts in this paragraph reflect discussions Williams had with Walsh’s lawyer.

618. Martin, *supra* note 602, at 1167.

619. *Id.* at 1138 n.76 (quoting *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996)).

620. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998).

621. *Id.* at 79; see also Martin, *supra* note 602, at 1162 (referencing *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 745 (7th Cir. 1999)).

622. CARBADO & GULATI, *supra* note 8, at 720.

“teddy-bear” faces—a built-in racial comfort strategy.<sup>623</sup> Carbado and Gulati focused more on people of color’s need to perform an identity acceptable to white people, but if some people of color embrace racial comfort strategies as a mechanism for assimilation, whereas other people of color refuse to do so, conflict among people of color emerges in majority white workplaces—a Tug of War effect.

*Twymon v. Wells Fargo* provides an apt example, as mentioned above.<sup>624</sup> Recall that in *Twymon*, an African-American male who was Director of Employee Relations allegedly told the plaintiff, an African-American female, that behaving in dominant as opposed to deferential ways was accepted from white but not Black people in the Minnesota Wells Fargo office where they worked.<sup>625</sup> No doubt he considered his advice to be a “good Black” to be valuable career advice for navigating a racist workplace, advice that presumably had worked for him.<sup>626</sup> But to Twymon, the advice was completely unacceptable—a demand that she behave like an “Uncle Tom.”<sup>627</sup> When she told him that, she made it clear exactly what she thought of his strategies for assimilating into the dominant group.

Tightrope bias also undermines the assumption that the same actor would not first hire and then discriminate against a member of a protected group. One scenario is where a white person hires a person of color with the expectation that they will play a subordinate role that the white person sees as suitable for people of color, but the person of color fails to deliver. Martin cites the apt example of *Johnson v. Zema Systems Corporation*, in which the plaintiff was hired as part of a merger of two beer distribution companies, one predominantly African-American serving mostly African-American customers, and one predominantly white serving mostly white customers.<sup>628</sup> The plaintiff, Leon Johnson, was a manager who complained that African Americans were originally segregated into separate rooms, received lower pay because they were allocated only African-American customers, were the first to be laid off or fired and the last to be rehired, were referred to as “n\*\*gers,” and that white but not African-American managers were allocated company cars.<sup>629</sup> In addition, the plaintiff established a friendship with a white sales manager, which his supervisor found disconcerting.<sup>630</sup> A magistrate judge awarded summary judgment for the employers, relying in part on the same-actor inference.<sup>631</sup> The Seventh Circuit reversed, aptly criticizing the discrimination-as-dislike model articulated in *Proud*.

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623. Livingston & Pearce, *supra* note 181, at 1229.

624. *Twymon v. Wells Fargo & Co.*, 462 F.3d 925 (8th Cir. 2006).

625. *Id.* at 931.

626. *Id.*

627. *Id.*

628. Martin, *supra* note 602, at 1167 (citing *Johnson v. Zema Systems Corp.*, 170 F.3d 734 (7th Cir. 1999)).

629. See *Johnson*, 170 F.3d at 738.

630. *Id.* at 744.

631. *Id.*

Tug of War dynamics can arise in any number of ways. A manager might hire a person of a certain race not expecting them to rise to a position in the company where daily contact with the manager would be necessary. An employer may hire a woman or person of color and then hold them to higher standards. An employer may also hire women expecting them to act, dress, or talk in a way the employer deems suitable for a woman and then fire that employee if she fails to conform to the employer's prescriptive gender stereotypes. If an employee is the first African American hired, an employer might be unaware of his own stereotypical expectations of African Americans at the time of hiring. If the employer subsequently discovers he does not wish to work with African Americans and fires the newly hired employee for this reason, the employee should still have a claim of racial discrimination. For these and other reasons, the same-actor inference is often unwarranted.<sup>632</sup>

Courts also need to be aware of the tensions that can arise between women professionals and admins. For example, in *Price Waterhouse*, Ann Hopkins' clients praised her "as 'extremely competent, intelligent,' 'strong and forthright, very productive, energetic and creative.'"<sup>633</sup> In sharp contrast, administrative personnel criticized her as sometimes overly aggressive and unduly harsh with staff. The Supreme Court did not pick up the Tug of War dynamic in which women professionals often encounter pushback from support staff, which the WES Survey documents in industry after industry.<sup>634</sup>

Note the difference between the generalized statement that bias varies depending on the situation—Krieger and Fiske's initial formulation—and the concrete description afforded by WES data detailing precisely how someone might easily hire someone and then subsequently fire them, or why a member of a protected group might discriminate against a member of his or her own group. That summarizes the transition from the implicit bias consensus to the five-patterns model proposed in this Article.

*Personal animosity defense.* Courts also should be wary of the "personal animosity" defense: the argument that a woman or person of color was fired or experienced another adverse employment action due to personal animosity, not discrimination.<sup>635</sup> In an at-will employment system like the one in the United States, employers can fire or discipline employees for any reason or no reason, including personal dislike.<sup>636</sup> Furthermore, we suspect many courts will be reluctant to interfere with employers' right to part ways with employees whom they or others just can't get along with. To say that some of the "personal animosity" cases describe people who aren't easy to get along with is an understatement: the plaintiffs in the "personal animosity" cases include men

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632. *Id.* at 745.

633. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234 (1989).

634. *See supra* p. 400.

635. Derum & Engle, *supra* note 449, at 1188; McGinley, *supra* note 1, at 463 n.277.

636. LARSON, *supra* note 498, § 8.04.

accused of sexual harassment,<sup>637</sup> a plaintiff who called a co-worker “arrogant, cocky, unprofessional, and lazy,”<sup>638</sup> and another who allegedly described a co-worker to other colleagues as a “hillbilly bitch” and commented “God knows what the f\*\*k she is doing.”<sup>639</sup>

Nonetheless, courts do need to take care because, as discussed in Part II, prescriptive bias often is expressed as dislike.<sup>640</sup> As has been noted, prescriptive gender bias often takes the form of hostility to women who do not conform to the stereotype that women should be modest, supportive, and nice rather than competitive, ambitious, and direct.<sup>641</sup> Courts have long recognized this. As far back as 1989 in *Price Waterhouse*, the Supreme Court noted, “We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.”<sup>642</sup> Similarly, if employers have an expectation that people of color will play a deferential worker-bee role, those who refuse to do so may find themselves disliked.

Consequently, courts face the challenge of distinguishing when employers’ dislike for an employee stems from prescriptive stereotypes and when it does not. This should not be insurmountably difficult. An example of a “personal animosity” case that does not involve prescriptive stereotyping is *McCollum v. Bolger*, in which a mother and her two sons alleged sex discrimination and retaliation when they were all fired from the postal service.<sup>643</sup> The trial court held that the mother’s dismissal was due to her “bad relationship with her supervisor . . . and she also disagreed with her superiors on how her job should be performed . . . in addition to her failure to follow instructions.”<sup>644</sup> “Competent witnesses,” it continued, “testified that the plaintiff did not get along with her supervisor and was ‘a combative, hostile, rude, vindictive and dictatorial employee.’”<sup>645</sup> The court was clearly reluctant to require the employer to put up with this kind of misbehavior when it noted “[t]he plaintiff cannot turn a personal feud into a sex discrimination case by accusation.”<sup>646</sup>

Unfortunately, courts sometimes cite personal animosity as the reason for adverse employment actions in cases that are less convincing. Chief among them is the famous *Hicks v. St. Mary’s Honor Center*.<sup>647</sup> Melvin Hicks was one of only two African-American shift commanders left after the others were fired following a 1981 study that warned that “too many blacks were in positions of

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637. *Hazard v. Runyon*, 14 F. Supp. 2d 120, 123 (D.D.C. 1998); *Smith v. Equitrac Corp.*, 88 F. Supp. 2d 727, 744 (S.D. Tex. 2000).

638. *Mathis v. Perry*, 996 F. Supp. 503, 510 n.19 (E.D. Va. 1997).

639. *Smith*, 88 F. Supp. 2d at 730.

640. *See supra* Part II.

641. *See supra* Part II.

642. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

643. *McCollum v. Bolger*, 794 F.2d 602, 605–08 (11th Cir. 1986).

644. *Id.* at 610.

645. *Id.*

646. *Id.*

647. *Hicks v. St. Mary’s Honor Ctr.*, 756 F. Supp. 1244, 1249 (E.D. Mo. 1991), *rev’d sub nom* *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

power” at St. Mary’s.<sup>648</sup> The employer argued that Hicks was fired for rule infractions—yet he was the only person disciplined for violations committed by his subordinates, and much more serious violations by white people were either disregarded or treated much more leniently.<sup>649</sup> It also held that Hicks’s superiors “had placed plaintiff on the express track to termination” and had “manufactured the confrontation between the plaintiff” and his supervisor in order to fire him.<sup>650</sup> The trial court concluded that the reasons (rule infraction) offered for Hicks’s dismissal were pretextual.<sup>651</sup> Then, despite the fact that Hicks’s supervisors denied any personal animosity, the court nonetheless awarded summary judgment to the employer on the grounds that Hicks’s dismissal stemmed from personal animosity, not discrimination, a holding affirmed by the Eighth Circuit.<sup>652</sup>

Going forward, certainly the first principle should be that where an employer’s agents have expressly denied personal animosity, courts should not step in at summary judgment (where courts are not supposed to be assessing credibility)<sup>653</sup> and second-guess them. That would seem to be a factual finding (and one without evidence to back it up).

Moreover, courts should recognize that a claim of personal animosity against a woman or person of color often requires courts to distinguish between situations in which animosity was triggered by a plaintiff’s failure to conform to prescriptive stereotypes and dislike for other reasons. Absent situations involving a jilted lover, discerning whether personal animosity stems from prescriptive stereotyping or not typically will involve a trial to resolve factual issues and credibility assessments—not the kind of thing suitable for summary judgment or a motion to dismiss.<sup>654</sup> Courts should sharply limit the personal animosity defense and should not use it to give a free pass to excuse employers after plaintiffs have proven the falsity of the employer’s supposedly “legitimate, nondiscriminatory reason.”

## E. CONCLUSION

Other authors have been pointing out for more than two decades the inaccuracy of claims that Title VII is inadequate to address contemporary forms

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648. *Id.* at 1252 (“[P]rior to the 1984 personnel change there was one white and five blacks in supervisory positions. After Steve Long became superintendent, there were four whites and two blacks in supervisory positions.”).

649. *Id.* at 1250–51.

650. *Id.* at 1251.

651. *Id.* at 1252.

652. *Id.*; *see also* Hicks v. St. Mary’s Honor Ctr., 90 F.3d 285, 293 (8th Cir. 1996).

653. FED. R. CIV. P. 56.

654. *See* 1 MOORE’S FEDERAL PRACTICE, CIVIL PROCEDURE (Daniel R. Coquillette, Gregory P. Joseph, Georgene M. Vairo & Chilton Davis Varner eds., 2019); *see also* Succar v. Dade Cnty. Sch. Bd., 60 F. Supp. 2d 1309, 1315–18 (S.D. Fla. 1999), *aff’d*, 229 F.3d 1343 (11th Cir. 2000) (“[Ms. Lorenz’s harassment of Plaintiff] was not the result of Plaintiff’s gender ‘but of responses to an individual because of her former intimate place in [that individual’s] life.’”); *see also* Huebschen v. Dep’t of Health & Soc. Servs., 716 F.2d 1167, 1172 (7th Cir. 1983) (motivation was not based on sex, “but that he was a former lover who had jilted her”).

of discrimination (or that law itself is).<sup>655</sup> Make no mistake: Title VII is far from perfect. Scholarship makes an important contribution when it critiques Title VII in order to help courts continue the dynamic statutory interpretation of Title VII that began in the early 1970s as discrimination transmuted from explicit to more modern forms.<sup>656</sup> But that dynamic process means that modern forms of discrimination typically can be litigated using one or both of the basic forms of evidence commonplace in Title VII cases—comparator and stereotyping evidence. No doubt defense-minded law professors will continue to argue that Title VII is incapable of reaching anything but the most explicit forms of discrimination. As the Article shows, we disagree.

#### IV. USING WES DATA IN LITIGATION

Lawyers we interviewed have used, or expressed interest in using, the five-patterns model in individual disparate treatment cases<sup>657</sup> and class actions.<sup>658</sup> Equally important, the five-patterns model is proving useful in mass arbitrations that are coming to rival class actions in importance, as employers require employees to sign mandatory arbitration agreements as a condition of employment. Jocelyn Larkin of the Impact Fund used the five-patterns model in a series of mass arbitrations that resulted from a class action against a large retailer.<sup>659</sup> “[The company] had a purely subjective system so we had to dig deeply to show that individual claimants were subject to all manner of implicit bias. We used the five patterns to create themes for our arbitrations. I remember that ‘Prove-It-Again’ was very useful because typically it took women 15 years’ work before they could even be considered for the promotions.”<sup>660</sup>

This Part and Appendix A explore the implications of WES data for litigation of Title VII cases. This Part begins by pointing out that knowledge of the basic patterns of bias is now widespread. This has implications for the summary judgment motions that typically end employment discrimination cases; in them, courts often make assumptions about whether a reasonable jury could find that the evidence presented supports an inference of discrimination.<sup>661</sup> Widespread dissemination of bias patterns also means that plaintiffs often should be able to introduce bias evidence as comparator or stereotyping evidence without the need for expensive expert testimony.<sup>662</sup> This Part first discusses

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655. See, e.g., McGinley, *supra* note 1, at 445; Selmi, *Proving Intentional Discrimination*, *supra* note 1, at 336.

656. See Williams N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1492–96 (1987).

657. Conversation of Joan C. Williams with Kathryn Dickson (2008).

658. Telephone Interview with Kate Muetting, Partner, Sanford Heisler Sharp LLP (Nov. 22, 2019) (on file with authors); Telephone Interview with Adam Klein, Managing Partner, Outten & Golden (Dec. 6, 2019) (on file with authors); Telephone Interview with Paul Mollica, Counsel, Outten & Golden (Dec. 3, 2019) (on file with authors).

659. E-mail from Jocelyn Larkin, Executive Director of the Impact Fund, to Joan C. Williams, Distinguished Professor of L., Univ. of California, Hastings Coll. of the L. (Oct. 21, 2019, 1:55 PM) (on file with authors).

660. *Id.*

661. FED. R. CIV. P. 56.

662. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 256 (1989).

these issues and presents the evidence of widespread dissemination. The Part continues with some thoughts on the implications of WES data for class actions. The Article ends with some brief pointers on how to use bias data in litigation, from the writing of the complaint, to discovery, to negotiations, to closing arguments.

#### B. THE IMPLICATIONS OF WIDESPREAD DISSEMINATION OF THE BIAS PATTERNS FOR SUMMARY JUDGMENT AND EXPERT TESTIMONY

The basic patterns of bias have received widespread attention in the last decade, in public discourse, popular culture, and the business community, as well as growing representation of the five bias patterns in literature, film, television, music, advertising, and journalism at large. This widespread dissemination has implications for summary judgment and for whether bias evidence can be introduced without expert testimony.

Because employment discrimination cases often end at summary judgment,<sup>663</sup> judges make rulings based on their own understanding of whether a reasonable jury could find that the evidence can support an inference of discrimination under Title VII.<sup>664</sup> When courts make statements about what a rational decisionmaker could find, they should take into account the fact that the bias patterns have been so widely disseminated that today's jurors are more likely than those in the past to recognize bias when they see it. Moreover, in courts or circuits that require that plaintiffs identify a comparator to avoid summary judgment, five-patterns evidence also can help plaintiffs identify suitable comparators and establish that the difference in treatment was "because of" race or sex.<sup>665</sup> Plaintiffs also can use five-patterns evidence to create a "genuine dispute over a fact that is 'material,'"<sup>666</sup> thereby defeating an employer's summary judgment motion.<sup>667</sup> For example, where a plaintiff claims that an objective rule has been applied rigorously to women (including her) and leniently to men, but the employer claims that the rule has been applied consistently, that's a genuine issue of material fact.

The broad dissemination of the basic bias patterns also has implications for whether evidence of bias needs to be introduced through expert testimony. The

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663. See Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 672–73 (2013) (discussing the statistics suggesting that summary judgment is granted more often in employment cases); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206–07 (1993) (discussing how three Supreme Court rulings in the early late 1980s were incorrectly interpreted, leading judges to grant summary judgment when plaintiff's cases appeared "weak" or "unpersuasive").

664. See, e.g., *Troupe v. May Dep't Stores, Co.*, 20 F.3d 734, 738–39 (7th Cir. 1994) (granting summary judgment for the employer on the grounds that the plaintiff "has no evidence from which a rational trier of fact could infer" discrimination); see also 11 MOORE'S FEDERAL PRACTICE, CIVIL PROCEDURE § 56.23 (Daniel R. Coquille, Gregory P. Joseph, Georgene M. Vairo & Chilton Davis Varner eds., 2019).

665. See 42 U.S.C. § 2000e-2 (2019).

666. 11 MOORE'S FEDERAL PRACTICE, *supra* note 664, § 56.23.

667. E-mail from Stephanie Bornstein, Professor of Law, Univ. of Fla. Levin Coll. of L. to Joan C. Williams, Distinguished Professor of L., Univ. of California, Hastings Coll. of the L. (Jan. 26, 2020, 11:57 AM) (on file with authors).

implicit bias consensus has long focused on introducing evidence of bias through the use of experts.<sup>668</sup> In class actions that remains important, but in the general run of discrimination cases experts are not an option because they are too expensive.

Luckily, as Mort Halperin once said, much of social science is what every cab driver in New York City already knew.<sup>669</sup> That is definitely true of the bias patterns outlined in Part II. Thus five-patterns evidence often can be introduced as stereotyping evidence without the expense of an expert. Recall that the Supreme Court in *Price Waterhouse* treated the testimony of Professor Susan Fiske as “merely icing on Hopkins’ cake,” noting that “[i]t takes no special training to discern sex stereotyping” in the comments of the partners at Price Waterhouse.<sup>670</sup> Williams and Cynthia Thomas Calvert purposely designed Maternal Wall litigation to present stereotypes about mothers as commonsense knowledge, and this approach deserves to be adopted more widely.

*Dissemination of the five-patterns model.* Williams’s model was first featured in *Harvard Business Review*’s October 2014 issue, in an article later republished as one of *Harvard Business Review*’s *10 Must Reads on Diversity*.<sup>671</sup> It was featured again in 2015,<sup>672</sup> in 2019,<sup>673</sup> and yet again in 2020.<sup>674</sup> Sheryl Sandberg’s organization Lean In also made videos of Williams discussing the bias patterns that were viewed over a million times on Lean In’s website and social media,<sup>675</sup> as well as in free content on Virgin America flights.<sup>676</sup> Facebook’s unconscious bias training also uses a version of Williams’s model.<sup>677</sup> Williams’s co-authored book *What Works for Women at Work*,<sup>678</sup> reviewed in *The New York Times* and now in its tenth edition,<sup>679</sup> and Williams’s

668. See, e.g., Hart & Secunda, *supra* note 18, at 41–44; Jones, *supra* note 22, at 1227–28, 1232–33; Kakoyannis, *supra* note 22, at 1181, 1189 (analyzing five cases and concluding some courts are allowing in such evidence, while others are not).

669. Conversation between Mort Halperin and James X. Dempsey in 2002, reported to Joan C. Williams (Jan. 28, 2020) (“Much of social science is either tautological, patently false, or what every cab driver in New York City already knew.”).

670. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 256 (1989).

671. Joan C. Williams, *Hacking Tech’s Diversity Problem*, HARV. BUS. REV. (Oct. 2014), <https://hbr.org/2014/10/hacking-techs-diversity-problem>; Joan C. Williams, *Hacking Tech’s Diversity Problem*, in HBR’S 10 MUST READS ON DIVERSITY (2019).

672. Joan C. Williams, *The 5 Biases Pushing Women Out of STEM*, HARV. BUS. REV. (Mar. 24, 2015), <https://hbr.org/2015/03/the-5-biases-pushing-women-out-of-stem.f>.

673. Joan C. Williams & Sky Mihaylo, *How the Best Bosses Interrupt Bias on Their Teams*, HARV. BUS. REV. (Nov. 2019), <https://hbr.org/2019/11/how-the-best-bosses-interrupt-bias-on-their-teams>.

674. Joan C. Williams & James D. White, *Update Your DE&I Playbook*, HARV. BUS. REV. (July 15, 2020), <https://hbr.org/2020/07/update-your-dei-playbook>.

675. E-mail from Ashley Finch to Joan C. Williams, Distinguished Professor of L., Univ. of California, Hastings Coll. of the L. (May 22, 2018, 4:24 PM) (on file with authors).

676. Joan C. Williams, *4 Kinds of Gender Bias Women Face at Work*, LEAN IN, <https://leanin.org/education/introduction-to-what-works-for-women-at-work> (last visited Nov. 23, 2020).

677. *Managing Unconscious Bias*, FACEBOOK, <https://managingbias.fb.com> (last visited Nov. 23, 2020).

678. WILLIAMS & DEMPSEY, *supra* note 82.

679. Debora L. Spar, *Leaning In Without Falling Over*, N.Y. TIMES (Apr. 11, 2014), <https://www.nytimes.com/2014/04/13/books/review/what-works-for-women-at-work-by-joan-c-williams-and-rachel-dempsey.html>.

team further disseminated her model in the studies of science professors, engineers, lawyers, architects, and tech workers discussed above.<sup>680</sup>

Much more widespread than the five-patterns model itself is knowledge of each individual pattern. This Part samples some of the recent public discussions of the five patterns.

*Dissemination of Prove-It-Again.* Prove-It-Again bias has so long been recognized in the context of race that it even has its own aphorism: “you have to work twice as hard to get half as far.”<sup>681</sup> Prominent Black leaders have long articulated the view that Black people are held to higher standards than their white peers; former President Barack Obama and Michelle Obama have both cited the need to be “twice as good . . . to get half as far.”<sup>682</sup> This recognition is non-partisan. In her memoir, former Secretary of State Condoleezza Rice, a prominent Republican, writes of a similar feeling during her youth when she was preparing to audition for an all-white music conservatory in Birmingham: “I was carrying the weight of needing to be twice as good. They [her parents] reassured me that I was indeed twice as good. Looking back, it is striking that they didn’t say, ‘You *don’t* have to be twice as good.’”<sup>683</sup>

While this phrase has a long history in the Black community, other communities of color also acknowledge the Prove-It-Again pattern.<sup>684</sup> The Not Your Model Minority activist movement, which challenges the “benevolent” stereotype that sets higher school and workplace performance expectations for people of Asian descent, is just one example.<sup>685</sup> First generation Latinxers in the United States have also noted their own “twice as good” challenges through film

680. Williams, *supra* note 164; WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100; WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, *supra* note 100; WILLIAMS & KORN, *supra* note 100. A forthcoming report (anticipated release in 2021) will address gender and racial bias against women of color in tech.

681. See DeSante, *supra* note 123, at 342.

682. Gene Demby, *Obama’s Racial Legacy: Some Last Words On The First Black President*, NPR: CODE SWITCH (Jan. 20, 2017, 3:52 AM), <https://www.npr.org/sections/codeswitch/2017/01/20/510676874/obamas-racial-legacy-some-last-words-on-the-first-black-president>; see also Gillian B. White, *Black Workers Really Do Need to Be Twice as Good*, ATLANTIC (Oct. 7, 2015), <https://www.theatlantic.com/business/archive/2015/10/why-black-workers-really-do-need-to-be-twice-as-good/409276/>; Obama: “As An African American You Have To Work Twice As Hard As Anyone Else If You Want To Get By”, REALCLEARPOLITICS (May 19, 2013), [https://www.realclearpolitics.com/video/2013/05/19/obama\\_if\\_you\\_think\\_you\\_can\\_just\\_get\\_over\\_in\\_this\\_economy\\_just\\_because\\_you\\_have\\_a\\_morehouse\\_degree\\_youre\\_in\\_for\\_a\\_rude\\_awakening.html](https://www.realclearpolitics.com/video/2013/05/19/obama_if_you_think_you_can_just_get_over_in_this_economy_just_because_you_have_a_morehouse_degree_youre_in_for_a_rude_awakening.html); 22 Revelations from Michelle Obama’s New Memoir ‘Becoming’, BUS. INSIDER S. AFR. (Nov. 15, 2018), <https://www.businessinsider.co.za/michelle-obama-becoming-revelations-2018-11>.

683. CONDOLEEZZA RICE, CONDOLEEZZA RICE: A MEMOIR OF MY EXTRAORDINARY, ORDINARY FAMILY AND ME 107–108 (2012).

684. Quoc Trung Bui & Claire Cain Miller, *Why Tech Degrees Are Not Putting More Blacks and Hispanics Into Tech Jobs*, N.Y. TIMES (Feb. 25, 2016), <https://www.nytimes.com/2016/02/26/upshot/dont-blame-recruiting-pipeline-for-lack-of-diversity-in-tech.html>.

685. Masako Fukui, *Being a Good, Quiet and Assimilated ‘Model Minority’ is Making Me Angry*, GUARDIAN (July 27, 2018), <https://www.theguardian.com/world/2018/jul/28/being-a-good-quiet-and-assimilated-model-minority-is-making-me-angry>; Jinseon Park, *Not Your Model Minority*, HUFFPOST (June 9, 2017, 3:13 PM), [https://www.huffpost.com/entry/not-your-model-minority\\_b\\_10367878](https://www.huffpost.com/entry/not-your-model-minority_b_10367878).

and journalism.<sup>686</sup> In the biographical film *Selena*, which chronicles Mexican-American singer Selena Quintanilla-Pérez's career, her father tells her:

We got to be twice as good as anybody else. We got to prove to the Mexicans how Mexican we are, and we have to prove to the Americans how American we are. We got to be more Mexican than the Mexicans and more American than the Americans, both at the same time. It's exhausting!<sup>687</sup>

Recent presidential elections have also popularized the Prove-It-Again pattern as it applies to women. Presidential candidate Senator Amy Klobuchar said: "Women are held to a higher standard. . . . And I think every working woman out there, any woman that's at home, knows exactly what I mean."<sup>688</sup> The former political campaign manager for Hillary Rodham Clinton's presidential bid put it simply: "It's no secret that women have to work twice as hard, be twice as good, to get half the credit."<sup>689</sup>

The Prove-It-Again pattern also has been widely discussed in the business press, in *Harvard Business Review* and *Forbes*, as well as mainstream publications, such as the *Los Angeles Times* and *The Atlantic*.<sup>690</sup> These conversations have made waves across industries. In one article in *The Cut* about being Black in the fashion industry, Lacy Redway, a celebrity hairstylist, explained: "You feel like you constantly have to prove that you are qualified to be in the room. It's so disrespectful."<sup>691</sup> A *Guardian* article discussed how Prove-It-Again plays out in academia, when Heidia Safia Mirza noted, "[T]here is a double-take as you enter a room, as if you are not supposed to be there. . . . [I]n many meetings, even though I am a professor, I have been mistaken for the coffee lady."<sup>692</sup>

686. Denise Soler Cox, *Do Latinos Have to Be Twice as Good as Everyone Else?*, PROJECT ENYE, <https://projectenye.com/do-latinos-have-to-be-twice-as-good-as-everyone-else/> (last visited Nov. 23, 2020).

687. SELENA (Warner Bros. 1997).

688. Maggie Astor, 'Women Are Held to a Higher Standard,' *Klobuchar Says at Debate*, N.Y. TIMES, <https://www.nytimes.com/2019/11/20/us/politics/amy-klobuchar-women-pete-buttigieg.html> (Jan. 3, 2020).

689. Patti Solis Doyle *Concurs with Amy Klobuchar: "Women Have to Work Twice as Hard, Be Twice as Good, to Get Half the Credit"*, CNN: REPLAY (Nov. 11, 2019), <https://www.facebook.com/CNNReplay/videos/patti-solis-doyle-concurs-with-amy-klobuchar-women-have-to-work-twice-as-hard-be/486468798744819/>.

690. Williams & Mihaylo, *supra* note 673; Jack Zenger & Joseph Folkman, *Are Women Better Leaders than Men?*, HARV. BUS. REV. (Mar. 15, 2012), <https://hbr.org/2012/03/a-study-in-leadership-women-do>; Tiffany Pham, *Think You're Not Biased Against Women at Work? Read This*, FORBES (Dec. 20, 2016, 8:03 AM), <https://www.forbes.com/sites/break-the-future/2016/12/20/think-youre-not-biased-against-women-at-work-read-this/#416344da7e5a>; Tracey Lien, *Why Are Women Leaving the Tech Industry in Droves?*, L.A. TIMES (Feb. 22, 2015, 5:05 AM), <https://www.latimes.com/business/la-fi-women-tech-20150222-story.html>; Katherine Reynolds Lewis, *How to Make Your Company Less Sexist and Racist*, ATLANTIC (Mar. 31, 2015), <https://www.theatlantic.com/business/archive/2015/03/how-to-make-your-company-less-sexist-and-racist/388931/>.

691. Lindsay Peoples Wagner, *Everywhere and Nowhere: What It's Really Like to Be Black and Work in Fashion*, CUT (Aug. 23, 2018), <https://www.thecut.com/2018/08/what-its-really-like-to-be-black-and-work-in-fashion.html>.

692. Rachel Hall, *I've Been Mistaken for the Coffee Lady': Experiences of Black Female Academics*, GUARDIAN (Nov. 16, 2017), <https://www.theguardian.com/higher-education-network/2017/nov/16/black-female-academics-ive-been-mistaken-for-the-coffee-lady>.

The popularization of themes long explored in social psychology took a major step in two influential reports by the prominent global nonprofit consultancy Catalyst.<sup>693</sup> *Women “Take Care,” Men “Take Charge”* (2005) and *The Double-Bind Dilemma for Women in Leadership* (2007) both played a central role in disseminating knowledge of Prove-It-Again patterns.<sup>694</sup> One chapter of *The Double-Bind Dilemma* notes, “Stereotypes create a second predicament for women leaders. As prototypical leaders, men’s potential to lead and, in particular, to lead effectively is rarely questioned *a priori*. As atypical leaders, however, women often have to prove that they can lead even *before* they have the opportunity to do so.”<sup>695</sup> Indeed, the business literature often discusses the technical terms, as in one *Harvard Business Review* article by a behavioral economist that discusses performance reviews: “[I]t does your company no good when employees are overrated because of subjective biases, including leniency [bias] . . . and the ‘halo effect.’”<sup>696</sup>

Advice books, too, have broadly disseminated knowledge of Prove-It-Again and the other basic bias patterns.<sup>697</sup> Williams’s co-authored *What Works for Women at Work* documents that while women in general often feel they need to prove themselves over and over, women of color may feel they can never make a single mistake.<sup>698</sup> This also features in advice books written by and for women of color. An example is Minda Harts’s *The Memo: What Women of Color Need to Know to Secure a Seat at the Table*, observes that women of color “have the added pressure of trying not to make any mistakes while our counterparts are given a pass to be mediocre and often rewarded for their imperfections.”<sup>699</sup> This additional pressure takes a toll on women of color and can lead to further feelings of exclusion and isolation.<sup>700</sup>

This advice literature has also drawn attention to another Prove-It-Again dynamic: women and people of color are more likely than others to report that

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693. CATALYST, WOMEN “TAKE CARE,” MEN “TAKE CHARGE:” STEREOTYPING OF U.S. BUSINESS LEADERS EXPOSED (2005), [https://www.catalyst.org/wp-content/uploads/2019/02/Women\\_Take\\_Care\\_Men\\_Take\\_Charge\\_Stereotyping\\_of\\_U.S.\\_Business\\_Leaders\\_Exposed.pdf](https://www.catalyst.org/wp-content/uploads/2019/02/Women_Take_Care_Men_Take_Charge_Stereotyping_of_U.S._Business_Leaders_Exposed.pdf) [hereinafter CATALYST, WOMEN “TAKE CARE”]; CATALYST, THE DOUBLE-BIND DILEMMA FOR WOMEN IN LEADERSHIP: DAMNED IF YOU DO, DOOMED IF YOU DON’T (2007), [https://www.catalyst.org/wp-content/uploads/2019/01/The\\_Double\\_Bind\\_Dilemma\\_for\\_Women\\_in\\_Leadership\\_Damned\\_if\\_You\\_Do\\_Doomed\\_if\\_You\\_Dont.pdf](https://www.catalyst.org/wp-content/uploads/2019/01/The_Double_Bind_Dilemma_for_Women_in_Leadership_Damned_if_You_Do_Doomed_if_You_Dont.pdf) [hereinafter CATALYST, THE DOUBLE-BIND DILEMMA].

694. See CATALYST, WOMEN “TAKE CARE,” *supra* note 693; CATALYST, THE DOUBLE-BIND DILEMMA, *supra* note 693, at 16.

695. CATALYST, THE DOUBLE-BIND DILEMMA, *supra* note 693, at 16.

696. Paola Cecchi-Dimeglio, *How Gender Bias Corrupts Performance Reviews, and What to Do About It*, HARV. BUS. REV. (Apr. 12, 2017), <https://hbr.org/2017/04/how-gender-bias-corrupts-performance-reviews-and-what-to-do-about-it>.

697. SHERYL SANDBERG & NELL SCOVELL, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013); WILLIAMS & DEMPSEY, *supra* note 82; MINDA HARTS, THE MEMO: WHAT WOMEN OF COLOR NEED TO KNOW TO SECURE A SEAT AT THE TABLE (2019).

698. WILLIAMS & DEMPSEY, *supra* note 82, at 23–42.

699. HARTS, *supra* note 697.

700. Williams, *supra* note 672; Maura Cheeks, *How Black Women Describe Navigating Race and Gender in the Workplace*, HARV. BUS. REV. (Mar. 26, 2018), <https://hbr.org/2018/03/how-black-women-describe-navigating-race-and-gender-in-the-workplace>.

other people get credit for ideas they originally offered,<sup>701</sup> sometimes called “bropropriating”<sup>702</sup> or a “rewrite.”<sup>703</sup> New terms like “mansplaining” have emerged to reflect the assumption that women’s contribution can be better explained by a man, another Prove-It-Again pattern.<sup>704</sup> *Mansplaining* has become so commonplace that Merriam-Webster officially added it to its dictionary in March 2018.<sup>705</sup> A related conversational dynamic was publicized when women staffers in President Obama’s White House disclosed that they engaged in “amplification,” where they would repeat and point out the ideas of other women employees to make sure the idea was not buried or taken without credit.<sup>706</sup>

Another prominent example from popular culture concerns coverage of the 2018 United States Open Final, when Serena Williams was penalized by an umpire, Carlos Ramos, whom, she felt, had applied a rule to her more stringently than was typically applied to male tennis players.<sup>707</sup> Some initial coverage of the incident, in which Williams smashed a racket in frustration and called the umpire a thief (for taking a point as a penalty), painted Williams’s behavior as poor sportsmanship,<sup>708</sup> but as the news cycle ran, more stories emerged highlighting the double standard at play.<sup>709</sup> One article in *Fast Company* highlighted other incidences where Ramos gave a less-severe penalty, or no penalty, for similar,

701. SANDBERG & SCOVELL, *supra* note 697, at 149; WILLIAMS & DEMPSEY, *supra* note 82, at 136; HARTS, *supra* note 697.

702. Cliff Leek, *3 Ways You Might Be Silencing Women (And a Checklist for Fixing That)*, CATALYST (Sept. 27, 2016), <https://www.catalyst.org/2016/09/27/3-ways-you-might-be-silencing-women-and-a-checklist-for-fixing-that/>.

703. Lindsay Dodgson, *Men Are Getting the Credit for Women’s Work Through Something Called ‘Hepeating’—Here’s What it Means*, BUS. INSIDER (Mar. 8, 2018, 2:01 AM), <https://www.businessinsider.com/what-is-hepeating-2017-9>.

704. *Mansplain*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/mansplaining> (last visited Nov. 23, 2020).

705. *Id.*; *Words We’re Watching: Mansplaining*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/mansplaining-definition-history> (last visited Nov. 23, 2020).

706. Cassie Werber, *Women at the White House Have Started Using a Simple, Clever Trick to Get Heard*, QUARTZ (Sept. 14, 2016), <https://qz.com/781404/women-at-the-white-house-have-started-using-the-simple-trick-of-amplification-to-get-heard-not-interrupted/>.

707. Don Van Natta Jr., *Serena, Naomi Osaka and the Most Controversial US Open Final in History*, ESPN (Aug. 17, 2019), [https://www.espn.com/tennis/story/\\_/id/27408140/backstory-serena-naomi-osaka-most-controversial-us-open-final-history](https://www.espn.com/tennis/story/_/id/27408140/backstory-serena-naomi-osaka-most-controversial-us-open-final-history). Serena Williams is a Black American tennis player who has won twenty-three Grand Slam singles titles. *Serena Williams’s Grand Slam Titles, Finals, Records*, TENNISX, <https://www.tennis-x.com/grand-slam-finals/serena-williams.php> (last visited Nov. 23, 2020).

708. Nancy Armour, *Instead of Triumphant, Serena Williams Diminished Herself with Behavior at US Open*, USA TODAY (Sept. 8, 2018, 11:12 PM), <https://www.usatoday.com/story/sports/columnist/nancy-armour/2018/09/08/serena-williams-didnt-behave-like-champion-us-open-loss/1243879002/>.

709. Georgia Aspinall, *7 Times Male Tennis Players Have Gotten Away With the Same Thing Serena Williams Was Penalized for*, GRAZIA (Sept. 10, 2018), <https://graziadaily.co.uk/life/in-the-news/serena-williams-sexism-tennis-row-umpire/>; Liz Clarke, *In Her Anger, in Defeat, Serena Williams Starts an Overdue Conversation*, WASH. POST (Sept. 9, 2018, 4:54 PM), [https://www.washingtonpost.com/sports/tennis/in-her-anger-in-defeat-serena-williams-starts-an-overdue-conversation/2018/09/09/9d9125ea-b468-11e8-94eb-3bd52df917b\\_story.html](https://www.washingtonpost.com/sports/tennis/in-her-anger-in-defeat-serena-williams-starts-an-overdue-conversation/2018/09/09/9d9125ea-b468-11e8-94eb-3bd52df917b_story.html); Maya Salam, *Serena’s Not Alone. Women Are Penalized for Anger at Work, Especially Black Women*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/sports/serena-williams-discrimination-black-women.html>.

or more extreme behavior from tennis-playing men, noting “women who act out are punished while men are written off as ‘bad boys’ who are just doing what boys do.”<sup>710</sup> The head of the United States Tennis Association, Katrina Adams, also noted the double standard when interviewed after the event on *CBS This Morning*.<sup>711</sup>

*Dissemination of Tightrope bias*: Also called the “double bind,” Tightrope patterns have been discussed in outlets ranging from *NPR* and *Harvard Business Review*, to *Cosmopolitan* and *Essence*.<sup>712</sup> Again, in both Catalyst’s the *Women “Take Care,” Men “Take Charge”* (2005) and *The Double-Bind Dilemma for Women in Leadership* (2007) these patterns were discussed extensively.<sup>713</sup>

Compared to men, women leaders are rated more harshly at stereotypically male, “take charge” behaviors, such as problem-solving . . . adding insult to injury, it may be difficult for women leaders to prove stereotypes about their leadership wrong. Because people pay more attention to information that confirms stereotypes . . . [and] stereotypes have the potential to seriously undermine women’s ability to lead.<sup>714</sup>

For most of the last decade, Facebook COO, Sheryl Sandberg, has been ringing the alarm about the ways in which women are forced to walk a tightrope in the workplace, including in her book *Lean In* (which sold over four million copies worldwide) and her widely circulated *New York Times* op-ed: “When a woman speaks . . . she’s barely heard or she’s judged as too aggressive. When a man says virtually the same thing, heads nod in appreciation for his fine idea,”<sup>715</sup> she said.

710. Melissa Locker, *Was Serena Williams Treated Fairly? Ask These Tennis “Bad Boys” Who Did Much Worse*, FAST CO. (Sept. 20, 2018), <https://www.fastcompany.com/90234350/was-serena-williams-treated-fairly-ask-these-tennis-bad-boys-who-did-much-worse>.

711. Jessica Kegu, *Are There Different Standards for Men and Women in Tennis? USTA Head Says “Yes”*, CBS: THIS MORNING (Sept. 11, 2018, 9:26 AM), <https://www.cbsnews.com/news/serena-williams-us-open-loss-usta-ceo-katrina-adams-men-women-usta-to-different-standards/>.

712. Jessica Bennett, *Why We Need to Stop Calling Powerful Women “Bitches”*, COSMOPOLITAN (Mar. 8, 2014), <https://www.cosmopolitan.com/career/advice/a5890/powerful-women-names/>; Marianne Cooper, *For Women Leaders, Likability and Success Hardly Go Hand-in-Hand*, HARV. BUS. REV. (Apr. 30, 2013), <https://hbr.org/2013/04/for-women-leaders-likability-a>; Paulana Lamonier, *What It Means If You’re Code-Switching in the Workplace*, ESSENCE (Sept. 7, 2018), <https://www.essence.com/lifestyle/money-career/women-lets-win/what-it-means-if-youre-code-switching-in-the-workplace/>; Courtney L. McCluney, Kathrina Robotham, Serenity Lee, Richard Smith & Myles Durkee, *The Costs of Code-Switching*, HARV. BUS. REV. (Nov. 15, 2019), <https://hbr.org/2019/11/the-costs-of-codeswitching>; Parth Shah, Jennifer Schmidt, Tara Boyle & Shankar Vedantam, *The Double Bind for Women in Leadership*, NPR (Mar. 5, 2018, 9:01 AM), <https://www.npr.org/2018/03/05/590881966/-shes-shrill-but-hes-just-being-a-boss-the-double-bind-for-women-in-leadership>; Shankar Vedantam, Maggie Penman, Renee Klahr, Jennifer Schmidt & Tara Boyle, *Too Sweet, Or Too Shrill? The Double Bind for Women*, NPR (Oct. 18, 2016, 12:00 AM), <https://www.npr.org/2016/10/18/498309357/too-sweet-or-too-shrill-the-double-bind-for-women>.

713. CATALYST, WOMEN “TAKE CARE,” *supra* note 693; CATALYST, THE DOUBLE-BIND DILEMMA, *supra* note 693.

714. CATALYST, WOMEN “TAKE CARE,” *supra* note 693, at 30.

715. Sheryl Sandberg & Adam Grant, *Speaking While Female*, N.Y. TIMES (Jan. 12, 2015), <http://www.nytimes.com/2015/01/11/opinion/sunday/speaking-while-female.html>; *see also* Judith Newman, *Lean In: Five Years Later*, N.Y. TIMES (Mar. 16, 2018), <https://www.nytimes.com/2018/03/16/business/lean-in-five-years-later.html> (indicating 4.2 million copies of “Lean In” sold worldwide).

Since Rachel Dempsey coined the term “office housework” in 2014, there’s been a steady rise in buzz about this pattern of bias.<sup>716</sup> It has been widely discussed in many outlets, including *Harvard Business Review*, *Wall Street Journal*, *New York Times*, and public radio.<sup>717</sup> In an episode of *Battle Tactics for Your Sexist Workplace*, a public radio show and podcast, a listener described when a job applicant asked her to throw away his lunch debris while she, a college dean, was interviewing him: “It felt like he was putting me in my place.”<sup>718</sup> Today the phenomenon is so widely recognized it has entered the realm of satire, as in a comedic piece in the *New Yorker* that imagines letters written by historical figures to women about office housework, including one by Lewis and Clark to Sacagawea asking her to find a “foraging spot” for a celebratory thank you lunch.<sup>719</sup>

It also is widely recognized that it is risky when women express anger or assertiveness. An example is the public congressional testimony of Dr. Fiona Hill, former United States National Security Council official, who stated, “I hate to say it, but often when women show anger, it’s not fully appreciated . . . It’s often you know, pushed onto emotional issues perhaps or deflected onto other people.”<sup>720</sup>

People of color have also begun to be very public about how they are perceived as “too loud” or “too emotional” when they are behaving in ways readily accepted from white peers. In a series by *Refinery29* on Latinx professionals, a Puerto Rican respondent spoke of the criticism she received for being “too excited” and “too loud.”<sup>721</sup> “It was discouraging at first,” she said of her experience, “I attempted to curve my personality so I could ‘match’ the level of my white coworkers, but this quickly became exhausting and was never enough.”<sup>722</sup> The prominent writer and actor Mindy Kaling remembers being “terrified and silent” for most of the first season of *The Office* as the only woman

716. WILLIAMS & DEMPSEY, *supra* note 82, at 108–09.

717. Eula Scott Bynoe, Jeannie Yandel & Caroline Chamberlain Gomez, *Don’t Bring Cupcakes to Work if You’re a Woman*, KUOW (Oct. 17, 2018, 2:53 PM), <https://www.kuow.org/stories/the-dangers-of-bringing-cupcakes-to-work>; Rachel Feintzeig, *Don’t Ask Me to Do Office Housework!*, WALL ST. J. (Oct. 13, 2019, 5:30 AM), <https://www.wsj.com/articles/dont-ask-me-to-do-office-housework-11570959002>; Maya Salam, *Women, Stop Volunteering for Office Housework!*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/business/women-careers-volunteering-work.html>; Joan C. Williams & Marina Multhaup, *For Women and Minorities to Get Ahead, Managers Must Assign Work Fairly*, HARV. BUS. REV. (Mar. 5, 2018), <https://hbr.org/2018/03/for-women-and-minorities-to-get-ahead-managers-must-assign-work-fairly>; Deborah M. Kolb & Jessica L. Porter, “Office Housework” Gets in Women’s Way, HARV. BUS. REV. (Apr. 16, 2015), <https://hbr.org/2015/04/office-housework-gets-in-womens-way>.

718. Bynoe et al., *supra* note 717.

719. Ali Ruth, *Office Housework: A History*, NEW YORKER (Nov. 6, 2019), <https://www.newyorker.com/humor/daily-shouts/office-housework-a-history>.

720. Alisa Wiersema, *Fiona Hill’s Gender Critique During Public Impeachment Testimony Gets Applause Online*, ABC NEWS (Nov. 21, 2019, 2:01 PM), <https://abcnews.go.com/GMA/News/fiona-hills-gender-critique-public-impeachment-testimony-applause/story?id=67205306>.

721. Ludmila Leiva, *8 Latinx Professionals Open Up About Discrimination in the Workplace*, REFINERY29 (Oct. 8, 2018, 8:00 AM), <https://www.refinery29.com/en-us/2018/10/210398/latina-discrimination-workplace-microaggressions>.

722. *Id.*

and only person of color on the popular series' writing team while her white men colleagues remember her being loud and opinionated.<sup>723</sup>

The rise of nationally recognized women presidential candidates has highlighted the Tighrope pattern that women who display authority risk being disliked, whereas if they do not display authority they are seen as unqualified. A flood of articles discussed the likability of Hillary Rodham Clinton.<sup>724</sup> In one television skit highlighting these challenges, talk show host Jimmy Kimmel "mansplains" to Clinton how to perform her stump speech.<sup>725</sup> Kimmel frequently interrupts her to make contradictory points about how "shrill" she is, followed by how she sounds "like a mouse."<sup>726</sup> Since then, the discussions around the likability of women candidates have led to scrutiny, from campaigns themselves, political pundits, and journalists.<sup>727</sup> The *New York Times* alone has written about the topic several times in the run up to the 2020 election.<sup>728</sup> To quote one such piece, "Even when voters acknowledge that they have higher standards for female candidates, they *still* hold women to those standards . . . . On the flip side . . . voters will support a male candidate they don't like but who they think is qualified."<sup>729</sup>

Recent discussions of pay inequity also shine a light on how women need to tread carefully when handling work issues like negotiating for equal pay.<sup>730</sup> After it was revealed that Jennifer Lawrence was making significantly less than her co-stars who were men, she wrote of her concerns over seeming "difficult" during pay negotiations, starting her frank essay on pay equity with an accommodating, "I want to be honest and open and, fingers crossed, not piss

723. Mindy Kaling is an Indian-American writer, actor, and producer. The Off Camera Show with Sam Jones, *Mindy Kaling Shares Her Early Experiences in 'The Office' Writers Room*, YOUTUBE (Oct. 5, 2016), [https://www.youtube.com/watch?v=uY5\\_e0L7mJw](https://www.youtube.com/watch?v=uY5_e0L7mJw).

724. See, e.g., Michelle Hackman, *Is Hillary Clinton "Likable Enough"?* *Science Has an Answer*, VOX (Jan. 1, 2016, 9:00 AM), <https://www.vox.com/2016/1/1/10695570/hillary-clinton-likable>; Chris Cillizza, *Hillary Clinton Has a Likability Problem. Donald Trump Has a Likability Epidemic*, WASH. POST (May 16, 2016, 12:43 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/05/16/hillary-clintons-long-lingering-likable-enough-problem/>; Megan Carpentier, *Why Do People Dislike Hillary Clinton? The Story Goes Far Back*, GUARDIAN (Oct. 18, 2016, 8:05 AM), <https://www.theguardian.com/us-news/2016/oct/18/hillary-clinton-why-hate-unlikeable-us-election>.

725. Jimmy Kimmel Live, *Jimmy Kimmel Mansplains to Hillary Clinton*, YOUTUBE (Mar. 24, 2016), <https://www.youtube.com/watch?v=j2wBpYT6Zlo>.

726. *Id.*

727. Joan C. Williams, *How Women Can Escape the Likability Trap*, N.Y. TIMES (Aug. 16, 2019), <https://www.nytimes.com/2019/08/16/opinion/sunday/gender-bias-work.html>; Alisha Haridasani Gupta, *The Likability Trap Is Still a Thing*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/us/the-likability-trap-women-politics.html>; Jessica Bennett, *But Is She Likable Enough?*, N.Y. TIMES (Aug. 27, 2019), <https://www.nytimes.com/2019/08/27/us/likability-penalty.html>; Claire Bond Potter, *Men Invented 'Likability.' Guess Who Benefits*, N.Y. TIMES (May 4, 2019), <https://www.nytimes.com/2019/05/04/opinion/sunday/likeable-elizabeth-warren-2020.html>.

728. Williams, *supra* note 727; Gupta, *supra* note 727; Bennett, *supra* note 727; Potter, *supra* note 727.

729. Gupta, *supra* note 727.

730. See, e.g., Katherine Reynolds Lewis, *Here's How Women Can Use 'Gender Judo' to Get Ahead at Work*, FORTUNE (Oct. 28, 2015), <https://fortune.com/2015/10/28/women-career-advancement/>.

anyone off,” but then ending it with: “I’m over trying to find the ‘adorable’ way to state my opinion and still be likable! Fuck that.”<sup>731</sup>

A common way Tightrope bias patterns are featured in the entertainment industry is through the calls of action to upend prescriptive stereotypes or gender roles. A joint campaign by Lean In and the Girl Scouts asks for a ban on using the term “bossy” to pejoratively describe girls taking charge in the classroom and on playgrounds.<sup>732</sup> In one of their promotional videos Beyoncé says, “I’m not bossy. I’m the boss,” the clip gained nearly three million views on YouTube.<sup>733</sup> Since the launch of this Ban Bossy campaign, Blue Q, a national socks retailer, has made a pair of socks with this messaging.<sup>734</sup>

Another example is a widely circulated clip of Nicki Minaj explaining that men in the hip hop industry are viewed as “a boss” when they behave assertively, while she is perceived as “a bitch.”<sup>735</sup> She goes on to further explain the constricting Tightrope she’s forced to walk: “When you’re a girl, you have to be *everything*. You have to be dope at what you do but you have to be super sweet and you have to be sexy . . . and you have to be nice. . . . ‘I can’t be all those things at once. I’m a human being.”<sup>736</sup>

These bias patterns are so well known they have even made it into advertising by Toyota, Mercedes-Benz, and other companies.<sup>737</sup> In one Nike ad, Serena Williams lists common prescriptive stereotypes and gendered double standards that often hold women back; she then flips the script by listing all the triumphs women athletes have accomplished that were once deemed “crazy” and challenges women to “show [naysayers] what crazy can do.”<sup>738</sup> Williams was in a Las Vegas hotel when she saw another example: “Assertive women who drink juice are fucking sexy,” said an ad by Juice Press.<sup>739</sup>

*Dissemination of Maternal Wall Bias: A range of popular media outlets, from Fast Company, Forbes, The Wall Street Journal, Harvard Business*

731. Jennifer Lawrence is a white American actor. Jennifer Lawrence, *Jennifer Lawrence: “Why Do I Make Less Than My Male Co-Stars?”*, LENNY LETTER (Oct. 13, 2015), <https://www.lennyletter.com/story/jennifer-lawrence-why-do-i-make-less-than-my-male-costars>.

732. BAN BOSSY, <http://banbossy.com/> (last visited Nov. 23, 2020).

733. The Ban Bossy video had 2,883,272 views on YouTube as of Nov. 23, 2020. Lean In, *Ban Bossy—I’m Not Bossy. I’m the Boss*, YOUTUBE (Mar. 9, 2014), <https://www.youtube.com/watch?v=6dynbzMICcw>.

734. *I’m Not Bossy, I’m the Boss W-Crew Socks*, BLUE Q, <https://www.blueq.com/shop/item/330-productId.125847841.html> (last visited Nov. 23, 2020).

735. Nicki Minaj is a Black American hip hop and rap artist. *Nicki Minaj Vents About Being a Female MC in ‘My Time Now’ Preview*, MTV NEWS (Nov. 26, 2010), <http://www.mtv.com/news/1653115/nicki-minaj-vents-about-being-a-female-mc-in-my-time-now-preview/>.

736. *Id.*

737. CBS This Morning, *Toni Harris, Featured in Super Bowl Ad, Aspires to Be 1st Female NFL Player*, YOUTUBE (Jan. 29, 2019), <https://www.youtube.com/watch?v=G1RvmqYr7D4&t=6s>; Nike—*Dream Crazier*, YOUTUBE (Feb. 24, 2019), <https://www.youtube.com/watch?v=liCDRNW5A84>; Jessica Radloff, *50,000 Toy Cars Are Being Gifted to Young Girls to Challenge Gender Stereotypes*, GLAMOUR (Nov. 8, 2019), <https://www.glamour.com/story/50000-toy-cars-are-being-gifted-to-young-girls-to-challenge-gender-stereotypes>.

738. Nike—*Dream Crazier*, *supra* note 737.

739. Photograph of white text on a red rectangle reading “assertive women who drink juice are fucking sexy.”, FOURSQUARE (Nov. 2, 2016), <https://foursquare.com/v/juice-press/5345b33d498e4336f4bb8b18?openPhotoId=581a94768edd3a0eac8c1b19>.

*Review*, to *Science* and *The New York Times*—to name a handful—have written about the persistent and harmful effects of Maternal Wall bias in the workplace.<sup>740</sup> In 2004, Williams wrote in *Harvard Business Review*: “While some women stand nose pressed against the glass ceiling, many working mothers never get near it. What stops them is the ‘maternal wall.’”<sup>741</sup> By 2018, this formulation appeared in *Forbes*.<sup>742</sup>

As with the other bias patterns, people understand that there are professional ramifications to Maternal Wall. In a *New York Times* piece, Katherine Goldstein spells it out: “A lack of professional advancement for mothers as a result of bias, termed the ‘maternal wall,’ often has a big impact on who makes it to top leadership positions.”<sup>743</sup> The business section of *The Atlantic* described benevolent prescriptive stereotyping: “[A] common scenario involves overlooking female employees for challenging assignments because employers assume mothers won’t want to travel or handle the extra workload.”<sup>744</sup>

In recent years, *The New York Times* released multiple high-profile pieces in the business section on pregnancy and breastfeeding discrimination at work.<sup>745</sup> One airline pilot, Randi Freyer, developed mastitis with a 104-degree fever after human resources ignored her multiple requests to modify her flight

740. Alexia Fernández Campbell, *The Revolt of Working Parents*, ATLANTIC (Jan. 12, 2017), <https://www.theatlantic.com/business/archive/2017/01/the-new-glass-ceiling/512834/>; Melissa Locker, *Discrimination Against Working Mothers Is Alive and Well*, FAST CO. (Nov. 15, 2017), <https://www.fastcompany.com/40494089/discrimination-against-working-mothers-is-alive-and-well>; Katherine Goldstein, *The Open Secret of Anti-Mom Bias at Work*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/opinion/workplace-discrimination-mothers.html>; Lesley Evans Ogden, *Working Mothers Face a ‘Wall’ of Bias—But There Are Ways to Push Back*, SCI. MAG. (Apr. 10, 2019, 3:00 PM), <https://www.sciencemag.org/careers/2019/04/working-mothers-face-wall-bias-there-are-ways-push-back>; Joan C. Williams & Amy J. C. Cuddy, *Will Working Mothers Take Your Company to Court?*, HARV. BUS. REV. (Sept. 2012), <https://hbr.org/2012/09/will-working-mothers-take-your-company-to-court>; Mary Beth Ferrante, *Before Breaking the Glass Ceiling, Women Must Climb the Maternal Wall*, FORBES (Oct. 3, 2018), <https://www.forbes.com/sites/marybethferrante/2018/10/31/before-breaking-the-glass-ceiling-women-must-climb-the-maternal-wall/#4164a07bc519>; Sue Shellenbarger, *The “Maternal Wall”: Employer Bias Against Working Women*, WALL ST. J. (Dec. 3, 2009, 1:54 AM), <https://blogs.wsj.com/juggle/2009/12/03/the-maternal-wall-employer-bias-against-working-women/>.

741. Joan C. Williams, *The Maternal Wall*, HARV. BUS. REV. (Oct. 2004), <https://hbr.org/2004/10/the-maternal-wall>.

742. Ferrante, *supra* note 740.

743. Goldstein, *supra* note 740.

744. Campbell, *supra* note 740.

745. Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America’s Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html> [hereinafter Kitroeff & Silver-Greenberg, *Pregnancy Discrimination*]; Natalie Kitroeff, *‘A Pumping Conspiracy’: Why Workers Smuggled Breast Pumps into Prison*, N.Y. TIMES (Dec. 31, 2018), <https://www.nytimes.com/2018/12/31/business/breast-feeding-discrimination-pregnancy.html>; Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html>; Natalie Kitroeff & Jessica Silver-Greenberg, *Planned Parenthood Is Accused of Mistreating Pregnant Employees*, N.Y. TIMES (Dec. 20, 2018), <https://www.nytimes.com/2018/12/20/business/planned-parenthood-pregnant-employee-discrimination-women.html> [hereinafter Kitroeff & Silver-Greenberg, *Planned Parenthood*].

schedule so she could express breastmilk.<sup>746</sup> In another particularly heartbreaking case, journalists shared the story of Chasisty Bee, whose supervisors at a Verizon warehouse rejected her requests for lighter duties during a pregnancy in 2014.<sup>747</sup> “One afternoon, after almost 14 hours on her feet, she started feeling dizzy and crumpled to the warehouse floor. Her physician told her that she had miscarried.”<sup>748</sup>

Williams and Amy Cuddy, a social psychologist and former Harvard Business School professor, warned employers long ago that perpetuating Maternal Wall bias puts organizations at legal risk.<sup>749</sup> In a 2012 *Harvard Business Review* article they noted: “Working mothers have become more likely to sue their employers for discrimination . . . . A new field of employment law, family responsibilities discrimination, is taking off.”<sup>750</sup> Journalists at *The New York Times* have continued to note the rise of Maternal Wall litigation, writing recently: “The number of pregnancy discrimination claims filed annually with the Equal Employment Opportunity Commission has been steadily rising for two decades and is hovering near an all-time high.”<sup>751</sup>

Again recent presidential campaigns have played a role. Senator Elizabeth Warren spoke openly about the pregnancy discrimination she experienced early in her career as a teacher, setting off a buzz in national outlets, like *Forbes* and *Vox*, as well as local ones, like the *Detroit Free Press*.<sup>752</sup> Women athletes sponsored by Nike outed the ways they were pressured to either keep performing or be pushed out of their contracts during and after pregnancy in a series of *New York Times* videos and articles.<sup>753</sup> “If we have children, we risk pay cuts from our sponsors during pregnancy and afterward. It’s one example of a sports industry where the rules are still mostly made for and by men . . . . If I, one of Nike’s most widely marketed athletes, couldn’t secure these [pregnancy] protections, who could?” wrote Allyson Felix, a nine-time Olympic medalist, in a *New York Times* op-ed.<sup>754</sup>

746. Kitroeff, *supra* note 745.

747. Silver-Greenberg & Kitroeff, *supra* note 745.

748. *Id.*

749. Williams & Cuddy, *supra* note 740.

750. *Id.*

751. Kitroeff & Silver-Greenberg, *Pregnancy Discrimination*, *supra* note 745.

752. Emma Hinchliffe, *Elizabeth Warren’s Story Shows Why Pregnancy Discrimination Is So Insidious*, FORTUNE (Oct. 8, 2019, 1:37 PM), <https://fortune.com/2019/10/08/elizabeth-warren-pregnancy-discrimination/>; Nancy Kaffer, ‘Evidence’ Used to Discredit Elizabeth Warren Pregnancy Story Actually Proves Her Point, DETROIT FREE PRESS (Oct. 15, 2019, 8:51 AM), <https://www.freep.com/story/opinion/columnists/nancy-kaffer/2019/10/11/elizabeth-warren-pregnancy-fired/3934102002/>; Thomas Kaplan, *Elizabeth Warren Details Her Account of Losing Her Teaching Job Because of Pregnancy*, N.Y. TIMES, <https://www.nytimes.com/2019/10/08/us/politics/elizabeth-warren-fired-pregnant.html> (Feb. 26, 2020); Emily Stewart, *The Elizabeth Warren Pregnancy Firing Controversy, Explained*, VOX (Oct. 8, 2019, 1:35 PM), <https://www.vox.com/policy-and-politics/2019/10/8/20904777/elizabeth-warren-pregnancy-discrimination-washington-free-beacon>.

753. Alysia Montaño, *Nike Told Me to Dream Crazy, Until I Wanted a Baby*, N.Y. TIMES (May 12, 2019), <https://www.nytimes.com/2019/05/12/opinion/nike-maternity-leave.html>; Allyson Felix, *Allyson Felix: My Own Nike Pregnancy Story*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/opinion/allyson-felix-pregnancy-nike.html?action=click&module=RelatedLinks&pgtype=Article>.

754. Felix, *supra* note 753.

Beyond the now-standard news coverage of the Maternal Wall, there has also been a growing interest in “know your rights” materials for employees, and guidance for employers on how to better support mothers in the workplace. Research and advocacy organizations like the Center for WorkLife Law and A Better Balance have published resources on these subjects via their own platforms and have also partnered with *The New York Times* to create additional guidance for their readers.<sup>755</sup> This awareness has also seen a surge in interest from elected officials and lobbying groups advocating for stronger protections for working caregivers, including a recent proposal by Senator Cory Booker to add caregiver discrimination to Title VII.<sup>756</sup> As of March 2020, over thirty states and localities have passed pregnant workers fairness laws.<sup>757</sup>

*Dissemination of Tug of War Bias:* This pattern, too, has received widespread coverage—although typically as articles about the “queen bee” who does not support other women.<sup>758</sup> This is a blame-the-victim take on women who find themselves encouraged by gender bias in their environments to side with the boys’ club against other women. As psychologist Belle Derks explained it to CBS News in 2011, “(being a) queen bee is simply a way of getting ahead in a company where femininity is not valued very highly.”<sup>759</sup>

A 2017 piece in *The Atlantic* that explores this issue, journalist Olga Khazan initially received pushback from women when she asked about whether or not they had been harshly treated by other women at work.<sup>760</sup> But then, “they would say things like ‘[w]ell, there was this one time,’” she writes, “and tales of female sabotage would spill forth. As I went about my dozens of interviews, I began to feel like a priest to whom women were confessing their sins against feminism.”<sup>761</sup> Khazan’s extensive article goes on to unravel the ways Prove-It-Again and Tightrope biases act as pressure cookers when women are tokenized

755. *Know Your Rights: State and Local Rights*, BABYGATE, <https://babygate.abetterbalance.org/know-your-rights/state-local-rights/> (last visited Nov. 23, 2020); *Talking to Your Boss About Your Bump?*, PREGNANT AT WORK, <https://www.pregnantatwork.org/pregnant-women-pregnancy/> (last visited Nov. 23, 2020); *Workplace Lactation Laws*, PREGNANT AT WORK, <https://www.pregnantatwork.org/workplace-lactation-laws> (last visited Nov. 23, 2020); Robin Shulman, *If You’re Pregnant and Working, Know Your Rights*, N.Y. TIMES (Apr. 18, 2019), <https://parenting.nytimes.com/work-money/pregnancy-discrimination-work>; Anna Nowogrodzki, *How to Keep Pumping When You Return to Work*, N.Y. TIMES, <https://www.nytimes.com/article/pumping-at-work.html> (May 8, 2020).

756. Protecting Family Caregivers from Discrimination Act, S. 3878, 116th Cong. § 2 (2020); *ACLU Petition: Protect the Rights of Pregnant Workers*, ACLU, [https://action.aclu.org/petition/protect-pregnant-worker-rights?ms\\_aff=NAT&initms\\_aff=NAT&ms=190108\\_womensrights\\_pwfa&initms=190108\\_womensrights\\_pwfa&ms\\_chan=web&initms\\_chan=web](https://action.aclu.org/petition/protect-pregnant-worker-rights?ms_aff=NAT&initms_aff=NAT&ms=190108_womensrights_pwfa&initms=190108_womensrights_pwfa&ms_chan=web&initms_chan=web) (last visited Nov. 23, 2020); Melissa Locker, *Congress Moves to Protect Pregnant Women at Work*, FAST CO. (May 15, 2019), <https://www.fastcompany.com/90350356/new-bill-in-the-u-s-house-protects-jobs-of-pregnant-workers>.

757. *State Pregnant Workers Fairness Laws*, A BETTER BALANCE, <https://www.abetterbalance.org/resources/pregnant-worker-fairness-legislative-successes/> (last visited Nov. 23, 2020).

758. Reality Check Team, *Queen Bees: Do Women Hinder the Progress of Other Women?*, BBC NEWS (Jan. 4, 2018), <https://www.bbc.com/news/uk-41165076>.

759. Kimberly Weisul, *Why Your Queen Bee Boss Won’t Help You*, CBS NEWS (July 8, 2011, 4:46 PM), <https://www.cbsnews.com/news/why-your-queen-bee-boss-wont-help-you/>.

760. Olga Khazan, *Why Do Women Bully Each Other at Work?*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/the-queen-bee-in-the-corner-office/534213/>.

761. *Id.*

at work, leading to strategic distancing or intensified survival-mode competition, such as when women managers hold their women subordinates to higher expectations, or nitpick their performance, often because they recognize their team member's work will likely reflect back on them as another woman, not just as their manager (aka "collective threat").<sup>762</sup> Another *Atlantic* article concluded simply that "Queen Bee behaviors are triggered in male dominated environments in which women are devalued."<sup>763</sup>

Prominent women have begun to warn other women to avoid the Tug of War. One of the earliest examples is a now oft quoted line from a speech by former Secretary of State Madeleine Albright, "I think there is a special place in hell for women who don't help other women."<sup>764</sup> Tina Fey's *Bossypants*, which has sold nearly four million copies since it was published in 2011, advises readers: "People are going to trick you. To make you feel that you're in competition with one another. . . . Don't be fooled. You're not in competition with other women. You're in competition with *everyone*."<sup>765</sup> Senator Claire McCaskill also spoke up: "Now that there are other female colleagues, I think you get over the Queen Bee Syndrome. If you're not gonna be the only woman, you're less worried about other women competing with you."<sup>766</sup> In an article for *Harvard Business Review*, finance leader Anne Welsh McNulty said that she had learned from her own early career "queen bee" experiences and urged readers, "[d]on't underestimate the power of women connecting and supporting each other at work."<sup>767</sup>

Popular culture, too, has taken up this theme in both the gender and the race contexts. The Pixar animated short *Purl* is about a pink ball of yarn trying to assimilate in a white men dominated workplace; the video has been viewed over seventeen million times on YouTube alone.<sup>768</sup> When a new ball of yarn shows up to work after Purl has finally been accepted by her peers, the title character's initial instinct is to distance herself from the new co-worker given how difficult it was for her colleagues to accept her when she exhibited feminine traits.<sup>769</sup> The film makes it clear that this instinct is unworthy, and Purl quickly reverses her

762. *Id.*; see also Duguid et al., *supra* note 332, at 393–94.

763. Marianne Cooper, *Why Women (Sometimes) Don't Help Other Women*, ATLANTIC (June 23, 2016), <https://www.theatlantic.com/business/archive/2016/06/queen-bee/488144/>. This article goes on to explain that elements of 'queen bee' are not unique to women, social distancing for example may happen among gay men who "try to distance themselves from stereotypes about gays being effeminate by emphasizing hyper-masculine traits." *Id.*

764. Mechelle Voepel, *Albright Empowers All-Decade Team at Luncheon*, ESPN (July 12, 2006), [https://www.espn.com/wnba/columns/story?columnist=voepel\\_mechelle&id=2517642](https://www.espn.com/wnba/columns/story?columnist=voepel_mechelle&id=2517642).

765. TINA FEY, *BOSSYPANTS* 88 (2011).

766. Alex Wagner, *Ladies First*, ATLANTIC (Nov. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/11/ladies-first/506546/>.

767. Anne Welsh McNulty, *Don't Underestimate the Power of Women Supporting Each Other at Work*, HARV. BUS. REV. (Sept. 3, 2018), <https://hbr.org/2018/09/dont-underestimate-the-power-of-women-supporting-each-other-at-work>.

768. *Purl* has been viewed 17,208,366 times on YouTube as of November 20, 2020. Pixar, *Purl—Pixar SparkShorts*, YOUTUBE (Feb. 4, 2019), <https://www.youtube.com/watch?v=B6uulHpFkuo>.

769. *Id.*

initial strategy and embraces her new colleague—at which point the men do, too.<sup>770</sup>

Less discussion exists of Tug of War dynamics among people of color. A notable exception is the persistent questions faced by Black politicians about whether they are “Black enough.”<sup>771</sup> Then-presidential candidate Senator Kamala Harris responded to this common critique in an interview with *The Breakfast Club*: “[T]his is the same thing they did to Barack [Obama] . . . They’re trying to . . . sow hate and division among us, and so we need to recognize when we’re being played.”<sup>772</sup> Harris is also an example of how this Tug of War gets even more complicated for multiracial people, as she also faced calls from some in the Asian American community to showcase her Indian heritage more on the national stage.<sup>773</sup> A similar theme emerged in *The Good Fight*, a television series that features a Black-majority law firm in Chicago, where tensions run high when Black employees begin to fear that their white co-workers are unfairly favored by management after salary inequities become public.<sup>774</sup> In the midst of this reckoning, Lucca, a biracial character, faces conflict with a white colleague for insinuating her colleague may be racially biased and criticism from a Black colleague for not being more aware of racial inequities at their workplace.<sup>775</sup>

*New Recognition of the Harm of Racial Stereotyping:* Racial stereotypes have had a long history in the United States; what is new is the recognition in mainstream media of how inappropriate and hurtful they are, as the movement spurred by Black Lives Matter highlights the structural nature of racism. In May

770. *Id.*

771. Satta Sarmah, *Is Obama Black Enough?*, COLUM. JOURNALISM REV. (Feb. 15, 2007), [https://archives.cjr.org/politics/is\\_obama\\_black\\_enough.php](https://archives.cjr.org/politics/is_obama_black_enough.php); David Graham, *A Short History of Whether Obama Is Black Enough, Featuring Rupert Murdoch*, ATLANTIC (Oct. 8, 2015), <https://www.theatlantic.com/politics/archive/2015/10/a-short-history-of-whether-obama-is-black-enough-featuring-rupert-murdoch/409642/>;

Jaweed Kaleem & Melanie Mason, *Kamala Harris & Cory Booker Embrace New Era for Black Candidates Post-Obama*, L.A. TIMES (Mar. 31, 2019), <https://www.latimes.com/politics/la-na-pol-harris-booker-black-african-american-20190331-story.html>.

772. CNN, *Kamala Harris’ Answer to Critics Who Say She’s Not ‘Black Enough’*, YOUTUBE (Feb. 11, 2019), <https://www.youtube.com/watch?v=IpkBYSN9m4&feature=youtu.be&t=104>.

773. Chris Fuchs, *In Kamala Harris’ Presidential Campaign, Indian Americans Want More Opportunities to Connect*, NBC NEWS (Feb. 12, 2019, 10:25 AM), <https://www.nbcnews.com/news/asian-america/kamala-harris-presidential-campaign-indian-americans-want-more-opportunities-connect-n965436>; Emil Guillermo, *Kamala Harris Has No Problem Being Black, But Why Doesn’t She Say Publicly She’s Part Asian?*, DIVERSE EDUCATION (June 30, 2019), <https://diverseeducation.com/article/148713/>. Presidential candidates of color were not the only ones to receive pushback that they were not “[insert identity] enough.” Pete Buttigieg also received criticism from some members of the LGBTQ+ community for not being sufficiently “gay” because of his personality and policy positions. Shannon Keating, *You Wanted Same-Sex Marriage? Now You Have Pete Buttigieg*, BUZZFEED NEWS (Dec. 11, 2019, 1:11 PM), <https://www.buzzfeednews.com/article/shannonkeating/pete-buttigieg-marriage-equality-lgbtq-gay-rights>; Skylar Baker-Jordan, *If One More Polyamorous Coastal ‘Queer’ Tells Me Pete Buttigieg Isn’t Gay Enough I’ll Scream. He Is—and So Am I*, INDEPENDENT (Dec. 13, 2019), <https://www.independent.co.uk/voices/buttigieg-chasten-gay-enough-queer-radical-a9246501.html>; Masha Gessen, *The Queer Opposition to Pete Buttigieg, Explained*, NEW YORKER (Feb. 12, 2020), <https://www.newyorker.com/news/our-columnists/the-queer-opposition-to-pete-buttigieg-explained>.

774. *The Good Fight: The One with Lucca Becoming a Meme* (CBS television broadcast Apr. 4, 2019).

775. *Id.*

2020, following the continued killings of Black Americans, including Ahmaud Arbery, Breonna Taylor and George Floyd, nationwide protests and calls for justice emerged.<sup>776</sup> Calls for reform were not isolated to policing and criminal justice circles; it became in vogue for companies to send out emails and social media campaigns aligning themselves with the Black Lives Matter movement and their commitment to a just workplace.<sup>777</sup> This conversational renaissance around race prompted some to refer to these statements by major corporations as “woke-washing,” a half-hearted attempt at solidarity with limited, if any, structural changes on their part.<sup>778</sup> Color for Change, a civil rights advocacy group, started a petition campaign demanding companies like Nike move #BeyondTheStatement: “Any company [who has] released a statement championing equity and decrying racism needs to take a good look at how injustice plays out in their own structures.”<sup>779</sup>

Current controversies are causing more Americans to recognize racist stereotypes when they see them. In 2018, clothing retailer H&M faced backlash after an image from their website showing an elementary school-aged Black boy wearing a sweatshirt that read “COOLEST MONKEY IN THE JUNGLE” went viral on Twitter.<sup>780</sup> H&M apologized, and took the image offline and the product out of stores.<sup>781</sup> Black people have long been likened to apes; even being President and First Lady did not prevent Barrack and Michelle Obama from being depicted as apes in internet memes or being called “monkey face” by detractors.<sup>782</sup>

When San Francisco 49ers football player Colin Kaepernick began protesting during the national anthem in August 2016, he faced significant backlash.<sup>783</sup> He was voted the most disliked player in the National Football

776. Anna North, *The Protest Over Breonna Taylor's Shooting Death, Explained*, VOX (June 3, 2020, 9:30 PM) <https://www.vox.com/2020/6/3/21279590/breonna-taylor-david-mcatee-death-police-protests>; Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>; Bob Self, *Demonstrators Gather to Protest Shooting Death of Ahmaud Arbery in Brunswick, Ga.*, USA TODAY (May 9, 2020, 11:04 AM), <https://www.usatoday.com/picture-gallery/news/nation/2020/05/08/protests-erupt-following-shooting-death-ahmaud-arbery/3097112001/>.

777. Tiffany Hsu, *Corporate Voices Get Behind 'Black Lives Matter' Cause*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/business/media/companies-marketing-black-lives-matter-george-floyd.html> (June 10, 2020).

778. Erin Dowell & Marlette Jackson, “*Woke-Washing*” *Your Company Won't Cut It*, HARV. BUS. REV. (July 27, 2020), <https://hbr.org/2020/07/woke-washing-your-company-wont-cut-it>.

779. Nike: *It's Time to Move #BeyondTheStatement*, COLOR OF CHANGE, <https://act.colorofchange.org/sign/black-workers-matter/> (last visited Nov. 23, 2020).

780. Liam Stack, *H&M Apologizes for 'Monkey' Image Featuring Black Child*, N.Y. TIMES (Jan. 8, 2018), <https://www.nytimes.com/2018/01/08/business/hm-monkey.html>.

781. *Id.*

782. Samantha Cooney, *Doctor Who Called Michelle Obama 'Monkey Face' Has Been Suspended*, TIME (Dec. 2, 2016), <https://time.com/4588752/michelle-obama-monkey-face-doctor/>; Adam Beam, *GOP Hopeful Not Sorry for Posts Depicting Obamas as Monkeys*, AP NEWS (Sept. 30, 2016), <https://apnews.com/90ec82dfca4f45e48628e4ae45b8247f>; Leslie Marshall, *Obama Monkey Picture Shows Racism Is Alive and Well in America*, US NEWS: THOMAS JEFFERSON ST. (Apr. 20, 2011), <https://www.usnews.com/opinion/blogs/leslie-marshall/2011/04/20/obama-monkey-picture-shows-racism-is-alive-and-well-in-america>.

783. Amy Tennery, *Kaepernick Anthem Protest Prompts Backlash from NFL Greats*, REUTERS (Aug. 30, 2016), <https://www.reuters.com/article/us-usa-nfl-kaepernick-idUSKCN1152AJ>; Hamed Aleaziz, *Colin*

League (NFL), and was not hired by any team after declining to renew his contract with the 49ers.<sup>784</sup> About a year later, President Donald Trump suggested the NFL should fire players who do not stand for the national anthem. In response, many team owners took a knee or locked arms with players during the national anthem as a show of unity.<sup>785</sup> More recently, people have begun to view Kaepernick's earlier protests as "prescient," and NFL Commissioner Roger Goodell issued an apology to players in June 2020: "[W]e were wrong for not listening to NFL players earlier and encourage all to speak out and peacefully protest. We, the National Football League, believe black lives matter."<sup>786</sup>

The new recognition that racial stereotypes are deeply inappropriate and harmful was highlighted when Quaker Oats announced in 2020 that it will be pulling its Aunt Jemima brand syrup and pancake mix off the shelves because the name's origin in a "racial stereotype."<sup>787</sup> Also newly controversial are depictions of African Americans as "the help." In June 2020, HBO Max, an online streaming service, temporarily pulled the 1940 film *Gone with the Wind* from its platform stating, "These racist depictions were wrong then and are wrong today, and we felt that to keep this title up without an explanation and a denouncement of those depictions would be irresponsible."<sup>788</sup> Two weeks later, the platform reintroduced the film with accompanying videos that contextualize the depictions of Black people in the film, with scholar Jacqueline Stewart explaining: "The film represents enslaved Black people in accordance with long-standing stereotypes: as servants, notable for their devotion to their white masters, or for their ineptitude."<sup>789</sup> Viola Davis, a Black woman who was nominated for an Academy Award for her performance as Aibileen Clark, a maid for a southern white family in *The Help*, has said she regrets playing the role, telling *Vanity Fair*, "[T]here's a part of me that feels like I betrayed myself, and my people, because I was in a movie that wasn't ready to [tell the whole

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*Kaepernick and Other Pro Athletes Pay A Price for Activism*, S.F. CHRON. (Sept. 1, 2016, 8:40 AM), <https://www.sfchronicle.com/bayarea/article/Colin-Kaepernick-and-other-pro-athletes-pay-a-9196376.php>.

784. Scooby Axson, *Poll: 49ers QB Colin Kaepernick Most Disliked Player in NFL*, SPORTS ILLUSTRATED (Sept. 22, 2016), <https://www.si.com/nfl/2016/09/22/san-francisco-49ers-colin-kaepernick-most-disliked-player>; Matt Maiocco, *Kaepernick Officially Opts Out of 49ers' Contract to Become Free Agent*, NBC SPORTS (Mar. 3, 2017), <https://www.nbcsports.com/bayarea/49ers/kaepernick-officially-opts-out-49ers-contract-become-free-agent>.

785. Tim Webber, *How Every NFL Team Responded to Trump's National Anthem Protest Comments*, NPR (Sept. 25, 2017, 5:64 PM), <https://www.npr.org/2017/09/25/553539767/how-every-nfl-team-responded-to-trump-s-national-anthem-protest-comments>.

786. *The Saga of Colin Kaepernick: Vindication But Still No Contract*, CBS SF BAY AREA (June 6, 2020, 2:42 PM), <https://sanfrancisco.cbslocal.com/2020/06/06/colin-kaepernick-vindication-no-nfl-contract/>.

787. Ben Kessler, *Aunt Jemima Brand to Change Name, Remove Image that Quaker Says Is 'Based on a Racial Stereotype'*, NBC NEWS (June 17, 2020, 12:07 PM), <https://www.nbcnews.com/news/us-news/aunt-jemima-brand-will-change-name-remove-image-quaker-says-n1231260>.

788. Daniel Victor, *HBO Max Pulls 'Gone With the Wind,' Citing Racist Depictions*, N.Y. TIMES (June 14, 2020), <https://www.nytimes.com/2020/06/10/business/media/gone-with-the-wind-hbo-max.html>.

789. Cydney Henderson, *'Gone With the Wind' Returns to HBO Max with Disclaimer, Discussion on 'Complicated Legacy'*, USA TODAY (June 24, 2020, 7:54 PM), <https://www.usatoday.com/story/entertainment/movies/2020/06/24/gone-wind-returns-hbo-max-disclaimer-videos/3254546001/>.

truth].<sup>790</sup> In the more recent television adaptation of *Little Fires Everywhere*, an affluent white woman is depicted as uncomfortable with inviting a Black woman to help her around the house.<sup>791</sup> “You mean, like to be your maid?,” asks the Black woman.<sup>792</sup> “More, more like a housekeeper,” responds the white woman.<sup>793</sup> In a workplace context, Editor-in-Chief of *Bon Appétit*, Adam Rapoport, resigned after allegations of racism and unequal treatment at the magazine began to emerge.<sup>794</sup> *Business Insider* quoted his assistant, Ryan Walker-Hartshorn, a Black woman, explaining that, “He treats me like the help.”<sup>795</sup>

The COVID-19 pandemic may also have made Americans more aware of the links between the twenty-first century “forever foreign” stereotype and the intensely harmful and xenophobic nineteenth century stereotyping of Asian Americans as the “yellow peril.”<sup>796</sup> In early 2020, when the COVID-19 health pandemic began to spread in the United States, it didn’t take long for some to frame the virus as a foreign threat.<sup>797</sup> President Donald Trump went on to refer to the pathogen as the “Chinese virus,” despite strong criticism that the label was rooted in xenophobia and might trigger discrimination against the Asian community.<sup>798</sup> While the first known case of this strain of coronavirus was found in Wuhan, China, it quickly became a global phenomenon. One headline from NBC summarized it simply: “Coronavirus fears show how ‘model minority’ Asian Americans become the ‘yellow peril.’”<sup>799</sup> Newspapers highlighted the ways attacks became literal: the *Mercury News* noted that 300 news articles reported attacks on Asian Americans in a roughly a two week period.<sup>800</sup> In the current freighted atmosphere, mainstream media are also becoming more aware of the downsides to the “model minority” stereotype. As reported by *Business*

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790. Sonia Saraiya, *Viola Davis: “My Entire Life Has Been a Protest”*, VANITY FAIR (July 14, 2020), <https://www.vanityfair.com/hollywood/2020/07/cover-story-viola-davis>.

791. *Little Fires Everywhere: The Spark* (Hulu streaming Mar. 18, 2020).

792. *Id.*

793. *Id.*

794. Rachel Premack, *Bon Appétit’s Editor in Chief Just Resigned—but Staffers of Color Say There’s a ‘Toxic’ Culture of Microaggressions and Exclusion that Runs Far Deeper than One Man*, BUS. INSIDER (June 9, 2020, 8:22 PM), <https://www.businessinsider.com/bon-appetit-adam-rapoport-toxic-racism-culture-2020-6>.

795. *Id.*; Justin Curto, *Everything to Know About the Media’s Reckoning With Abuse of Power*, VULTURE (July 24, 2020), <https://www.vulture.com/2020/07/a-list-of-media-companies-reckoning-with-racism.html>.

796. Adrian De Leon, *The Long History of U.S. Racism Against Asian Americans, from ‘Yellow Peril’ to ‘Model Minority’ to the ‘Chinese Virus’*, USC DORNSIFE (Apr. 8, 2020), <https://dornsife.usc.edu/news/stories/3192/coronavirus-covid-19-racism-asian-americans-model-minority/>.

797. Robin Savillo, *Fox News Pushes Racist and Xenophobic Language for Coronavirus*, MEDIA MATTERS FOR AMERICA (Mar. 25, 2020, 1:17 PM), <https://www.mediamatters.org/coronavirus-covid-19/fox-news-pushes-racist-and-xenophobic-language-coronavirus>.

798. Eren Orbey, *Trump’s “Chinese Virus” and What’s at Stake in the Coronavirus’s Name*, NEW YORKER (Mar. 25, 2020), <https://www.newyorker.com/culture/cultural-comment/whats-at-stake-in-a-virus-name>.

799. Matthew Lee, *Coronavirus Fears Show How ‘Model Minority’ Asian Americans Become the ‘Yellow Peril’*, NBC NEWS (Mar. 9, 2020, 8:22 PM), <https://www.nbcnews.com/think/opinion/coronavirus-fears-show-how-model-minority-asian-americans-become-yellow-ncna151671>.

800. Leonardo Castañeda, *Coronavirus: Attacks Against Asian Americans Reported in Bay Area and Beyond*, MERCURY NEWS (Mar. 23, 2020, 6:42 AM), <https://www.mercurynews.com/2020/03/21/coronavirus-attacks-against-asian-americans-reported-in-bay-area-and-beyond/>.

*Insider*, chef and magazine contributor Sohla El-waylly shared that she and her fellow co-workers of color at *Bon Appétit* had not been compensated for their video appearances on the magazine's successful YouTube channel, "Test Kitchen."<sup>801</sup> El-waylly, who is Bengali-American, pointed out that she was offered a considerably lower status position and salary at *Bon Appétit* despite having more extensive training and expertise than many of her white, better-compensated peers.<sup>802</sup>

The heightened attention to the Black Lives Matter movement and structural racism has also impacted popular understandings of Latinx stereotypes and the American Latinx experience. Alexandria Ocasio-Cortez, a congresswoman of Puerto Rican descent who has become a press phenomenon, has played a critical role in increasing visibility and understanding for the Latinx community. In July 2019, President Donald Trump tweeted a rant concerning "'Progressive' Democrat Congresswomen," suggesting that "they go back and help fix the totally broken and crime infested places from which they came."<sup>803</sup> Though Trump didn't list the congresswomen by name, it was widely reported in the media that he was referring to Ocasio-Cortez and some of her close colleagues, all women of color.<sup>804</sup> In response Ocasio-Cortez called him out: "once you start telling American citizens to quote 'go back to their countries,' . . . it's about ethnicity and race."<sup>805</sup>

Ocasio-Cortez's straightforward callouts of racist and sexist attacks on her may provide a useful reference point for attorneys trying to explain their Latinx clients' experience. In June 2020, *The Hill* reported that Ocasio-Cortez was verbally accosted on the United States Capitol steps by Representative Ted Yoho, who later called her a "fucking bitch."<sup>806</sup> The *New York Times* printed the "fucking bitch" comment on the front page.<sup>807</sup> After the story went viral, Yoho publicly spoke about the matter in the House of Representatives, but he did not mention Ocasio-Cortez by name in his "apology" and denied the "offensive

801. Premack, *supra* note 794; Palmer Haasch, *The Internet Is Rallying Behind Bon Appétit's Sohla El-Waylly After She Accused the Publication of Pay Inequity*, BUS. INSIDER (June 9, 2020), <https://www.businessinsider.in/thelife/news/the-internet-is-rallying-behind-bon-appetits-sohla-el-waylly-after-she-accused-the-publication-of-pay-inequity/articleshow/76290920.cms>.

802. Premack, *supra* note 794; Haasch, *supra* note 801.

803. Nina Golgowski, *Trump Urges Democratic Congresswomen to 'Go Back' to Other Countries in Racist Rant*, HUFFPOST, [https://www.huffpost.com/entry/trump-tells-congresswomen-to-leave-us\\_n\\_5d2b300fe4b0060b11ee0664](https://www.huffpost.com/entry/trump-tells-congresswomen-to-leave-us_n_5d2b300fe4b0060b11ee0664) (July 20, 2019).

804. *Id.*; *Donald Trump Tells US Congresswomen to Go Back to Where They Came From*, ABC NEWS (July 14, 2019), <https://www.abc.net.au/news/2019-07-15/trump-tells-us-born-congresswomen-to-go-back-to-home-countries/11308368>.

805. Daniel Marans, *Alexandria Ocasio-Cortez Embraces Her Maverick Role in First Town Hall Since High-Profile Spat*, HUFFPOST, [https://www.huffpost.com/entry/alexandria-ocasio-cortez-immigration-town-hall-maverick-defiant-progressive-corona-queens\\_n\\_5d33b7c8e4b020cd99446eaa](https://www.huffpost.com/entry/alexandria-ocasio-cortez-immigration-town-hall-maverick-defiant-progressive-corona-queens_n_5d33b7c8e4b020cd99446eaa) (July 22, 2019).

806. Mike Lillis, *Ocasio-Cortez Accosted by GOP Lawmaker Over Remarks: 'That Kind of Confrontation Hasn't Ever Happened to Me'*, HILL (July 21, 2020, 8:45 AM), <https://thehill.com/homenews/house/508259-ocasio-cortez-accosted-by-gop-lawmaker-over-remarks-that-kind-of>.

807. Luke Broadwater & Catie Edmondson, *A.O.C. Unleashes a Viral Condemnation of Sexism in Congress*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/23/us/alexandria-ocasio-cortez-sexism-congress.html>.

name calling” that was reported in the press.<sup>808</sup> He closed his remarks by saying, “I cannot apologize for my passion or for loving my God, my family, and my country.”<sup>809</sup> The following day, Ocasio-Cortez took to the microphone in response with a speech that quickly gained traction:

Representative Yoho put his finger in my face, he called me disgusting, he called me crazy, he called me out of my mind, and he called me dangerous . . . Representative Yoho called me, and I quote, a fucking bitch. These are the words that Representative Yoho levied against a congresswoman . . . this issue is not about one incident, it is cultural.<sup>810</sup>

As of November 2020, the clip of her speech on the C-SPAN Twitter account had over 16.1 million views.<sup>811</sup> This level of visibility and direct recognition of the harm caused by racist and sexist stereotypes is a prime example of the sea change happening in America’s conversation on racial and ethnic inequality.

*Conclusion.* Attorneys arguing employment discrimination cases and judges assessing what a reasonable jury would find in the context of summary judgment motions would be well-advised to recognize the widespread dissemination of the basic bias patterns. Widespread dissemination also means that five-patterns evidence often can be introduced as commonsense stereotyping evidence, without expert testimony. An important note: this does not mean that use of expert testimony will never be appropriate. For example, although most Americans know by now that some groups need to prove themselves more than others, an expert could provide important context concerning the relationship between leniency bias and in-group favoritism, or on the psychological processes that create Tug of War patterns (favoritism threat, competitive threat, etc.). How five-patterns evidence is used often will depend on circumstances. Plaintiffs in individual disparate treatment cases likely will use five-patterns evidence as stereotyping evidence or comparator evidence, while class action plaintiffs are more likely to link the patterns to specific studies (such as those cited in this Article) and seek to introduce expert testimony.

**B. TO AVOID DILUTION, WES DATA SUGGEST THAT LAWYERS SHOULD CONSIDER USING WHITE MEN AS COMPARATORS, PARTICULARLY IN CASES INVOLVING “INTERSECTIONAL PLAINTIFFS”**

Lawyers in class actions involving race or gender discrimination plaintiffs should consider comparing the experience of the protected group to the experience of white men, rather than comparing men to women or white people

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808. *Representative Yoho Apologizes for “Abrupt” Conversation with Representative Ocasio-Cortez, Denies Name-Calling* (C-SPAN television broadcast July 22, 2020).

809. *Id.*

810. Jack Hutton, *Rep Alexandria Ocasio-Cortez Addressing Rep Ted Yoho’s Abusive Comments*, C-SPAN (July 23, 2020), <https://www.c-span.org/video/?c4894472/user-clip-rep-alexandria-ocasio-cortez-addressing-rep-ted-yohos-abusive-comments>.

811. CSPAN (@CSPAN), TWITTER (July 23, 2020, 8:02 AM), <https://twitter.com/cspan/status/1286315637275598849> (last visited Nov. 23, 2020).

to people of color. The strongest case for trying this concerns Prove-It-Again bias, which is triggered robustly both by gender and by race.<sup>812</sup> Requiring women to compare themselves to men of all races will understate the level of gender-based Prove-It-Again bias against women by diluting the sharply lower rate of Prove-It-Again bias reported by white men with the considerably higher rate reported by men of color. Similarly, requiring racial discrimination plaintiffs to compare themselves to white people of all genders will understate the level of race-based Prove-It-Again bias by diluting the sharply lower rate of Prove-It-Again bias against white men with the higher rate reported by white women.

Of course, sometimes slicing and dicing in this way, in small workplaces or with small samples within a workplace, risks resulting in numbers too low to produce statistically significant differences. So, the recommendation is not to *always* do this, but to try it out. In cases where numbers are high enough, comparing everyone to white men will produce a more accurate measure of bias.

Perhaps the solution is to proceed in several steps. For example, in a case involving a Black woman, the plaintiff could first compare the effect by gender, then compare the effect by race, and then compare the effect by both race and gender, explaining that is the most significant comparison because it eliminates both discriminatory factors encountered by women of color (race and gender).

The early nationwide samples of professionals surveyed by the WES typically contained too few representatives of Black and Latinx people to do statistical analysis broken down by racial group—though this problem was solved in more recent studies of architects and tech workers (still unpublished). (Anyone litigating a case involving people of Asian descent may find it helpful to consult a WorkLife Law White Paper<sup>813</sup> that summarizes WES findings about that group.) Plaintiffs' employment lawyers may find themselves in a similar situation in the context of disparate impact claims, which are proven by comparing protected and non-protected groups and showing statistically significant differences.<sup>814</sup> It is defense lawyers who usually push for disaggregation, while plaintiffs' lawyers are resistant out of fear that disaggregation will erase statistically significant differences (sometimes called the "sparse cell problem").<sup>815</sup>

Thus, plaintiffs' lawyers will be pulled in two directions: they will be pulled towards disaggregation to avoid the dilution effect described above, yet they will be pulled away from disaggregation by the sparse cell problem.

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812. *See supra* Part II, p. 370–71.

813. JOAN C. WILLIAMS, RACHEL M. KORN & SU LI, WORKLIFE LAW, WHITE PAPER: DOES THE STEREOTYPE THAT "ASIAN PEOPLE ARE GOOD AT SCIENCE" HELP WOMEN OF ASIAN DESCENT IN STEM CAREERS? NO (2017), <https://worklifelaw.org/publications/White-Paper-Bias-Against-Asian-People-in-STEM.pdf>.

814. CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 93 (9th ed. 2017).

815. Telephone Interview with Adam Klein, Managing Partner, Outten & Golden (Dec. 6, 2019) (on file with authors).

The use of white men as comparators may be particularly important for women of color, given the challenges faced by “intersectional plaintiffs.”<sup>816</sup> A robust law review literature posits that women of color face particularly high hurdles in employment discrimination cases.<sup>817</sup> The most elegant study on the lower success rates of women of color who bring employment discrimination suits is a 2011 study by a group of lawyers and sociologists.<sup>818</sup> 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.<sup>819</sup> They found “plaintiffs making intersectional claims are less than half as likely to win” as compared to non-intersectional plaintiffs (15% compared to 31%), only half as likely to obtain at least a partial victory, and one-third as likely to win completely.<sup>820</sup> Holding other factors equal, intersectional plaintiffs will win only 13% of the time and non-intersectional plaintiffs win 28% of the time.<sup>821</sup> 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%).<sup>822</sup> The study suggested that the claims of intersectional plaintiffs are not intrinsically weaker than those of discrimination plaintiffs in general.<sup>823</sup> The study 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.<sup>824</sup>

Happily, *Bostock v. Clayton County*’s revamp of Title VII’s causation requirement, which clarifies that Title VII requires that discrimination be *a* but-for cause of the adverse employment action complained of—not the only cause—may help reverse the shockingly low success rate of intersectional plaintiffs. *Bostock*’s holdings preclude the common defense argument that intersectional plaintiffs should lose because they need to prove *either* that gender completely explains the adverse employment action *or* that race does.<sup>825</sup> *Bostock* can be used in conjunction with WES data documenting that Prove-It-Again bias and some forms of Tightrope bias are more widely reported by women of color than by any other group.<sup>826</sup> Hopefully, *Bostock* spells the end of the era when women of color’s attempts to point out that both gender and racial bias shape

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816. Williams, *supra* note 164, at 238; *see also* Crenshaw, *supra* note 9, at 140–41, 149.

817. *See* Williams, *supra* note 164, at 238 (reviewing relevant studies).

818. *See* Best et al., *supra* note 9.

819. *Id.* at 999.

820. *Id.* at 1009.

821. *Id.* at 1011.

822. *Id.* at 1012.

823. *Id.* at 1011–12.

824. *Id.* at 1008.

825. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741–43 (2020).

826. *See supra* Part II.

their experience are dismissed by courts as an illegitimate attempt to create a “new super-remedy.”<sup>827</sup>

### C. STEP BY STEP USE OF FIVE-PATTERNS EVIDENCE IN LITIGATION

Attorneys who seek to use five-patterns evidence should start educating others about how bias operates long before trial, as early as in the client interview to ensure that plaintiffs’ lawyers have uncovered all available evidence of racial and gender bias (using the protocol set forth in Appendix A). This Subpart sets forth considerations about how to use five-patterns evidence in litigation from complaint to the closing argument.

*In the complaint.* Charles A. Sullivan has pointed out that *Bell Atlantic Corp. v. Twombly*<sup>828</sup> and *Ashcroft v. Iqbal*<sup>829</sup> raise the requirements for what constitutes a complaint that can survive a motion to dismiss. Prior to those two cases, the standard was “notice pleading” (a short and plain statement that gives notice of the claim to the other party),<sup>830</sup> but these two cases raised the standard to “plausible pleading.” That requires that “the plaintiff would have to plead not merely that defendant had intent to discriminate, but also additional facts that make such an allegation plausible.”<sup>831</sup> Judges are urged to use their “common sense” in assessing complaints under the plausible pleading test.<sup>832</sup>

Sullivan argues that plaintiffs should plead studies documenting the widespread nature of bias as a “legislative fact” that a court would have to take as true for purposes of a motion to dismiss, given that in a motion to dismiss courts have to take the facts pled as true. Sullivan proposes such language as: “social science research indicates that discriminatory attitudes are common, even typical, in 21<sup>st</sup> century America and further indicates that such attitudes often result in decisions adverse to” members of protected groups.<sup>833</sup> This is a creative suggestion, and may be helpful in introducing five-patterns evidence in the complaint. Five-patterns evidence will be much more concrete than the formulation offered by Sullivan: complaints may well be able to state that plaintiffs recognized what happened to them as bias because of the widespread discussion of bias patterns in the press and popular culture.

However, some caution is in order. Courts do not have to accept legal conclusions or conclusory statements when ruling on a motion to dismiss. Moreover, a common defense technique in depositions is to take the plaintiff

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827. See Crenshaw, *supra* note 99, at 141–42 (discussing *Degraffenreid v. General Motors Corp.*, 413 F. Supp. 142 (E.D. Mo. 1976)).

828. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

829. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

830. Charles A. Sullivan, *Plausibility Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1616 (2011).

831. Sullivan notes that ambiguity exists about whether the governing case prior to *Twombly* and *Iqbal*, *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), is still valid law. *Id.* at 1617. He assumes for purposes of argument that it is not; purely for purposes of argument, so do I, to explore what is the best strategy for plaintiffs under this worse-case scenario.

832. *Iqbal*, 556 U.S. at 679.

833. Sullivan, *supra* note 830, at 1671.

line by line through the complaint and have her say everything she knows about every allegation.<sup>834</sup> If the complaint contains an allegation about patterns of bias, the plaintiff has to be prepped and able to persuasively defend the notion that she has personal knowledge of the pervasiveness of the bias patterns. Rule 11 of the Federal Rules of Civil Procedure provides that, an attorney's signature on a complaint is a certification that to the best of their knowledge and after reasonable inquiry, the complaint is well-grounded in fact.<sup>835</sup> So lawyers need to avoid alleging things in the complaint that they or their clients do not personally know.<sup>836</sup>

*During negotiations.* One way of using evidence of bias that has received little or no attention in law reviews is during negotiations. To quote Jennifer Schwartz of Outten & Golden:

Evidence of bias is important, and indeed critical, in many cases and at different stages of the litigation. However almost every single working woman on this planet has experienced gender bias so often that when negotiating settlements with a woman lawyer on the other side, I try to analogize what happened to my client to what I think was likely my opponent's experience. Or what she knows could easily be her experience. Bringing it home can often benefit settlement negotiations.<sup>837</sup>

*Begin early and be persistent.* Cynthia Thomas Calvert, who provides support to plaintiffs' employment lawyers in cases involving family responsibilities discrimination through the WorkLife Law Attorney Network, has a lot of experience in helping plaintiffs' lawyers educate judges and opposing counsel on common patterns of bias against mothers.<sup>838</sup> "You can't assume that the judge will understand. You need to begin the process of educating judges by mentioning the bias patterns in the complaint, and in a motion to dismiss if one is filed."<sup>839</sup> Bias evidence also is obviously relevant in the defense's high-inevitable motion for summary judgment, as discussed above.<sup>840</sup> "It is also great in closing arguments," she continued, "where it is important to relate the case to the everyday experience of the jury."<sup>841</sup> The materials above discussing mainstream media and popular culture references to each of the five patterns should prove helpful in talking with juries.

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834. Interview with Cynthia Thomas Calvert, Senior Advisor to WorkLife Law (Jan. 28, 2020).

835. FED. R. CIV. P. 11.

836. E-mail from Cynthia Calvert, Senior Advisor to WorkLife Law, to Joan C. Williams, Distinguished Professor of L., Univ. of California, Hastings Coll. of L. (Jan. 28, 2020, 12:01 PM) (on file with authors).

837. E-mail from Jennifer Schwartz, Partner at Outten & Golden LLC, to Joan C. Williams, Distinguished Professor of L., Univ. of California, Hastings Coll. of L. (Feb. 2, 2020, 9:41 PM) (on file with authors).

838. Plaintiffs' employment lawyers who wish to inquire about joining the WorkLife Law Attorney Network should consult the WorkLife Law webpage. *Attorney-Network Application*, WORKLIFE LAW, <https://worklifelaw.org/projects/attorney-network-application/> (last visited Nov. 23, 2020).

839. Interview with Cynthia Thomas Calvert, Senior Advisor to WorkLife Law (Jan. 28, 2020).

840. *See supra* Part II.

841. Interview with Cynthia Thomas Calvert, Senior Advisor to WorkLife Law (Jan. 28, 2020).

## CONCLUSION: MERITOCRACY GONE AWRY

In an important and insightful article, Katie R. Eyer points out that plaintiffs' low success rate in employment discrimination cases predates so-called second generation discrimination.<sup>842</sup> She attributes that low success rate to Americans' deep belief in meritocracy, which makes many Americans resistant to acknowledging discrimination.<sup>843</sup> Eyer herself despairs of antidiscrimination statutes as an approach to workers' empowerment, and argues instead for general workers' rights statutes such as Family and Medical Leave Act (FMLA).<sup>844</sup> We draw a different conclusion from her impressive analysis: perhaps the key to winning a Title VII suit is to describe precisely how, in the plaintiff's case, the meritocracy ideal was subverted. The five-patterns model can do that by describing in very concrete ways how plaintiffs' treatment thwarts meritocracy.

Eyer's article joins a long string of articles that point to low win rates, sometimes overlooking the fact that (according to Wendy Parker's careful study) two-thirds of cases settle.<sup>845</sup> Commentators sometimes appear to forget that plaintiffs' employment discrimination lawyers typically support themselves through settlements, interspersed with only occasional trials.<sup>846</sup>

Settlements occur in the shadow of the law,<sup>847</sup> so it matters whether plaintiffs' lawyers are telling stories that would convince a reasonable jury. The central insight we take from Eyer is that plaintiffs need to tell stories of meritocracy gone awry. Five-patterns data allow them to do so by pinpointing the very concrete ways that women and people of color are disadvantaged through normal workplace interactions: by being held to higher standards than white men to gain promotions or be seen as having promise; by being criticized for personality traits that are tolerated or praised in white men; by losing access to good work after they have children; by being pitted against members of their own group due to differences in assimilation strategies.

To highlight how different this is from the implicit bias consensus approach, consider the testimony by IAT-inventor Anthony Greenwald in *Jones v. National Council of Young Men's Christian Associations*.<sup>848</sup> In that case, Greenwald testified "that bias or stereotypes—and particularly unconscious bias against African Americans, which is widely present in the population—poses greater risk of manifesting itself in conjunction with subjective criteria."<sup>849</sup> The

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842. Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1287 (2012).

843. *Id.* at 1279.

844. *Id.* at 1341.

845. Parker, *supra* note 588, at 912.

846. Telephone Interview with Jennifer Schwartz, Partner, Outten & Golden LLP (Jan. 28, 2020); Telephone Interview with Rachel Dempsey, Associate, Outten & Golden LLP (Mar. 16, 2020).

847. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

848. *Jones v. Nat'l Council of Young Men's Christian Ass'ns*, 34 F. Supp. 3d 896, 899 (N.D. Ill. 2014).

849. *Id.*

judge, an Obama appointee,<sup>850</sup> rejected this classic social framework testimony on the grounds that “Dr. Greenwald’s opinions do not fit: they are (so far as his report suggests, anyway) derived solely from laboratory testing that does not remotely approximate the conditions that apply in this case.”<sup>851</sup> The court was troubled that the IAT involved “people who spontaneously react to virtual strangers in laboratory settings,” not what people do when making “deliberate business decisions in the workplace.”<sup>852</sup>

WES data confirm that, alas, the same stereotypes and bias that have been documented by forty years of lab studies do, in fact, appear in “deliberate business decisions.” Using evidence of the five patterns of bias can help empower plaintiffs to show how widespread ideals of meritocracy have been subverted in a specific case—or an entire institution.

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850. Kathryn A. Kelly, *Judicial Profile: John J. Tharp, Jr.*, ILL. STATE BAR ASS’N (June 2013), <https://www.isba.org/sections/federalcivilpractice/newsletter/2013/06/judicialprofilejohnjtharpjr>.

851. *Jones*, 34 F. Supp. 3d at 900.

852. *See id.*

## APPENDIX A

Here are some useful questions to help lawyers ensure that they have uncovered all available evidence of bias from plaintiffs in Title VII race and gender cases.

## B. PROVE-IT-AGAIN

Numbers that are potentially useful include whether women take longer to get promoted than men and whether base pay, pay raises, or bonuses are lower for women than men. It is also useful to look for a pattern of polarized evaluations, where a few women superstars get very high evaluations, while most women get very low evaluations. Another pattern is where positive feedback about men translates into high ratings, but positive feedback about women does not.<sup>853</sup>

In a class case with performance evaluation data, assess whether they are judging men and women on the same criteria. Also look for the “halo/horns effect,” where one success or strength is generalized into an overall positive assessment for men but not for women, or where one mistake or weakness is generalized into an overall negative assessment for women but not for men.<sup>854</sup> Along the same lines, are men more likely to be seen as having promise than women?<sup>855</sup>

Investigating Prove-It-Again bias first entails investigating whether in-group favoritism has affected the hiring and/or advancement of women or people of color. If a company hires based on internal referrals, see if they have records about who has been hired based on internal referrals, and see if there’s a demographic pattern.

*Does your company hire people based on internal referrals?*

*In some workplaces, it’s really important in order to be promoted to have a sponsor—a sponsor is a mentor who is willing to spend their political capital to help your career. Is that true in your workplace? If so, are men more likely to have sponsors than women?*

*In some workplaces, it’s really important to be part of a tight little in-group in order to get promoted or get access to good work. Is that true in your workplace? If so, why is it important?*

Other questions to tease out Prove-It-Again bias:

*Have you had to prove yourself more—to get a job, get promoted, get a raise or a bonus, in order to get high-quality work—than your male colleagues with similar education and experience?<sup>856</sup>*

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853. Monica Biemat, M. J. Tocci & Joan C. Williams, *The Language of Performance Evaluations: Gender-Based Shifts in Content and Consistency of Judgment*, 3 SOC. PSYCH. & PERSONALITY SCI. 186, 190–91 (2012).

854. See generally Rosenburg et al., *supra* note 133; Thorndike, *supra* 132.

855. Daniel Storage, Tessa E. S. Charlesworth, Mahzarin R. Banaji & Andrei Cimpian, *Adults and Children Implicitly Associate Brilliance with Men More Than Women*, 90 J. EXPERIMENTAL SOC. PSYCH. (2020).

856. Depending on a variety of factors, the comparison can be drawn with men in general, or white men in particular for all of the Prove-It-Again questions.

*Have you been told you have to do one thing for promotion—but then when you do that one thing, another is added (on and on and on) in a way that doesn't happen to men?*

*Do white men get promoted or get other work benefits based on their promise or potential, or based on the assumption that they will pick up what they need to know after they have the job or promotion—while you have to show you have met every requirement **before** you get the job, promotion, etc.?*

*Are objective rules and requirements applied leniently to white men but rigidly to everyone else?<sup>857</sup> (This is such a broad and important category; follow-up questions may well be needed.)*

*Has your work been hyper-scrutinized, more so than is the case for men (or white men)?*

*Is a credential more valued when white men have it?*

*Are your mistakes or oversights more likely to be noticed and remembered, or more likely to come back to haunt them, than men's are? Has this happened to you?*

*Do other people regularly get credit for ideas you originally offered?*

*Have your successes and accomplishments been written off (for example, as "just luck") or overlooked in a way that doesn't happen to white men (or white people)?*

*Have you had to prove yourself more—to get a job, get promoted, get a raise or a bonus, or high-quality work—than your white (or white male) colleagues with similar education and experience?<sup>858</sup>*

*Have you been told you have to do one thing for promotion—but then when you do that one thing, another is added (on and on and on) in a way that doesn't happen to white colleagues (or white men)?*

*Do white men (or white people) get promoted or get other work benefits based on their promise or potential, or based on the assumption that they will pick up what they need to know after they have the job or promotion—while you have to show you have met every requirement **before** you get the job, promotion, etc.?*

*Are objective rules and requirements applied leniently to white peoples (or white men) but rigidly to everyone else?<sup>859</sup> (This is such a broad and important category; follow-up questions may well be needed.)*

*Has your work been hyper-scrutinized, more so than is the case for white men (or white people)?*

*Is a credential more valued when white people (or white men) have it?*

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857. "He didn't do the planner, and wasn't dinged for it. She was." Interview with Jocelyn Larkin, Executive Director, Impact Fund (Nov. 13, 2019) (on file with authors).

858. See *supra* note 856 and accompanying text.

859. "He didn't do the planner, and wasn't dinged for it. She was. . . . If a guy didn't achieve his goal, it was overlooked. If a woman didn't, it was not." Interview with Jocelyn Larkin, Executive Director, Impact Fund (Nov. 13, 2019) (on file with authors).

*Are people of color's mistakes or oversights more likely to be noticed and remembered, or more likely to come back to haunt them, than white peoples' (or white men's) are? Has this happened to you?*

*Do other people regularly get credit for ideas you originally offered?*

*Have your successes and accomplishments been written off (for example, as "just luck") or overlooked in a way that doesn't happen to white people (or white men)?*

*Do you sometimes feel that you can't afford to make a single mistake?*

*Does your workplace hire only people of color with elite degrees, but white people from a broader range of schools?*

*Have your accomplishments and/or credentials been written off on the grounds that you're "just an affirmative action hire"?*

## B. TIGHTROPE

### 1. Gender & Race

*Have you ever been faulted for being too self-confident or too assertive in ways that are readily accepted from (men, white people, white men)?*

*Have you received comments about your personality on your performance evaluations?*

*Have you gotten pushback for giving critical feedback of a type readily accepted from (men, white people, white men)?*

*Have people ever sent the message, overtly or covertly, that they wanted you to be supportive and nice, rather than rigorous and demanding, whereas (men, white people, white men) can just "go for it"?*

*Have you ever been penalized for showing anger in ways that are readily accepted from (men, white people, white men)?*

*Have you ever been penalized for sharing your accomplishments and successes in ways that are readily accepted from (men, white people, white men)?*

*Have you felt wary about sharing your accomplishments and successes, although the (men, white people, white men) do that all the time?*

*Do you feel like you are expected to be uncomplaining "worker bees" who do not demand the limelight, but support those who do? Do you feel that other (women, people of color) are?*

If there is a way to track assignments, look for patterns in who gets career-enhancing work. Some useful questions:

*Are there any key times when (men, white people, white, men) have been given a chance to shine before the higher-ups that women are not—perhaps men are more likely to be promoted as a result?*

*Are (men, white people, white, men) been given more of a chance to develop skills required for promotion than you and other members of your group have?*

*Are (men, white people, white, men) given better access to career-enhancing work, or given access to it earlier in their careers, than you and members of your group have gotten?*

## 2. Race

*Have you ever been called words like “difficult,” “aggressive,” “a poor communicator,” or sent messages that assertive behavior accepted in (white people or white men) is inappropriate in you?*

*Have people interpreted your behavior as “angry,” “emotional,” or “out of control,” when they would readily accept similar behavior from (white people or men)?*

*Have people interpreted your behavior as angry when you weren’t angry at all—you were just having a business disagreement?*

*Do you feel like you (and members of your group) are expected to be uncomplaining “worker bees” who do not demand the limelight, but support those who do?*

*Have you gotten pushback for giving critical feedback of a type readily accepted from (white people or white men)?*

## 3. Gender

*Have you ever been called words like “bossy,” “difficult,” “strident,” “aggressive,” “too tough,” “sharp elbows,” “a poor communicator,” or told to be nicer when you are behaving in ways that are readily accepted from men (or white men)? If the client is a woman of color, also ask if she has been called “feisty,” “fiery,” “sassy,” or a “dragon lady.”*

*Have people you supervise expected you to be the ever-supportive office mom rather than the boss who insists on quality work?*

*Have you ever felt pressures to behave in feminine ways—to be the peacemaker, or the office mom who takes care of everyone around her, or the dutiful daughter who aligns with a powerful man but never threatens him? Are the same things expected of men?*

*At your workplace, do women do more of the office housework? Have you done more than your colleagues? This includes literal housework like ordering the lunch, cleaning up the room after a meeting, or being expected to plan parties and get signatures on birthday cards.*

*Are women in your workplace (and are you) more likely to be given administrative tasks than men, such as being expected to take notes of the meeting, find a time everyone can meet, or send follow-up email?*

*Are women in your workplace (and are you) more likely to be expected to take care of other people’s emotions or personal and professional development in ways men aren’t, such as being the peacemaker, or doing the mentoring, or running the summer program, or the like?*

*Are women in your workplace (and are you) more likely to be under pressures to do the back-office or undervalued tasks, while men are seen as a better fit for the glamour work—career-enhancing tasks?*

## C. MATERNAL WALL

### 1. Gender

First, some numbers to be crunched:

*Do women's pay or promotions fall when they get pregnant, return from maternity leave, or ask for workplace flexibility (job sharing, part time, flex time, telecommuting, etc.)?*

*Are women pressured to go part time even when they are working the same number of hours as men who are full time? (This can mean that women are working longer hours for the same pay.)*

Here are additional questions for mothers.

*Did your work get hyper-scrutinized after you got pregnant, returned from leave, or asked for workplace flexibility? Were you criticized for things men are rarely criticized for?*

*Did men get a pass for things you did not get a pass for?*

*Were you assumed to be less competent, less productive, or less committed because you are a mother?*

*Were you deprived of opportunities or shifts that might have led to a promotion, higher pay, or other benefits because people at work assumed that, as a mother or a wife, you would not want them?*

*Were you deprived of opportunities that required you to move your family that might have led to a promotion, higher pay, or other benefits because people at work assumed that, as a mother or a wife, you would not want them?<sup>860</sup>*

*Were you pressured to go part time after you had children?*

*Did or do people keep assuming that you won't return to work after you had children (even if you have never given any signal or made a statement to that effect)?*

*Are women told that they are not getting hired, getting raises, or getting paid as much, because their husbands, fiancés, or boyfriends are, or should be, supporting them or that men are being paid more because "he has a family to support"?<sup>861</sup>*

*If you asked for an accommodation for pregnancy or breastfeeding, has anyone else been given a similar accommodation for other reasons?*

### 2. Race

The Center for WorkLife Law has run a hotline for twenty years for workers who encounter discrimination based on family responsibilities. We regularly hear from women of color who have been denied workplace accommodations that are routinely offered to white women.

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860. See *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004). "Sometimes managers made assumptions that women with a number of children or husband were not interested in a more important job because they couldn't move." Interview with Jocelyn Larkin, Executive Director, Impact Fund (Nov. 13, 2019) (on file with authors).

861. *Costa v. Desert Palace*, 299 F.3d 838, 845 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

*Have you been denied or penalized for asking for accommodations like leaves or workplace flexibility that are readily offered to white women?*

#### D. TUG OF WAR

##### 1. Gender

*Do some women hold each other to higher standards because “that’s what it takes to succeed here as a person of color”?*

*Do women undercut each other by criticizing each other for being too masculine or too feminine (in clothing, voice, manner, etc.)?*

*Do women undercut each other for taking too much time off to be with children—or too little?*

*Do some women join the boys’ club, aligning with men against other women?*

*In your workplace, is there room for only one woman on certain teams or high-profile committees? If so, do women feel the need to compete with each other to get that one position? Has this affected you?*

*Do you get the same level of support from support staff as the men in your environment do?*

##### 2. Race

*Do some people of color hold each other to higher standards because “that’s what it takes to succeed here as a person of color”?*

*Do people of color fault each other for acting “too white” or “not white enough”?*

*In your workplace, is there room for only one person of color on certain teams or high-profile committees? If so, do people of color feel the need to compete with each other to get that one position? Has this affected you?*

*Do you get the same level of support from support staff as your colleagues?*

#### E. RACIAL STEREOTYPES (NOT OTHERWISE MENTIONED)

##### 1. For Black Individuals

*Have you been criticized for talking loudly when you were just speaking in a normal tone of voice, or for dominating the conversation, when you were contributing no more than other people were?*

*Has your behavior been treated as threatening when you were just behaving in ways other people behave all the time?*

*Have you ever been treated with the kind of disrespect not typically shown to others in your workplace?*

##### 2. For People of Asian Descent

*Have you been criticized for being “passive”?*

*Do colleagues assume you will, or should, work more, or do more with less, than is expected of your colleagues?*

*Do colleagues hold you to higher standards when it comes to technical work on the assumption that people of Asian descent are naturally good at technical work?*

*Do colleagues assume you are good at technical work but that you lack social skills or leadership potential?*

## APPENDIX B

The Workplace Experiences Survey is a ten-minute survey designed to examine the way bias plays out in the workplace. The current Article discusses five studies conducted with the workplace experiences survey. Each study involved participants filling out the workplace experiences survey for their current or most recent workplace. The populations and sample sizes of each study were as follows:

- Women STEM Science Professors – 550
- U.S. Engineers – 3093
- Indian Engineers – 693
- Lawyers – 2827
- Architects – 1346
- Cross-Industry Sample 1 – 823
- Cross-Industry Sample 2 – 1616

***Throughout this Article we highlight graphs, quotes, and findings from these studies. This data can also be found in the original reports for the first three studies. Reports on the two cross-industry studies are forthcoming.***

Survey participants for industry surveys were recruited through partner organizations using email list serves as follows:

- Women STEM Science Professors were recruited through the Association for Women in Science.
- Engineers were recruited through the Society of Women Engineers.
- Lawyers were recruited through the American Bar Association's Commission on Women in the Profession and the Minority Corporate Counsel Association.
- Architects were recruited through the American Institute of Architects

The cross-industry samples were recruited differently:

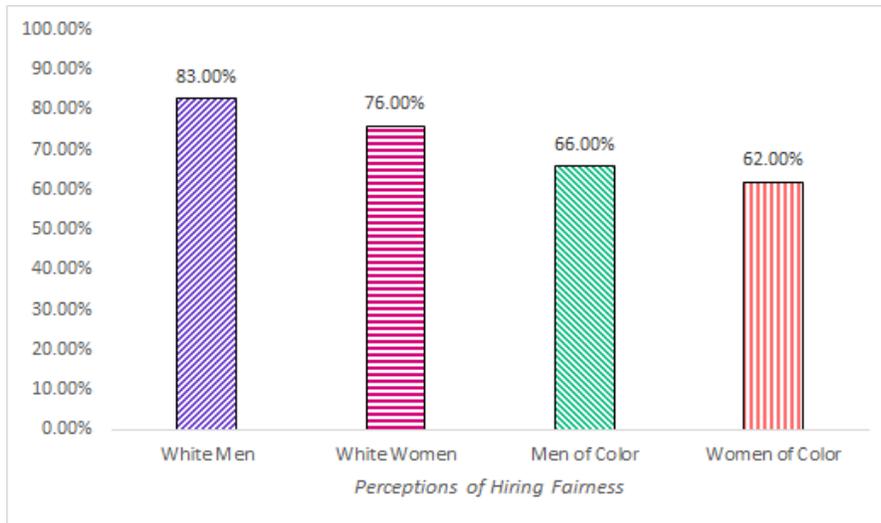
- Cross-Industry Sample 1 was recruited using a combination of social media, targeted emails, a link on our website, and word of mouth.
- Cross-Industry Sample 2 was recruited using Cint, a paid participant pool.

## APPENDIX C

The Workplace Experiences Survey also contains data on workplace processes. Our research shows that white men tend to report more fair workplace processes across a variety of systems.

## B. HIRING

In a biased workplace, differential treatment of gender and racial groups begins with the hiring process. Our data on lawyers support this: white men reported that their organizations' hiring systems were unbiased at a rate more than twenty percentage points higher than women of color, with men of color and white women falling in between.<sup>862</sup>



White women have an easier time than other women when it comes to some workplace processes: Black women report having more difficulty in the hiring process than white women.<sup>863</sup>

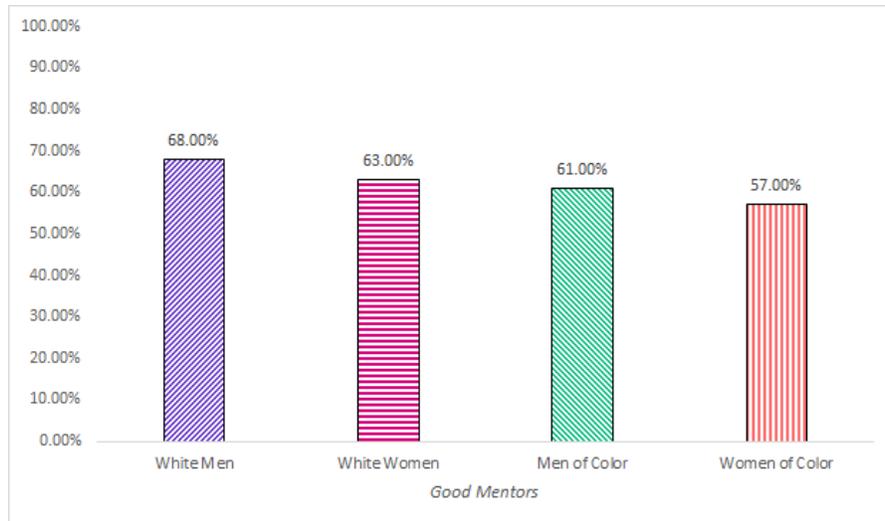
862. WILLIAMS ET AL., YOU CAN'T CHANGE WHAT YOU CAN'T SEE, *supra* note 100, at 45.

863. Data on file with authors. *See supra* notes 169–172 and accompanying text.



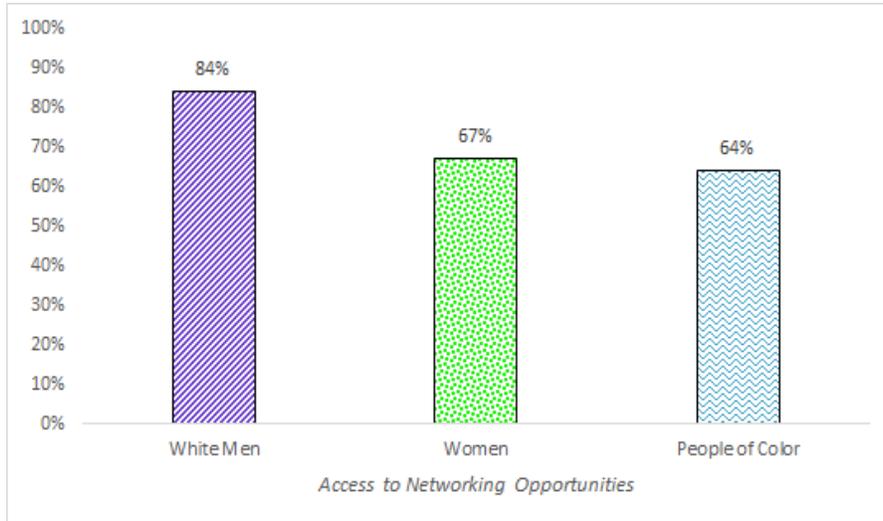
## B. MENTORSHIP

Mentorship can be a crucial factor in career advancement, but there can also be gender and racial disparities that make it easier for some groups to get ahead than others. In our data from lawyers, white men reported having good mentors at a level higher than women and people of color.<sup>864</sup>



<sup>864</sup> WILLIAMS ET AL., YOU CAN'T CHANGE WHAT YOU CAN'T SEE, *supra* note 100, at 45.

Similarly, white men reported access to networking opportunities at a higher rate than women and people of color in our study of engineers.<sup>865</sup>



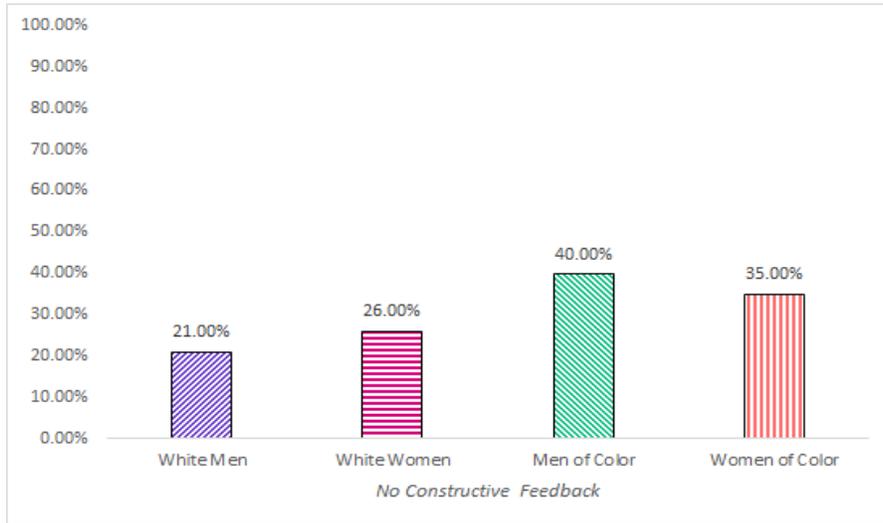
### C. PERFORMANCE EVALUATIONS

Although performance evaluations are supposed to be objective measures of performance, they are subject to the types of bias we have documented over and over again. In our studies of lawyers, women and people of color reported receiving constructive feedback on their performance evaluations at a level lower than white men.<sup>866</sup>

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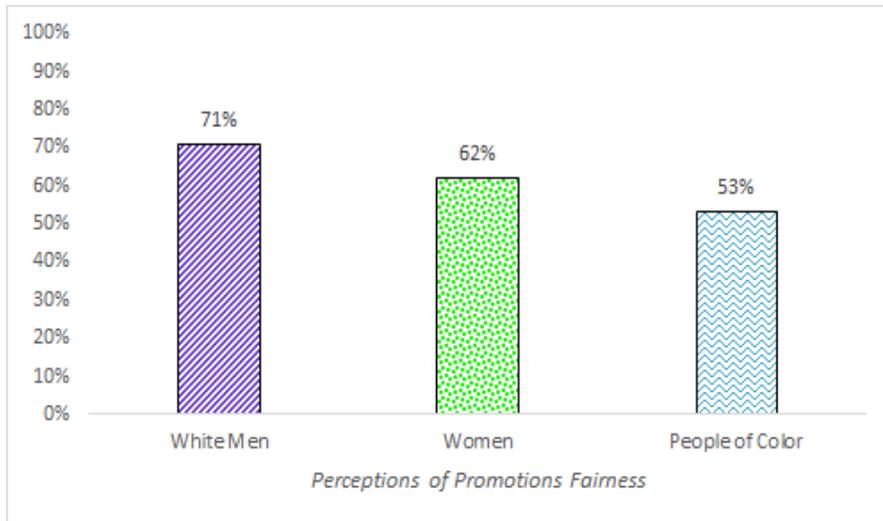
865. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 128.

866. WILLIAMS ET AL., YOU CAN'T CHANGE WHAT YOU CAN'T SEE, *supra* note 100, at 53.



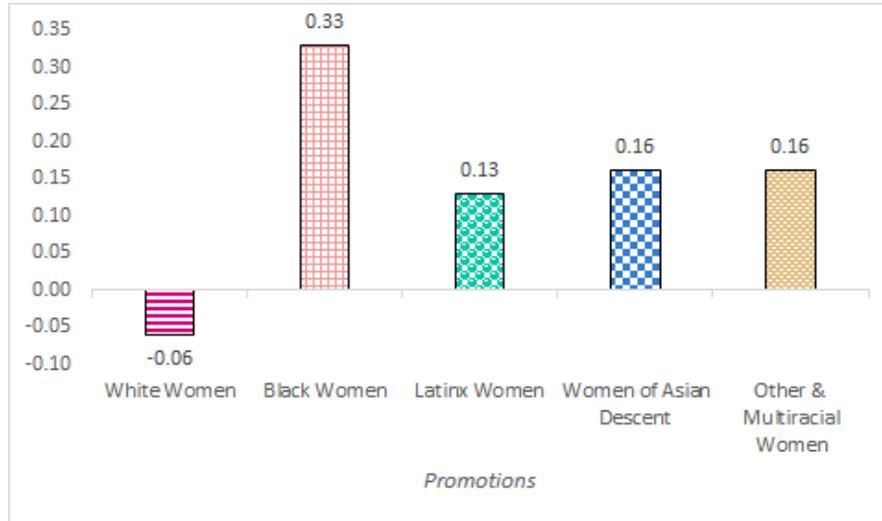
#### D. PROMOTIONS

In order to get more women and people of color at the top of organizations, it is essential to promote them. Data from our survey on engineers shows that white men report fair opportunities for advancement at a level higher than women and people of color.<sup>867</sup>



867. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 128.

Black women and women of Asian descent also report less fairness in the promotions process than white women.<sup>868</sup>

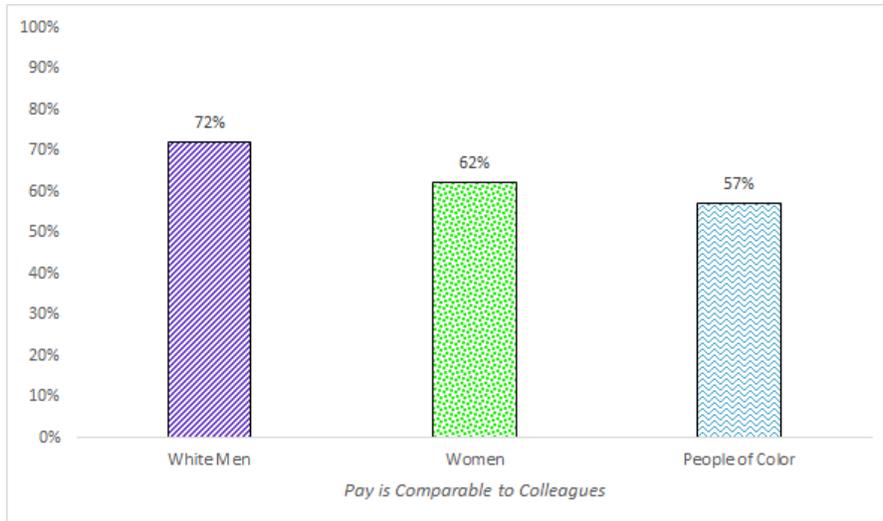


#### E. COMPENSATION

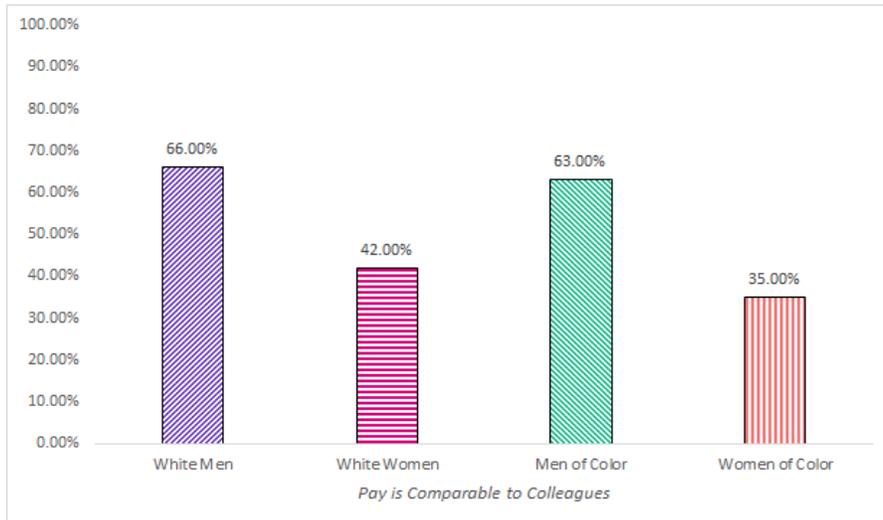
Compensation is an area in which women and people of color have long struggled to reach equality with white men. Data from both our studies on engineers and lawyers indicate that individuals in these fields are noticing a pay gap in their own jobs.<sup>869</sup>

868. Data on file with authors. *See supra* notes 169–172 and accompanying text.

869. WILLIAMS ET AL., CLIMATE CONTROL, *supra* note 100, at 128; WILLIAMS ET AL., YOU CAN'T CHANGE WHAT YOU CAN'T SEE, *supra* note 100, at 57–61.



The disparity between the reports of white men and women of color in our study of lawyers is particularly large: over thirty percentage points between white men and women of color.<sup>870</sup>



870. WILLIAMS ET AL., YOU CAN'T CHANGE WHAT YOU CAN'T SEE, *supra* note 100, at 58.