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## A Legal Fempire?: Women in Complex Civil Litigation

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## A Legal Fempire?: Women in Complex Civil Litigation

BROOKE D. COLEMAN\*

*Justice Ruth Bader Ginsburg made headlines when she said that she would be satisfied with the number of women on the Supreme Court “when there are nine.” But why should that answer have been so remarkable? After all, there were nine men on the Court for nearly all of its history. Yet, Justice Ginsburg’s statement was met with amusement—or from some quarters—disdain. What answer would have been considered more appropriate coming from a groundbreaking feminist litigator? Would four have been an acceptable answer? Would five have been presumptuous?*

*This episode reflects our cramped view of how much representation women can and should expect in the loftiest reaches of the legal profession. And indeed, while women have been attending and graduating from law school in record numbers, they are only a fifth of the partners in law firms. Even when they make partner, they are paid nearly half the compensation of their male counterparts. Likewise, women are underrepresented as state and federal judges, as appellate practitioners, and in complex litigation.*

*This Article begins from the view that gender equity is important to the functioning and legitimacy of our legal system, and assesses gender equity—or rather the lack thereof—within the legal profession. First, the Article reflects on the gender bias task force movement that began almost four decades ago. Second, using a case study approach, the Article updates that work by examining the role of women on the Judicial Panel for Multidistrict Litigation, as judges, and in multidistrict litigation leadership roles. Finally, after assessing the ongoing barriers to gender equity in modern complex civil litigation as well as its modest gender-equalizing reforms, the Article closes with a set of proposals for how to move toward gender equality.*

*“The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for [the practice of law].”<sup>1</sup>—Justice Joseph Bradley*

*“I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”<sup>2</sup>—Justice Sonia Sotomayor*

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1. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).
2. Sonia Sotomayor, *A Latina Judge’s Voice*, 13 *BERKELEY LA RAZA L.J.* 87, 92 (2002).

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#### INTRODUCTION

For the first time, the Judicial Panel on Multidistrict Litigation is chaired by a woman and has a majority of female members.<sup>3</sup> This is no small feat. During the nearly fifty years of the Panel’s existence, fifty judges have served, only seven of whom have been women. In fact, the first female panelist was not appointed until as recently as 2000.<sup>4</sup> Gender equity, as a normative matter, is undoubtedly important. Inequity calls the legitimacy of the entire legal system into question.<sup>5</sup> Moreover, studies repeatedly show that heterogeneity in group decision making leads to better results.<sup>6</sup> Thus, equity is critical to the efficacy of our legal system. In these respects, the current Panel is an encouraging sign of progress.

Unfortunately, the presence of women in positions of power at the top of the legal profession is a novel development. While women are almost half of the students currently attending law school, they make up only 36% of the legal profession overall.<sup>7</sup>

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3. *Current and Former Judges of the United States Judicial Panel on Multidistrict Litigation*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., [http://www.jpml.uscourts.gov/sites/jpml/files/Current\\_Former\\_Judges\\_of\\_the%20Panel-10-9-2015.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Current_Former_Judges_of_the%20Panel-10-9-2015.pdf) [https://perma.cc/C5WB-M5T3]. Judge Julie Smith Gibbons was appointed in 2000. *Id.*; see also *Panel Judges*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <http://www.jpml.uscourts.gov/content/panel-judges> [https://perma.cc/D2ZA-T69N].

4. *Panel Judges*, *supra* note 3.

5. See *infra* Part III.A.

6. See *infra* Part III.A.

7. COMM’N ON WOMEN IN THE PROFESSION, AM. BAR ASS’N, A CURRENT GLANCE AT WOMEN IN THE LAW 2 (2016), [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_may2016.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_may2016.authcheckdam.pdf) [https://perma.cc/K5ZB-AXZY]. In 2014–2015, 49.3% of first-year law students were women. *Id.* at 4. This is up from 2011 to 2012 when 46.8% of first-year law students were women. AM. BAR ASS’N, *First Year and Total J.D. Enrollment by*

On the bench, they hold only one out of every four federal and state court judgeships.<sup>8</sup> Further, while women attend law school and even start law firm jobs at higher rates, they occupy only 21% of partnership seats.<sup>9</sup> Even when women achieve partnership, they earn 44% less than their male counterparts.<sup>10</sup> Female lawyers are also pigeonholed into lower-income practice areas such as family law instead of practicing in high-paying legal sectors.<sup>11</sup> Outside of practice and in the academy, women now occupy roughly 30% of law school professorships, but hold only 31% of head deanships.<sup>12</sup>

The racial composition of female legal professionals is also stark. Women of color make up roughly 20% of the overall population. Yet, they hold only 8% of state and appellate court judgeships.<sup>13</sup> More specifically, of the 1344 federal judges appointed as of 2016, only 347 have been women.<sup>14</sup> Of that 347, only 53 were African American, 29 were Latina, 11 were Asian American, and 1 was American Indian.<sup>15</sup> Women of color also make up less than 3% of partnership positions at law firms.<sup>16</sup> In 2015, slightly more than 1% of law partnerships were held by Asian American women, and

*Gender, 1947–2011*, at 1, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/jd\\_enrollment\\_1yr\\_total\\_gender.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf) [<https://perma.cc/LK5W-K2W8>].

8. See COMM'N ON WOMEN IN THE PROFESSION, *supra* note 7, at 5.

9. *Id.* at 2.

10. Lizzy McLellan, *Male Partners Make 44 Percent More Than Women, Survey Shows*, LAW.COM (Oct. 20, 2016, 11:21 AM), <http://www.law.com/sites/almstaff/2016/10/12/male-partners-make-44-percent-more-than-women-survey-shows/?sreturn=20170723130302> [<https://perma.cc/FW6Z-LE7N>].

11. Hannah C. Dugan, *Does Gender Still Matter in the Legal Profession?*, ST. B. WIS. (Oct. 1, 2002), <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=75&Issue=10&ArticleID=248> [<https://perma.cc/P49S-T2SN>] (“They also tend not to practice in substantive law areas that are more lucrative; for example, fewer women practice civil litigation, which can bring in substantial contingency fees and thus higher pay. Instead, women in higher numbers concentrate on areas of practice such as family law that commonly are not as lucrative as other substantive practice areas and that have higher numbers of just simply unhappy clients who cannot or will not pay earned fees.”).

12. COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 4, *supra* note 7; Adriane Kayoko Peralta, *The Underrepresentation of Women of Color in Law Review Leadership Positions*, 25 BERKELEY LA RAZA L.J. 69, 74 (2015) (as of 2012, “[o]nly 21.5% of full-time faculty members are women, and only 30.4% of tenure or tenure-track professors are women”).

13. TRACEY E. GEORGE & ALBERT H. YOON, AM. CONST. SOC'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 7, <http://gavelgap.org/pdf/gavel-gap-report.pdf> [<https://perma.cc/H9ZS-V3Z8>].

14. Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016*, 26 BERK. LA RAZA L.J. 92, 117 (2016) (examining the number of judges on federal courts of general jurisdiction).

15. *Id.*

16. Renwei Chung, *Diversity in the Legal Profession Has Flatlined Since the Great Recession; Who Is To Blame?*, ABOVE THE LAW (Jan. 6, 2017, 4:31 PM), <http://abovethelaw.com/2017/01/diversity-in-the-legal-profession-has-flatlined-since-the-great-recession-who-is-to-blame/> [<https://perma.cc/49MJ-U7U8>].

slightly more than half a percent were held by black women and Latina women, respectively.<sup>17</sup> In the academic setting, women of color are similarly underrepresented, holding only 7% of the tenure and tenure-track positions and 8% of head law school deanships.<sup>18</sup> As of 2009 there were only 772 women of color serving as law school professors.<sup>19</sup>

This Article assesses gender equity—or rather the lack thereof—within the legal profession. Nearly forty years ago, lawyers, academics, and activists argued for the need to increase the number of women in law and to improve their experience within the legal system.<sup>20</sup> As a major part of that effort, state and federal courts created “gender bias task forces” to look at how female lawyers, parties, and court staff fared.<sup>21</sup> While the granular results of their studies varied, these task forces generally found that male lawyers dominated legal practice, women lawyers often suffered gross discrimination, and female parties and staff were regularly mistreated on the basis of gender.<sup>22</sup> Armed with these findings, the task forces laid out a number of prescriptions for how to improve the treatment and hiring of women within the legal profession. The current statistics demonstrate that the goals of these task forces are not yet fully realized.

Using a case study approach, this Article updates some of the gender bias task force work by focusing on women and complex civil litigation. More specifically, it will look at the role of women on the Judicial Panel for Multidistrict Litigation, as judges, and in multidistrict litigation leadership roles.<sup>23</sup> Data in this high-stakes arena is necessarily limited because it provides only a snapshot of the larger legal market, yet the insights from complex litigation are still of interest. Complex litigation is a highly competitive and elite practice area, and one for which exclusivity creates a particularly challenging setting for gender equity. Conversely, the extent to which gender-equalizing reforms are adopted and working in complex litigation might be an indication of the success those reforms could have in other contexts.<sup>24</sup> The Article will consider developments within complex litigation, reflect on the gender bias task

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17. Press Release, NALP, Women, Black/African American-Associates Lose Ground at Major U.S. Law Firms 4 tbl.2 (Nov. 19, 2015), [http://www.nalp.org/lawfirmdiversity\\_nov2015#table1](http://www.nalp.org/lawfirmdiversity_nov2015#table1) [<https://perma.cc/M2Q5-VCUW>].

18. Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441, 445–46, 448 (2016).

19. *Id.* at 447. Of those, 53% were African American, 18% were Latina, 14.5% were Asian/Pacific Islander, and 2.7% were Native American. *Id.* The academic picture improves slightly if all law school leadership positions are collapsed to include deans and associate deans. Then, women of color make up 12% of law school leaders, with white women increasing to 35%. *Id.* at 448.

20. *Infra* Part I.C.

21. *Id.*

22. *Id.*

23. The Article will focus on the private, not public, sector. *See infra* note 105.

24. It should be acknowledged that there is a risk of only looking at this problem from the elite perspective and not also addressing it “from below.” *See* Kenneth Walter Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-1960*, 87 CORNELL L. REV. 1405, 1410 (2002). As an academic, I am an elite, and the risk of analyzing the problem from an elite perspective is further compounded by looking at private complex litigation.

force efforts, and close with proposals for achieving gender equity both within complex litigation and the broader legal system.

### I. WOMEN IN LAW

Discussing women as a monolithic group is troublesome. By leaving out an account of race, class, or sexual orientation, the experience of women who are at the intersection of their gender and “other” is lost.<sup>25</sup> Some have argued that taking an essentialist approach—one that focuses on the common characteristic of female-ness—is necessary for a concentrated examination of how women are treated unfairly.<sup>26</sup> Others have argued that leaving intersectionality to the side paints an inaccurate and misleading picture of women’s individual experiences.<sup>27</sup> Add to this the sheer lack of information and statistics around the intersection of race and gender, for example,<sup>28</sup> and the challenge of presenting a complete and rigorous account of women in the law is apparent.

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25. See Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2204 (1993) (noting that the gender bias studies are limited in that “much of the available demographic information relies on drawing distinctions between women and men, on the one hand, and among ‘minorities’ on the other—thus making invisible the woman who is also a member of an ethnic or racial minority”); Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2248 (2010) (noting the “conceptual metaproblem” of “collapsing the experiences of women lawyers into one category, ignoring racial, sexual-orientation, ethnoreligious, socioeconomic, and cultural distinctions” as “highly problematic”).

26. Vicki C. Jackson, *Empiricism, Gender, and Legal Pedagogy: An Experiment in a Federal Courts Seminar at Georgetown University Law Center*, 83 GEO. L.J. 461, 508–09 (1994) (“In any piece of work, in order to accomplish anything, we must exclude much. Focusing on gender as one source of difference seems to make sense in the world as it now exists, and to offer enough possibility for learning some useful things to warrant the risks of essentialist misuse.”); Wald, *supra* note 25, at 2248–49 (noting that the “demands [of] unpacking concepts such as ‘women’ lawyers” “might at times cause the discourse to stall by rejecting necessary general propositions as overinclusive and too abstract” and that “at some level it should not be overlooked or trivialized that [gender stereotypes] affect all women lawyers”).

27. See, e.g., IDENTITIES, POLITICS, AND RIGHTS (Austin Sarat & Thomas R. Kearns eds., 1995); TAMAR PITCH, LIMITED RESPONSIBILITIES: SOCIAL MOVEMENTS AND CRIMINAL JUSTICE 189 (John Lea trans., 1995); CAROL SMART, FEMINISM AND THE POWER OF LAW 41–42 (1989); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991) (describing the intersectional location of women of color and their marginalization within feminist discourse); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (discussing the need for the feminist movement to engage and embrace intersectional identities); Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS: J. WOMEN CULTURE & SOC’Y 952 (1996).

28. See, e.g., Carla D. Pratt, *Sisters in Law: Black Women Lawyers’ Struggle for Advancement*, 2012 MICH. ST. L. REV. 1777, 1779 (“This Essay calls for more racially disaggregated inquiries into the experience of women lawyers in an effort to more accurately identify the unique experiences and challenges of women of color, and the degree to which

This Article (has and) will often present statistics and discuss women as one—their commonality will be their gender and only their gender—sometimes because it is the only information available and other times because it simplifies the discussion. Yet, the Article does so with a full awareness and acknowledgment that doing so perpetuates the narrative of feminism as a white, elite movement,<sup>29</sup> and it presupposes and perpetuates the idea that the norm is white heterosexual elite women and the exceptions are women of color, women of different sexual orientations, and women of different socioeconomic class. Such narratives and presuppositions are not my intention, but it would be foolhardy to fail to acknowledge how my work, in all candor, is a part of the problem. In an effort to lessen this potential impact, the Article will, whenever possible, endeavor to discuss how women with intersecting characteristics experience the legal profession. It is a modest step, and perhaps not done perfectly. Yet, it moves the discussion forward, and in this time of much introspection about feminism, one hopes such forward motion is a meaningful contribution on its own.

#### A. The “Firsts”

Advances for women in the law—and their attendant challenges—have occurred over a relatively short period of time. That rather quick ascension has not been easy. From joining the profession to going to law school to gaining entry into the highest echelons of practice, women have had a fight at every step.

Women attempted to officially join the profession in the mid-nineteenth century.<sup>30</sup> This effort was made at both the local and national level. It was not until 1869, in Iowa, that Arabella Mansfield became the first woman formally licensed to practice law in a state.<sup>31</sup> On the national front, women were not successful. In 1873, the United States Supreme Court held that women did not have a constitutional right to practice law under the Fourteenth Amendment.<sup>32</sup> Justice Bradley opined that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently

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those experiences vary depending upon the racial background of the woman lawyer.”).

29. See DOROTHY SUE COBBLE, LINDA GORDON & ASTRID HENRY, *FEMINISM UNFINISHED* (2014) (providing a history of feminism); ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* (1983) (describing class and racial divides of first wave feminist and suffrage movements); BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* 145 (1981) (noting that “many upper and middle class white feminists who suffer least from sexist oppression were attempting to focus all attention on themselves”); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL ED. 47 (1988).

30. Women, like many men, had practiced as lawyers without being officially licensed. Thus, Margaret Brent, from Maryland, is often listed as the first woman lawyer in America. See *History*, N.Y. WOMEN’S B. ASS’N, <http://www.nywba.org/history2> [<https://perma.cc/X79G-MPXH>]. She was not officially licensed to practice law, however. See *id.*

31. Louise B. Raggio, *Women Lawyers in Family Law*, 33 FAM. L.Q. 501, 505–06 (1999). The federal courts were similar. “In 1879, Belva A. Lockwood became the first woman admitted to the bar of the U.S. Supreme Court when she persuaded Congress to open the federal courts to women lawyers. Later she was first woman to argue a case before the Supreme Court.” *Id.*

32. *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872).

unfits it for many of the occupations of civil life.”<sup>33</sup> Indeed, according to the Justice, women were on Earth “to fulfil the noble and benign offices of wife and mother,” and not to serve as lawyers.<sup>34</sup>

Without a constitutional right to practice, women eager to join the profession followed Mansfield’s state-based model. Women like Clara Foltz, who joined the California State Bar in 1878, worked in their respective states to gain entry into their parochial professional bars.<sup>35</sup> Charlotte E. Ray, who graduated from Howard University School of Law, was admitted to her state bar in 1872, becoming the first African American woman lawyer.<sup>36</sup> Lyda Burton Conley was the first Native American woman admitted to a state bar (Kansas) in 1910,<sup>37</sup> Mary Estella Cota-Robles was the first Latina woman admitted to a state bar (Arizona) in 1940,<sup>38</sup> and Sau Ung Loo Chan was the first Asian American woman admitted to a state bar (Hawaii) in 1942.<sup>39</sup> All of these women utilized their respective state bar systems to gain entry into professional practice.

These trailblazing women became the “firsts” in their states, but it is not as if once admitted to the practice of law all other barriers dissolved. Women in law during this time confronted consistent attacks on their competency and their gender. Clara Foltz famously cut off challenges to her analytical abilities by stating, “I ask no special privileges and expect no favors, but I think it only fair that those who have had better opportunities than I . . . should meet me on even ground, upon the merits of law and fact without this everlasting and incessant reference to sex . . . .”<sup>40</sup>

Admission into law schools was no different. Lemma Barkaloo and Pheobe Wilson Couzins were the first women admitted to law school, attending Washington University in St. Louis in 1869.<sup>41</sup> Other law schools soon followed and admitted women into their programs—schools such as Howard University (admitting Charlotte E. Ray, who graduated in 1872), the University of Michigan and Boston

33. *Id.* at 141 (Bradley, J., concurring).

34. *Id.*

35. See Barbara Allen Babcock, *Feminist Lawyers*, 50 STAN. L. REV. 1689, 1693 (1998) (reviewing VIRGINIA DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* (1998)).

36. Pratt, *supra* note 28, at 1780. Lucy Terry Prince is thought to be the first black woman to appear before the Supreme Court when she acted as a lay advocate in 1795. *Id.* n.13; see also *History*, *supra* note 30 (noting that Charlotte E. Ray was the first black woman admitted to a state bar in the District of Columbia).

37. *History*, *supra* note 30.

38. *Arizona Trailblazers: Women and Minority Trailblazers*, STATE BAR OF ARIZ., <http://www.azbar.org/aboutus/mission-vision-andcorevalues/diversity/arizonatrailblazers/> [https://perma.cc/8D9F-N87S].

39. *History*, *supra* note 30; see also Curtis Lum, *Sau Ung Loo Chan, 95, Broke Legal Ground*, HONOLULUADVERTISER.COM (Mar. 10, 2002), <http://the.honoluluadvertiser.com/article/2002/Mar/10/ln/ln26a.html> [https://perma.cc/A5Q6-QXLW].

40. Clara Shortridge Foltz, *Struggles and Triumphs of a Woman Lawyer*, NEW AM. WOMAN, Jan. 1918, at 4, 15.

41. *History*, *supra* note 30. Couzins graduated in 1871 and Barbaloo, while gaining admission into the Missouri bar, did not complete law school. *Id.*

University in 1872, Hastings Law School in 1878 (after losing a lawsuit about admitting women), and Buffalo Law School in 1887.<sup>42</sup> Other law schools waited a few more decades. Fordham Law School and Yale Law School first admitted women in 1918,<sup>43</sup> while other elite schools like Columbia and Harvard waited until 1919 and 1950, respectively.<sup>44</sup>

In law school, the doors may have opened, but women did not receive a full-throated welcome. For example, in 1955, Ruth Bader Ginsburg was famously asked by then Harvard Law Dean Erwin Griswold how she could justify taking a coveted position at the law school from a qualified man.<sup>45</sup> Admission to the schools did not translate into male colleagues' or professors' acceptance of women as equals.

Once in law school and admitted into law practice, the next goals became status within the legal profession. Starting in 1934, women began to ascend into more prestigious jobs like federal judgeships. That year, President Roosevelt appointed Florence Ellinwood Allen to the U.S. Court of Appeals.<sup>46</sup> While the appointment was significant, it is worth noting that during the 145 years and through the thirty-one presidents before Allen's appointment, not one woman was appointed to a judgeship on a federal court.<sup>47</sup>

Moreover, even when Presidents after President Roosevelt appointed women, they did so at low rates. Men, and specifically white men, still dominated the picture. Federal judicial appointments by Presidents Kennedy, Johnson, Nixon, and Ford, for example, each exceeded 98% men, with the appointments of white men ranging from 89% to 96%.<sup>48</sup> It was not until President Carter that this trend changed. In his administration, approximately 15% of his appointments were women.<sup>49</sup> (Carter was the first president to appoint more than three women to the federal bench.)<sup>50</sup> Yet,

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42. *Id.*

43. *Id.* One woman, Alice Rufie Jordan Blake, graduated from Yale Law School in 1886, but her story was a bit unusual, and she was the only woman to graduate from the law school until another woman graduated in 1920. Judith Schiff, *Yale's First Female Graduate*, YALE ALUMNI MAG. (Sept./Oct. 2013), <https://yalealumnimagazine.com/articles/3742/yales-first-female-graduate> [<https://perma.cc/9B3A-2N2D>].

44. *History*, *supra* note 30.

45. LINDA HIRSHMAN, *SISTERS IN LAW* 15–16 (2015).

46. Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 487 (2004); Lynn Hecht Schafran, *Not from Central Casting: The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953, 964 n.56 (2005). While Judge Allen was the first woman to be appointed to a federal court position with lifetime tenure, she was not the first judge appointed to a federal court of general jurisdiction. Stubbs, *supra* note 14, at 101. Genevieve Rose Cline was appointed with lifetime tenure to the U.S. Customs Court by President Coolidge. *Id.*

47. Stubbs, *supra* note 14, at 99. As noted above, some women had been appointed to specialty federal courts, but not one woman had been appointed to a federal court of general jurisdiction until 1934.

48. *See id.* at 103–06.

49. *Id.* at 106.

50. *Id.*

President Reagan returned to prior patterns, making only 8% of his judicial appointments to women.<sup>51</sup> With respect to women of color, between 1789 and 1976, only one woman of color was appointed to the federal bench: Judge Constance Baker Motley was appointed by President Johnson in 1966.<sup>52</sup> President Carter appointed seven African American women and one Latina, but President Reagan similarly took a few steps backward by appointing only one African American woman and one Latina during his two terms.<sup>53</sup>

In addition to federal judicial appointments, another professional battleground has been law firm partnership. As women attended law school and began entering the profession in larger numbers, some started to break into the partnership ranks at major law firms. For example, in Seattle in the 1950s, Preston Gates (now K&L Gates) was allegedly the first firm in the Northwest to elevate a woman to partner.<sup>54</sup> That firm also claims that it was the first firm to include a woman's name in its partnership title when Betty Fletcher joined its partner ranks.<sup>55</sup> Vinson & Elkins, a major international law firm, made its first woman partner in 1979 when it elevated Carol E. Dinkins.<sup>56</sup>

In sum, between the late nineteenth and mid-twentieth century, women began to make headway into what had previously been a completely white, male-dominated profession. That headway, while meaningful, had something of a two steps forward, one step back effect, leading to an important call for new thinking on how to achieve gender equity.

#### B. Gender Bias Task Force Studies

Despite meaningful progress, as late as the 1980s, women were still not accepted members of the legal profession. Their numbers may have grown, but as women became more prominent in the field, they could recognize their progress and also see quite starkly the shortcomings of how gender and the law intersected for them. In response to these challenges, women began to organize into different groups to bring more attention to these infirmities.

One well-known movement started with a collaboration between the National Organization for Women and the National Association of Women Judges.<sup>57</sup> Their goal was to educate judges about gender discrimination in their courtrooms. The

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51. *Id.* at 106–07; *see infra* Part II.A (discussing modern judicial appointments).

52. Stubbs, *supra* note 14, at 104; *see also* Henry Louis Gates, Jr., *Who Were the 1st Black Federal Court Judges?*, ROOT (Sept. 29, 2014, 3:00 AM), <http://www.theroot.com/who-were-the-1st-black-federal-court-judges-1790877204> [<https://perma.cc/RH4H-ACHM>].

53. Stubbs, *supra* note 14, at 106–07.

54. Katharena L. Zanders, *Women Ascend to Top Practice Group Slots at Unique Seattle Firm*, OF COUNSEL, May 5, 1997, at 18.

55. The firm was called Preston Thorgrimson Holman Ellis & Fletcher. *Id.*

56. Judithe Little, *Blazing Trails for Women Attorneys in Houston: The Honorable Carolyn Dineen King and Carol E. Dinkins*, HOUS. LAW., May–June 2016, at 31.

57. Judith Resnik, “Naturally” *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1684 (1991); *see also* Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 260–63 (1998) (discussing the gender bias task forces).

movement became known colloquially as “Gender Bias Task Forces.”<sup>58</sup> These task forces attempted to shed light not just on the profession, but on all aspects of how women were treated within the legal system, including, but not limited to, domestic violence, divorce, and parental custody.<sup>59</sup>

State courts were pathbreaking in their creation of gender bias task forces. New Jersey was the first state to assemble a task force in 1982.<sup>60</sup> Other states followed that lead, with some thirty states adopting them by 1990.<sup>61</sup> Federal courts were noticeably reluctant to follow the states for some time.<sup>62</sup> It was not until 1990 that the D.C. Circuit became the first federal circuit to establish a task force on “gender, race, and ethnic bias.”<sup>63</sup> The Ninth Circuit followed and circulated its draft of preliminary results in 1992.<sup>64</sup> In all, eight federal circuit courts eventually adopted gender bias task forces, leaving four of their sister circuits behind.<sup>65</sup>

Each of the state and federal courts approached their work differently.<sup>66</sup> For example, the Ninth Circuit task force on gender bias “decided not to impose a definition

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58. Resnik, *supra* note 57, at 1684; *see also* Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN’S STUD. 1, 7 (1996) (discussing the origin of the gender task force movement). The National Judicial Education Project, founded by the Legal Defense and Education Fund of the National Organization of Women, worked with the National Association of Women Judges to educate judges about gender discrimination in their courtrooms. Resnick, *supra* note 57, at 1684.

59. Swent, *supra* note 58, at 55–62.

60. N.J. SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS, THE FIRST YEAR REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS—JUNE 1984 (1986), *reprinted in* 9 WOMEN’S RTS. L. REP. 129 (1986).

61. Swent, *supra* note 58, at 12–16.

62. Resnik, *supra* note 25, at 2197.

63. *Report of the Special Committee on Gender to The D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 GEO. L.J. 1657, 1666 (1996).

64. Ninth Circuit Task Force on Gender Bias, *Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias*, 45 STAN. L. REV. 2153, 2154 (1993) [hereinafter *Ninth Circuit Executive Summary*].

65. The District of Columbia was the only other federal court to take on such a study as of 1993, but between 1990 and 1994 eight of the twelve federal circuits set up task forces. Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 U. RICH. L. REV. 615, 615, 621–23 (1998); *see, e.g.*, David M. Ebel, *Tenth Circuit: Gender Bias Study—Continuing Education and Training*, 32 U. RICH. L. REV. 745 (1998); The Eighth Circuit Gender Fairness Task Force, *Final Report & Recommendations of the Eighth Circuit Gender Fairness Task Force*, 31 CREIGHTON L. REV. 9 (1997) [hereinafter *Eighth Circuit Gender Fairness Task Force*]; *Eleventh Circuit: “Executive Summary”—Report of the Eleventh Circuit Task Force on Gender Bias*, 32 U. RICH. L. REV. 751 (1998); Sharon E. Grubin & John M. Walker, Jr., *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 9 (1997); *Ninth Circuit Executive Summary*, *supra* note 64; Gregory A. Nussel, *Fifth Circuit: Study of Gender Bias*, 32 U. RICH. L. REV. 723 (1998); Samuel W. Phillips, *Fourth Circuit: The Judicial Council’s Review on the Need for a Gender Bias Study*, 32 U. RICH. L. REV. 721 (1998); *Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, *supra* note 63; Bruce M. Selya, *First Circuit: A Study of Gender Bias in and Around the Courts*, 32 U. RICH. L. REV. 647 (1998).

66. *Cf. Ninth Circuit Executive Summary*, *supra* note 64, at 2154.

of ‘gender bias’ in the federal system nor to look for bias per se.”<sup>67</sup> Instead, it searched for what it called the “effects of gender.”<sup>68</sup> New Jersey took a more direct approach with its gender study than the Ninth Circuit, reaching out to “investigate the extent to which gender bias exists.”<sup>69</sup> Almost all of the task forces left out inquiries—or only inquired briefly—into how race and gender might intersect.<sup>70</sup>

While the task forces took different approaches, their inquiries and findings overlapped quite a bit. For example, most examined how female litigants and defendants were treated. Through a mix of data and narrative, the studies found many discrepancies in how female parties were treated. Courts regularly trivialized domestic violence cases, awarded lower attorneys’ fees to economically dependent spouses in divorce proceedings, and held women in child custody cases to a higher, gender-stereotyped standard of behavior.<sup>71</sup> Similarly, many of the studies assessed how female court personnel were treated. There again, the treatment was found wanting.<sup>72</sup>

The findings about court parties and personnel are undoubtedly of great interest, but are beyond the scope of this Article. The narrow focus is instead on female legal professionals and how they experienced the courts. There were over forty studies, which makes a comprehensive review of the task force reports infeasible. Instead, I have selected a cross-section of state and federal reports representing seven states and two federal circuits.<sup>73</sup> In spite of the different approaches and scope of these studies, they all intersected at two pertinent findings: (1) the underrepresentation of women in professional legal positions and (2) rampant sexism.

### 1. Women as Lawyers and Judges: The Numbers

Women as a percentage of lawyers and judges was (and still is) well below the relative number of women in the general population. This was true in each of the task force reports. The real question for the task forces was just how far below the general population—and in many cases just how far below the national averages—each would be.

In the Eighth Circuit, in 1997, women were only 12–19% of the attorneys practicing in federal courts.<sup>74</sup> The national percentage at that time was approximately 23%.<sup>75</sup> Judges fared no better with women holding only 13% of the federal judgeships in the circuit relative to almost 18% of federal judgeships being held by women nationwide.<sup>76</sup> To put it in even more stark numbers, of the 149 total judges on the bench in the Eighth Circuit in 1997, only one woman served on the court of appeals,

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67. *Id.* (emphasis omitted).

68. *Id.* (emphasis omitted).

69. Swent, *supra* note 58, at 10 (emphasis omitted).

70. *See id.* at 78–81 (noting that some task force members worried that “separate studies had left the intersection of race/ethnicity and gender unexplored in any significant depth”).

71. *See id.* at 56–61.

72. *Id.* at 61–62.

73. The Article reviews the Eighth and Ninth Circuits, as well as Florida, Michigan, Missouri, New Jersey, New York, Utah, and Washington.

74. *Eighth Circuit Gender Fairness Task Force*, *supra* note 65, at 43.

75. *Id.*

76. *Id.* at 40–41.

seven in the federal district court, four in the bankruptcy courts, and seven as magistrate judges.<sup>77</sup> Similarly, in the Ninth Circuit, the task force found that women were grossly underrepresented in the courtroom and on the bench: Only 16% of the lawyers in federal practice and 12% percent of federal judicial positions in the Ninth Circuit were women.<sup>78</sup>

State courts fared no better. In 1993 in Missouri, women made up only 8% of the state judiciary, while nationwide women filled between 10% and 15% of the elected and appointed judgeships.<sup>79</sup> Women were only 23% of the lawyers, but 43% of law students and 53% of the general population nationwide.<sup>80</sup> Other states like Utah found that of its 90 judges of record, only 7% were women.<sup>81</sup>

Across the board, the gender bias task force studies found that women were not practicing law or serving as judges in numbers commensurate with the general population. In spite of the progress that had been made by the “firsts,” there was still quite a way to go toward true equity.

## 2. Sexist Treatment of Women

Of the women who had made it into the profession, the next question for many of the task force studies was how were those women treated? The answer was not encouraging. All of the task force work consistently found that male colleagues and judges behaved boorishly in interactions with female attorneys. Even the task forces themselves were the subject of sexist skepticism and rebuff.<sup>82</sup> When the New Jersey task force sent out its attorney survey, it immediately discovered the challenges ahead. Scrawled on the surveys were comments such as “[w]hat is [gender bias], a disease?,” “[w]hy are you wasting the taxpayers’ money,” and “[d]on’t you girls have anything better to do with your time?”<sup>83</sup>

This response to the task force work mirrored realities in courtrooms, chambers, and law offices across the country. In the Report of the New York Task Force on Women in the Courts, the then-Attorney General stated that “[m]ale attorneys do not

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77. *Id.* at 36–40.

78. *Ninth Circuit Executive Summary*, *supra* note 64, at 2157.

79. *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 683 (1993).

80. *Id.*

81. UTAH TASK FORCE ON GENDER & JUSTICE, REPORT TO THE UTAH JUDICIAL COUNCIL 69 (1990), <http://digitallibrary.utah.gov/awweb/awarchive?type=file&item=81132> [hereinafter UTAH TASK FORCE]. Utah’s then-Governor Norman H. Bangerter made forty-two judicial appointments between January 1985 and March 1989, but only three of those appointments were women. *Id.* at 70. Other states similarly found underrepresentation of women as judges and lawyers. *See* MICH. SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS, CONCLUSIONS AND RECOMMENDATIONS 18 (1989), [https://www.michbar.org/file/programs/eai/pdfs/regtf\\_1989\\_part3.pdf](https://www.michbar.org/file/programs/eai/pdfs/regtf_1989_part3.pdf) [<https://perma.cc/M929-UUFJ>] (discussing the underrepresentation of women in the legal field) [hereinafter MICHIGAN SUPREME COURT TASK FORCE]; REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 30 (1990), [http://www.floridasupremecourt.org/pub\\_info/documents/bias.pdf](http://www.floridasupremecourt.org/pub_info/documents/bias.pdf) [<https://perma.cc/454J-5ZGS>] (finding that women were underrepresented as law partners, judges, and tenured law faculty).

82. *Ninth Circuit Executive Summary*, *supra* note 64, at 2157.

83. Swent, *supra* note 58, at 10.

have their gender or their lives brought gratuitously into the courtroom” the way that female attorneys do.<sup>84</sup> This difference manifested in female attorneys regularly being referred to as “dear” or “young lady.”<sup>85</sup> Blatant and humiliating sexual remarks were the norm. In one case, a judge threatened a female attorney that he would “put [her] over [his] knee and spank [her]” because she strongly disagreed with him.<sup>86</sup>

In the Eighth Circuit, sixty percent of female attorneys reported some form of “gender-based incivility,” including unprofessional forms of address, offensive comments about appearance, off-color jokes and comments, and being mistaken for a non-lawyer.<sup>87</sup> Similarly, the Washington State Task Force on Gender and Justice in the Courts determined that male attorneys demeaned female lawyers by making openly sexist remarks by using first names or patronizing terms like “dear,” “young lady,” or “girls,” and by making gratuitous remarks about personal appearance.<sup>88</sup> In New York, female lawyers also reported being snubbed or ignored by male judges and attorneys.<sup>89</sup>

Overall, the findings were discouraging. Women were treated quite differently on the basis of their gender, and that treatment was often offensive and intimidating. The task forces could not help but note that there must be a relation between these attitudes and behaviors and the relatively low numbers of women serving as lawyers and judges.

### C. Gender Bias Task Force Recommendations

Once the various task forces had all their data, most compiled a list of recommendations for improvement. To address the way women were treated, state court task forces like those in New York suggested judicial education programs on bias and changes to the rules of professional conduct that would address gender-biased behavior.<sup>90</sup> The Eighth Circuit Task Force also recommended educational efforts focused on “gender and civility issues,” including a focus on law school curriculum and bar education.<sup>91</sup> Other federal circuit court studies suggested action ranging from education and training, to the adoption of local court rules, to the establishment of circuit-level committees dedicated to continuing study and attention to gender bias.<sup>92</sup>

To address the inequitable representation of women as lawyers and on the bench, task forces also made recommendations focused on active recruitment. With respect

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84. *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11, 128 (1986).

85. *Id.* at 130.

86. *Id.* at 133.

87. *Eighth Circuit Gender Fairness Task Force*, *supra* note 65, at 132–35.

88. EXECUTIVE SUMMARY OF THE WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS FINAL REPORT 24 (1989), <http://www.courts.wa.gov/committee/pdf/Gender%20and%20Justice%20in%20the%20Courts--Final%20Report%201989.pdf> [https://perma.cc/4C7C-UGKV].

89. *See Report of the New York Task Force on Women in the Courts*, *supra* note 84, at 141–42.

90. *See id.* at 162–65.

91. *Eighth Circuit Gender Fairness Task Force*, *supra* note 65, at 169.

92. *See Schafran*, *supra* note 65, at 636–37.

to court committee and advisory groups (really a stepping stone to judicial appointments), the Eighth Circuit Task Force recommended encouraging more women to apply for the positions and, relatedly, for more women to be appointed to those groups.<sup>93</sup> The structural changes required to increase applications and appointments were not elaborated upon.

Similarly, the Missouri task force focused on the low numbers of female judges and found that many of the lawyers surveyed believed that gender bias prevented judges from being elected and a lack of formal or consistent criteria for evaluating judicial candidates contributed to an unfair selection process by court commissioners.<sup>94</sup> In response, the task force recommended reforming both the election and appointment processes by providing better training to court commissioners, creating ethical rules (encouraging greater transparency) to govern nominating commissioner processes, standardizing the appointment process, and exploring ways to increase outreach and recruitment efforts to female prospects.<sup>95</sup>

Utah's task force made similar, albeit less ambitious, recommendations. It found that nominating commissioners often asked inappropriate questions regarding the candidates' willingness to travel and their emotional state.<sup>96</sup> To respond to this issue, the task force recommended education programs for the commission members.<sup>97</sup> It also recommended that sitting judges and court administration "encourage qualified women to apply."<sup>98</sup>

Missing from most of the gender bias task force studies was a consideration of intersecting factors for many women—race, class, and sexual orientation, for example. Some of the studies self-consciously chose to forego a consideration of those factors to focus solely on gender.<sup>99</sup> Other task forces did not appear to be quite as self-aware. Indeed, the creators of the task force movement advocated for an essentialist approach to the studies.<sup>100</sup> In the gender bias task force "manual," members were encouraged to "deal with gender bias only" or risk "overload and confusion" if trying to study other issues.<sup>101</sup> The price of not considering race and other intersecting identities is that it leaves little administrative data or thought about how these intersecting factors affected women in the practice of law during the time of these

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93. *Eighth Circuit Gender Fairness Task Force*, *supra* note 65, at 168–69; *see also* MICHIGAN SUPREME COURT TASK FORCE, *supra* note 81, at 18–19 (encouraging the active recruitment and appointment of women leadership positions).

94. *Report of the Missouri Task Force on Gender and Justice*, *supra* note 79, at 694–95.

95. *See id.* at 707, 710.

96. UTAH TASK FORCE, *supra* note 81, at 71.

97. *Id.* at 73–74.

98. *Id.* at 74.

99. For example, the Michigan Supreme Court Task Force on Gender Issues in the Courts led to the creation of a parallel task force on race, The Task Force on Racial/Ethnic Issues in the Courts. *See* MICHIGAN SUPREME COURT TASK FORCE, *supra* note 81, at 1.

100. The first National Judicial Education Program director, Norma J. Wikler, and her friend and colleague, New York lawyer Lynn Hecht Schafran, created a "guide" for how to conduct gender bias task force studies. *See* LYNN HECHT SCHAFRAN & NORMA JULIET WIKLER, OPERATING A TASK FORCE ON GENDER BIAS IN THE COURTS: A MANUAL FOR ACTION (1986).

101. *Id.* at 6.

studies. This—as many commentators noted—made many women invisible in this process.

Overall, however, the task force efforts encouraged increased education and governance efforts, at least with respect to gender broadly. Many task forces also recommended creating enduring committees to continue study and efforts in the context of gender equity. The gender bias task force movement arguably led to a heightened consciousness of gender issues in the legal realm and some concomitant changes in favor of gender equity. The question is how effective that effort has been.

## II. MODERN COMPLEX LITIGATION & WOMEN

Women began attending law school in larger numbers nearly forty years ago.<sup>102</sup> In 1985, the percentage of female first-year law students first crossed the forty percent mark.<sup>103</sup> By 1996, it crossed fifty percent and has hovered around that number ever since.<sup>104</sup> Around that time, most of the concentrated gender bias task force work had also come to an end. Over twenty years later, what do we have to show for the fact that more women are attending law school than ever before? This Part will begin to answer that question by focusing on women as lawyers and judges in modern complex litigation, and more specifically in multidistrict litigation.<sup>105</sup>

### A. Judicial Panel on Multidistrict Litigation

The Judicial Panel on Multidistrict Litigation (JPML) is an elite panel of judges who consolidate related cases so that pretrial issues can be uniformly resolved.<sup>106</sup> The JPML consists of seven federal circuit and district court judges who are appointed to the panel by the Chief Justice of the United States Supreme Court.<sup>107</sup> The Multidistrict Litigation (MDL) statute that created the consolidation device and the

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102. See GAVEL GAP, *supra* note 13, at 8.

103. *Id.*

104. *Id.*

105. The Article will focus on the private sector because that is where most of the money and prestige in law practice is found. There is, of course, exceptional value in public interest work; yet, the social and economic status associated with that work is markedly different. Not surprisingly, white women and women of color tend to dominate public interest work when compared to men. See Nina Burleigh, *Black Women Lawyers: Coping with Dual Discrimination*, 74 ABA J. 64, 67 (1988) (noting that “forty-eight percent of black women lawyers go into government or public interest law”); see also James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?*, 65 J. LEGAL EDUC. 3, 8 n.19 (2015) (citing ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992)) (“A smaller percentage of women lawyers than men are in private practice, while a higher percentage practice in government, for private associations, or in public interest positions.”); Cynthia Fuchs Epstein & Abigail Kolker, *The Impact of the Economic Downturn on Women Lawyers in the United States*, 20 IND. J. GLOBAL LEGAL STUD. 1169, 1190 (2013) (noting that the gender pay gap is due, in part, to the fact that “a disproportionate number of women lawyers [are] working in the not-for-profit sphere (such as public interest or government work)”).

106. 28 U.S.C.A. § 1407(a) (West 2012 & West Supp. 2017).

107. *Id.* § 1407(d).

JPML was adopted only two years after the modern class action rule (Federal Rule of Civil Procedure (FRCP) 23) was created.<sup>108</sup> While multidistrict litigation had a slow start as a procedural device—especially when compared to class actions under FRCP 23 during the first few decades following its adoption—multidistrict litigation is now universally considered the locus of some of the most important cases both monetarily and structurally.<sup>109</sup> In other words, multidistrict litigation is the new black, with more than a third of pending federal cases consolidated into MDLs.<sup>110</sup> Thus, an appointment to the JPML and the attendant power to make decisions about consolidation is a strong sign that one is near the top of her judicial profession.<sup>111</sup>

The first JPML was constituted in 1968; it was not surprisingly made up of seven white male judges.<sup>112</sup> It remained an all-male panel until 2000 when Judge Julie Smith Gibbons became the first woman appointed to the panel.<sup>113</sup> Four years later in 2004, a second woman, Judge Kathryn H. Vratil, was appointed.<sup>114</sup> The slow pace of progress picked up in 2010, starting with the appointment of Judge Barbara S. Jones.<sup>115</sup> Her appointment ushered in the appointment of four additional female judges between then and 2014: Judges Marjorie O. Rendell, Sarah S. Vance, Ellen Segal Huvelle, and Catherine D. Perry.<sup>116</sup>

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108. The modern class action rule, FRCP 23, was adopted in 1966. The MDL statute was adopted in 1968. *See* 28 U.S.C. § 1407 (2012); Judith Resnik, *From “Cases” to “Litigation,”* 54 *LAW & CONTEMP. PROBS.* 5, 29 (1991).

109. *See* Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 *EMORY L.J.* 329, 331 (2014) (noting that “multidistrict litigation (MDL) has taken on a profoundly important role in not just the aggregate litigation system but also the judiciary as a whole”).

110. The number of cases pending subject to MDL proceedings as of September 30, 2014 was 127,704. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., *STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2014* (2014), [http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical%20Analysis%20of%20Multidistrict%20Litigation\\_2014.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2014.pdf) [<https://perma.cc/H7R9-8MDE>]. The total number of pending civil cases during that same time period was 337,302. *U.S. District Courts-Judicial Business 2014*, U.S. COURTS tbl.3, <http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2014> [<https://perma.cc/2JHL-HCUU>].

111. *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 *N.Y.U. L. REV.* 71, 84 (2015) (“Multidistrict litigations are plum judicial assignments; they involve interesting facts, media attention, and some of the nation’s most talented attorneys.”).

112. CURRENT AND FORMER JUDGES OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, [http://www.jpml.uscourts.gov/sites/jpml/files/Current\\_Former\\_Judges\\_of\\_the%20Panel-10-9-2015.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Current_Former_Judges_of_the%20Panel-10-9-2015.pdf) [<https://perma.cc/K2V6-3VHJ>].

113. *Id.*

114. *Id.*

115. In 2016, Judge Jones retired from the bench to join a white collar defense law firm, Bracewell. *See* *Barbara Jones and Paul Shechtman Join Bracewell*, *CORP. CRIME REP.* (May 9, 2016, 12:30 PM), <http://www.corporatecrimereporter.com/news/200/barbara-jones-paul-shechtman-join-bracewell> [<https://perma.cc/48A2-3RNG>].

116. CURRENT AND FORMER JUDGES OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *supra* note 112.

In the fifty years that the Panel has been in existence, fifty judges have served, and only seven of those have been women.<sup>117</sup> These women are white.<sup>118</sup> The lack of racial diversity and the paucity of women on the JPML is quite discouraging. Yet, for the first time, the Panel is chaired by a woman, Judge Sarah Vance, and for the first time, the Panel is majority women with four female judges and three male judges.<sup>119</sup>

The JPML is necessarily made of up sitting federal judges, so an inevitable question is from whom does the Chief Justice choose his appointments? As discussed earlier, Presidents appoint judges to the federal bench, and if there are not as many women to choose from, this is at least one aspect of why the JPML similarly underrepresents women. Women make up only 26% of the federal judiciary, and this underrepresentation can be traced to the presidential appointments to the federal judiciary.<sup>120</sup> As also discussed earlier, it was not until President Roosevelt that a woman was first appointed to the federal bench and not until President Carter that women were asked to serve as federal judges in moderately significant numbers.<sup>121</sup>

Thus, the lack of women on the federal bench has deep structural roots that have only recently begun to change by modern Presidents making a concerted effort to appoint more women. Even then, however, the progress seems glacial. President George H.W. Bush's federal appointments were almost 20% women.<sup>122</sup> President Bill Clinton was the first President to exceed 20% by making almost 28% of his federal judicial appointments to women.<sup>123</sup> President George W. Bush did not meet Clinton's numbers, but he still made 22% of his federal judicial appointments to women.<sup>124</sup> President Barack Obama's imprint appears to be the strongest by making 42% of his federal judicial appointments to women.<sup>125</sup> In his first five years of office, President Obama appointed more women than Presidents Reagan, H.W. Bush, and W. Bush combined.<sup>126</sup> This progress has completely stalled under now-

117. *Id.*

118. *Julia Smith Gibbons*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Julia\\_Smith\\_Gibbons](https://en.wikipedia.org/wiki/Julia_Smith_Gibbons) [<https://perma.cc/ZQG9-9ZAE>]; *Ellen Segal Huvelle*, ALCHETRON, <https://alchetron.com/Ellen-Segal-Huvelle> [<https://perma.cc/ZCQ3-DHSS>]; *Barbara S. Jones*, BRACEWELL, <https://bracewell.com/people/barbara-s-jones> [<https://perma.cc/E3HM-53KG>]; Jennifer J. Salopek, *Judge Catherine D. Perry*, AM. INNS OF CT. (Sept./Oct. 2016), [https://home.innsforcourt.org/AIC/Awards\\_and\\_Scholarships/Professionalism\\_Awards/Professionalism\\_Awards\\_Recipients/2016\\_Judge\\_Catherine\\_D\\_Perry.aspx](https://home.innsforcourt.org/AIC/Awards_and_Scholarships/Professionalism_Awards/Professionalism_Awards_Recipients/2016_Judge_Catherine_D_Perry.aspx) [<https://perma.cc/MFA4-MA46?type=image>]; *Judge Marjorie O. Rendell*, DUANE MORRIS, [https://www.duanemorris.com/site/alumni\\_profiles\\_rendell.html](https://www.duanemorris.com/site/alumni_profiles_rendell.html) [<https://perma.cc/W63P-MH7S>]; *The Hon. Sarah S. Vance*, AM. L. INST., <https://www.ali.org/members/member/100864/> [<https://perma.cc/GST8-ZASR>]; *Kathryn Vratil, JD*, U. KAN., <https://emilytaylorcenter.ku.edu/womens-hall-of-fame/vratil-kathryn> [<https://perma.cc/6V35-JQ3R>].

119. *Panel Judges*, *supra* note 3.

120. Stubbs, *supra* note 14, at 117.

121. *See supra* Part I.A.

122. *See* Stubbs, *supra* note 14, at 107.

123. *Id.* at 108. President Clinton appointed the first Asian American woman to the bench, Susan Oki Mollway. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 109.

President Donald J. Trump. As of November 2017, only 19% of Trump's nominations for the federal judiciary are women.<sup>127</sup> Only 9% of his nominees are nonwhite.<sup>128</sup> These numbers parallel the appointments he is making to other elite positions such as his Cabinet and the offices of the U.S. Attorney.<sup>129</sup>

The implication of federal judicial appointments is that they create the pool of available candidates for positions of power like JPML. Perhaps that is why more female judges have been recently appointed to the Panel. However, the Chief Justice still has full discretion in making those appointments, regardless of the available pool. Moreover, if the trend of appointing more women to the federal bench begins to wane—as is already the case under the current administration—it is not clear what impact that will have on future appointments to this panel.

Finally, not one woman of color has been appointed to the JPML to date.<sup>130</sup> Again, this can be traced, in part, to the available pool: of the 347 women currently sitting as federal judges, only 94 (or 27%) are women of color.<sup>131</sup> While President Obama made significantly more appointments of women of color to the federal bench, it may take a while for those appointments to become part of the pool the Chief Justice considers. Yet, as will be discussed in Part III.B, given the benefit of heterogeneity in group decision making and the benefit to systemic legitimacy, it is something he should consider straight away.<sup>132</sup>

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127. *Trump's Federal Judge Picks Lack Diversity So Far, With Many Vacancies to Fill*, TIMES-PICAYUNE, (Nov. 14, 2017), [http://www.nola.com/national\\_politics/2017/11/trumps\\_federal\\_judge\\_picks\\_les.html](http://www.nola.com/national_politics/2017/11/trumps_federal_judge_picks_les.html) [https://perma.cc/75JP-V3P3] (“The AP reviewed 58 nominees to lifetime positions on appellate and district courts, as well as the Supreme Court, by the end of October. Fifty-three are white, three are Asian-American, one is Hispanic and one is African-American. There are 47 men and 11 women. Thirteen have won Senate approval.”).

128. *Id.*

129. His Cabinet is overwhelmingly white and male. Jasmine C. Lee, *Trump's Cabinet So Far Is More White and Male than Any First Cabinet Since Reagan's*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/interactive/2017/01/13/us/politics/trump-cabinet-women-minorities.html> [https://perma.cc/3CYC-YAL9]. His appointments to the offices of the U.S. Attorney are no different. Of the forty-two people he has nominated for U.S. Attorney, only one is a woman. Joan Biskupic, *Trump Has Nominated 42 People for U.S. Attorney. Only One is a Woman*, CNN POLITICS, (Sept. 12, 2017, 4:24 PM), <http://www.cnn.com/2017/09/12/politics/us-attorneys-one-women/index.html> [https://perma.cc/YRF4-L282].

130. *See supra* note 118.

131. *See* Stubbs, *supra* note 14, at 117.

132. It does not appear that there is any work on the demographic makeup of transferee judges. It is not hard to imagine, however, that—like the JPML—transferee judges are similarly reflective of the federal judiciary as a whole. Anecdotally at least, the demographic makeup may be even more skewed toward white men. The most notable recent MDL cases—*VW*, *Vioxx*, and *Toyota*, for example—were all adjudicated by white male judges. *See In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 148 F. Supp. 3d 1367, 1369 (J.P.M.L. 2015) (Judge Charles R. Breyer); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 704 F. Supp. 2d 1379, 1382 (J.P.M.L. 2010) (Judge James V. Selna); *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005) (Judge Eldon E. Fallon).

### B. Transferee Judges

Once the JPML decides to consolidate a case, it must then decide to which district court judge the case should be transferred. Like the JPML, the transferee judge has a meaningful impact on the trajectory of the litigation. The judge generally appoints the legal leadership teams, resolves pretrial disputes, and exercises a great deal of influence over the potential for settlement. Being appointed as a transferee judge is largely viewed as a considerable achievement in the life of an Article III district court judge.

Unsurprisingly, the current gender composition of transferee judges is reflective of other elite areas of the legal profession. As of July 2016, 33% of active U.S. district court judges were women.<sup>133</sup> Thus, one might expect that—given that pool—a similar percentage of female judges would be appointed to transferee judge positions. That expectation would be wrong. As of April 2017, there were 236 active MDL dockets being handled by 186 transferee judges.<sup>134</sup> Of those 186 judges, 46—or 25%—were women.<sup>135</sup> In other words, an already underrepresentative number of district court judges is compounded further once there is a decidedly sought after and elite position like an MDL transferee judge on the line.

### C. MDL Litigation

Related to the composition of the judges deciding which cases are consolidated into multidistrict litigation and which judges adjudicate those cases is the composition of the lawyers who litigate, and more important, lead those cases. Once the JPML decides to consolidate and transfer a case, the transferee judge—the judge presiding over the entire lot of consolidated cases—has a great deal of authority and power. That power, in many cases, includes appointing the team of plaintiffs' lawyers who will lead the litigation.<sup>136</sup> These leadership positions are plum ones because with such a position comes the power to make strategic decisions about how the case will proceed.<sup>137</sup> Moreover, the lawyers leading the MDL litigation are likely to negotiate any potential settlement and related attorneys' fees.<sup>138</sup>

The competition for these leadership positions is fierce, and again not surprisingly, most of the time the appointed lawyers are white men. A recent study found

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133. NAT'L WOMEN'S LAW CTR., JUDGES AND THE COURTS: WOMEN IN THE FEDERAL JUDICIARY: STILL A LONG WAY TO GO 1 (2016), <https://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud7.14.16.pdf> [<https://perma.cc/C3L7-85TT>].

134. MDL STATISTICS REPORT-DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT (2017), [http://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_District-April-17-2017.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-17-2017.pdf) [<https://perma.cc/VXG7-RCZ3>].

135. *See id.*

136. *See Dodge, supra* note 109, at 355–56.

137. *See* Julie A. Steinberg, *More Women Plaintiffs' Lawyers Becoming Complex Litigation Leaders*, BNA (Feb. 3, 2107), <https://www.bna.com/women-plaintiffs-lawyers-n57982083338/> [<https://perma.cc/KR2P-VF9N>] (citing an unpublished study by Dana Alvare at the Sheller Center for Social Justice at the Temple University School of Law).

138. *See Burch, supra* note 111, at 81.

that between 2011 and 2015, women made up only 16% of all plaintiffs' MDL leadership appointments.<sup>139</sup> The somewhat positive news is that the number of women in MDL leadership has steadily increased during this time.<sup>140</sup> Women held only 13.5% of leadership roles in 2011, but with the exception of 2013, that percentage has steadily grown each year.<sup>141</sup> The study found that in 2015 women held over 27% of the MDL leadership positions.<sup>142</sup>

The news is not all rosy, however. Within MDL leadership, there is further stratification. There are the "Tier 1" leaders—those lawyers who essentially function as lead counsel—and "Tier 2" leaders—those who serve lower-level leadership functions.<sup>143</sup> According to the same study of MDL cases between 2011 and 2015, women held only 15% of Tier 1 leadership roles and 19% of Tier 2 leadership roles.<sup>144</sup> In addition, almost 50% of cases did not have any women in Tier 1 leadership roles, while 98% of cases had at least one male attorney at that level.<sup>145</sup> Worse still, 63% of cases did not have any women in leadership positions at either tier level.<sup>146</sup>

Other studies echo these results. In one study, Elizabeth Burch examined the phenomenon of repeat-player law firms and individuals in multidistrict litigation.<sup>147</sup> Burch collected data from seventy-two product liability and sales-practices multidistrict litigation cases pending as of May 2013.<sup>148</sup> She found that certain "repeat players" were regularly appointed to leadership positions in the litigation. More specifically, 30% of the available leadership roles were occupied by an elite group of fifty attorneys.<sup>149</sup> Those elite lawyers were named lead attorney in five or more multidistrict litigation cases then pending.<sup>150</sup> Of those premier fifty attorneys, only eleven—or 22%—were women.<sup>151</sup>

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139. Steinberg, *supra* note 137.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* Class actions outside of MDL are no different. One study looked at a sample of forty-eight class actions. See STEPHANIE A. SCHARF & ROBERTA D. LIEBENBERG, FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE 12 (2015), [https://www.americanbar.org/content/dam/aba/marketing/women/first\\_chairs2015.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdam.pdf) [<https://perma.cc/D64W-9CV9>]. It found that forty-seven of those cases had at least one male lead counsel, while thirty-four of the cases did not have any women listed as lead counsel. *Id.* Counting all of the attorneys who filed appearances in this sample of cases revealed that 68% were men and 32% were women. *Id.*

147. See Burch, *supra* note 111, at 71.

148. *Id.* at 95.

149. *Id.* at 96.

150. *Id.*

151. *Id.* at 93 n.102. A less formal study by Jaime Dodge made similar findings. For cases pending as of April 2014, Dodge found that between 2000 and 2004, men were appointed to plaintiff's side leadership positions 11.8 times more often than women. Dodge, *supra* note 109, at 364. Between 2005 and 2009, men were appointed 6.73 times more often, and between 2010 and 2014, 3.02 times more often. *Id.* When looking specifically at "Tier 1" leadership roles on the plaintiff's side, Dodge found that between 2005 and 2009, men were appointed 7

At least one study has shown that MDL defense-side lawyers are slightly more diverse. In most cases the defendant, not the transferee judge, appoints its lawyers in multidistrict litigation.<sup>152</sup> One study found that slightly more women represented defendants in this context. Between 2010 and 2014, the study found that men were appointed as defense counsel 2.88 times more than women.<sup>153</sup> In contrast, during the same time period, men were appointed as plaintiffs' attorneys 3.02 times more than women.<sup>154</sup> It is difficult to know why there is this slight difference, and of course, there are limitations to the study.<sup>155</sup> Nonetheless, the findings suggest that there is a variance, which begs the question of whether and how structural differences in the appointment processes for plaintiff and defense lawyers contribute to that difference.

Finally, with respect to women of color, little if any empirical work has been done to assess the number of women of color appointed to leadership positions within MDL cases. Anecdotally at least, the sense is that those numbers are even lower than the number of women as a whole.<sup>156</sup> Like JPML judges, women of color are underrepresented as MDL lawyers.

In sum, the elite practice of multidistrict litigation—from the judges to the attorneys—is slowly changing to include more white women, but it is failing to include women of color. There may be lessons from women's experiences in complex litigation, but there is certainly more work to be done.

### III. MOVING GENDER EQUALITY FORWARD

In this Section, the Article will make the case for why the inclusion of all women in complex litigation—and law more broadly—is important. Having made that case, it will focus on what we have learned from women's experience in complex litigation. Finally, it will make a variety of proposals for how to ensure that all women have a chance to succeed in law.

#### *A. The Case for Gender Equity*

What might seem obvious is not always so. Such is the case with the argument that diversity within institutions is essential. In this Section, the Article argues that women should be participating in the practice of law—at all levels—in numbers that are reflective of the general population. This argument is not made for the sake of aesthetic appeal, but because there is value in ensuring that women participate and lead at higher numbers than are currently reflected in the statistics. First, heterogeneity mitigates the risks inherent in group decision making. Second and related, when

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times as often as women and between 2010 and 2014, men were appointed 5.47 more times.  
*Id.*

152. Dodge, *supra* note 109, at 364.

153. *Id.* at 365.

154. *Id.*

155. *Id.* (“But, the data cannot pinpoint the cause, as many factors influence these appointment rates.”).

156. *Id.* at 363–64 (“Anecdotally, attorneys have long expressed a sense that there are few women and even fewer non-Caucasians appointed to MDL leadership, particularly on the plaintiff's side.”).

women are part of a decision-making process, the results are different, often—it appears—in a way that is beneficial. Third, diversity lends the civil justice system greater credibility and legitimacy. And finally, with respect to the most elite echelons of the legal market, there is a duty to commit to greater heterogeneity because of a consistent and blatant history of exclusion.

First, group decision making of all kinds—including judicial and lawyerly decision making—is most optimal when the group is heterogeneous. Group decision making has been studied at length by numerous social scientists.<sup>157</sup> It is beyond the scope and capacity of this Article to restate that work in detail. Yet, there is one important generalization that can be made from this literature that is both significant and supportive of greater diversity: group decisions are better when made by a group that includes a variety of viewpoints.<sup>158</sup> Stated differently, there are meaningful risks in homogenous group decision making. Risks like cascade effect<sup>159</sup> and confirmation bias<sup>160</sup> are ready examples. Those risks can be most profitably mitigated by creating a more heterogeneous group.

Some scholars argue that instead of using identity, “cognitive diversity” should be employed.<sup>161</sup> Cognitive diversity has appeal because instead of focusing on “visible differences such as race, ethnicity, age, gender, physical disabilities, and demographic dissimilarities,” cognitive diversity focuses on identity as well as “diverse knowledge and expertise stemming from training, experiences, [and] expertise.”<sup>162</sup>

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157. See IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* (2d ed. 1982) (coining the term “Groupthink” and inspiring an area of study around group dynamics and decision making); Eden B. King, Michelle R. Hebl & Daniel J. Beal, *Conflict and Cooperation in Diverse Workgroups*, 65 J. SOC. ISSUES 261 (2009) (summarizing social science research on group dynamics in the workplace).

158. At least one study has shown that “identification and social attraction,” the things that make a group homogenous, diminish the value of group decision making. See Michael A. Hogg & Sarah C. Hains, *Friendship and Group Identification: A New Look at the Role of Cohesiveness in Groupthink*, 28 EUR. J. SOC. PSYCHOL. 323, 337 (1998).

159. Cascade effect is when a few members of a group signal that a decision is correct, leading the other members of the group to fall in line without dissent. CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 10–11 (2003). Cascade effect can occur even when the “following” members of the group have reservations about the decision. See *id.* Individuals might be worried about their reputation if they dissent and are wrong or if they dissent and are no longer seen as team players. See *id.*

160. Confirmation bias occurs when group members discount views that run counter to the group’s view—in spite of the relative value of that different view—or when group members interpret information in a way that is most beneficial to the group’s overall views—again, in spite of diverging interpretations of that information. See Elizabeth Thornburg, *Cognitive Bias, the “Band of Experts,” and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 785–86 (2016). “Confirmation bias leads us to find and interpret information in a way that supports preexisting hypotheses and to avoid information or interpretations that support alternative possibilities.” *Id.* at 785. Thornburg also discusses availability bias, an individual bias, which means that “when examples are easy to retrieve from memory, people will estimate that the category is large or the event frequent.” *Id.*

161. See Burch, *supra* note 111, at 120 (arguing for “cognitive” as opposed to “identity” diversity).

162. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 140 (2017).

Cognitive diversity appeals to the notion that society should not “reward” individuals with opportunity simply because of their identity—something with which they were born. It must instead focus on qualifications that are earned through experience, education, and for lack of a better term, grit. In short, the allure of an argument like cognitive diversity is that it minimizes—and in some instances, eliminates—identity.

While there is certainly worth to cognitive diversity, it should not replace or eclipse identity diversity as an equality value. First, cognitive diversity underestimates, or in the very least obscures, the impact identity has on one’s cognitive development. For example, one scholar arguing in favor of cognitive diversity provides the following hypothetical: “[A] Mexican American woman raised in an upper class family who attends Harvard Law School may have similar analytical tools and training as white males attending the same school.”<sup>163</sup> It seems plausible that two individuals with similar socioeconomic status and the same elite law school training might have some cognitive and analytical tools in common. However, those commonalities—assuming they exist—cannot displace the distinct and profound experiential differences a Latina and a non-Latino white man have because of their identity.

Cognitive diversity proponents would respond that they believe identity matters; indeed, the intersection of surface and internal forms of diversity is an area of study in which social scientists are engaged.<sup>164</sup> What they—cognitive diversity proponents—want is a more nuanced approach to assessing diversity. The risk of not doing so, they argue, is twofold. First, the context and complexity of interactions and decision making are lost when the only point of study is identity.<sup>165</sup> And second, there is a risk that by observing only identity, one might assume that identity alone dictates “cognitive styles, values, or beliefs.”<sup>166</sup> These are certainly valid risks.

Yet, there is a greater risk. The problem with talking about cognitive diversity as a replacement or proxy for identity diversity is that it provides cover for the fact that identity diversity does not yet exist.<sup>167</sup> In fact, as this Article shows within the context of complex litigation, we are not even close to obtaining identity equality. While cognitive diversity might have a place in this important discussion, it must take a back seat to identity diversity—at least for now. In other words, until power is equally distributed in a way that reflects the various identities in our society, the luxury of parsing the impact of diversity in our cognition must wait.

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163. *Id.*

164. See King et al., *supra* note 157, at 279 (“Understanding how different attributes function in multidimensional space will be a critical task facing researchers in the area of workgroup diversity.”).

165. See Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference?: The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCHOL. SCI. PUB. INT., no. 2, 2005, at 31, 43–44.

166. *Id.* at 44.

167. This same critique has been echoed within the tech industry. See Bärri A. Williams, *Tech’s Troubling New Trend: Diversity Is in Your Head*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/opinion/diversity-tech-women-silicon-valley.html> [<https://perma.cc/BLE2-CUTS>]. (“If our focus shifts to cognitive diversity, it could provide an easy way around doing the hard work of increasing the embarrassingly low numbers of blacks and Latinos in the ranks of employees, in leadership roles, as suppliers and vendors, and on boards.”).

Second, and relatedly, cognitive diversity—unlike identity diversity—is difficult to measure. As discussed, there are studies attempting to measure the impact of cognitive diversity on group decision making, but getting at internal distinctions between individuals proves to be challenging.<sup>168</sup> In contrast, identity is relatively easier to measure and can be observed both within and without scientific study.

Thus, while identity is not the only way to achieve heterogeneity, it is certainly a decent place to start. Scholars have identified these issues already in the context of multidistrict litigation. Conformity and the lack of dissent among the repeat players who often lead the plaintiffs' MDL case can lead to suboptimal results for their clients.<sup>169</sup> When group members are encouraged and allowed to express differing viewpoints, better decisions are made.<sup>170</sup> The lack of that diversity, as is often the case in MDL leadership committees, means that there are many risks: lead lawyers might use their elevated position to bargain for increased fees at the expense of the overall settlement value;<sup>171</sup> fears about reputation and future opportunities prevent some leading lawyers from objecting on the basis of misgivings about a case or proposed settlement,<sup>172</sup> and transferee judges are often too familiar with repeat-player attorneys, which obscures their ability to see that the representation may not be adequate.<sup>173</sup> What is apparent from scholars' assessment of multidistrict litigation is that more voices in the room—with differing perspectives and incentives—would be of great benefit. Women are a necessary part of that solution.

A second and related benefit of greater participation by women is results-oriented. When women are involved in decision making, the results change. In judicial decision making, studies have repeatedly shown that the judge's gender affects the decisions that he or she makes.<sup>174</sup> One study found that in sex discrimination suits, female

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168. See King et al., *supra* note 157, at 279.

169. See Burch, *supra* note 111, at 119–20.

170. See *Id.* at 80, 92–93, 95.

171. *Id.* at 80.

172. *Id.* at 85–86 (“An objecting attorney faces the risk that her peers will dub her non-cooperative and thus ‘ineligible’ for future leadership roles.”).

173. *Id.* at 86.

174. See Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776 (2005) (finding in sexual harassment cases that having a female judge increased the probability of a vote for the plaintiff by 86% (from 22% to 41%)). But see Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 168–72 (1983) (finding no statistically significant difference in voting patterns between male and female federal appellate court judges in sex discrimination cases between July 1, 1979, and June 30, 1981); Gerard S. Gyski, Eleanor C. Main & William J. Dixon, *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 148–50 (1986) (finding the same between state supreme court judges in sex discrimination claims between 1971 to 1981); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 607–09 (1985) (finding the same in selected male and female Carter appointees to the federal district court bench examining the voting patterns of twelve matched pairs of female and male when deciding on “women’s policy issues”). Most experts believe that these studies, while correct, were based on too small a sample of female judges to bear rigorous statistical results. Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-*

judges were more likely to find in favor of the plaintiff than male judges.<sup>175</sup> Another scholar reviewed fourteen studies and determined that federal female appellate judges had decision-making patterns distinct from their male counterparts in gender discrimination cases.<sup>176</sup> The question of whether those differences are optimal is a matter of perspective. It is rather difficult to agree on whether some gender discrimination cases are rightly decided or not.

Setting aside the question of whether the decision making in the legal context is optimized when women participate in greater numbers, there is data showing that higher participation by women in other contexts begets better results. For example, in the corporate context, a recent study by the Peterson Institute for International Economics determined that for firms that are profitable, a 30% increase in female leadership within the organization was associated with a 15% increase in the net revenue margin.<sup>177</sup> Another study of Fortune 500 companies found that those with the highest percentage of female board of directors enjoyed a return on invested capital nearly 66% higher than companies with lower female participation.<sup>178</sup> Corporate success is measured by corporate profits, and more women as decision makers positively impacts that metric. One could also argue that—depending on the measure of success in the legal context—more women might improve the results there as well.

The third benefit of more women participating in law is that it inures legitimacy to our justice system. As Larry Solum argued in his pathbreaking work *Procedural Justice*, outcomes alone are not enough to legitimize an adjudicatory system.<sup>179</sup> No system is perfect, so inaccurate outcomes are inevitable. Solum argued that an imperfect system can still be legitimate if it is grounded in a procedural framework “that affords us a meaningful opportunity to participate in a process that strikes a reasonable balance between the goal of accurate outcomes and the inevitable costs

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*Examination*, 21 YALE J.L. & FEMINISM 297, 311–13 (2010). Studies of the impact of race on judicial decision making have similarly shown that race matters. See, e.g., Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U.L. REV. 1117, 1156 (2009) (“Plaintiffs are successful in 46% of their cases before African American judges but less than half as often before White judges; logistic regression analysis indicated that on average, plaintiffs before African American judges are 3.3 times more likely to win than before White judges.”).

175. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 401 (2010) (finding that the likelihood of a female plaintiff succeeding in her case increased by about 10% when the judge was a woman).

176. Pat K. Chew, *Judges’ Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER, RACE & JUST. 359, 366 (2011).

177. Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey* 16 (Peterson Inst. for Int’l Econ, Working Paper No. 16-3, 2016), <https://piie.com/publications/wp/wp16-3.pdf> [<https://perma.cc/JE5Z-25D6>].

178. Lois Joy, Nancy M. Carter, Harvey M. Wagner & Sriram Narayanan, *The Bottom Line: Corporate Performance & Women’s Representation on Boards*, CATALYST (2007), [http://www.catalyst.org/system/files/The\\_Bottom\\_Line\\_Corporate\\_Performance\\_and\\_Womens\\_Representation\\_on\\_Boards.pdf](http://www.catalyst.org/system/files/The_Bottom_Line_Corporate_Performance_and_Womens_Representation_on_Boards.pdf) [<https://perma.cc/3WQ5-JRP2>].

179. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 190 (2004).

imposed by any system of dispute resolution.”<sup>180</sup> Solum’s work articulated a set of principles that create the foundation for procedural justice.<sup>181</sup> The paramount principle—according to Solum—is participation.<sup>182</sup>

Expanding on this theory of participation is the idea that full participation in one’s case requires that participants believe they have been heard. Thus, the decision makers who are listening and the attorneys who are making arguments are a critical part of this participation value. An individual litigant who sees herself in the decision maker or in the attorney will have a much stronger sense of participation, and thus legitimacy. Again, identity is not the only thing that matters. Yet, the participation effect is more credible when the decision makers and lawyers reflect the population using the court system, leading to greater systemic legitimacy.

Finally, the legal profession is generally held in high esteem and is often at the forefront of the pursuit of social change and justice; yet it is a profession that regularly excluded (and excludes) people viewed as “other.”<sup>183</sup> This history of exclusion in the legal profession—most would agree—is not something about which we as lawyers should be proud. Instead, it should compel us to take action to remediate the inevitable results of that exclusion. In other words, this history should not be hidden but should instead be discussed and utilized to counteract the consistent and lengthy advantage that white men had (and continue to have).<sup>184</sup> In sum, there are certainly economic, systemic, and social benefits of heterogeneity, but in addition to those benefits, the legal profession has a duty to commit to correcting its history of excluding so many qualified individuals based on identity alone.

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180. *Id.*

181. *Id.* at 305–07.

182. *Id.* at 321.

183. See Troy J.H. Andrade & Ke Kānāwai Māmalahoe, *Equality in Our Splintered Profession*, 33 U. HAW. L. REV. 249, 257 (2010) (“The legal profession’s history can be characterized as one of discrete and sometimes outright exclusion.”); Helia Garrido Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, 4 COLUM. J. RACE & L. 1, 2–3 (2013) (“Despite being the architects of significant, positive societal advancement over the last half of the twentieth century, members of the legal community continue to struggle with the inequality that exists within their own ranks.”); Kevin R. Johnson, *Bias in the Legal System? An Essay on the Eligibility of Undocumented Immigrants to Practice Law*, 46 U.C. DAVIS L. REV. 1655, 1658–59 (2013) (summarizing history of exclusion of immigrants and “others” from the practice of law); Mary Vasaly, *Men in Black: Gender Diversity and the Eighth Circuit Bench*, 36 WM. MITCHELL L. REV. 1703, 1703 (2010) (“For most of the history of the legal profession in the United States, courts were the exclusive domain of ‘men in black.’”); David B. Wilkins, *From “Separate is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1560–71 (2004) (summarizing how the legal profession historically excluded non-white men and women).

184. See David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1922 (2005) (arguing that “[l]aw schools and legal employers were justified in taking affirmative steps to assist black students and lawyers in order to counteract the systematic and pervasive preferences that had been accorded to white, Anglo-Saxon, Protestant men of means for more than one hundred years”).

*B. Some Steps on the Path to Gender Equity*

The gender bias task forces of the 1980s and 90s were important in their own right. The work identified ongoing issues with how women were treated in the court system, both as professionals and as parties. Relatedly, the task forces made some concrete recommendations for how to improve the situation for women.<sup>185</sup> Yet, there were frailties. The task forces did not generally inquire into how intersectional traits like race impacted the experience of women.<sup>186</sup> And, some of the recommendations, while progressive for the time, have proven to be inadequate to achieve gender equity.

Whatever their net worth, one thing is for sure: The gender bias task force movement shed new light on an ongoing challenge for our country, for our courts, and for women. It is in that spirit that this Article reflects on where women stand in the elite world of modern complex litigation. As the Article has detailed, there again progress has been made, but it has been slow, and there is much more work to be done.

In this Part, the Article will make a variety of proposals for how to bring more women into positions of power within the practice of law. Some of these proposals will be of general applicability. For example, changing social norms around how women are viewed in the workplace would benefit women across all kinds of legal practice and indeed across all aspects of their lives. Its impact is not limited to complex litigation. Other proposals harness some of what has been learned from the experience of women in complex litigation. One such proposal is the need to increase mentoring for women within professional networks. This kind of proposal has a specific application for women in complex litigation because the intent is to bring more women into equity partnership at elite law firms. Yet, it has positive ramifications for women who practice outside of complex litigation as well.

The goal here is not to be comprehensive and it is certainly not to be definitive. Instead, the hope is that the conversation around women and the law continues, with thanks to the movements that have come before and with an eye toward how to improve going forward. With that caveat in mind, the Article will discuss the following proposals: (1) confront and change base sexism and social gender norms; (2) retain women at major law firms through structural changes to mentoring, networking, and assessment; and (3) restructure systems that lead to homogeneity in legal practice; for example, the “slate” system for selecting plaintiffs’ attorneys in multidistrict litigation.

### 1. Base Sexism & Social Norms

First, as a society, we must confront base sexism and change social norms. The 2016 presidential election, and even more recently, the attention being paid to sexual harassment and assault claims by women in politics, Hollywood, and the board room demonstrate the foundational sexism and misogyny underlying our culture.<sup>187</sup> When

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185. *See supra* Parts I.B, I.C.

186. *Id.*

187. *See* Samantha Cooney, *Here Are All the Public Figures Who’ve Been Accused of Sexual Misconduct After Harvey Weinstein*, TIME (Jan. 26, 2018), <http://time.com/5015204/harvey-weinstein-scandal> [<https://perma.cc/372Y-WQKU>]; Michelle Ruis, *Now Can We Admit Sexism*

doing research for this Article, for example, the query of “first woman lawyer” turned up a few interesting finds. High on the list was a website boasting the “10 Most Attractive Women Lawyers.”<sup>188</sup> There, the achievements of amazing female lawyers like Amal Clooney (née Alamuddin) and Shaheed Fatima were reduced to descriptions of their “breathtaking beautiful eyes,”<sup>189</sup> “delightful dimple[s],”<sup>190</sup> and similarly offensive top-ten lists. Overcoming this kind of latent sexism and objectification of women continues to be a struggle.

Indeed, appearance is a constant challenge for women, but especially so for women of color. For example, African American women often struggle to make their hair fit an expected mold of appearance and beauty.<sup>191</sup> The “texture and length of a black woman’s hair ‘becomes a proxy for legitimacy.’”<sup>192</sup> Similarly, Muslim women wearing hijab experience discrimination that compounds any discrimination on the basis of their gender.<sup>193</sup> The focus on women and their appearance is detrimental to their success in the workplace.

The answer to this challenge is not an easy one. Awareness, education, movements, and overt action by allies can only help. Failing to acknowledge that this most basic challenge in our culture must be overcome—as hard and intractable a problem as it might be—would be a mistake.

## 2. Retaining & Elevating Women in Complex Litigation Practice

Second, complex litigation draws attorneys from the most elite law firms. Those law firms might be hiring men and women at close to equal rates, but white women and women of color are not achieving commensurate rates of partnership.<sup>194</sup> The question is how to both assess and ameliorate the gap between hiring and partnership at elite law firms.<sup>195</sup>

*Was a Factor in the 2016 Election?*, VOGUE (May 16, 2017, 2:44 PM), <https://www.vogue.com/article/donald-trump-classified-information-russians-sexism-2016-election> [<https://perma.cc/TW9D-PJQ8>].

188. Ejaz Khan, *10 Most Attractive Women Lawyers*, WONDERSLIST, <http://www.wonderslist.com/10-attractive-women-lawyers/> [<https://perma.cc/N6GG-5AQA>].

189. *See Amal Clooney*, DOUGHTY STREET CHAMBERS, <http://www.doughtystreet.co.uk/barristers/profile/amal-clooney> [<https://perma.cc/GH6W-96WS>].

190. *See Shaheed Fatima QC*, BLACKSTONE CHAMBERS, <https://www.blackstonechambers.com/barristers/shaheed-fatima-qc/> [<https://perma.cc/6LCE-N26L>].

191. Pratt, *supra* note 28, at 1783.

192. *Id.* (quoting Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 383 (1991)).

193. *See, e.g.,* Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim-American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 224 (2012) (“After 9/11, as this article argues, the headscarved woman faces an additional stereotype—a disloyal and anti-American terrorist or terrorist-sympathizer.”); *Discrimination Against Muslim Women - Fact Sheet*, AM. C.L. UNION (Nov. 2008), <https://www.aclu.org/other/discrimination-against-muslim-women-fact-sheet> [<https://perma.cc/38DS-79YK>].

194. *See supra* Introduction and Part II.C.

195. A related, and perhaps, precedent issue is what Deborah Jones Merritt & Kyle McEntee call the “leaky pipeline” for women entering the legal profession. Deborah Jones Merritt & Kyle McEntee, *November 2016 Research Summary: The Leaky Pipeline for Women*

Many, if not most, elite law firms have taken public steps to demonstrate their commitment to diversity.<sup>196</sup> This work has paid dividends as the number of women entering “BigLaw” firms has increased.<sup>197</sup> That success is tempered, however. Partnership rates are still disproportionately white and male.<sup>198</sup> Moreover, “positions of power [within law firms] are still predominantly stratified with an overrepresentation of white men in senior positions.”<sup>199</sup> While exceptions like Faiza Saeed—a practice group head at Cravath, Swaine & Moore—can be found, statistics show that women are rarely in top law firm positions.<sup>200</sup> A recent study found that 25% of top law firms do not have any women on their management committees.<sup>201</sup> The study also found that one out of every eight such law firms did not have even one female practice group leader.<sup>202</sup> For women of color, the picture is similarly discouraging. While a recent study found that the number of African American men and women on management committees slightly increased, it also found that more than a third of top law firms do not have any men or women of color serving as the heads of practice groups.<sup>203</sup>

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*Entering the Legal Profession*, LST RADIO, [http://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary\\_Nov-2016.pdf](http://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary_Nov-2016.pdf) [<https://perma.cc/8JQS-EG44>]. Merritt and McEntee found that women were at a disadvantage even before applying for law school. First, 3.4% of male college graduates apply to law school, while only 2.6% of women do. *Id.* at 1. Second, once they apply, women are less likely to be admitted: 79.5% of male applicants were accepted in the fall of 2015, compared to 75.8% of female applicants. *Id.* Finally, women who are admitted to law school tend to attend law schools that put them at a disadvantage in the employment market. *Id.* at 2. For schools who placed 70–84% of their graduates in JD-required positions, women made up just 45.7% of those schools’ enrollment. *Id.* at 2. Yet, in schools that placed less than 40% of their students in the same jobs, women were 55.9% of that enrollment. *Id.* at 2. This data suggests that women are not entering law school or the work force on equal footing. See also Elizabeth Olson, *More Law Degrees for Women, but Fewer Good Jobs*, N.Y. TIMES: DEALBOOK, (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/business/dealbook/more-law-degrees-for-women-but-fewer-good-jobs.html> [<https://perma.cc/3REH-UXBW>].

196. See Russell G. Pearce, Eli Wald & Swethaa S. Ballakirshnen, *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2409 (2015); see also *Diversity Recruitment and Retention*, PERKINS COIE, <https://www.perkinscoie.com/en/about-us/firm/diversity/diversity-recruitment.html> [<https://perma.cc/P9AZ-E992>]; *Our Commitment to Diversity and Inclusion*, K&L GATES, <http://www.klgates.com/aboutus/diversity> [<https://perma.cc/HK8V-CVDY>].

197. Pearce et al., *supra* note 196, at 2409.

198. See *supra* Introduction; see also Wald, *supra* note 25, at 2246 (“Regularly constituting half the entry class of associates at large law firms, women lawyers have run into the glass ceiling effect, failing to achieve equal representation in partnership ranks.”).

199. Pearce et al., *supra* note 196, at 2409.

200. See Elizabeth Olson, *Leading New York Law Firms Lag in Including Women and Minorities*, N.Y. TIMES: DEALBOOK (Oct. 16, 2016), <https://www.nytimes.com/2016/10/17/business/dealbook/leading-new-york-law-firms-lag-women-and-minorities-diversity.html> [<https://perma.cc/5ZNF-VY62>].

201. *Id.*

202. *Id.*

203. *Id.*

One major reason for the lack of women at the top is that while women are entering practice at higher rates, law firms are not retaining those women long enough to allow them to ascend into such positions. A recent study found that during 2015, 18.4% of women and 20.8% of men and women of color left major law firms, compared to only 13% of white men.<sup>204</sup> These retention rates mean that while white women and women of color might be hired at higher rates, they are unable to succeed once within the firm environment. Thus, women are not gaining partnership positions and when the firm looks to fill leadership positions, its pool of diverse candidates is significantly lower.

There are many theories for why white women and women of color are leaving law firms at higher rates.<sup>205</sup> One compelling theory is that—once in the door—the firm is blind to difference among its associates and that such a “difference blindness” approach is counterproductive to creating an environment where white women and women of color can succeed.<sup>206</sup> This is because the difference blindness approach is based on the false premise that if everyone is held to the same standards, the best will rise to the top and succeed.<sup>207</sup> This premise is flawed because the merit-based standards are “built on conformity to an historical ideal worker who is white, heterosexual, and male.”<sup>208</sup> So, while firms might believe that they are operating within a merit-based system, the reality is that they are not.

The normalization of whiteness and maleness allows implicit biases to persist and prevents “different” people from succeeding. If white men are the dominant group, their biases will have an unequal impact on who carries favor within the workplace.<sup>209</sup> Relatedly, human nature will prevail and people will continue to be most comfortable with people who are like them—a phenomenon called homophily.<sup>210</sup>

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204. *Id.*

205. For example, there are concerns around work-life balance, parental-leave policies, and related considerations regarding how women are expected to function based on stereotypically male-oriented standards of behavior both within and without the office. John E. Higgins, *Grutter and Gratz Decisions Underscore Pro-Diversity Trends in Schools and Businesses*, 76 N.Y. ST. B.A. J. 32, 36 (2004) (suggesting that, among other things, law firms should offer “family-friendly policies and flexible work options”); Liane Jackson, *Invisible Then Gone Minority Women Are Disappearing from Biglaw-and Here's Why*, 102 ABA J. 36, 42 (2016) (discussing how differences between men and women must be “acknowledged and valued” and how “the entrenched paradigm on delivery and individual contributions” that men who succeed in law firms make must change). There are also pipeline issues. Michelle P. Crockett, *Alone on an Island the Realities of Practicing Law for Women of Color*, 92 MICH. B.J., 42, 44 (2013). While the Article generally focuses on retention issues more broadly, I acknowledge that these concerns, and others, contribute to the complexity of why more women do not become partners at major law firms.

206. *See* Pearce et al., *supra* note 196, at 2411.

207. *Id.* at 2412.

208. *Id.* The authors argue that this norm creates two related and problematic dynamics. First, it leads individuals and institutions to believe that they have agency in creating a truly equal workplace. *Id.* And, second, it prevents individuals and the institution from considering evidence that the “normalization of whiteness” and “blindness to difference” actually makes achieving real equality impossible. *Id.*

209. *Id.* at 2412–13.

210. *Id.* at 2413.

When the blind merits are the measuring stick, the benefits that individuals gain from being mentored by those who are leaders and who look like them are not considered and weighed.<sup>211</sup> Stated differently, the inherent advantages that white men have when coming into the legal workplace are simply not accounted for when comparing their work with their differently-situated counterparts.

Identifying the cause of such low retention rates is certainly a challenge, but figuring out how to ameliorate the low retention rates is even more daunting. Work in organizational theory is useful in determining how best to structure a workplace that will allow for all kinds of people to succeed.<sup>212</sup> One brief account of such work is instructive here. Having shed “difference blindness,” institutions should adopt a “bias awareness” approach.<sup>213</sup> Adopting that approach opens the door to structural changes that might actually work. For example, once a firm can openly discuss bias and how it impacts one’s ability to succeed, it can create programs to educate individuals—especially those in leadership roles—on how bias functions.<sup>214</sup> This education, however, cannot be the often-ineffective required diversity training that one does on her computer at home, but instead must be the kind of training that forces an institution to collectively engage in creating equality by openly discussing bias and learning about how it works.<sup>215</sup>

Once the education piece is complete, the institution must then commit to concrete changes such as rewarding partners who mentor diverse associates who are successful.<sup>216</sup> Conscious mentoring of white women and women of color would mean that those women would benefit from the implicit advantage that white men gain automatically when they enter a firm. Because so much of firm leadership is still white and male, however, this means that any training must be targeted to teaching white men how to mentor and connect with individuals who do not look like them.<sup>217</sup>

With that kind of mentoring, white women and women of color would gain valuable experience and—most important for ascension within a firm—be exposed to clients and engage in client development. This is critical for two reasons. First, the firm would be better able to retain white women and women of color long enough for them to be competitive for leadership positions. Second, once in a position to lead, women will be better able to compete for the highest-level positions like equity partner.

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211. *Id.*

212. *See, e.g.*, TAYLOR COX, JR., *CULTURAL DIVERSITY IN ORGANIZATIONS: THEORY, RESEARCH AND PRACTICE* (1994) (discussing how to understand cultural diversity and its effects on organizational behavior); JAY M. SHAFRITZ, J. STEVEN OTT & YONG SUK JANG, *CLASSICS OF ORGANIZATION THEORY* (8th ed. 2016) (collection of works in organization theory); Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 *GENDER & SOC’Y* 139 (1990) (arguing that organizational structure is not gender neutral, but is instead built on a assumptions about gender difference).

213. Pearce et al., *supra* note 196, at 2411.

214. *See id.* at 2444–48.

215. *See id.*

216. *Id.* at 2442.

217. *See id.* at 2451–53.

Statistics show that even when women obtain equity partnership, men still make 44% more.<sup>218</sup> This is largely due to origination credit—the idea that the person who brought in the business originally should get more money than the person who simply serves the client. One survey found that male partners reported an average origination payment of \$2.6 million while female partners reported only \$1.7 million.<sup>219</sup>

This difference is due, in part, to the fact that women are not exposed to clients and given the opportunity to cultivate clients in a difference-blindness firm environment early in their careers. One study looked at billing records, time sheets, origination files, and personnel records across a number of law firms to determine why there is an “origination gap” between male and female partners.<sup>220</sup> The study determined that “women tend to grow their book incrementally and often through the (obviously harder) process of developing clients who are brand new to the firm.”<sup>221</sup> In contrast, “men tend to ‘inherit’ institutional clients – either as the sole or co-lead partner on major accounts.”<sup>222</sup> This “biased origination” system traces back to the associate years when mentoring develops differently based largely on identity.<sup>223</sup>

If women are to have a bigger place in complex litigation—both as lawyers and judges—the number of women who succeed at elite law firms must increase. To accomplish that goal, firms must make significant structural changes. Firms have figured out how to diversify their entry-level associate ranks;<sup>224</sup> they must now turn their attention to retaining and elevating those same individuals.

### 3. Restructuring Multidistrict Litigation Practices

Within each type of practice there are additional structural barriers to women succeeding. Multidistrict litigation’s primary source of inequity is in the plaintiffs’ leadership committees.<sup>225</sup> Yet, both lawyers and judges are making changes and becoming more aware of this inequality. There also appears to be a recent, concerted effort on the part of the current JPML to change the composition of MDL transferee judges. In this final proposal, the Article will use the leadership committee process and how lawyers and judges have responded as an example of how structural changes within specific areas of legal practice can begin to remedy institutionalized inequality. It will also discuss how the changing face of MDL transferee judges may further assist in this pursuit.

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218. Elizabeth Olson, *A 44% Pay Divide for Female and Male Law Partners, Survey Says*, N.Y. TIMES: DEALBOOK (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/business/dealbook/female-law-partners-earn-44-less-than-the-men-survey-shows.html> [<https://perma.cc/T4XN-27TW>].

219. *Id.*

220. Heidi Gardner, *Harvard Study: On Gender and Origination in the Legal Profession (Perspective)*, BLOOMBERG LAW: BIG LAW BUSINESS (Nov. 3, 2016), <https://bol.bna.com/harvard-study-on-gender-and-origination-in-the-legal-profession> [<https://perma.cc/8CNN-KABW>].

221. *Id.*

222. *Id.*

223. *See id.* Firms using lock-step compensation systems may have more success at both retaining and elevating women within their partnership ranks.

224. *See supra* note 196.

225. *See supra* Part II.C.

Traditionally, MDL transferee judges solicited and received a “slate” of proposed attorneys to serve on leadership committees.<sup>226</sup> While slates have the benefit of ensuring expertise, experience, and a collegial working group, they have a downside.<sup>227</sup> As discussed earlier, the homogeneity of such a group presents risks such as confirmation bias.<sup>228</sup> Moreover, the slate process necessarily excludes new entrants into the MDL process because repeat players tend to dominate the slates presented to judges.<sup>229</sup> We know the composition of those repeat players are white men, so the slate process necessarily institutionalizes a gender and race disparity.

In response, some judges have adopted “an individualized-appointment process [that] allows the decisive factors in selecting between the many qualified attorneys to become skill, diversity of clients, diversity of experience, and other factors that would more directly improve the results in the MDL.”<sup>230</sup> This new trend is generally being well-received by experienced complex litigation attorneys. For example, Elizabeth Cabraser, most recently the solo lead counsel in the Volkswagen “Clean Diesel” litigation, explained that the individual-appointments process “promotes diversity naturally, without discounting merit, because it simply eliminates the barriers to entry that a slate system can subconsciously impose.”<sup>231</sup> Changing the way the selection process works has already resulted in changes to plaintiffs’ leadership committees, lending credibility to the argument that changes to certain structures can actually decrease barriers for women.

An additional way that women in multidistrict litigation have begun to increase their participation in leadership positions is to demand it. Most notably, Jayne Conroy, an attorney at Simmons Hanly Conroy, argued that Judge James Selna should consider the demographic composition of the plaintiffs in the Toyota accelerator litigation (as over half the Toyota buyers were women).<sup>232</sup> Because so many plaintiffs were women, Conroy argued, the judge should ensure that the leadership committee was reflective of the plaintiffs it was representing.<sup>233</sup> This was a blatant declaration that the legitimacy of the process, to some degree, depended on the composition of the leadership committee. The argument was not that the judge should appoint women solely for the sake of aesthetics, but that among a large pool of equally qualified candidates—both men and women—an effort should be made to reflect the composition of the plaintiffs because there was a real value to that diversity.<sup>234</sup> Conroy was appointed to a leadership role, and many saw this as something of a tipping point for engaging judges in the demographic composition of leadership committees.<sup>235</sup> It is not clear yet whether similar arguments might work for the inclusion of women of color.

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226. See Dodge, *supra* note 109, at 364–66.

227. See *id.* at 365–66.

228. See *supra* Part III.A.

229. Dodge, *supra* note 109, at 366.

230. *Id.*

231. Steinberg, *supra* note 137.

232. Dodge, *supra* note 109, at 366.

233. *Id.*

234. *Id.*

235. *Id.*; see also Steinberg, *supra* note 137 (“Several attorneys singled out the Toyota sudden acceleration litigation as a tipping point toward gender diversity awareness.”).

Some judges have been explicit about ensuring that attorneys be more representative of their clients in aggregate litigation. Judge Harold Baer Jr. (deceased) regularly and quite controversially required that lawyers in class action cases in his court be “diverse.”<sup>236</sup> In certifying a class in an Employee Retirement Income Security Act (ERISA) and age discrimination case, Judge Baer provided the following:

The proposed class includes thousands of Plan participants, both male and female, arguably from diverse racial and ethnic backgrounds. Therefore, I believe it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel I appoint. A review of the firm biographies provides some information on this score. Here, it appears that gender and racial diversity exists, to a limited extent, with respect to the principal attorneys involved in the case. Co-lead counsel has met this Court's diversity requirement—i.e., that at least one minority lawyer and one woman lawyer with requisite experience at the firm be assigned to this matter.<sup>237</sup>

Judge Baer's approach was not met with universal acceptance. In a rare opinion written to deny a writ of certiorari, Justice Alito took aim at Judge Baer's approach, which he noted had “impose[d] race- and sex-based staffing requirements on law firms” who represented classes before Judge Baer.<sup>238</sup> While the issue was not squarely before the Court, Justice Alito took the time to opine that “[c]ourt-approved discrimination based on gender is . . . objectionable, and therefore it is doubtful that the practice in question could survive a constitutional challenge.”<sup>239</sup>

Judge Baer's attention to the composition of the lawyers before him was never tested in a court case. Yet, other judges appear to be following in his footsteps, although perhaps not quite so blatantly. Recently, in her MDL order, Judge Cynthia M. Rufe advised the leadership committee she appointed to provide participation opportunities for the non-appointed attorneys who remained.<sup>240</sup> Perhaps an awareness of the repeat-player problem and its impact on the composition of leadership committees can be ameliorated by judges putting similar pressure on attorneys to mentor and provide opportunities for new entrants.<sup>241</sup>

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236. See, e.g., *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265 (S.D.N.Y. 2007), amended by, 255 F.R.D. 130 (S.D.N.Y. 2009).

237. *Id.* at 277.

238. *Martin v. Blessing*, 134 S. Ct. 402 (2013), *denying cert. to Blessing v. Sirius XM Radio Inc.*, 507 F. App'x 1 (2012).

239. *Id.* at 403.

240. Steinberg, *supra* note 137.

241. For example, Judge Weinstein, a federal judge in the Southern District of New York, recently adopted a rule “urging a more visible and substantive role for young female lawyers” arguing cases in his courtroom. Alan Feuer, *A Judge Wants a Bigger Role for Female Lawyers. So He Made a Rule*, N.Y. TIMES (Aug. 23, 2017), <https://www.nytimes.com/2017/08/23/nyregion/a-judge-wants-a-bigger-role-for-female-lawyers-so-he-made-a-rule.html> [https://perma.cc/7SY6-XG29]. Another federal judge, Judge Ann Donnelly, has a similar rule. *Id.* Neither of these edicts are limited to multidistrict litigation, but they would do the same work in that context and beyond. *Id.*

Relatedly, women within multidistrict litigation have begun to organize and network in an effort to increase their numbers. According to Elizabeth Cabraser, “Women lawyers and attorneys of color are organizing, networking, and promoting and supporting each other.”<sup>242</sup> Groups like Women En Mass, a “self-organized group of women plaintiffs’ tort lawyers,” have already helped to augment the visibility of women as judges and in litigation leadership positions.<sup>243</sup> As the law firm setting demonstrates, mentorship is a key component of breaking down barriers for white women and women of color. This kind of networking may be an additional way to provide that necessary tool for success.

Finally, the current JPML appears to be making a concerted effort to expand the gender and racial composition of the pool of MDL transferee judges. For example, of eight recently appointed MDL transferee judges, there is a noticeable level of gender and racial diversity. While three of the judges are white men, the remaining five are one African American man, one South Asian American man, one African American woman, one Asian American woman, and one white woman.<sup>244</sup> The JPML seems cognizant of the fact that it must ensure that new judges get the opportunity to develop expertise in managing MDL cases. For example, in a recent transfer order to one of these judges—Judge Indira Talwani—the JPML stated that Judge Talwani “ha[d] not yet had an opportunity to preside over an MDL docket,” yet the Panel was persuaded that Judge Talwani could rightfully handle the case.<sup>245</sup> By giving new-to-MDL judges a chance, there is a positive impact on gender and racial diversity. These “rookie” judges are more reflective of the general population and will undoubtedly have some amount of impact on leadership attorney selection. The degree of that impact remains to be seen.

#### CONCLUSION

There is much to overcome. Yet, the sheer breadth of what needs to change should not distract from the fact that the effort, if fruitful, is more than worth it. In 2003, Judith Resnik observed that the work of confronting gender bias was not a project that was just beginning.<sup>246</sup> Instead, Resnik stated, “as George Eliot put in when opening her novel, *Daniel Deronda*, we are in the medias res—in the middle.”<sup>247</sup> In 2017, it appears that we are still deeply in media res: we are not just beginning and progress has indeed been made, but our work is certainly not done.

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242. Steinberg, *supra* note 137.

243. *Id.*

244. Amanda Bronstad, *Meet the Next Generation of MDL Judges*, NAT’L L.J. (Apr. 20, 2017, 12:24 AM), <https://www.law.com/nationallawjournal/almID/1202784167417> [<https://perma.cc/5HMQ-Z7MU>].

245. Transfer Order at 3, *In Re: Stryker Orthopaedics LFIT V40 Femoral Head Products Liability Litig.*, (Apr. 5, 2017) (MDL No. 2768).

246. Judith Resnik, *A Continuous Body: Ongoing Conversations About Women and Legal Education*, 53 J. LEGAL EDUC. 564, 565 (2003). While Resnik was discussing gender in the context of legal education, her comments are broadly applicable as the inquiry into legal education and gender was an outgrowth of the gender bias task force studies.

247. *Id.*