

## Chapter II

### How Hidden Bias Affects Everyday Workplace Interactions

A patient is brought into the emergency room, and the surgeon says, “I cannot operate on this patient: he is my son.” The surgeon is not the patient’s father. Why can’t the surgeon operate? The answer is that the surgeon is the patient’s mother. The riddle sometimes stumps the listener because of the hidden assumption that surgeons are male. Most jobs carry unstated messages about gender.

Fifty-five percent of white women and 32% of women of color—but less than 5% of white men—say they missed client relationship and development opportunities due to gender.

—ABA, *Visible Invisibility*, p. 9.

“[T]o combat sex discrimination, it will be necessary to change stereotypes about occupations, not just stereotypes about people.”<sup>13</sup> The lawyer role is gendered in two distinct ways. First, “the quick image that is likely to come to people’s minds when they think ‘lawyer’ is still male.”<sup>14</sup> (Hence the riddle.) This “quick image”—

the readily available, taken-for-granted, culturally shared template—is called a schema. It reflects both tradition and demography, given that a 2005 study indicated that more than 82% of law firm partners are men.<sup>15</sup>

Not only is the lawyer schema *male*, it is also *masculine*. That is, the personality traits commonly ascribed to a good lawyer (competent, confident, and assertive) are culturally associated with masculinity.<sup>16</sup>

Close to one-third of women of color said they have had at least one unfair performance evaluation, as did 25% of the white women (but less than 1% of white men).

—ABA, *Visible Invisibility*, p. 26.

The fact that the senior positions in law firms are overwhelmingly male feeds the sense that lawyers are “naturally”

men, particularly because men often see traditionally male jobs as requiring exclusively masculine traits. (In sharp contrast, women tend to see such jobs as requiring a combination of masculine and feminine traits.)<sup>17</sup> Thus men will tend to see the job of a litigator as aggressive and combative—although a litigator who is soft-spoken but commanding can be equally effective.<sup>18</sup>

The purpose of this section is to help legal employers provide “structured, systematic intervention to counteract stereotyping,” without which women will not face a level playing field in the legal profession.<sup>19</sup> This is not as simple as making evaluation programs gender-neutral. The message of a quarter of a century of social science is that gender neutrality is not the key to measuring women’s performance fairly.<sup>20</sup> The key is to put in place training and procedures that correct for the stereotypes that reflect hidden—but correctable—bias that flows from gender schemas that influence perceptions about what makes a good lawyer, a good colleague, a “player,” or a “go-getter.” This hidden bias stems from our everyday sense of “the way things are,” which informs our everyday workplace interactions unless the patterns of bias are brought to consciousness and controlled. Such bias affects how ambiguous information is interpreted, which information is remembered and for how long, and what conclusions people draw about causation. Even minimal amounts of bias can have powerful cumulative effects. A computer simulation found that after eight rounds of promotion, a gender bias favoring men by just 1% led to only 35% women at the hierarchy’s highest level.<sup>21</sup>

Twenty-eight percent of white women and 14% of women of color but less than 3% of white men report being denied promotion opportunities due to gender.

—ABA, *Visible Invisibility*, p. 9.

"The male associates all had stay-at-home wives who took care of all the everyday things. So even if they didn't have children, their dry cleaning was picked up, their dinner was cooked, their house was cleaned. And women have to do that stuff on top of their work."

—African-American woman attorney, ABA, *Visible Invisibility*, p. 33.

The challenge of establishing effective attorney evaluations is a pressing one. Today, less than 18% of law firm partners are women, despite the fact that women have comprised 40% or more of law school graduates for over two decades.<sup>22</sup> The assumption that the flow of women through the career pipeline would naturally lead to proportionate representation of women was not realized. One reason is the ratcheting up of the hours lawyers work: whereas 1,300 billable

hours was considered full time in the 1960s,<sup>23</sup> full time at large law firms today typically requires at least 1,950,<sup>24</sup> and, anecdotally, "go-getter" associates are reported to be pushing 3,000 billable hours a year.

This schedule virtually requires full-time lawyers to have what sociologists call a "two-person career": a lawyer who earns virtually all the family income and a spouse who supports his or her career.<sup>25</sup> The vast majority of female lawyers do not have a stay-at-home spouse. In sharp contrast, the bulk of male law firm partners—78%—earn most or all of the family income.<sup>26</sup> Attorneys of color also are negatively affected by the unspoken requirement of 24/7 availability, given that 70% of women attorneys of color are the sole or primary wage earner in their families.<sup>27</sup> When asked about changes they would like to see in the legal profession, more than twice as many women of color as men of color wanted fewer required billable hours.<sup>28</sup>

It is critical that partners, particularly senior partners, recognize the gap between their experiences and those of many of today's associates. With the economic need for two-income households and with women moving into the workforce (including the legal profession) in increasing numbers, Generation X and Y lawyers have very different work/life experiences and expectations. Partners who base their evaluations on their own life experiences may be allowing gender bias to creep into their thought process.

Recent studies show that highly educated professional women often feel that they were pushed out of their professions by workplace inflexibility and various forms of gender bias.<sup>29</sup> One study found that only 16% of the highly educated women surveyed left the workforce because they had always wanted to stay home with their children. The steady drumbeat of stories reporting that women are happily "opting out" notwithstanding, the same study found that 86% of the women surveyed listed workplace conditions, including workplace inflexibility, as a key reason they left their jobs.<sup>30</sup>

"...[S]enior partners generally do not even recognize their inherent favoring of male attorneys."

—Lauren Stiller Rikleen, *Ending the Gauntlet: Removing Barriers with Women's Success in the Law*, p. 159.

## A. Stereotyping in Law Firms and How It Affects Attorney Evaluations

Gender bias today typically does not take the form of misogyny and does not include the explicit opinion that the law is not a suitable profession for a woman. Gender bias today is often subtler.<sup>31</sup> Studies show that although explicit stereotyping ("women are not smart enough to be lawyers") has fallen sharply since the 1970s, *implicit*, unacknowledged bias ("mothers of young children are less committed to their jobs") has changed very little.<sup>32</sup> A key goal of this section is to provide an accessible introduction to the more subtle patterns of implicit stereotyping that often abound in today's legal workplace.

To understand the process of stereotyping, we must begin with common sense about what men and women are "really like"—the gender stereotypes that function as "structured sets of beliefs about the personal attributes of women and men."<sup>33</sup> The typical woman is seen as nurturing, expressive, and responsive to the needs of others, qualities not typically associated with lawyering or other high-status professions.<sup>34</sup> The typical man is seen differently: as "more confident, less sensitive, more influential, more analytical, less warm, and somewhat more deserving of respect than women"—qualities that overlap significantly with our image of the successful lawyer.<sup>35</sup> Because women are not, in a default mode, seen as having "what it takes" to be a lawyer, they must demonstrate higher levels of competence, or demonstrate competence over and over again, to be judged as equal to men. In this way, gender operates as "a subtle but continuous drag" on women's performance evaluations.<sup>36</sup> Schemas that associate men with competence, ambition, and other aspects of masculinity, and women with nurturance, reassurance, and other aspects of femininity, drive two types of stereotyping: prescriptive and descriptive.

*Prescriptive stereotypes* send messages about how women *should* behave.<sup>37</sup> This kind of stereotyping combines hostile disapproval of women who fail to conform to prescribed gender roles with benevolent approval of women who follow conventionally feminine roles.<sup>38</sup> An example of hostile prescriptive stereotyping is when a working mother is told that her place is in the home. An example of benevolent prescriptive stereotyping is when an employer does not consider a mother for a major case

on the assumption that she will not want to put in the hours. Note that in both cases the effect is the same: the employer basing its decisions on what it thinks the working mother *should* do, instead of simply asking the employee what she wants to do.

“There are covert examples of bias every day, and many times the people... involved..., when challenged, would absolutely flatly deny it, and would get angry with you for accusing them.”

—Prominent woman attorney, Holly English, *Gender on Trial*, p. 7.

More subtle is what social scientists call *descriptive stereotyping*. Descriptive stereotypes focus on how people are presumed to behave or will behave. For an example of descriptive stereotyping, consider *Trezza v. Hartford*.<sup>39</sup> Trezza, an attorney and mother of two young children, claimed

that her employer failed to consider her for promotions because she was a mother. Despite her consistently excellent job evaluations, a promotion was offered to less qualified men with children and to a woman without children. The plaintiff said she was not considered for the promotion because the new management position required extensive traveling, and her supervisors assumed she would not be interested because of her family responsibilities. In addition, she quoted the senior vice-president of her company as complaining about the “incompetence and laziness of women who are also working mothers.” She also stated that he noted that women are not good planners, especially women with kids, and that Trezza would be “home eating bonbons” if her husband, also an attorney, won another big verdict. Finally, the general counsel of the legal department in which she worked reportedly stated that working mothers cannot be both good mothers and good workers, saying, “I don’t see how you can do either job well.”<sup>40</sup>

Descriptive stereotyping not only affects the default assumptions about women; it also affects the default assumptions about *men* through a dynamic called *in-group favoritism*. In-group favoritism reflects the tendency to favor people like oneself. Favoritism toward one’s own group “is particularly pernicious when it alters one’s perception about the rules of fairness that should be applied when decisions about merit are being made.”<sup>41</sup> In-group favoritism may lead to situations where objective rules are applied leniently to men but rigidly to women (a pattern called *leniency bias*).

Descriptive stereotyping stems from people’s need to make sense of the chaotic overabundance of information we encounter in everyday life, which leads us to oversimplify our experience through selective attention to some input as opposed to other input.<sup>42</sup> Descriptive stereotyping helps organize and structure the flow of information about men and women in everyday life; stereotyping is tenacious because it is triggered automatically.<sup>43</sup> Lawyers

often assume that stereotypes function as overbroad generalizations triggered when employers incorrectly assume that all women will conform to stereotypes, because this is the type of stereotyping involved in the early Equal Protection cases of the 1970s (when lawyers first began to be aware of stereotyping).<sup>44</sup> This is one way stereotypes disadvantage women—but only one way. Since the 1970s, social psychologists have documented that descriptive stereotypes function in many other ways as well. Descriptive stereotypes drive evaluators’ perceptions, interpretations, inferences, retention, and recall.<sup>45</sup> Evaluators are more likely to notice and remember information that confirms an applicable stereotype than information that contradicts it.<sup>46</sup> Descriptive stereotypes also drive people’s interpretations and the inferences they draw. All this means that stereotyping may occur even when “the stereotypes are true.” For example, a woman may become a mother and want to work fewer hours, thereby living up to the “stereotype” of mothers. She may nonetheless also encounter stereotyping in the form of untested assumptions that, because she is a mother who works a reduced schedule, she is less competent and committed to her career.<sup>47</sup>

An important point is that women, as well as men, can stereotype women.<sup>48</sup> Organizations committed to avoiding gender bias need to implement systems designed to check for bias by women as well as by men.

## B. Specific Types of Gender Bias

The good news is that while stereotypes are automatic, their negative influence on everyday decision making can be controlled. Just as we do not blurt out everything we think, organizations can be designed to correct for automatic stereotyping.

The massive academic literature on stereotyping is of little use to busy attorneys. This section makes that literature accessible by pinpointing what individual attorneys need to watch out for during formal, as well as informal, performance evaluations.

Gender bias falls into four basic patterns. The strongest gender bias is triggered when a lawyer gets pregnant or otherwise signals that she is a mother. This is called *maternal wall bias*. The second and third patterns, typically associated with the glass ceiling, are *double standards* and *double binds*. Double standards make it harder for women to establish themselves as competent. Double binds penalize women who, though highly competent, are seen as too “outspoken,” “not team players,” or otherwise lack interpersonal skills. The final pattern, *ambivalent sexism*, combines benevolence toward women who adhere to traditional feminine roles with hostility toward women who do not. What follows is a discussion of how each pattern plays out in law firms and, where possible based on the limited research available on

the intersection of gender and race, also explores the double jeopardy faced by women of color.<sup>49</sup>

(i) *The maternal wall: how stereotypes link motherhood and part-time work with lack of competence and commitment*

*“I think there was outright gender bias in some cases. They would say, ‘She’s just getting married, how long before she has kids? When she comes back she won’t be as productive.’”<sup>50</sup>*

“After two women left after having babies, my partner said, ‘You know, it’s illegal, you’re not allowed to say it, but the next time a woman comes through here, don’t even bring her into my office. I’m not going to interview her.’”

—Latina partner, ABA, *Visible Invisibility*, p. 16.

The strongest and most explicit bias in today’s workplace typically is against mothers. These findings help explain the strong negative competence assumptions that often arise when a woman gets pregnant or returns from maternity leave. In the law firm context, where working part-time or a flexible schedule is closely associated with motherhood, part-time or flexible work also can trigger maternal wall bias, because it makes a woman’s motherhood salient. “Most of the bias around here centers on the issue of part time,”<sup>51</sup> law firm associates told the Project for Attorney Retention. The stigma associated with part-time work, which has been extensively documented, can be seen as a kind of maternal wall bias<sup>52</sup> (Note that part-time work undertaken for a reason unrelated to motherhood, such as to teach law, does not trigger the same stigma.)

**Negative competence assumptions.** A 2004 study found that adding the words “has a two-year-old child” to a woman’s resumé led evaluators to rate a woman as less capable and skillful and to decrease their interest in training and promoting her.<sup>53</sup> Mothers were held to higher performance and time commitment standards than nonmothers, although fathers were held to lower performance and time commitment standards than nonfathers.<sup>54</sup> A 2007 study found that mothers were 79% less likely to be hired, 100% less likely to be promoted, offered an average of \$11,000 less in salary, and held to higher punctuality and performance standards. Mothers were seen as less suitable for hire, promotion, and management training, and deserving of lower salaries.<sup>55</sup> It is often noted that “when men need time off to handle family matters, people think

it reflects well on them. When women need time off to handle family matters, it is seen as a lack of commitment or a weakness.”<sup>56</sup> Women’s absence (but not men’s) often is attributed to lack of commitment. This is an example of *attribution bias*: note how the stereotype that women, but not men, lack commitment drives different interpretations of men’s and women’s behavior.<sup>57</sup>

**The pregnancy plummet.** Job evaluations of managers “plummeted,” according to one study, when they became pregnant.<sup>58</sup> Pregnant women, the study found, tend to be viewed as “overly emotional, often irrational . . . and less committed to their jobs. They were not seen as valued or dependable employees.”<sup>59</sup> Another study found that pregnant women are “expected . . . to be non-authoritarian, easy to negotiate with, gentle and neither intimidating nor aggressive, and nice.”<sup>60</sup> In other words, pregnant women are expected to play stereotypically feminine roles. When, instead of being empathetic, a pregnant manager “behaved firmly in a conflict situation, she was rated as more authoritarian and controlling than a non-pregnant manager, . . . suggesting the importance of compliance with traditional social norms.”<sup>61</sup>

“They think that if you’re a working mother you’re not totally committed. For me, that’s a bigger problem than being a minority.”

—Latina partner, ABA, *Visible Invisibility*, p. 33.

**The good mother v. the norm of work devotion.** While “the good father” and “the good mother” share many attributes, one important difference emerges: the good mother (but not the good father) is “always available to her children.”<sup>62</sup> The implicit stereotype of “the good mother” is a married mother who “will do anything for [her] children (e.g., children come first, always on call, wants the best for her kids).”<sup>63</sup> This ideal clashes with the ideal of a lawyer who is always available for clients. The notion that a lawyer with a “good work ethic” is always on call reflects “the norm of work devotion,” which requires that professionals “manifest singular ‘devotion to work,’ unencumbered with family responsibilities.”<sup>64</sup> When “[t]ime becomes a proxy for dedication and excellence,” lawyers who need to place limits on their availability for work tend to be judged as lacking in both commitment and competence.<sup>65</sup>

**“Mothers belong at home.”** Sending the message that mothers belong at home is an example of prescriptive

stereotyping. Consider the facts in *Bailey v. Scott-Gallaher*:<sup>66</sup> A Virginia woman phoned to arrange her return from maternity leave, only to be fired on the grounds that mothers belong at home with their children. Such a blatant comment is not common in law firms, but the same message can be delivered in more subtle ways.

The ABA Commission on Women study, *Visible Invisibility*,<sup>67</sup> offers more subtle examples. “I get that a lot,” said an Asian-American woman partner. “‘Don’t you feel bad leaving your kids at home? Don’t you miss them?’ And I say, ‘Sure, I miss them. My husband misses them, too, but I have a wonderful relationship with my kids...’ And they say, ‘Oh, my wife could never do that, never leave the kids.’”<sup>68</sup> Said another Asian-American woman, “The problem I see is that they really don’t understand what you are doing here. They may prize you as a lawyer, they may think you’re a heck of a litigator, but deep down they’re wondering, ‘What’s she doing here? Why isn’t she home with the kids like my wife is?’ It’s a real problem when people just don’t get what you do.”<sup>69</sup>

**“Killing moms with kindness.”** Benevolent prescriptive stereotyping, in a kinder and gentler tone of voice, enforces employers’ sense of how mothers should behave. An example: A husband and wife worked for the same law firm. After they had a baby, the mother was sent home promptly at 5:30, on the assumption that she had a baby to care for. The father was kept later than ever, on the assumption that he had a family to support. Note how the employer, in effect, is pressuring the family into traditional gender roles. For a lawyer, such well-intended actions could lead to exclusion from challenging assignments or beneficial client contacts, and ultimately to denial of partnership. This is stereotyping, despite the good intentions: the better approach is simply to *ask* each parent what he or she wants.<sup>70</sup>

**“Role incongruity.”** Role incongruity sends the message that one cannot be a good mother and hold a certain job. For example, in one Fourth Circuit case, a supervisor told a lawyer that she needed to decide if she wanted to be “a successful mommy or a successful lawyer.”<sup>71</sup> In a Massachusetts case, an investigation revealed that a managing partner said that a woman with children was not a suitable candidate for a full-time position because her priorities lay “elsewhere.”<sup>72</sup>

**Giving the benefit of the doubt to others, but not mothers.** “The rule appears to be, when judgments are uncertain, give an in-group member the benefit of the doubt. Coldly objective judgment seems to be reserved for members of out-groups.”<sup>73</sup> Merit reviews have been found to be particularly vulnerable to stereotyping of this kind,

called *leniency bias*. An example from an in-house lawyer who is a mother: “[B]efore I went part-time, people sort of gave me the benefit of the doubt. They assumed that I was giving them as fast a turnaround as was humanly possible. After I went part-time, this stopped, and they assumed that I wasn’t doing things fast enough because of my part-time schedule.”<sup>74</sup> The vast majority of attorneys working flexible work schedules are women, and they do so for childcare reasons. The combination of being a woman and working a flexible schedule makes motherhood salient, which may well trigger leniency bias.

**Mothers are assumed to be uncommitted.** As noted above, part-time work can trigger maternal wall bias by making gender salient. The mother quoted in the previous section continued, “[B]efore I went part-time, when people called and found I was not at my desk, they assumed that I was elsewhere at a business meeting. But after I went part-time, the tendency was to assume that I was not there because of my part-time schedule—even if I was out at a meeting.”<sup>75</sup> This again is *attribution bias*: note how the lawyer’s absence was attributed to a work reason while she was full time, but to a family reason once her part-time status triggered the schema of the “good mother” who is always available to her children. Again, the analysis of causation in an ambiguous situation is driven by the assumption that, as a mother working part-time, this lawyer is not committed to her work. Interviews by the Project for Attorney Retention reveal that women who work alternative schedules commonly encounter this type of bias.

“My gender prevented me from getting IP work because the partner who brings in that kind of work and distributes it prefers not to work with women—he thinks they get married and/or pregnant and leave, so why invest in them. That is why I am leaving this employer.”

—Woman attorney of color, ABA, *Visible Invisibility*, p. 24.

**Double jeopardy.** Studies that inquire whether women of color encounter different kinds of maternal wall stereotypes are few and far between. One found that African-American mothers are even less likely to be promoted than white mothers.<sup>76</sup> Another reported that white women are sometimes offered flexible work arrangements that are not offered to women of color.<sup>77</sup>

(ii) *Double standards: why women have to work harder to prove competence*

“Women have to be objectively better to be perceived as equal.”<sup>78</sup>

“Remember, Ginger Rogers did everything Fred Astaire did—but backwards and in high heels.”

—Frank and Ernest cartoon by Bob Thaves, reprinted with permission.

The common saying “women must try twice as hard to achieve half as much” is documented by more than a quarter century of social science.<sup>79</sup> Women are judged as less competent than men in traditionally masculine domains such as the law.<sup>80</sup>

Studies document that women need to provide more evidence of job-related skills (relative to white men) before evaluators feel confident of their competence<sup>81</sup> and that this has an effect on performance evaluations.<sup>82</sup> Not only do women have to work harder to establish competence; they also can make fewer mistakes than men before they are judged incompetent.<sup>83</sup>

The following are basic patterns of descriptive stereotyping that can make it harder for women to establish competence, driven by unspoken stereotypes that associate competence with men.

**He's skilled, she's lucky.** Men's successful performance of masculine tasks tends to be attributed to stable personality traits (he has the right stuff) while women's successes tend to be attributed to transitory situational factors (she lucked out or drew a receptive judge).<sup>84</sup>

**He's busy, she has trouble with deadlines.** Conversely, men's failures tend to be attributed to situational factors (he's busy working on other matters), while women's tend to be attributed to stable personality traits (she has trouble with deadlines).<sup>85</sup>

**Are men given larger rewards for the same accomplishment?** When men's successes are attributed to personality traits while women's are attributed to transitory factors, men will be seen as deserving of larger rewards than women for the same accomplishment.

**He's thoughtful, she's hesitant/he's prudent, she's passive.**<sup>86</sup> The stereotype of men as competent leads to the assumption that, though they may hesitate, they know what they are talking about.<sup>87</sup> Women may not benefit from the

“There's definitely this machismo that goes with being a corporate lawyer:...In the law firms where I have worked, the first hurdle is being a woman on the corporate side. After that, being a person of color. It's worse being a woman.”

—ABA, *Visible Invisibility*, p. 11.

same assumption. Men, like members of other majority groups, are particularly prone to making attributions that are driven by unspoken stereotypes.<sup>88</sup>

**Do women need to prove their competence over and over again?** Stereotypes are resistant to disconfirming information. Thus women may have to prove their competence over and over while men do not, because men's good performance is consistent with their assumed competence, whereas women's good performance is inconsistent with the stereotype of them as less competent at masculine tasks and in predominantly male work environments.<sup>89</sup>

One study of senior male executives found that “[t]hey freely admitted that women in upper-level positions were subject to competency testing much more often than their male counterparts.”<sup>90</sup>

**Are women's mistakes remembered long after men's are forgotten?** Similarly, stereotype-consistent information is recalled better than stereotype-inconsistent information, so that women's mistakes (confirming their lack of competence) are remembered long after men's are forgotten.<sup>91</sup>

**Are men judged on their potential and women strictly on their achievements?** The tendency to judge men on their potential but women strictly on their achievements again reflects the automatic assumption (until proven otherwise) that men are competent.<sup>92</sup>

**Leniency bias revisited.** If men are given the benefit of the doubt but women aren't, obviously women will often have to work harder to establish their competence. Merit reviews have been found to be particularly vulnerable to leniency bias.<sup>93</sup> Leniency bias highlights that stereotyping emerges not only from disfavored treatment of women but also from lenient treatment of men.

“They were saying ‘We don't know her book of business,’ yet they let the males slide through.... The scrutiny of a woman's book of business is harder.”

—Woman attorney, Holly English, *Gender on Trial*, p. 83.

**Only the superstars survive: women and polarized evaluations.** In-group favoritism can lead to polarized evaluations of out-groups (i.e., women and minorities). Evaluations of out-groups tend to be global (entirely good or bad), and evaluations of one's own group tend to be more nuanced (some strengths; some weaknesses).<sup>94</sup> Thus, while superstar women may fare very well, women

who are merely excellent tend to get sharply lower evaluations than comparable men. This pattern is especially likely to occur in situations where there are few women, as when few senior women associates are present because so many women have left.<sup>95</sup>

"It was very common to hear an associate evaluation as follows: For a male associate, it would read, 'They haven't had the opportunities to get real trial experience, but we have all the confidence in the world that he has all the capability to be a success.' Then, for a female associate, and I am talking about some of the most exceptional young attorneys, they would say, 'She has not had the opportunity to get any real trial experience, and so the jury is still out.'"

—Patricia Forbes, Esq., Retiring General Counsel of The Irvine Company

**Presto change-o.** In one study, subjects preferred an educated candidate over an experienced one when the male candidate had outstanding educational credentials. But this "education advantage" disappeared when the female candidate was better educated. Then many respondents stressed experience over education—and still favored the male over the female.<sup>96</sup> In the evaluation context, criteria may be given different weight depending on the gender of the person being evaluated.

**Double jeopardy.** A 2006 study found that women lawyers of color reported being perceived less favorably than their counterparts in almost every one of the 14 categories covered in a survey. In sharp contrast, white males reported

that they thought they were perceived favorably in every category tested (including research and writing skills, client relationship skills, initiative, and interpersonal skills).<sup>97</sup> Extensive literature documents the negative competence assumptions triggered by race for African-Americans.<sup>98</sup> One study found that a favorable letter of recommendation for a black candidate was interpreted by third parties as indicating a less objectively good performance than a similar recommendation for a white candidate because of competence assumptions.<sup>99</sup> Another study found that white women were seen as significantly more competent and more intelligent than black women.<sup>100</sup> A third found that, when subjects were given identical resumés—one with a white-sounding name and the other with an African-American sounding

name—African-Americans had to have eight years more experience than whites in order to receive the same number of callbacks.<sup>101</sup>

African-American women are disadvantaged by two sets of negative competence assumptions when their race triggers stereotypes of African-Americans in general as well as stereotypes of women. Consequently, they may have to give even more convincing demonstrations of competence than white women in order to be seen as competent.

The evidence on Asian-American women is both scarcer and more mixed. On the one hand, Asians are seen as "too competent, too ambitious, too hardworking," which might be expected to mitigate the stereotypes of women (and racial minorities) as less competent.<sup>102</sup> On the other hand,

"White associates are not expected to be perfect. Black associates . . . have one chance, and if you mess up that chance, look out. There is no room for error. Who's perfect coming out of law school?"

—African-American woman, ABA, *Visible Invisibility*, p. 25.

"I've had opposing counsel treat me like a little girl and part of that is the Asian thing because they see a little Asian doll....it's really annoying and I'm really tired of it."

—Asian-American woman lawyer, ABA, *Visible Invisibility*, p. 10.

one stereotype of Asian-American women is that they are deferential and passive, a characterization that might be expected to trigger negative competence assumptions.<sup>103</sup>

(iii) *Double-binds and "deference-challenged" women: when the job requires a "go-getter" but assertive women are disliked*

"Women have to walk a careful line because it's still very easy for people to say, 'Oh my God, she's a bitch, she's so hard to deal with.' . . . And once you're [labeled as] a bitch, no one wants to work with you."<sup>104</sup>

"I got a very high-profile case dismissed with prejudice...., and I received no recognition for my accomplishment. When a white female associate won an oral argument against a pro se plaintiff, the firm announced the win to everyone by e-mail and took everyone out for drinks after work to celebrate. Her case was worth about \$5,000 and my case was valued at about \$1.5 million."

—Woman of color, ABA, *Visible Invisibility*, p. 27.

"They were astonished to find that I could write a basic memo. Even the completion of an easy task brought surprised compliments."

—African-American lawyer Monica Biernat, *Toward a Broader View of Social Stereotyping*, 58 Am. Psychologist 1019 (2003).

“The women who were more acceptable, they have a gift of making everybody in the room feel good, they are no threat.”

—Woman law firm partner, Holly English, *Gender on Trial*, p. 168.

“[P]aradoxically, women in non-traditional fields may be penalized if they do their jobs well—in some cases, *because* they do their jobs well.”<sup>105</sup> An example is Ann Hopkins, a senior manager at Price Waterhouse, who received excellent evaluations from her clients, billed more hours and brought in more business than any other partnership candidate, and was seen by her

supporters as ambitious and hardworking. Clearly she was competent, but she was denied partnership on the grounds that she lacked “interpersonal skills.”<sup>106</sup> Hopkins swore like a sailor; a supporter told her to “walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry”; another partner said she should go to “charm school.”<sup>107</sup> Said the Supreme Court, “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch 22: out of a job if they behave aggressively and out of a job if they do not.”<sup>108</sup>

Whereas descriptive stereotyping impacts assessments of competence, “deference-challenged” women often encounter prescriptive stereotyping that faults them for their failure to conform to feminine norms of selflessness and sensitivity to the comfort of others. (These are the interpersonal skills that are felt to be lacking.)<sup>109</sup>

“Women executives at the top often report that their male colleagues feel uncomfortable or even threatened by their presence.”<sup>110</sup> Women who are successful often need to meld assertive competence with “socio-emotional ‘softeners’ to assuage resistance and increase their influence in the group.”<sup>111</sup> Women who cannot or will not agree to these softeners (not required of men) may well encounter hostility.

“There were women who did well but were just despised. And I think I would say that the same personality in a man was not nearly as despised. There were many more male partners who were just complete jerks, and people kind of laughed it off a little bit.”

—Former partner at D.C. firm, Holly English, *Gender on Trial*, p. 142.

Moreover, many behaviors considered inappropriate for women are precisely those deemed necessary in order to be seen as competent in a traditionally male job, thereby creating a double bind. If women behave in traditionally feminine ways, their competence is undervalued, whereas if they behave in traditionally masculine ways, their interpersonal skills are derogated and their mental

health questioned.<sup>112</sup> “Because advancement in organizations depends not only on competence but also on social acceptance and approval,” negative reactions to women who seek to achieve in “areas that traditionally are off-limits to them can be lethal when they strive to get ahead.”<sup>113</sup>

**What a witch.** Some women are unpleasant; others lack interpersonal skills. That said, studies show that behavior that would be accepted in men often is considered unacceptable in women. When a woman in a traditionally masculine job is called a “witch” or “too ambitious” in situations where a man would be characterized as “hard-driving,” “having a temper,” or “not suffering fools lightly,” the unspoken prescription that women should be “helpful, warm, understanding, and kind” is at work.<sup>114</sup> Decades of studies document that behavior that is praised and applauded in men often is regarded as unattractive in women,<sup>115</sup> and that women who do not display feminine characteristics often are judged less psychologically healthy and evaluated less favorably than those who do.<sup>116</sup> Women who

“An aggressive man is never going to be viewed as bitchy. He may be viewed as obnoxious and egocentric and egotistical, but none of those carry quite the connotation of being labeled bitchy.”

—Male partner at Southern firm, Holly English, *Gender on Trial*, p. 142.

“It’s really hard for a woman to ask for what she should be able to ask for and not be perceived as a bitch.”

—Latina lawyer, ABA, *Visible Invisibility*, p. 25.

violate the mandates of femininity are often viewed as “aggressive, selfish, greedy and cold.”<sup>117</sup> In some workplaces, women are seen either as “likable, dependent . . . traditional women” who are nice but not competent or as “dominant, competent, nontraditional women” (e.g., career women, feminists) who are competent, but are disliked for violating unspoken norms that women should be inclusive and nurturing.<sup>118</sup> This pattern is called *ambivalent sexism*.

**He’s incisive; she’s abrasive.** Ambivalent sexism also lies behind the finding that the “same critical remark was found to be abrasive coming from a woman, but incisive and direct coming from a man.”<sup>119</sup>

**She’s a shameless self-promoter; he knows his own worth.** Hiding one’s light under a bushel is not a promising strategy for success. Not surprisingly, self-promotion enhances performance ratings and thus impacts

evaluations.<sup>120</sup> Yet self-promotion in women is often viewed with distaste.<sup>121</sup> One study found, in the context of a masculine job, that women who “spoke in a direct, self-confident manner, highlighted past accomplishments,” and attributed successes to skill rather than luck were viewed less positively than women who were more modest about skills and accomplishments and included disclaimers (“I’m no expert”) and hedges (“Don’t you think?”).<sup>122</sup> Another found that women had “to show that they were not seeking status at the expense of other group members.”<sup>123</sup> Self-promotion in women flouts the norm that “women cooperate, men compete,” and that women are selfless and supportive of others.<sup>124</sup>

(iv) *Good girls/bad girls: ambivalent sexism at work*

*“I’m like the frigging firm mom. People come to me if they’re having problems.”<sup>125</sup>*

In environments affected by ambivalent sexism, women can succeed only by stepping into a few conventionally feminine roles. These include the *princess*, who seeks her fortune by aligning with a powerful man; the *mother*, who sees it as her role to ensure everyone else’s welfare; the *pet*, who applauds male achievements; *Ms. Efficiency*, who

organizes the group and keeps things on track; and the *daughter*, who looks up to the men around her.<sup>126</sup>

Where women are forced to choose from among a narrow range of feminized roles in order to succeed, those who adopt traditionally feminine roles generally receive benevolent approval, while those who

adopt traditionally masculine patterns typically encounter hostile disapproval.<sup>127</sup> In such environments, women tend to be separated into liked and disliked subtypes, with very positive feelings toward traditionally feminine women and very negative ones toward masculine women (who are seen as aggressive, selfish, and cold).<sup>128</sup>

Women in these environments are under pressure to take on “soft” or less valued roles that are useful to the men around them, such as case management, rather than bringing clients in the door. Social scientists have noted that part of “knowing one’s place” involved “behaving in a friendly, deferential manner.”<sup>129</sup>

Workplaces that offer approval to suitably feminine women (the *femmes*) but disapproval for women who eschew traditional feminine roles (the *tomboys*) tend to create conflict among the women. The “mommy wars” documented in the popular press between stay-at-home mothers and women who are employed full time is the best-known conflict between the *femmes* and the *tomboys*. Similar patterns may emerge if women who have played by the old rules (e.g., working full time) play the tomboy role and women who want to change those rules (e.g., by working part-time or taking a career break) play the *femme* role. One most common workplace conflict between the *femmes* and the *tomboys* is the generational conflict between older women who made partner by closely following the traditional masculine career path and younger women who seek more flexible options, including part-time work.

## Conclusion

This chapter has sought to provide a short, usable introduction to 40 years of social science consisting of hundreds of studies. Having this extensive literature at one’s fingertips can help the conscientious evaluator guard against bias in performance evaluations. The following chapter is equally vital in guarding against hidden bias. Studies warn of the “halo effect”: If evaluators rely on global evaluations rather than assessment of specific skills, women will be disadvantaged as a group, and women of color will face double jeopardy.<sup>130</sup> An objective, job-related evaluation system that ensures that development and advancement opportunities for every lawyer are determined by qualifications and merit can help ensure that women do not face race and gender bias.

“Women who make partner either had to fly under the radar and be the nice daughter, or be this kind of feared intense type that nobody wants to offend....”

—Male partner at West Coast firm, Holly English, *Gender on Trial*, p. 138.