

Nevertheless She Persisted: From Mrs. Bradwell to Annalise Keating, Gender Bias in the Courtroom

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NEVERTHELESS SHE PERSISTED:
FROM MRS. BRADWELL TO ANNALISE KEATING,
GENDER BIAS IN THE COURTROOM

CHRIS CHAMBERS GOODMAN*

INTRODUCTION

I. BACKGROUND

- A. *Bias, Stereotypes, and Schemas*
- B. *Stereotypes About Women Applied in the Law*
- C. *How the Media Evidences, Influences, and Exacerbates Gender Bias*

II. THE IMPACTS OF GENDER STEREOTYPES AND BIAS IN THE LAW

- A. *Stereotypical Female Speech*
- B. *Do Looks Matter?*
- C. *The Role and Toll of Emotions*

III. REDUCING THE IMPACTS OF GENDER BIAS IN THE LEGAL PROFESSION

- A. *Gender Stereotypes and Bias in Law School*
- B. *What Law Firms and Legal Departments Can Do*
- C. *What the Bench Can Do*
- D. *What Women and Men Can Do in the Courtroom*

CONCLUSION

*“Let me help you. Because if you do,
I promise you will get away with this.”*

“Speak of the devil and she shall appear.”

“You call it crazy. I call it winning.”¹

* Professor of Law, Pepperdine University School of Law; JD Stanford Law School, AB Harvard College *cum laude*. The author extends her appreciation to the members of the Board of Governors of California Women Lawyers, who continually inform about examples of gender bias in courtrooms, law offices and other areas of the profession, to all of the affiliate women bar associations who have participated in discussions of these issues, statistics and strategies around the state of California over the past years as this Article progressed, and to the members of the Pepperdine Women’s Legal Association, for providing inspiration to keep looking for ways to enhance participation of women in the legal profession. As always, reference librarian Don Buffaloe provided extensive support. The editors of the William & Mary Journal of Women and the Law strengthened the Article, and other authors in this symposium edition provided useful insight. A final note of appreciation goes to Shonda Rhimes: thank you for creating HTGAWM.

1. Michael Hetzel, *Life Quotes from Annalise Keating*, THE ODYSSEY ONLINE (Apr. 11, 2016), <https://www.theodysseyonline.com/life-quotes-annalise-keating> [http://

INTRODUCTION

The history of women in the law (at least in the Western Hemisphere) must begin with Margaret Brent, who left England in 1638, landed in Maryland, ended up working as an attorney, and is thus credited with being “the first female lawyer in what would eventually become the United States,” retiring in 1657.² Next comes the story of Arabella Mansfield, who studied law with her husband and passed the bar of Iowa in 1869 (though she never did actually practice law).³ Next we have the symbolic foremother (in the minds of many) Myra Bradwell, who also in 1869 passed the Illinois bar exam but was refused admission to the bar because of her gender.⁴

It was not until “The Lockwood Bill” became law that “female attorneys were legally entitled to practice in the federal courts,” after Belva Lockwood had been denied the opportunity “to litigate a patent law case because the U.S. Court of Claims asserted that a woman was ‘without legal capacity to take the office of attorney.’”⁵ “Despite Lockwood’s gains, [the United States’ Supreme Court case of] *Bradwell* emboldened state legislatures to bar women from legal practice in state courts.”⁶ The last holdout was the state of Delaware, which allowed women to practice starting in 1923 (after women had obtained the right to vote in 1920).⁷

We know that women are attending law schools in equal or greater numbers than men. We know that they are passing the bar examination at similar rates and entering the legal profession. While the national bar was ninety-two percent male in 1980, the percentage has dropped to sixty-four percent in 2016.⁸ Women lawyers have enjoyed a more than 400% increase, from eight percent to thirty-six percent, during that time period.⁹ Still, there is more to do at the partner,

perma.cc/5QE9-GTFZ]. Annalise Keating is the main character in ABC’s series *How To Get Away with Murder*.

2. Ann Bartow, *Some Dumb Girl Syndrome: Challenging and Subverting Destructive Stereotypes of Female Attorneys*, 11 WM. & MARY J. WOMEN & L. 221, 235 (2005).

3. *Id.* at 235–36.

4. *Id.* at 236–37 (citing *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872)).

5. *Id.* at 237.

6. *Id.* at 238.

7. *Id.* at 239–40.

8. *Lawyer Demographics*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2014.authcheckdam.pdf [http://perma.cc/NA73-LUPT]; *Lawyer Demographics Year 2016*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf [http://perma.cc/Z33X-CWA7].

9. *Id.*

managing partner, and general counsel levels, but calling that to the attention of those in charge may backfire.¹⁰ Some would say that what Ms. Bradwell, Clara Shortridge Foltz and other early women lawyers faced no longer confronts the females of our profession.

Or does it?¹¹ Bias still impacts our judges,¹² lawyers,¹³ and jurors, and potentially trial outcomes, and thus, addressing gender bias is still important in the context of women attorneys, litigants, and witnesses. Eighty-five percent of women surveyed perceived gender bias in the legal profession and two-thirds think that their male peers do not accept them as equals.¹⁴ A 2007 survey found that while

10. Bartow notes:

[W]e are not supposed to draw attention to our own lack of visibility when our numbers are small. One of my wonderful law professor mentors once gave me this career advice: “If you point out that women are under-represented in a given context, qualified women will often be added, but you will not be one of them. Do it anyway.” Although she was right about this, it can be difficult and awkward to raise visibility concerns with colleagues who often respond defensively.

Bartow, *supra* note 2, at 246.

11. For instance, United States Senator Kamala Harris was called “hysterical” for persisting in seeking a response to her questions, rather than have her short time allotment for questioning consumed by a nonresponsive lecture from then–Attorney General Sessions. Katie Mettler, *As a prosecutor, Kamala Harris’s doggedness was praised. As a senator, she’s deemed ‘hysterical.’*, WASH. POST (June 14, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/06/14/as-a-prosecutor-kamala-d-harris-doggedness-was-praised-now-shes-hysterical/?utm_term=.8a3797cc1d94 [<http://perma.cc/8SNG-KSJJ>].

12. Consider the study that shows that female justices on SCOTUS are interrupted noticeably more often than their male colleagues (65%), Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. (forthcoming Fall 2017) (manuscript at 56), and the Brock Turner sentencing case, the former college athlete whose judge was accused of demonstrating bias when he gave a three-month sentence for sexual assault of an unconscious woman. Sam Levin, *Brock Turner released from jail after serving half of six-month sentence*, THE GUARDIAN (Sept. 2, 2016, 9:19 EDT), <https://www.theguardian.com/us-news/2016/sep/02/brock-turner-released-jail-sexual-assault-stanford> [<http://perma.cc/P9UX-ZCPL>].

13. For example, in a recent Tennessee rape trial, the defense lawyer in closing argument said, “[w]omen can be especially good at [lying] because they’re the weaker sex” and the defendant was acquitted. Katie Fretland & Daniel Connolly, *Rape case lawyer: Women ‘especially good’ at lying*, USA TODAY (Apr. 20, 2017, 10:20 PM), <https://www.usatoday.com/story/news/nation-now/2017/04/20/rape-case-lawyer-women-especially-good-lying/100728420> [<http://perma.cc/KC2J-SR6E>]. Or the attorney who complained that his female opposing counsel behaved in an “unladylike manner” during a deposition. *22nd Annual Litigators Forum: “Conduct Unbecoming of a Woman. . .”*, WOMEN LAW. ASS. OF L.A., <http://www.wlala.org/events/EventDetails.aspx?id=919619&group=> [<http://perma.cc/45BG-HUYT>]. See Debra Cassens Weiss, *Lawyer sanctioned for telling opposing counsel it’s ‘not becoming of a woman’ to raise her voice*, ABA JOURNAL (Jan. 14, 2016, 7:45 AM), http://www.abajournal.com/news/article/lawyer_sanctioned_for_not_becoming_of_a_woman_remark_discovery_conduct [<http://perma.cc/WP89-MN72>].

14. *From the Lectric Law Library’s Stacks: What Lawyers need to Know About Gender*

eighty-six percent of males believed that male and female attorneys were treated equally, less than half of the females agreed.¹⁵

76% reported feelings of negative bias from opposing counsel, 64% from clients; 48% from superiors, and 43% from peers. It is interesting to note that most feelings of negative bias were from opposing counsel, and the least was from peers. While 65% did not make any career changes due to these perceptions of negative bias, it is statistically significant that 35% did, and that 37% made no career changes because they believed it would not be any better elsewhere.¹⁶

A 2012 study found that ninety-seven percent of jurors felt that, in general, female attorneys are neither more nor less qualified than male attorneys, and about three percent actually believed that the female attorneys were more qualified.¹⁷ Another study showed that men prefer to hire male attorneys generally, while women prefer a White male to a White woman, but prefer females to males of other racial groups (Black, Asian, and Hispanic).¹⁸

Women minority lawyers view themselves as being subject to both ethnic bias and gender bias, and a number of respondents suggested the legislature amend the Rules of Professional Conduct to prohibit both gender and/or racially biased conduct by lawyers.¹⁹ The ABA Model Rules have been amended in this way.²⁰

Significant numbers of women continue to experience gender bias in the courtroom and in law practice, and “[s]tatistics demonstrate that decades of inequality in the legal profession have only shown slight amelioration.”²¹ In some cases, it is quite blatant and in others more subtle or implicit. Several of the common occurrences

Bias in the Legal Profession, LETRIC LAW LIBRARY, <http://www.lectlaw.com/files/att06.htm> [<http://perma.cc/T9SP-4HUV>].

15. Nicole E. Negowetti, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L.J. 930, 938 (2015) (discussing implicit bias in attorney hiring and lawyer evaluations, noting that 48% percent of women lawyers in the survey thought women were treated equally).

16. LETRIC LAW LIBRARY, *supra* note 14.

17. Victoria Pynchon, *Juror Attitudes to Women in the Courtroom*, FORBES (Feb. 15, 2012, 11:11 AM), <https://www.forbes.com/sites/shenegotiates/2012/02/15/juror-attitudes-to-women-in-the-courtroom/#d348c7613d32> [<http://perma.cc/LKB4-VBCC>].

18. *Beating Bias*, L.A. CTY. BAR ASS'N. (Jan. 26, 2017), https://customers/lacba.org/Interactive/Event_Display.aspx?EventKey=012617LAC [<http://perma.cc/L785-AGZ8>].

19. *Id.*

20. *See Rule 8.4: Misconduct*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html [<http://perma.cc/W4RL-3JEY>].

21. Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 41 (2010).

include: “1. being mistaken for a secretary or paralegal; 2. being called a term of endearment . . . ; 3. being critiqued for their voice sounding shrill or too high . . . ; 4. being treated differently . . . ; and 5. having clients express a preference for male lead trial counsel.”²² As one author notes:

Almost every woman has had the experience of being trivialized, regarded as if she is just ‘some dumb girl,’ of whom few productive accomplishments can be expected. When viewed simply as ‘some dumb girls,’ women are treated dismissively, as if their thoughts or contributions are unlikely to be of value and are unworthy of consideration.²³

Even when people believe male and female attorneys to be similarly qualified, in one study almost a quarter of them still “believe that women are at a disadvantage in the courtroom, which was defined as being because ‘society feels that way’ rather than a personal preference.”²⁴ Any gender-based discrimination by judges, jurors, and other attorneys, also impacts female attorney’s clients.

Demeaning treatment of women results not only in personal humiliation for the woman, but undermines her credibility and professionalism in the courtroom. In cases where the victim of gender bias is a female attorney, the biased behavior compromises her ability to provide her client with the best possible advocacy by creating and reinforcing in the minds of jurors and judges unfounded doubts about her credibility and competency.²⁵

Jurors also recognized that female attorneys were “less respected” and thus indicated that they were more likely to hire a male attorney.²⁶ Thus, biased behavior takes its toll on women lawyers, and on the legal profession.²⁷ “Consequently, gender biases against female

22. Connie Lee, *Gender Bias in the Courtroom: Combating Implicit Bias Against Women Trial Attorneys and Litigators*, 22 *CARDOZO J.L. & GENDER* 229, 234–35 (2016) (summarizing empirical data on the impact of gender bias in the courtroom).

23. Bartow, *supra* note 2, at 221.

24. See Ann T. Greeley & Karen Hirschman Larsen, *Trial Teams: Considering Diversity and Context*, 44 *THE BRIEF* 18, 22 (2015).

25. Donald C. Nugent, *Judicial Bias*, 42 *CLEV. ST. L. REV.* 1, 43–44 (1994) (internal citations omitted).

26. Pynchon, *supra* note 17.

27. The impact of gender-biased behavior described above cannot be underestimated. Demeaning treatment of women results not only in personal humiliation for the woman, but undermines her credibility and professionalism in the courtroom. In cases where the victim of gender bias is a female attorney, the biased behavior compromises her ability to provide her client

attorneys not only undermine the attorneys' credibility, but also affect their clients' opportunity to actually be heard and have a fair court proceeding."²⁸

Even law students have an implicit bias against females being associated with judges as opposed to paralegals, based on the research and some studies.²⁹ Studies also found that law students were more likely to associate women with home and men with career.³⁰

Women of color attorneys face even greater disparities with "double bias." "The combined effect of racial and gender stereotypes create particular problems for women of color."³¹ Already struggling to overcome the negative competency issues based on their race and gender, perceptions of credibility also negatively correlate with race and gender.³²

Part I of this Article gives some brief background on the nature of implicit gender biases, and discusses the evolution of gender bias against female attorneys, with particular attention to how the media influences those biases. Part II analyzes the specific manifestations of gender bias in the courtroom. Part III addresses concrete strategies that law schools, firms, the bench, and bar can implement to reduce its impact.

I. BACKGROUND

A. *Bias, Stereotypes, and Schemas*

Bias is the prejudging of a person based on his or her (perceived or actual) status of being a member of a particular group.³³ The groups can be clearly identified, like the group "women," or less clearly identified, like people who are "emotional." The bias can be in favor of a group, or it can be against a group. Many positive biases are products

with the best possible advocacy by creating and reinforcing in the minds of jurors and judges unfounded doubts about her credibility and competency.

Nugent, *supra* note 25, at 43–44 (focusing mainly on all types of judicial bias but with a short section addressing gender bias against female attorneys, litigants, and witnesses) (internal citations omitted).

28. Lee, *supra* note 22, at 230 (exploring why and how the various gender biases that female attorneys confront help explain the disproportionately small number of women trial attorneys and litigators).

29. *Id.* at 237–38. See *supra* notes 22–28 and accompanying text.

30. Lee, *supra* note 22, at 238. See *supra* notes 22–28 and accompanying text.

31. Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 620 (2007).

32. See Alexis A. Robinson, *The Effects of Race and Gender of Attorneys on Trial Outcomes*, 23 JURY EXPERT 1, 5 (2011), <http://www.thejuryexpert.com/wp-content/uploads/RobinsonTJEMay2011.pdf> [<http://perma.cc/KW9G-2TJ5>].

33. Rhode, *supra* note 31, at 618.

of in-group favoritism and “[o]ne of the most significant effects is the presumption of competence that dominant groups accord only to insiders. For example, men tend to attribute accomplishments of male colleagues to intrinsic characteristics, such as intelligence, drive, and commitment. By contrast, men often ascribe women’s achievements to luck or special treatment.”³⁴ Some women may similarly credit successful males with competence and successful women with luck.

Positive and negative biases can be based on stereotypes. Stereotypes begin to form early in life (some saying as early as in toddlerhood), based on “cultural and social beliefs, and are learned directly from multiple sources, including the children’s parents, peers, and the media.”³⁵ Stereotypes continue to impact children as they become adults and they “perceive information in ways that conform to their stereotypes.”³⁶ Common stereotypes about lawyers include being “assertive, dominant, ambitious, competitive, and argumentative,” and because stereotypes link women into the home and family,³⁷ they necessarily do not fit the “lawyer” mold.

Stereotypes are based on generalizations. We all rely upon generalizations every day, to help us process information quickly. For instance, the last time you drove a car, you might have encountered a driver in the lane next to you, who was holding his or her cell phone while driving. And the generalization “people who hold their cell phones instead of using Bluetooth are not very careful drivers” quickly activated in your brain. Based on that generalization, you decided to keep clear of this driver on the road. For those who do not drive, but rather use public transportation, the association between Bluetooth and carefulness is not as attuned. Our generalizations are based on what we see and hear, but also on what we experience.

Generalizations can evidence explicit bias, such as when one acknowledges that women are more sensitive to violence than men, but also can manifest implicit bias, where there is no acknowledgment of a direct link between gender and an expectation. For instance, one might apply the generalization that “people who tear up in front

34. *Id.* at 619.

35. Levinson & Young, *supra* note 21, at 6 (noting that “[a]s the children grow older, their stereotypes harden. Although they may develop non-biased (explicit) views of the world, their stereotypes remain largely unchanged and become implicit (or automatic). In the context of gender stereotypes, children are likely to learn at an early age that men are ‘competent, rational, assertive, independent, objective, and self confident,’ and women are ‘emotional, submissive, dependent, tactful, and gentle.’”).

36. *Id.*

37. Negowetti, *supra* note 15, at 943 (citing Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 891 (2010) (discussing how these stereotypes impact those who do not fit the mold, such as Asian American attorneys in the employment context)).

of others usually fall apart under pressure.” While the generalization does not explicitly refer to gender, more women will be included in the premise “people who tear up,” and more women will be assumed to be in that category than men. Thus, applying that generalization will perpetuate implicit gender bias. The downside of the generalization is that one might tend to assume that all people who have ever had tears well up in their eyes in public are not cut out to be litigators, when some people who tear up do it strategically or are as tough as they need to be. Nevertheless, generalizations help to make decisions about how to act, and about how to treat others.

Another way to think about this use of generalizations is as character evidence—evidence about a particular trait or disposition, which we often use to predict how someone else is likely to act, or actually did act, on a particular occasion. We can and do use character evidence in our everyday lives, in making decisions about who to trust, to whom to assign work, to whom to refer a case or client. But in court, there are limits to how, when, and whether litigants can use character evidence.³⁸

Similarly, in the legal profession, we can have preferences based on which associate does more thorough work, or which partner is very responsive to his clients, and these are appropriate biases to act upon. These character evidence biases are based on past specific conduct, specific instances of the person behaving in a particular way and can be perfectly reasonable tools for evaluating an individual—based on his or her past conduct, rather than on conduct attributed to a group to which that individual may belong.³⁹

Often, when we do not have a series of specific instances of behavior, we rely upon reputation, as well as the opinions of others. This reputation and opinion evidence may or may not be based on past specific instances of others dealing with that person, but rather based on generalizations about that person based on a group to which that person belongs, or to which we think that person belongs. If that is the only information available, we tend to act on it. With short time frames, these types of reputational shortcuts are common in litigation as well as in life.

We call these paths “schemas,” which are heuristic aides to complex decision-making. They are cognitive shortcuts that save time. Like cutting a path through a field, the more one travels that exact route, the more trodden the terrain, and the easier it becomes to get through faster. And most importantly, forging a new path, or taking a different route, requires slowing down and thinking about it.

38. See FED. R. EVID. 404.

39. As the evidence rules proclaim, specific instance character evidence is the type the courts are most likely to exclude, though it is quite useful in real life. *Id.*

Inertia and even habit play their roles. For example, when information is missing, or we do not have the full story, we fill in the blanks in ways that make sense to us. Consider the following two excerpts:

- i. *“She demanded money from the store clerk. The police were called.”*
- ii. *“He went to a fancy party. He woke up ill.”*

What’s the story you would tell?⁴⁰ Your experience, background, schemas, and biases lead you to fill in with one story, rather than another. And your biases make you more willing to consider evidence that supports your story script, and more likely to reject evidence that contradicts or conflicts with your story script.

B. Stereotypes About Women Applied in the Law

People in courtrooms, such as judges and jurors, also classify information according to stereotypes and generalizations, and gender stereotypes are prevalent. Male and female jurors react differently to women attorneys.⁴¹ Women must walk a fine line in the courtroom between “societal stereotypes regarding feminine and masculine traits in order to be perceived favorably in the courtroom,” which results in them struggling “to maintain a style and persona somewhere between the stereotyped extremes.”⁴²

Those who do not conform to stereotypes may be disadvantaged. “For example, assertive women are called ‘bitches’ and men who lack physical strength are seen as ‘wimps.’ . . . Women are often expected to be passive and submissive, while men are usually expected to be self-confident and aggressive.”⁴³ Rhode also notes:

These stereotypes of femininity leave women stuck in a double bind. What is assertive in a man seems abrasive in a woman,

40. What story first came to mind? Did you consider a clerk pocketing her change from a \$100 bill? What about food poisoning?

41. Elizabeth J. Parks-Stamm, *Anticipate and Influence Juror Reactions to Successful Women*, 40 *JURY EXPERT* 8, 8–9 (2008), <http://www.thejuryexpert.com/wp-content/uploads/ParksStammSuccessfulWomenNov08TJE.pdf> [<http://perma.cc/9U8U-GHR2>]. For instance, “when [women] read about a woman who was clearly competent and successful in this traditionally male position, she was then assumed to be selfish, insensitive, cold, and manipulative—characteristics directly opposed to the female stereotype,” whereas competent men were not similarly maligned. *Id.* at 9.

42. Lee, *supra* note 22, at 238–39.

43. Sydney McClary, *Sexism and Gender Stereotypes*, IND. STATE UNIV. OFFICE OF DIVERSITY (2013), <http://www.calhoun.k12.al.us/teacherpages/teacherfiles/Sexism%20and%20Gender%20Stereotypes%20Final.pdf> [<http://perma.cc/4BXP-VDDK>].

and female leaders risk seeming too feminine or not feminine enough. On the one hand, they may appear too “soft”—unable or unwilling to make the tough calls required of those in positions of power. On the other hand, they may appear too tough—strident and overly aggressive or ambitious.⁴⁴

Professor Rhode found that “professional women frequently report being held to higher standards than their male colleagues and cite ‘male stereotyping and preconceptions’ as a major barrier to advancement.”⁴⁵ This standard-raising occurs with other women as well as with men. In addition, responsibilities in the office as well as at home may retard the advancement of some women who can neither stay at work late (to get more done) nor leave early to attend networking events (to enhance their business development skills).⁴⁶ When they do leave early, or they do not, confirmation bias impacts evaluations because the evaluators are more likely to recall information that confirms their suspicions as opposed to “information that contradicts those assumptions. ‘For example, when employers assume that a working mother is unlikely to be fully committed to her career, they more easily remember the times when she left early than the times when she stayed late.’”⁴⁷ In addition, that evaluator is more likely to remember the networking or client development events she did not attend, rather than those that she did attend.

Differential standards apply to men and women on the issue of credibility as well. Teacher evaluations performed in the 1970s showed a gender difference on credibility; for while women and men both said that their female teachers were better prepared, had a mastery of the material, and were more responsive to students, they evaluated the male professors as “more credible, more believable, more authoritative and more persuasive than their female professors.”⁴⁸ In addition, “[c]ustom and law have taught that women are not to be believed and not to be taken seriously. Historically, women existed to look pretty, make babies and keep house.”⁴⁹ Recently, a male lawyer defending a rape case argued that women are “especially good at [lying] because they’re the weaker sex.”⁵⁰

44. Rhode, *supra* note 31, at 621.

45. *Id.* at 620.

46. *Id.* at 626 (stating that “[w]omen with demanding domestic responsibilities often lack time for the extended hours and networking activities that are necessary for advancement. If women are not choosing to run the world, it is partly because men are not choosing to run the washer and dryer.”).

47. Negowetti, *supra* note 15, at 948. *See also* Rhode, *supra* note 31, at 624.

48. Lynn Hecht Schafran, *Eve, Mary, Superwoman: How Stereotypes About Women Influence Judges*, 24 JUDGES’ J. 12, 16 (1985).

49. *Id.*

50. Fretland & Connolly, *supra* note 13.

An article written by Lynn Hecht Schafran in 1985 still resonates today. She describes a study published in 1971 analyzing how racist patterns of thought had been greatly reduced in judicial opinions, but that sexism was “as easily discernible in contemporary judicial opinions as racism ever was.”⁵¹ She refers to a definition in a 1979 book entitled, *Sexism and the Legal Profession*, which states:

Yet the most cursory sampling of the vast literature about women (written largely by men) reveals a number of contradictory attributes. This schizoid male image of women as somehow morally superior yet intellectually inferior, as the embodiment of both all that is good and asexual symbolized by the Virgin Mary and all that is evil, including insatiable sexuality, symbolized by Eve, has forced women through the ages to live with contradiction, with an internal discord and confusion about their true nature. It has also made them the object of both man’s love and hate.⁵²

Recognizing that for many judges, Mary (as in, The Virgin Mary) is the appropriate symbol: “[a] woman for whom motherhood is the only appropriate goal, who remains at home participating in a limited range of activities in the ‘domestic sphere,’ who does not assume positions of authority, whose chastity is unassailable.”⁵³ When women act outside of this stereotype, some judges express their concerns privately (while others did so in open court).

What is more pernicious, however, is the unconscious bias made manifest by disrespectful behavior in response to female, but not male, lawyers.⁵⁴ Recognizing that “[b]ody language that reveals discomfort or disinterest when a woman speaks has a tremendous impact on a jury: [c]ommunications researchers have found that non-verbal messages carry four times the weight of verbal messages.”⁵⁵ Studies analyzing the behavior and attitudes of judges found that judges are concerned when women raise their voices because it often comes across as shrill.⁵⁶

51. Schafran, *supra* note 48, at 13–14 (internal citations omitted) (stating that “[t]he observation is as true today as it was in 1971.”).

52. *Id.* at 14 (quoting from ALBIE SACHS & JOAN HOFF WILSON, *SEXISM AND THE LEGAL PROFESSION* (1979)).

53. *Id.*

54. *Id.* at 14–15 (noting that judges “express their unease with female attorneys in completely unconscious ways, such as listening intently when a male lawyer speaks but looking at the clock and shuffling papers when female counsel speaks.”).

55. *Id.* at 15.

56. Lee, *supra* note 22, at 242. It would be interesting to know how many of the judges in this survey were male versus female.

Schafran then observed a new stereotype about women—that of Superwoman who is “the woman who can hold down a job (or two), raise her children, clean her house, and never need a respite or help from the children’s father or society. We see her in court when it is time to set or enforce a support award.”⁵⁷ This Superwoman stereotype seems to also apply to women lawyers, not just litigants. Researchers found that when women were able to derogate the successful woman compared to themselves, they felt better about themselves.⁵⁸ The researchers sought to answer the question of whether this process occurs only when the women themselves are threatened by the other woman’s success, and from their preliminary findings note that “[w]hen women were first given positive feedback about their own managerial potential (so another woman who had succeeded as a manager would not be threatening), they no longer took the opportunity to derogate her.”⁵⁹ From this study, the main motivation seems to be self-protection of one’s ego or perception of competence. Thus, it appears that “Superwoman” can only succeed in the courtroom with other women if the other women see her as truly unusual and not a threat.

The gender of the attorney had an effect on people’s “perception of the attorney’s friendliness, the witness’ friendliness, and the seriousness of the crime involved.”⁶⁰ Aggressive attorneys were “considered unfriendly regardless of gender; passive female attorneys were still rated as somewhat unfriendly, though more friendly than aggressive attorneys; and passive male attorneys were rated as significantly friendlier than passive female attorneys”⁶¹ This study concluded “[i]t is clear that jurors do not view aggressiveness in men in the same light as aggressiveness in women.”⁶² It also recognized the dual standard of the stereotype, that “[i]f a woman acts the same way, she may be viewed as abrasive, bossy, and combative.”⁶³

For some people, women are expected to be more caring, compassionate, and gentle than men. Because aggressiveness appears

57. Schafran, *supra* note 48, at 14. The Superwoman stereotype has been applied in marital dissolution cases where courts ignore “opportunity cost and assume[] that that [sic] upon divorce a woman can go from Mary to Superwoman overnight, ‘fully equipped’ for economic self-sufficiency despite years given to unpaid family labor.” *Id.* at 50.

58. Parks-Stamm, *supra* note 41, at 9–10.

59. *Id.* at 10.

60. Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 L. & Hum. Behav. 533, 543 (1996) (evaluating the effects of defense attorneys’ presentation style and gender on jurors’ verdicts and evaluations of attorneys and witnesses).

61. *Id.* at 544.

62. *Id.* at 549.

63. *Id.*

to be perceived as inversely related to friendliness, women attorneys in a role that is necessarily direct, assertive, and adversarial may be considered cold and unfriendly. This notion is supported by the present study's finding that male attorneys were viewed as friendlier than female attorneys in general. This is the same double-bind that faced Ann Hopkins when she was denied a partnership in the accounting firm of Price Waterhouse⁶⁴

Another study confirmed differences in how males and females perceive attorneys of each gender. Participants read a summary of a legal case and then listened to an audiotape of a closing argument, where half of the participants heard a female voice and the other half heard a male voice with the exact same text. The surprising result of this study was that "[w]omen rated the female attorney significantly less intelligent, less friendly, less pleasant, less capable, less expert, and less experienced than the male attorney. There were no significant effects for attorney gender among men, who rated the male and female attorneys about the same."⁶⁵ The male and female voices said the same words, verbatim, and yet other females deemed her to be "less than" him, on a variety of measures.⁶⁶

The gender of the subjects was significant in another way: "[r]egardless of the presentation style, female subjects rated the attorney as more aggressive than did the male subjects"⁶⁷ Also, many "[m]ale subjects rated the passive attorney as significantly less aggressive than did female subjects"⁶⁸ These researchers tested their hypothesis that "in general, active, aggressive, and confident defense attorneys will be more successful than reserved, passive, and less confident attorneys, and that presentation style will interact with attorney gender and juror gender."⁶⁹ A few notable findings include that "[f]emale subjects were not affected by the presentation style, but male subjects were strongly affected."⁷⁰ "Each

64. *Id.* (internal citations omitted).

65. *Id.* at 538 (citing studies by Hodgson & Pryor (1984)).

66. Hahn & Clayton, *supra* note 60, at 538.

67. *Id.* at 544.

68. *Id.*

69. *Id.* at 539. The researchers decided for a variety of reasons to decrease the variation to present the trial with a combination of a written transcript and videotape. There was a summary of the case, excerpts from testimony, some of the prosecutor's questions and some defense attorney questions and then a defense cross-examination on videotape. *Id.* at 539. There was an aggressive male attorney, an aggressive female attorney, a passive male attorney, and a passive female attorney. The subjects were asked to fill in a questionnaire to "evaluate the defense attorney and witness on seven characteristics (aggressiveness, competence, friendliness, confidence, credibility, intelligence, and overall presentation), to render a verdict on a scale from definitely not guilty to definitely guilty, and to evaluate the style of the attorney and witness in the form of open-ended questions." *Id.* at 540–41.

70. Hahn & Clayton, *supra* note 60, at 542.

attorney was more successful with subjects of the same gender”⁷¹ Aggressive attorneys were more successful than passive attorneys, and “male attorneys generally more successful than [sic] female attorneys at obtaining not-guilty verdicts for their clients”⁷²

By some measures, women are making progress in terms of their perceived aggressiveness. Some study participants seem to have accepted it in female lawyers, with some studies showing no significant difference in the percent of people evaluating the aggressiveness levels of male and female attorneys, which suggests that “[p]erhaps the stereotype of women attorneys coming across as ‘shrill’ may be diminishing.”⁷³ Others find to the contrary, noting that aggressive or assertive lawyers tend to do better for their clients with jurors except when those being assertive or aggressive are female.⁷⁴

Similarly, when women are evaluated, the term “double bind” is used because they are either considered to be “too masculine” or “not fitting the masculine stereotype for the job.”⁷⁵ Furthermore, female attorneys are often put in a Catch-22 situation where any response she makes appears defensive, and a lack of response appears weak.⁷⁶

C. How the Media Evidences, Influences, and Exacerbates Gender Bias

Female judges and judges of color also are subject to the competency double bind.⁷⁷ A study evaluating implicit bias in the evaluations

71. *Id.* at 542.

72. *Id.* at 543.

73. Greeley & Larsen, *supra* note 24, at 23 (explaining the social role theory that people expect the genders to behave differently with women being more warm and communal and men more competent).

74. Lee, *supra* note 22, at 239–40 (including studies cited in footnotes 77–94 therein).

75. Negowetti, *supra* note 15, at 947 (noting that “when female leaders behave in a ‘directive, autocratic style,’ they receive more negative evaluations.”) Moreover, Professor Rhode notes that “[g]ender stereotypes also subject women to double standards and a double bind,” explaining that a significant number of female lawyers believe they are held to a higher standard than their male colleagues, they are questioned on their commitment to the law when they give birth, and what is assertive in a man “seems abrasive in a woman.” Deborah L. Rhode, *Women and the Path to Leadership*, 2012 MICH. ST. L. REV. 1439, 1451–53 (2014) (explaining the historical context of gender discrimination and the gap between principles and practice as well as stereotypes and how in-group favoritism impacts women).

76. Ashley Kissinger, Note, *Civil Rights and Professional Wrongs: A Female Lawyer’s Dilemma*, 73 TEX. L. REV. 1419, 1425 (1995) (discussing the sources of bias and harms to client interests, and noting that “[g]ender-based derogatory comments made by opposing counsel in litigation can place a female attorney in a double bind. If she handles the situation by ignoring it, she may be viewed as a weak, ineffective advocate. If she responds, she may be viewed as a ‘pushy bitch.’ The resulting atmosphere of anger, hostility, and embarrassment can harm the interests of the female attorney’s client.”).

77. “The conflicting expectations for female and male judges was aptly stated by

attorneys made of judges found significant disparities in what should be similar levels of competence based on the race and gender of the judges.⁷⁸ The study included a number of control variables in the evaluations, which asked attorneys to rate judges' performances as "more than adequate," "adequate," or "not adequate," and also used other qualitative measures in statements regarding punctuality, and moving cases through the system.⁷⁹ "After controlling for a number of important indicators of judicial performance, women scored nearly 12 points lower out of 100 than men; minority judges scored 21 points lower than white judges."⁸⁰ The researcher concluded, "[u]nfortunately, the results presented here suggest that there is significant cause for concern about JPE attorney surveys. The sex and race disparities in the Judging the Judges survey act as a thumb on the scales, systematically disadvantaging groups that have been traditionally underrepresented on the bench."⁸¹

The media plays a crucial role in the way women are treated and expect to be treated in the courtroom. Stock stories that are familiar to jurors, litigants, judges, and opposing counsel help form a basis of expectations. Confirmation bias and expectation biases operate in a similar way to influence expectations about female lawyers. Perhaps there is no greater influence than that of television (at least for older Americans).⁸² The average person in the United States watches

Lynn Hecht Schafran: 'A male judge who strictly controls his courtroom runs a tight ship. His female counterpart is a bitch.'" Negowetti, *supra* note 15, at 947.

78. See Rebecca D. Gill, *Implicit Bias in Judicial Performance Evaluations: We Must Do Better Than This*, 35 JUST. SYS. J., 271, 271–72 (2014) (analyzing judicial performance evaluations and attorney surveys based on ABA guidelines, and raising questions about the validity and reliability of the JPE).

79. *Id.* at 279.

80. *Id.* at 282. The article continues,

This pattern continues throughout the rest of the analyses. Women and minority judges were significantly less likely to receive "more than adequate" ratings and were significantly more likely to receive "not adequate" ratings. In the various ABA categories, which are scaled here from –1 to +1, women and minority judges fared worse than their male and white counterparts across the board.

Id.

81. *Id.* at 289. The author continues, "[t]here is not a single category of questions that escapes this problem; the effects of judge sex and race are significant, large, and consistent across all of the dimensions of judicial performance evaluated by the Judging the Judges survey." She notes:

While some lament the fact that many voters are unaware of the judicial performance evaluation data when they make their decisions, perhaps instead we should be relieved. All of this does not mean that the entire enterprise of evaluating judicial performance should be abandoned; however, we must do better than this.

Id. at 291 (internal citations omitted).

82. While actual television sets were the places where people watched shows, increasingly a computer, tablet or even smart phone is the machine through which the

approximately five hours of television per day and that number increases to over seven hours for those who are Black or African American.⁸³ In fact, the average child spends more time watching television per year than she spends in school.⁸⁴ Older people tend to watch more television as they age, while the younger generation and others are moving towards streaming services which permit binge watching of episodes that tend to increase television viewership.⁸⁵

Due to the rise of reality court TV in the past few decades, with its titles (“Judge”), costumes (robes and bailiff uniforms), customs (oaths), and set design (a raised bench and witness stand), many jurors believe that trials and hearings progress similarly in most actual courtrooms.⁸⁶ A recent law review article explains that because laypeople have such limited exposure to courtrooms, they come to expect and rely upon what they see on television and in popular culture when they get into a real courtroom, creating a “feedback loop” that is self-perpetuating.⁸⁷ In explaining the mental process that viewers go through, when television programming is the primary source of the viewers’ understanding about the law, they may tend to conflate television shows with reality.⁸⁸

This “feedback loop” starts with the fact that “[p]opular culture influences the viewing public’s perception of the law, which in turn affects the public’s expectations, which are reinforced by the misconduct of actual members of the legal profession, which affects what the networks will portray as popular legal culture.”⁸⁹ The most telling part about this feedback loop is what the author calls the “Popular Legal Culture Two-Step,” which arises because viewers form a perception about members of the legal profession based on popular culture.⁹⁰ Then, through the media, they find examples that confirm their expectations about how lawyers behave. That confirmation creates what the viewers think is reality about how lawyers

“television shows” are viewed. To avoid cumbersome terminology, this Article will use “television” to include broadcasts and tapes that are live-streamed, available on cable or Netflix, Amazon Prime, YouTube, and other social media sites, when viewed on computers, tablets, smart phones or other devices.

83. *Television Watching Statistics*, STATISTIC BRAIN, <http://www.statisticbrain.com/television-watching-statistics> [<http://perma.cc/MMK6-V4LM>] (identifying statistics from a May 2017 A.C. Nielsen survey).

84. *Id.* (noting an average of 900 hours in school and 1,200 hours watching TV yearly).

85. Taylor Simpson-Wood, *The Rise and Fall of Bad Judge: Lady Justice is No Tramp*, 17 TEX. REV. ENT. & SPORTS L. 1, 2 (2015).

86. *Id.* at 6.

87. *Id.* at 3–4.

88. *Id.* at 8.

89. *Id.* at 4.

90. *Id.* at 4–5.

behave. Once the viewers have this expectation and come into the courtroom, trial lawyers “will have no choice but to at least partially adapt to the version of the legal world now held by the Two-Stepping viewers,” understanding that to the extent their case resembles a case that may have been portrayed fictitiously, being persuasive requires the attorneys to consider, and perhaps explicitly address, that media influence when crafting their arguments and entreaties to the jury.⁹¹

Viewers may not separately compartmentalize information that is fact versus fiction.⁹² The failure to categorize information that one remembers can have a significant impact if one also watches news on the television. What happened on the news may be conflated with what happened on a television show, thus further blending the lines between what happens in the real world with lawyers, judges, and court cases, and what happens on television.

As an example, during the same time period as this study, the author analyzed the show *Bad Judge*, and the Florida Association for Women Lawyers efforts to have the show removed from the prime timeline lineup.⁹³ She explains that after watching the show, if the viewer “were to learn about comparable, actual misconduct on the part of a real woman judge, the two images would resonate to move the viewer from simply having misguided perceptions about women judges, to holding actual false beliefs.”⁹⁴ Similarly, reactions to attorney and law professor Annalise Keating from ABC’s *How to Get Away with Murder* may impact the perceptions of Black females in the real world, and other attorneys and judges may be more likely to be influenced by implicit biases. How television lawyers and judges behave, and how females are portrayed and treated in the television courtrooms and law offices, influence juror expectations about their behavior in the real world.

91. Simpson-Wood, *supra* note 85, at 5.

92. *Id.* at 9.

93. *Id.* at 16 (examining the potential harm done by bad TV lawyers and judges, and exploring “possible responses to the demeaning portrayal of the judicial system and female judges and attorneys conveyed in *Bad Judge* in order to ameliorate the influence of television’s cultivation of viewer perceptions of the legal world and to prevent such perceptions from becoming viewer reality.”). The Florida Association for Women Lawyers (FAWL) sent a letter to the CEO of NBC urging NBC to remove the show on the grounds that those who “hold preconceived notions about women judges will find their sexist beliefs reaffirmed. A misogynist who believes that women in power cannot control their sexuality, their bodies and their professional or personal conduct would have their views endorsed by this show.” *Id.* (quoting the letter from Deborah Baker Esq. of FAWL).

94. *Id.* at 26. Those who already hold those beliefs after watching even one of the episodes may have them reaffirmed. *Id.* at 26–27.

II. THE IMPACTS OF GENDER STEREOTYPES AND BIAS IN THE LAW

In its literature review, one study notes that an American Bar Foundation survey conducted with attorneys and judges in the state of Illinois, found that “[m]ale attorneys tend[] to perceive their female counterparts as less competent. Male judges also perceive[] female attorneys as less competent than male attorneys.”⁹⁵

A lack of respect contributes to the perceived inferiority of women lawyers, and that perception stems from women lawyers themselves as well as from men. As Professor Bartow notes:

Female attorneys need to treat each other as if we are unequivocally equal to men. Men who would write off a woman lawyer as ‘some dumb girl’ should not be given any tacit support or unconscious affirmation by those they would ignore or dismiss. Although we cannot force men to respect us, we can take ourselves seriously⁹⁶

Women who refrain from challenging men who dismiss women as unqualified exacerbate the problem, perhaps unwittingly, but in other cases the women themselves see other women as less competent than their male counterparts.

One area where significantly more research is needed is the intersection of race and gender for female attorneys. While there are some studies determining differences based on race, the intersection of race and gender is not often addressed. Nevertheless, some researchers feel comfortable drawing inferences that where the evidence is evenly matched, a White male attorney will fare better for his client than a Black attorney of any gender.⁹⁷

95. Christian B. May, *Anger in the Courtroom: The Effects of Attorney Gender and Emotion on Juror Perceptions* (2014) (unpublished Honors thesis, Georgia Southern University).

96. She continues, “even while flexing our well-endowed and shapely (but never cosmetically enhanced) senses of humor.” Bartow, *supra* note 2, at 265. “On that note, some final advice for aspiring women attorneys: [r]eject being treated as ‘some dumb girl,’ and refuse to tolerate it when other women are dismissed as ‘dumb girls’ in your presence.” *Id.* at 266.

97. See Alexis A. Robinson, *The Effects of Race and Gender of Attorneys on Trial Outcomes*, 23 *JURY EXPERT* 1, 3 (2011) (highlighting the unexplained questions about the intersection of race and gender of attorneys and the jurors who processed the information) [capitalizations as noted in the quote for Black and White]. Robinson notes:

[W]here the evidence favors neither the defense nor the prosecution, a White male defense attorney (as a non-stigmatized source) should be more successful at persuading the jurors of his client’s innocence than would a stigmatized source such as a Black male, a White female, or a Black female. More simply, when the attorneys’ cases are evenly matched, the White male attorney is more likely to win than the Black and/ or female attorney.

Id.

Robinson explains that “[a]t this point, the lack of research suggests that law and social science researchers are unaware of the climate that Black and/or female attorneys face in the courtroom,” because while stereotypes against women in the courtroom have progressed, “what the information fails to tell us is whether the progress for White women has improved more or less than progress for Black women.”⁹⁸ She cautions that additional research is needed because “by not analyzing the differences in privilege between the four combinations of race and gender, researchers cannot, with certainty, advise on what race and gender combination will experience the most difficulty when trying to persuade the jury.”⁹⁹

A. *Stereotypical Female Speech*

Evaluating speech patterns and speaking styles of male and female attorneys shows notable gender differences. One study began with a literature review of a number of earlier studies that addressed factors that “add to or detract from the perceived effectiveness of a speaker,” alternating with a focus on aggressive and passive words.¹⁰⁰ It found that those speakers who were “confident enough about their statement that they do not solicit acknowledgment are perceived as more intelligent and credible than speakers who are skeptical about their statement.”¹⁰¹ This and other studies were based on making strong and/or modified assertions, such as those using language like “must be” instead of “is,” and “tag questions,” which are seeking confirmation—like, “we should do this, shouldn’t we?”—balanced against the neutral control questions.¹⁰² Another study found that fast speakers were more persuasive to jurors than those who speak more deliberately.¹⁰³

Other research has determined that “a speaker’s credibility may be perceived differently depending on the gender of the speaker, regardless of the content or quality of the speech itself.”¹⁰⁴ For

98. *Id.* at 3–4.

99. *Id.* at 5 (focusing on Black and White for race and male and female as the “four” combinations and noting that it could be that Black men are at the bottom of the hierarchy with Black women being in third place, or Black women could be at the bottom of the hierarchy with men at third place). The author indicates that she plans to do further studies, but this author has not been able to find anything else published by her.

100. See Hahn & Clayton, *supra* note 60, at 534 (evaluating the effects of defense attorneys’ presentation style and gender on jurors verdicts and evaluations of attorneys and witnesses).

101. *Id.*

102. *Id.* (citing studies by Siegler and Siegler (1976), and Newcombe and Arnkoff (1979)).

103. *Id.* (citing studies by Miller, Maruyama, Beaber, and Vallone (1976)).

104. *Id.* at 536 (citing Linz & Penrod (1984)).

instance, studies “sought to distinguish reactions to actual differences in sentence construction from stereotypes,” using the same process of strong assertions, modified assertions, tag questions, and neutral controls where research participants were asked to identify whether a speaker was most likely male or female based on the sentence, and separately whether the speech was of high quality or lower quality.¹⁰⁵ Not surprisingly, “[b]oth men and women associated the strong assertions with male speakers and high intelligence; the tag questions were associated with female speakers and low intelligence; modified assertions were rated in the intermediate range for both scales.”¹⁰⁶

B. Do Looks Matter?

It is important to recognize that as a service industry, the legal profession places a premium on physical appearances.¹⁰⁷ However, though physical attractiveness should be helpful, “a focus on appearances can nevertheless hurt female attorneys by decreasing their perceived competence, morality, and warmth.”¹⁰⁸ Physical attractiveness can also be a double-edged sword with jurors focusing more on women’s appearances and attractiveness than they do with that of White males.¹⁰⁹ Of course, physical attractiveness can have an advantage as studies show that people consider those who are physically attractive to be more competent, intelligent, and persuasive.¹¹⁰ People often prefer an attractive individual to an individual that they perceive to be unattractive, particularly when there is no information about competence and merely the visual reference.¹¹¹

Being unattractive has greater consequences for women than for men, with studies finding that “the highest ability was attributed

105. *Id.* at 537 (citing research by Goldberg (1968), and Siegler and Siegler (1976)).

106. Hahn & Clayton, *supra* note 60, at 537.

107. See Peggy Li, *Physical Attractiveness and Femininity: Helpful or Hurtful for Female Attorneys*, 47 AKRON L. REV. 997, 1007 (2015).

108. *Id.* at 1008.

109. Greeley & Larsen, *supra* note 24, at 23 (noting that their experience “suggests there is a risk that jurors may devalue the expertise of a female attorney seen as too attractive or attractive in a sexual way. Physical appearance may be more central to evaluating women and minority attorneys than white male lawyers, due to cultural stereotypes about demeanor, tone of voice, and, for women, physical size.”) *Id.*

110. Kathleen A. Bergin, *Sexualized Advocacy: The Ascendant Backlash Against Female Lawyers*, 18 YALE J. L. & FEMINISM 191, 212 (2006) (citing several studies in notes 128–31).

111. See Li, *supra* note 107, at 1001. “Physically attractive individuals are seen as more likely to succeed and more hireable as managers; receive higher starting salaries, performance evaluations, and voter ratings when running for public office; receive better offers when bargaining; and have more favorable judgments at trial.” *Id.*

to unattractive men while the lowest ability was attributed to unattractive women.”¹¹² In management roles, studies also have found that women are evaluated less favorably if they are attractive, whereas in secretarial and receptionist-type roles, women are treated more favorably if they are physically attractive.¹¹³ This researcher notes that “[w]omen in traditionally male-dominated positions must be both agentic enough to be perceived as competent, yet feminine and communal enough to be likeable.”¹¹⁴

Looks impact self-esteem, particularly for women. One survey found that “thirty-four percent of women rated appearance as the most important quality affecting their self-image, above both job performance and intelligence. Almost ninety-nine percent consider how they look a ‘very important’ (forty-two percent) or ‘somewhat important’ (forty-five percent) part of who they are.”¹¹⁵ Women are often complimented on their looks, rather than their work, even in a professional setting, whereas men are complimented on their work.¹¹⁶

In addressing the question of whether women are partially responsible for society still promoting a standard of beauty, Professor Rhode answers:

Well, yes and no, but we need to pay more attention to the no. These responses again discount the ways in which women’s “choices” are socially constrained, and the costs for those who try to conform or fail to conform to cultural expectations. In effect, women face another double bind. Those who invest too much in their appearance are condemned as shallow, vain, and narcissistic.

112. *Id.* at 1002. The author notes another study that tested preferences as to business partners where “participants preferred men over women, attractive males over unattractive females, and had equal preference for attractive women and unattractive men. This suggest[ed] either being male compensated for being unattractive or that being attractive compensated for being female.” *Id.*

113. *Id.* at 1004.

114. *Id.* at 1005 (citing Alice H. Eagly & Stephen J. Karau, *Role Congruity Theory of Prejudice toward Female Leaders*, 109 *PSYCHOL. REV.* 573 (2002)) (describing research studies to support the notion of prejudice against women: their being perceived less favorably than men as potential leaders, and evaluating their behavior less favorably when they are leaders).

115. Rhode, *supra* note 31, at 633.

116. Hannah Brenner & Renee Newman Knake, *Rethinking Gender Equality in the Legal Profession’s Pipeline to Power: A Study of Media Coverage of Supreme Court Nominees (Phase I, The Introduction Week)*, 84 *TEMP. L. REV.* 325, 343–44 (2012) (stating “[s]tudies reveal that women face far more frequent compliments on their appearance than on the substance of their legal work, in contrast to male attorneys who receive no appearance-based comments and are complimented almost exclusively on their substantive legal contribution.”). *Id.* (addressing the media coverage of Supreme Court nominees during the first week after their nomination and showing differences between how male and female nominees are discussed and described).

Those who invest too little or fall too short are punished in multiple ways. What constitutes the right level of effort is open to dispute, and the formula becomes ever more elusive as women age. The double standard of beauty is especially pronounced during later life.¹¹⁷

Some female attorneys responding to a survey acknowledged that they do “use clothing, makeup, and body language to enhance their sexual attractiveness, with an understanding that this will provide them with a competitive advantage in the courtroom.”¹¹⁸ Some women indicated that they use these tools to set themselves apart from other women because of what they consider to be a “pro-male bias” in the courtroom.¹¹⁹ While many women did not see “sexualized advocacy” as effective in combating or overcoming the bias in favor of male attorneys,¹²⁰ some still admitted that it might be useful “when you really WANT to distract your audience from the substantive matters.”¹²¹ This use of sexualized advocacy can exacerbate gender biases because as an Illinois study found, “[m]ale attorneys and judges (though more so in attorneys), also perceive[] that female attorneys use[] the perception of a gender bias as a tactic to discredit the other attorney.”¹²²

Another researcher disagrees with the notion that professional women are necessarily constrained by notions of how they should dress, stating, “[i]t is undeniable that an attractive facade can be useful to one’s career. Yet many very smart women have determined that they can succeed at their professions without unduly conforming to societal expectations of how they should appear.”¹²³ And perhaps this continues to improve.¹²⁴ So what’s a woman lawyer to do?

117. Rhode, *supra* note 31, at 628–29 (recognizing that men become “distinguished” while women become “unattractive”).

118. Bergin, *supra* note 110, at 197 (discussing the results of a random anonymous survey of attorneys and law professors examining “the commodification of sex as it applies to female lawyers”).

119. *Id.* at 198.

120. *Id.*

121. *Id.* at 202 (quoting an e-mail from Agnes Maura dated February 8, 2006).

122. May, *supra* note 95, at 4.

123. See Bartow, *supra* note 2, at 253. The author notes the photographs of women who have succeeded in business, at law firms, as doctors and on faculties, stating they are all “radiantly beautiful on their own terms, few appear particularly preoccupied with issues of clothing, hair, or makeup.” *Id.* “If nothing else, the mental picture of being hobbled by high heels as one is chased down for unwanted risqué advances by a law and economics scholar should make the reader rethink wearing elevating footwear.” *Id.* at 257.

124. See Martha W. Barnett, *Women Practicing Law: Changes in Attitudes, Changes in Platitudes*, 42 FLORIDAL REV. 209, 211 (1990) (providing details on statistics of women’s impact in the legal profession and the results of the ABA Commission on Women in the Profession studies from the 1980s.)

One word of advice: “Support your sisters, and finally, always wear comfortable shoes.”¹²⁵

C. *The Role and Toll of Emotions*

This sometimes “presumptive incompetence” of women compared to men is enhanced when a display of emotion is involved.¹²⁶ Studies have shown that when one perceives the anger in another to be appropriate, that “other” seems more confident and competent, but if the anger is inappropriate then that other has less influence.¹²⁷ Another study examined how gender stereotypes impact jurors’ perceptions of an attorney’s competence by evaluating the closing statements of male and female attorneys who were expressing either anger or neutral emotions.¹²⁸ The study focused on anger:

Anger has been associated with both actual confidence in oneself about the event in question (i.e., an angry person is more confident that his or her perceptions about something are correct) and perceived confidence in oneself from others (i.e., other people perceive an angry person as confident in him or herself).¹²⁹

Anger is considered to be appropriate for men but not appropriate for women.¹³⁰ When a woman shows anger in the courtroom, it is often considered to comport with the stereotypical notion that

Many questions remain unanswered for the 1990s: Will larger numbers of women become partners, enter firm management, and establish themselves as “rainmakers”? Will their pay be commensurate with their work? Will the next decade see more women who honestly can be characterized as leaders of the profession? In short, will women have real impact in and on the profession? I predict a “yes” answer to each question.

Id. at 227.

125. Bartow, *supra* note 2, at 266.

126. Jessica Salerno et al., *Expressing Anger Increases Male Jurors’ Influence, but Decreases Female Jurors’ Influence, During Mock Jury Deliberations*, 28 JURY EXPERT 1, 2 (2016) (setting the stage by stating “[m]any women who have sat in board meetings, classrooms, workplace groups, juries, and governing bodies might relate to this anecdotal evidence that women’s opinions are less influential when presented with emotion—while men harness this powerful persuasion tool successfully.”).

127. *Id.* at 2.

128. *See* May, *supra* note 95, at 12–24.

129. *Id.* at 6. The article continues:

This element is of particular interest to the current study as confidence is important when dealing with convincing a jury to side with an attorney’s side. If anger increases the confidence of knowing how an event took place, and others perceive that anger as confidence, a jury might possibly be more inclined to believe one’s side than if the attorney had not conveyed anger.

Id. at 6–7.

130. *See* Salerno et al., *supra* note 126, at 2.

women are more likely to be governed by their emotions, rather than reason.¹³¹ Because “women’s emotion expressions are often attributed it [sic] to an internal cause . . . there are several reasons to expect that the same anger expression will be interpreted differently when it comes from men versus women.”¹³² Any expression of anger by a female can minimize her persuasiveness.¹³³ In contrast, “if a man shows similar emotion, jurors may believe that he must have had ‘a darn good reason’ because it isn’t consistent with their expectations for men.”¹³⁴

In one study, the researchers found that “anger expression created a gender gap in social influence between men and women that was absent when opinions were expressed with no emotion or with fear.”¹³⁵ The authors concluded that expressions of anger made women less reliable and enhanced the credibility of men using the exact same words.¹³⁶

In another group of studies analyzing competence based on gender, the researchers found that upon delivery of a closing statement showing either anger or a neutral emotional tone, the angry male attorney was considered to be more competent and the angry female attorney was considered to be the least competent.¹³⁷ Where the man was given credit for being angry about the situation, the female was presumed to not be in control of her emotions.¹³⁸

These findings suggest that “in the cases that women are most passionate about, women might have less influence than men. Our results lend scientific support to a frequent claim voiced by women, sometimes dismissed as paranoia: that people would have listened to her impassioned argument, had she been a man.”¹³⁹

III. REDUCING THE IMPACTS OF GENDER BIAS IN THE LEGAL PROFESSION

Bergin sums up some of the major issues impacting women lawyers noting these four points: (1) “empirical evidence does in fact

131. *See id.*

132. *Id.* (testing how mock jurors responded to scripted comments made by other jurors differently depending on the gender of the juror making the comment).

133. *Id.* at 3.

134. Greeley & Larsen, *supra* note 24, at 22.

135. Salerno et al., *supra* note 126, at 3 (noting that “[t]his effect of anger expression was the same for male and female participants [mock jurors] and for participants voting guilty or not guilty.”).

136. *Id.*

137. May, *supra* note 95, at 18.

138. Lee, *supra* note 22, at 240.

139. Salerno et al., *supra* note 126, at 4.

demonstrate that women occupy a subordinate social status to men”;¹⁴⁰ (2) “a female lawyer’s ‘performance’ is assessed in terms of competence, capability, and persuasiveness, which social psychologists tell us a male judge or juror might predictably underrate on account of in-group favoritism, and a female judge or juror might underrate on account of inter-group tension”;¹⁴¹ (3) “the built-in bias favoring generosity toward in-group members could subtly influence the judgments or verdict rendered to a female lawyer”;¹⁴² and (4) “one might reasonably posit that sexualized advocacy by female lawyers, whether or not it works to an individual woman’s benefit, discredits women as a group.”¹⁴³

As Viktor Frankl said, “[b]etween stimulus and response, there is a space. In that space lies our freedom and our power to choose our response.”¹⁴⁴ Too often, we react and respond reflexively, rather than deliberate and respond thoughtfully. Reducing implicit bias is about that training, making conscious and deliberate the thought and decision-making process to get to the point of justice.

Some say it is important to categorize the motive behind gender-biased comments and behavior, noting three basic motives: “1) true prejudices; 2) ignorance; or 3) a desire to gain an adversarial edge.”¹⁴⁵ True prejudice often entails explicit bias, and therefore statements are likely to demonstrate explicit bias and be easy to find. In terms of ignorance, ignorance of the law is not a defense, as we all know from that oft-quoted maxim of jurisprudence.¹⁴⁶ Desiring to gain an adversarial advantage should be limited to conduct becoming of an officer of the court.

140. Bergin, *supra* note 110, at 219.

141. *Id.* at 220 (noting further that “a hostile cross-examination or objection overruled might qualify as the type of behavioral transgression or task failure that becomes imprinted in the memory of a judge or juror to a greater degree than similar incidents involving male attorneys. When these episodes occur among highly sexualized women they are most likely to corrupt the objectivity of a presiding judge and derail the direction of jury deliberations. Sex appeal itself might well be seen as a cultural transgression in the mind of a judge or juror wedded to the ideal of deference, conservatism, and conformity in court. In that case, the presumed incompetence arising out of the perceptions created by sexualized female advocacy would become even more visible in the shadow of the presumptively competent male opponent whose performance is overrated and whose missteps are fast forgotten.” *Id.* at 220–21).

142. *Id.* at 221.

143. *Id.*

144. ALEX PATTAKOS, PRISONERS OF OUR THOUGHTS: VIKTOR FRANKL’S PRINCIPLES FOR DISCOVERING MEANING IN LIFE AND WORK VI (2d ed. 2010).

145. Marsha S. Stern, Note, *Courting Justice: Addressing Gender Bias in the Judicial System*, 1996 ANN. SURV. AM. L. 1, 49 (1996) (describing the nature of gender bias, the manner in which the system currently addresses it, and proposing a two-tiered gender bias standard for non-courtroom context).

146. See CAL. CIV. CODE § 1578 (Deering 2017).

A. Gender Stereotypes and Bias in Law School

We may expect that the new generation of lawyers, those who are currently in law schools, would exhibit less bias against women in the profession. Unfortunately, studies confirm that law students also possess implicit gender biases. One recent study was conducted to test the hypothesis of whether implicit gender bias operates in the legal setting and whether it predicts biased decision-making, using an IAT test as well as choices in law firm hiring, judicial appointments, and allocating law student organizational budgets using test subjects of law students.¹⁴⁷

Levinson and Young designed a study that incorporated the judge/gender IAT and the gender/career IAT along with additional measures including an explicit gender bias measure called the Modern Sexism Scale.¹⁴⁸ They used a pool of law students as the study participants. The results of their study are as follows: the study confirms the hypothesis “that law students hold implicit gender biases related to leadership positions in the legal profession,” because participants had a significant association between judge and male over judge and female.¹⁴⁹ Similarly, the tests “confirmed the hypothesis that law students hold implicit gender biases connecting women with the home and family.”¹⁵⁰

In terms of the judicial appointment instrument, there were different findings based on the gender of the subject. “Put simply, the more implicit bias male participants displayed linking men to career, the more they preferred feminine judge attributes. The direction of this finding was thus not as we predicted.”¹⁵¹ In contrast, “the more implicit bias the participants displayed linking judges to males, the more they preferred masculine judge attributes.”¹⁵² For the females, in contrast, “the more implicit bias the participants

147. See Levinson & Young, *supra* note 21, at 3 (reviewing past empirical studies on gender disparities, describing their research study participants, and materials used to conduct the study).

148. *Id.* at 22–23.

149. *Id.* at 28.

150. *Id.* The results of the IAT were not correlated with the Modern Sexism Scale; This result is expected, first because implicit and explicit measures are intended to test different constructs, and second because the Modern Sexism Scale is designed to test responses to somewhat different societal issues than the IATs we implemented. The difference between the responses to the IATs and the Modern Sexism Scale demonstrates the importance of investigating both implicit gender biases and explicit gender attitudes.

Id. at 29.

151. *Id.* at 30.

152. Levinson & Young, *supra* note 21, at 30.

displayed linking men to career, the more they preferred masculine judge attributes” and “the more implicit bias female participants displayed linking men to career, the more they preferred feminine judge attributes.”¹⁵³ In the hiring study, men and women were hired at similar levels without much variation based on the gender of the hirer.¹⁵⁴ There were no gender differences on the budget cut issue.¹⁵⁵

The authors concluded that “[t]he majority of our results support the argument that our law student participants successfully resisted or compensated for the implicit biases we tested. . . . Other results showed that participants sometimes acted in ways directly contrary to their implicit biases.”¹⁵⁶ This means that:

[I]t is possible for people to hold harmful implicit biases and simultaneously hold egalitarian implicit norms that allow them to resist these biases. . . . After all, research has demonstrated that simply being in the presence of “egalitarian-minded others” can inhibit prejudice. Without having tested for implicit motivation to control bias, however, we cannot speculate further as to whether that might account for the some [sic] of the results.¹⁵⁷

Perhaps not surprisingly, racial biases continue to exist in law student subjects as well. In a study involving death penalty lawyers and law students evaluating the association of race and good versus bad, the authors then turned to examine the effect of gender to answer the question of “do males and females separately confirm the pattern of more correct responses when white faces are paired with ‘good’ than when black faces are paired with ‘good?’” and found that “for white females and males the significant advantage is in white/good pairings, while for black males, the significant advantage is in black/good pairings. For black females, the tendency is toward easier black/good pairings, but the difference . . . is not statistically significant.”¹⁵⁸ They also note that men tend to reflect a greater own-race advantage than women generally, but the difference is not significant for Black men and women.¹⁵⁹

153. *Id.* at 30–31.

154. *Id.* at 31.

155. *Id.*

156. *Id.* at 33.

157. *Id.* at 34.

158. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1549 (2004). The authors begin with an assumption that “[v]irtually nothing is known about the racial attitudes of lawyers in general, let alone defense lawyers or capital defense lawyers specifically.” *Id.* at 1540–41.

159. *Id.* at 1549. The authors do note that based on anecdotal experience, many of the defense attorneys were surprised that their automatic preferences were influenced by race, indicating they would not have realized such preference. *Id.* at 1555–56.

So what can law schools do? Some recommendations are to require bias training in law school, to encourage law firms and other agencies to hire women for implicit male prototype jobs, and to recognize that most bias reduction strategies “are only temporary measures.”¹⁶⁰ Nonetheless, “[r]esearchers have also found that carefully confronting people with their biases can reduce implicit bias.”¹⁶¹

Training female lawyers to be “‘relentlessly pleasant’ without backing down” in order to project a “decisive and forceful manner without seeming arrogant or abrasive”¹⁶² is another suggestion. Simpson-Wood urges law professors (as well as lawyers and judges) to accept every invitation to speak to the public to help mold perceptions about the law based on reality rather than on what is available in popular culture.¹⁶³

Another way to reduce inequities may be by increasing the frequency of exposure to females who do not meet typical stereotypes. One study found that doing so reduces the level of automatic stereotyping by women themselves.¹⁶⁴ These researchers also performed a study where they primed participants with famous female leaders and then had them take a type of implicit attitude test pairing up women with a supporter versus women with a leader role. Their results showed that “participants who had previously seen famous female leaders were significantly faster at associating women with leadership attributes . . . compared to those who had previously seen control exemplars.”¹⁶⁵ They also found that this exposure also “activated more counterstereotypic beliefs,” thus enhancing the expected benefit of activating fewer stereotypic beliefs.¹⁶⁶

Focusing on the important role of single gender education, these researchers did a study on college freshmen and sophomores and found that after one year, “those who were now sophomores at the

160. Levinson & Young, *supra* note 21, at 38. They also suggest that the theme of “gender biases relating to women’s traits and characteristics affect hiring and promotion opportunities—should also be included in empirical studies of implicit gender biases in the legal profession.” *Id.* at 37.

161. *Id.* at 39 (noting that “[t]he researchers found that post-confrontation participant responses displayed significantly fewer stereotypes”).

162. Rhode, *supra* note 31, at 1466 (explaining that “[s]trategies include frequently smiling, expressing appreciation and concern, invoking common interests, emphasizing others’ goals as well as their own, and taking a problem-solving rather than critical stance.”).

163. See Simpson-Wood, *supra* note 85, at 29–30.

164. See Nilajana Dasgupta & Shaki Asgari, *Seeing is Believing: Exposure to Counterstereotypic Women Leaders and its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 654 (2004) (conducting two studies to test the conditions “under which social environments can undermine automatic gender stereotypic beliefs expressed by women.”).

165. *Id.* at 647.

166. *Id.* at 648.

women's college expressed no gender stereotypes at all whereas those who were sophomores at the coeducational college expressed strong gender stereotypes," though they had begun at the same level as freshmen.¹⁶⁷ The authors note that this suggests, "the campus environment may have played a significant role in shaping participants' nonconscious beliefs."¹⁶⁸ A variable that seemed to be very important was exposure to female faculty.¹⁶⁹ One ray of hope is that the researchers concluded, "women's automatic stereotypic beliefs about their ingroup can be undermined if they inhabit local environments in which women frequently occupy counterstereotypic leadership roles."¹⁷⁰ Their studies support previous notions that stereotyping diminishes when "people notice that women and men increasingly occupy atypical roles in society."¹⁷¹ The authors also suggest that "conscious reflection and subjective interpretation of the counterstereotypic individuals' success as attainable for one's ingroup and self may further contribute to nonconscious stereotype change."¹⁷²

B. What Law Firms and Legal Departments Can Do

One author suggests several potential solutions to try to "eradicate the root of the problem: an unjust and unequal society that privileges males over females."¹⁷³ She suggests providing implicit bias training to women so they can understand how gender and physical attractiveness interact to become an obstacle for them in the workplace.¹⁷⁴ The downside of this potential solution is that "[w]hile potentially providing short-term assistance to women in male-dominated professions, this advice reinforces rather than combats the status quo."¹⁷⁵ She suggests trainings to raise awareness of these inequalities to educate employers and leaders about their uses of gender stereotypes and bias, particularly in hiring decisions.¹⁷⁶

C. What the Bench Can Do

One of the potential solutions that Simpson-Wood proposes is to educate people about how courts really operate and she notes

167. *Id.* at 651.

168. *Id.*

169. *Id.* at 651–52.

170. Dasgupta & Asgari, *supra* note 164, at 654.

171. *Id.* (citing Diekmann & Eagly (2000) and Eagly & Steffen (1984)).

172. *Id.* at 655.

173. Li, *supra* note 107, at 1014.

174. *Id.*

175. *Id.* at 1015.

176. *Id.* at 1015–16.

Judge Kozinski's "movie nights" at the Ninth Circuit as one mitigating effect, where discussions after the movie can inform and influence the public perception of the differences between reality and the screen.¹⁷⁷

Enforcing existing rules regulating the conduct of lawyers and judges could be used to provide more of a sanction for manifestations of gender bias.¹⁷⁸ Currently, most of the focus is on the courtroom and egregious behavior may be a "likely candidate[] for the sporadically-applied sanctions."¹⁷⁹ Some courts seem to have adopted a standard of whether the bias is harmful or harmless, and frequently determine bias to be harmless if it is not taking place in the courtroom or in front of the jury. The main point is that if the offensive act or statement is made in front of the jury, then the female attorney is more limited in how she can respond, whereas when it occurs outside of the present of the judge or jury she has a greater ability to put inappropriate comments in their place.¹⁸⁰

Schafran cautions that "[j]udges need both to eliminate gender bias in their own verbal and nonverbal behavior and to intervene when, for example, male counsel deliberately fails to use a female expert's professional title in order to undercut her authority, or a male witness makes a crude gesture to his female cross-examiner."¹⁸¹ Judicial responses are important because if the woman lawyer responds, she may be deemed to be overly sensitive and if she does not respond, she is deemed to be a pushover. Schafran concludes that the "deeply rooted stereotypes of women described in this article are among those unconscious forces. Only by recognizing their existence and their power can judges move beyond Mary, Eve and Superwoman and treat women as individuals, rather than as emblems of their sex."¹⁸²

D. What Women and Men Can Do in the Courtroom

Fixing this problem requires reliance on another a double-edged sword. Researchers found that:

[E]mphasizing a woman's femininity should be harmful when her competence is questioned (e.g., a defendant in a malpractice case),

177. Simpson-Wood, *supra* note 85, at 29.

178. Stern, *supra* note 145, at 43, 46–47 (describing the nature of gender bias, the manner in which the system currently addresses it, and proposing a two-tiered gender bias standard for non-courtroom context).

179. *Id.* at 28.

180. *Id.* at 33.

181. Schafran, *supra* note 48, at 17 (noting the Eve stereotype as the "unchaste eternal temptress," which has significant ramifications in rape cases).

182. *Id.* at 52.

but beneficial when her interpersonal qualities or goodness are questioned (e.g., a defendant in a discrimination case). A female lawyer concerned about her perceived intelligence may want to minimize her femininity, whereas a female lawyer concerned that she will be disliked for appearing too aggressive may want to highlight it.¹⁸³

In terms of strategies, one option is to “highlight other differences between the successful woman and the self that offer an excuse for different personal choices or levels of success.”¹⁸⁴ Another strategy is to create a “we mentality” by addressing women’s common struggles and achievements as a group so that the female jurors “view successful women as a source of pride rather than competition, [such that] it is possible for them to both admire successful women and feel good about themselves at the same time.”¹⁸⁵ The advice for women litigators when addressing female jurors is that if you can distinguish yourself enough from the other women, they will be less likely to see you as a threat, and thus less likely to attempt to derogate your competency.

CONCLUSION

As Simpson-Wood lamented about the television series *Bad Judge*, “[t]he symbols of Lady Justice are not skimpy lingerie, a tequila bottle, and a used pregnancy test.”¹⁸⁶ She continues, “[t]hey are the sword, the scales, and the blindfold. We need to restore them to her.”¹⁸⁷ Real women in the law are not only about sex appeal, alcohol abuse, and reckless behavior without regard for the consequences, but some of those on television appear to be. In *How to Get Away with Murder*, we have wigs and tight dresses for sex appeal, vodka bottles for alcohol abuse, and cell phone messages that needed to be “wiped,” as the consequences of reckless provocation behavior without enough concern for the consequences.

The symbols of Lady Justice are actually “the sword, the scales, and the blindfold.”¹⁸⁸ The sword asserts rights, the scales balance the equities, and the blindfold confirms principled decision-making. ABC. Annalise Keating’s quotes at the beginning of this paper—“speak of

183. Parks-Stamm, *supra* note 41, at 11.

184. *Id.*

185. *Id.* at 12.

186. Simpson-Wood, *supra* note 85, at 31. Although, a bloodied scales of justice statue was the murder weapon in the first season of *How to Get Away with Murder*.

187. *Id.*

188. *Id.*

the devil,” and being “crazy” suggest recklessness and evil, but “winning” as her goal reminds us that she does not recognize the consequences. Season Four began in a similar way, with her dealing with demons (the specter of childhood rape and adults who turned the other way), alcohol (temptation and AA meetings), and promiscuity (an attempted one-night stand with a stranger). Now she is Asserting Rights (on behalf of her dementia-suffering mother) and Balancing Equities (releasing her former law clerks and students with outstanding personal recommendation letters). We have A and B. Will Annalise Keating be redeemed? Will Black female lawyers be redeemed? C—Confirming Principles/principled decision-making remains to be seen. I look forward to the journey as this season unfolds.