

# STOLEN VOICES:<sup>1</sup>

## A Linguistic Approach to Understanding Implicit Gender Bias in the Legal Profession

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1. The phrase, “Stolen Voices” comes from a famous University of Pennsylvania Law School study documenting the extent and impact of gendered differences at law school. See Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 3, 4 (1994). Several women described that their voices were “stolen” from them in the first year. *Id.* at 4. One woman described her experience as follows: “Law school is the most bizarre place I have ever been. . . [First year] was like a frightening out-of-body experience. Lots of women agree with me. I have no words to say what I feel. My voice from that year is gone.” *Id.* at 4. Based upon the data, the studies’ authors concluded that for many women, “learning to think like a lawyer means learning to think and act like a man.” *Id.* at 4–5.

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## INTRODUCTION

Around the time that women gained the right to vote, a small number of women were beginning to attend law school and enter the bar.<sup>2</sup> In fact, by the early 1920s all states admitted women to the bar, along with a few elite law schools.<sup>3</sup> By the late 1930s, the top twelve law schools had 370 female students.<sup>4</sup> Yet, with legal employers openly and steadfastly refusing to hire women as “real” lawyers, most of the women graduating law school from the 1920s through the 1960s were relegated to jobs as stenographers or librarians in law firms.<sup>5</sup> As the famous story goes, the late Justice Ruth Bader Ginsburg, who graduated first in her class from Columbia Law School, was unable to acquire a job at a law firm when she graduated law school in 1959.<sup>6</sup>

Perhaps due to the legal profession’s long history of excluding women from legal employment, change has been slow.<sup>7</sup> As late as 1971, women constituted fewer than three percent of the total lawyer population.<sup>8</sup> That percentage climbed to 8.1 percent in 1981 and

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2. Cynthia Grant Bowman, *Women in the Legal Profession From the 1920s to the 1970s: What Can We Learn From Their Experience About Law and Social Change?*, 61 ME. L. REV. 2, 3 (2009), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1011&context=facpub> [<https://perma.cc/D6JQ-A9QJ>].

3. *Id.*

4. *Id.*

5. *Id.* at 2–12. In the 1940s, many corporate law firms, facing wartime shortage from men going off to the front, hired women as attorneys at an increased rate. Most of these women, however, left these firms without making partner once the men returned. *Id.* at 5–6.

6. Meredith Mandell, *When Ruther Bader Ginsberg Couldn’t Land A Job (Review)*, BLOOMBERG LAW (Nov. 9, 2016, 9:30AM), <https://news.bloomberglaw.com/business-and-practice/when-ruth-bader-ginsburg-couldnt-land-a-job-review> [<https://perma.cc/MY4Q-2JT7>] (reviewing RUTH BADER GINSBURG, MY OWN WORDS (Simon & Schuster 2016)).

7. See Bowman, *supra* note 2, at 2–12.

8. Joni Hersch, *The New Labor Market for Lawyers: Will Female Lawyers Still Earn Less?* 10 CARDOZO WOMEN’S L.J. 1 (2003), <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1792&context=faculty-publications> [<https://perma.cc/48K8-UVS5>] (citing BARBARA A. CURRAN, WOMEN IN THE LAW: A LOOK AT THE NUMBERS 8 (The Commission, 1995)).

just 22 percent in 1991.<sup>9</sup> Today, women make up 37 percent of all practicing lawyers.<sup>10</sup>

Despite the emergence of women in the profession in greater numbers over the past thirty years, studies examining the experience of women in the law have found that women are decidedly less satisfied with legal education<sup>11</sup> and the legal profession<sup>12</sup> than their male counterparts. Although 54 percent of law school graduates today are women,<sup>13</sup> women fall far behind their male counterparts in the markers of success in the profession. They are far less likely

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9. *WOMEN IN THE LEGAL PROFESSION, Demographics*, AM. BAR ASS'N, <https://www.abalegalprofile.com/women.php> [<https://perma.cc/B3AU-RVJC>].

10. *Id.*; 2019 Report on Diversity in U.S. Law Firms, NAT'L ASS'N FOR LAW PLACEMENT 10–11 (2019), [https://www.nalp.org/uploads/2019\\_DiversityReport.pdf](https://www.nalp.org/uploads/2019_DiversityReport.pdf) [<https://perma.cc/DB2S-GHML>].

11. Studies documenting women's experiences in law school span the decades and find that female law students encounter greater obstacles and experience higher levels of dissatisfaction than their male counterparts. *See, e.g.*, Guinier et al., *supra* note 1; *see* Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1242 (1988), <https://doi.org/10.2307/1228866> [<https://perma.cc/Y93Z-7TCV>]; *see* Marsha Garrison et al., *Succeeding in Law School: A Comparison of Women's Experience at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515, 524–25 (1996), <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1207&context=faculty> [<https://perma.cc/7W83-Q4Z2>]; *see* Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U. J. GENDER SOC. POL'Y & L. 511, 531 (2005), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1298&context=jgspl> [<https://perma.cc/EY4J-4AMW>]; Mallika Balachandran, et al., *Speak Now: Results of a One-Year Study of Women's Experiences at the University of Chicago Law School*, U. CHI. LEGAL. L. F. 647, 657 (2019), <https://chicagounbound.uchicago.edu/uclf/vol2019/iss1/19> [<https://perma.cc/5ADZ-4RKU>]; Allison L. Bowers, *Women at the University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117, 135 (2000); *see generally*, Dara E. Purvis, *Legal Education as Hegemonic Masculinity*, 65 VILL. L. REV. 1145, 1154 (Jan. 29, 2021), <https://digitalcommons.law.villanova.edu/vlr/vol65/iss5/9> [<https://perma.cc/6T8N-G29R>].

12. *See, e.g.*, JOYCE STERLING & LINDA CHANOW, IN THEIR OWN WORDS: EXPERIENCED WOMEN LAWYERS EXPLAIN WHY THEY ARE LEAVING LAW FIRMS AND THE PROFESSION (2021); ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURES OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE (2019). Female lawyers reported significantly less job satisfaction than men in several important areas. For example, 71 percent of men said they were satisfied with the recognition they received at work, but only 50 percent of women said the same. Likewise, 62 percent of men said they were satisfied with opportunities for advancement at their law firms, but only 45 percent of women felt the same. *Id.* at 5, 8.

13. AM. BAR ASS'N, *supra* note 9.

to make partner,<sup>14</sup> less likely to be lead counsel or first chair on a case,<sup>15</sup> less likely to be lead attorney on corporate deals,<sup>16</sup> less likely to publish works of scholarship,<sup>17</sup> and more likely to leave the profession at the height of their careers.<sup>18</sup> In short, even as the doors to opportunity in the profession have opened, the trajectory of women in the law remains troubling.

Why women continue to be underrepresented in the legal industry is the subject of much recent study. Although it has been posited that the problem is explainable through women's choices

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14. In 2020, about 19 percent of all managing partners are women, 21 percent of all equity partners were female, and about 31 percent of all non-equity partners were female. Women of color fare far worse, making up only 4 percent of non-equity partners and 3 percent of equity partners. *Id.*

15. In a 2015 study looking at the Northern District of Illinois, men were three times more likely to play the role of lead counsel on a civil case than a woman. Stephanie A. Scharf & Roberta Liebenberg, *First Chairs at Trial: More Women Need Seats at the Table*, AM. BAR FOUND. 10 (2015). Among all attorneys appearing in criminal cases, 67 percent are men. Among attorneys appearing as lead counsel, 67 percent are men (33 percent are women), and among attorneys appearing as trial attorney, 79 percent are men (21 percent are women). *Id.* at 13. In a 2019 study of the percentage of women appearing before 7<sup>th</sup> circuit, the authors found that in civil cases, only 24 percent of all attorneys who argued before the court were women, and in criminal cases, women comprised only 33 percent of all attorneys. AMY J. ST. EVE & JAMINE B. LUGURI, HOW UNAPPEALING: AN EMPIRICAL ANALYSIS OF THE GENDER GAP AMONG APPELLATE ATTORNEYS 10–11 (2021), [https://www.americanbar.org/content/dam/aba/administrative/women/how-unappealing-f\\_1.pdf](https://www.americanbar.org/content/dam/aba/administrative/women/how-unappealing-f_1.pdf) [<https://perma.cc/E7JQ-922C>].

16. Afra Afsharipour, *Women and M&A*, 12 U.C. IRVINE L. REV. 359, 379 (Feb. 2022), <https://scholarship.law.uci.edu/ucilr/vol12/iss2/17> [<https://perma.cc/7VS7-QU4Q>].

17. Between 2013 and 2018, law reviews published 2074 articles authors in total and of those, 1414 (68.17 percent) were men and 660 (31.82 percent) were women. Thus, over the five-year period, it was over twice as likely that the journal would publish a male author as opposed to a female author. Shontee M. Pant, *Calculating the Gender Gap in Legal Scholarship: An Empirical Study*, 65 ST. LOUIS U. L.J. 199, 211 (2020), <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=2202&context=lj> [<https://perma.cc/EJM2-DTYW>].

18. Thirty percent of female lawyers leave their careers. Jane R. Bambauer & Tauhidur Rahman, *The Quiet Resignation: Why Do So Many Female Lawyers Abandon Their Careers?*, 10 U.C. IRVINE L. R. 799, 816–17 (Mar. 2020), <https://scholarship.law.uci.edu/ucilr/vol10/iss3/5> [<https://perma.cc/C5GH-F4QF>]; see Joni Hersch & Erin E. Meyers, *Why Are Seemingly Satisfied Female Lawyers Running for the Exits? Resolving the Paradox Using National Data*, 102 MARQ. L. REV. 915, 916 (2019), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5401&context=mulr> [<https://perma.cc/WYT4-JACW>]; Liane Jackson, *Why do experienced female lawyers leave? Disrespect, social constraints, ABA survey says*, ABA JOURNAL (Aug. 3, 2018), [http://www.abajournal.com/news/article/why\\_do\\_experienced\\_female\\_lawyers\\_leave\\_disrespect\\_social\\_constraints\\_ABA](http://www.abajournal.com/news/article/why_do_experienced_female_lawyers_leave_disrespect_social_constraints_ABA) [<https://perma.cc/P8K6-CNVZ>].

to divest in their careers as a result of the demands of childbearing, motherhood, or other family commitments, this simply does not account for the lack of gender parity in the profession.<sup>19</sup> As blatant sex discrimination has been somewhat ameliorated<sup>20</sup> through corporate policies and the possibility of legal action, many researchers have begun to attribute lack of gender parity, in part, to implicit gender bias, or the unconscious bias against stereotypes and associations linked to a specific gender.<sup>21</sup> Implicit gender bias is a well-recognized phenomenon in male-dominated professions and has been posited to be a significant contributor to women's inability to achieve professional equity within a variety of professions.<sup>22</sup>

While implicit gender bias may attack multiple aspects of one's gender, this Article examines gender bias solely through the lens of communication and language use, with the hope that this allows for a more focused understanding of the lack of gender parity in the law.<sup>23</sup> Though arguably narrow in scope, gender bias directed at communication and language may have an outsized impact on women's experiences and success in the legal profession. Indeed, the historical conventions of language use within the legal profession have remained largely unaltered even after the profession opened its doors to women and other historically disenfranchised groups.<sup>24</sup> And contrary to many other professions, the expectation of how lawyers should communicate to achieve leadership roles in the workplace and successful outcomes for their

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19. Liebenberg & Scharf, *supra* note 12, at 8; Bambauer & Rahman, *supra* note 18, at 816–17.

20. In 2019, 50 percent of women attorneys still reported that they were subject to sexual harassment in the workplace. Sterling & Chanow, *supra* note 12, at 9.

21. See *supra* note 18; see also Joan C. Williams et al., *YOU CAN'T CHANGE WHAT YOU CAN'T SEE, Interrupting Racial & Gender Bias in the Legal Profession*, AM. BAR ASS'N COMM'N WOMEN PROF. (2018), <https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf> [<https://perma.cc/5JZG-R6Z5>]; Afsharipour, *supra* note 16.

22. Naznin Tabassum & Bhabani Shankar Nayak, *Gender Stereotypes and Their Impact on Women's Career Progressions from a Managerial Perspective*, 10 IIM KOZHIKODE SOC'Y & MGMT. REV. 192, 193 (2021).

23. Michele N. Struffolino, *Lessons Learned from the Ignored, Silenced, and Interrupted: The Time Is Right for Women to Take the Lead and Model Essential Lawyering Skills*, 89 UMKC L. REV. 325, 335 (2020).

24. "Legal language is . . . the quintessential master's tool in that it is a language traditional accessible only to the wealthy and powerful and notorious for its conservatism and imperviousness to ideas that challenge its basic assumptions." Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. R. 387, 388 (2020), <https://digital.sandiego.edu/sdlr/vol39/iss2/4> [<https://perma.cc/V3ZR-FGX4>].

clients, is extraordinarily stylized and rigid.<sup>25</sup> Arguably, the language of the law embodies the “practice” of language that appeals to the individuals who originally designed it and who still, in large measure, control it.<sup>26</sup> Indeed, given that language is a product of culture, many feminist legal scholars have argued that legal discourse is “gendered, and that gender matches the male gender of its linguistic architects.”<sup>27</sup>

Relying heavily on sociolinguistic (language and society) studies, this Article makes the case that the legal profession’s obedience to stereotypical masculine language practices significantly contributes to implicit gender bias. A large body of sociolinguistic scholarship dating back to the 1970s has found that men and women exhibit subtle but significant lexical differences in the way that they speak and write.<sup>28</sup> Though these differences are arguably linked equally, if not more, to issues of power, socialization, and cultural expectations than to biology, the differences still operate to erect barriers to success for professional women—particularly in a male-dominated profession such as the law.<sup>29</sup> Further, soci-

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25. *Id.* at 398.

26. “Throughout the history of Anglo-American jurisprudence, the primary linguists of law have almost exclusively been men—white, educated, and economically privileged men. Men have shaped it, they have defined it, they have interpreted it and given it meaning consistent with their understandings of the world and of people ‘other’ than them. As the men of law have defined law in their own image, law has excluded or marginalized the voices and meanings of these ‘others.’” Lucinda M. Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 892 (1989), [https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1193&context=journal\\_articles](https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1193&context=journal_articles) [<https://perma.cc/K6V6-S3WY>].

27. *Id.* at 892–94.

28. *See infra* Part III.

29. Some researchers have theorized that lexical differences can be attributed to differences in brain development between men and women, ANNE MOIR & DAVID JESSEL, *BRAIN SEX: THE REAL DIFFERENCE BETWEEN MEN AND WOMEN* 137 (Mandarin Paperbacks, 1991) (arguing that differences in physiological brain development results in language differences between the sexes). Yet, the current scholarship, as a whole, views such lexical differences as being associated with a combination of gender, gender performance, and other outside influences. *See e.g.*, Frankie J. Weinberg et al., *Gendered Communication and Career Outcomes: A Construct Validation and Prediction of Hierarchical Advancement and Non-Hierarchical Rewards*, 46 COMM’N RSCH. 456, 459 (June 2019) (agreeing with post structural communication theorists, that “the important distinction is not one of male and female, per se, so much as their respective performances of gendered language.”); Mats Deutschmann & Anders Steinvall, *Combating Linguistic Stereotyping and Prejudice by Evoking Stereotypes*, 6 OPEN LINGUISTICS, 651–71 (Nov. 2020), <https://www.degruyter.com/document/doi/10.1515/opli-2020-0036/html?lang=en> [<https://perma.cc/3LKF-EFCG>] (arguing that “[v]arious

olinguistic and management theory scholarship demonstrates that women who are professionals regularly encounter bias based upon stereotypes of what their communication style should be—creating untenable situations in which women must make strategic and often no-win decisions about how to perform language.<sup>30</sup>

Part I of this Article reviews the studies and statistical data indicating that women in the legal profession lag behind their male counterparts in traditional indicators of success. Part II discusses the role that implicit bias may play in preventing women from achieving parity in legal employment. Part III addresses the sociolinguistic studies documenting gendered differences in communications styles as well as the feminist theories that suggest why women experience barriers to success based upon these differences. Part IV examines the social science literature documenting how women are penalized for their communication style in the workplace and courtroom. Part V charts the “linguistic minefield”—how women conform their language practices to the masculine norm and suffer the penalizing consequences of such accommodation. Finally, Part VI discusses the individual and organizational repercussions of communication bias. It also suggests how interdisciplinary partnerships could go beyond traditional implicit bias training to help law schools and legal employers craft a targeted response to address gendered communication bias in the profession.

## I. WOMEN’S STRUGGLE TO ACHIEVE PARITY IN THE LEGAL PROFESSION

Legal employment’s struggle to achieve equity in the compensation, promotion, and retainment of female attorneys is stubbornly unyielding. Despite women making up more than 50 percent of law students for the past six years, and for decades prior having made up almost half of all law students, they have yet to achieve equity in status or pay in the profession.<sup>31</sup> With only approximately 37

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intersecting factors, such as the influence of other identity variables, context and power, may be far more important causal influences in language performance and perception” than gender alone).

30. See Judith Baxter, *Resolving a gender and language problem in women’s leadership: consultancy research in workplace discourse*, 11 DISCOURSE & COMMUN 141, 142 (Mar. 15, 2017).

31. See e.g., Destiny Peery, *2020 Survey Report on the Promotion and Retention of Women in Law Firms*, NAT. ASS’N WOMAN LAWYERS (2020); Sterling & Chanow, *supra* note 12. Although this article groups women together as a whole, it is important to note that women of color face even greater hurdles than white women with respect to equity in status, participation, and pay.

percent of the profession comprising women, the legal profession continues to be one of the least diverse in the nation.<sup>32</sup>

According to 2020 data, although women are hired into law firms at almost an equal rate as men—47 percent of associates are women—women make up only 31 percent of nonequity partners and 21 percent of equity partners.<sup>33</sup> In terms of law firm committees, women make up 28 percent of governance committees and 29 percent of compensation committees.<sup>34</sup> Only 19 percent are firm wide managing partners.<sup>35</sup> Law firms have had difficulty budging these numbers: these statistics are a “near exact replication” from the findings of NAWL from 2017 to 2019.<sup>36</sup>

Only 34 percent of state court judges are women,<sup>37</sup> while approximately 28 percent of all federal court judges are women.<sup>38</sup>

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32. See *Share of lawyers in the United States from 2020 to 2022, by gender* STATISTA (Jan. 2023), <https://www.statista.com/statistics/1086790/share-lawyers-united-states-gender/#:~:text=In%202020%2C%2037.4%20percent%20of,by%20New%20York%20and%20Florida> [<https://perma.cc/RCE2-HU4E>]; Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, AM. BAR. ASS'N (May 2, 2018), <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives> [<https://perma.cc/GN88-B3MP>]. “Women’s representation among lawyers is lower than their representation among financial managers (55.2%), accountants and auditors (60.6%), biological scientists (47.5%), and post-secondary teachers (49.0%); and significantly lower than their representation within the management and professional workforce as a whole (51.5%).” Maria D. Suarez & Demetria Themistocles, *IILP Review 2019–2020: The State of Diversity and Inclusion in the Legal Profession*, IILP REV. 13, 15 (2019), [https://www.theiilp.com/resources/Documents/IILP\\_2019\\_FINAL\\_web.pdf](https://www.theiilp.com/resources/Documents/IILP_2019_FINAL_web.pdf) [<https://perma.cc/9T9A-NC9M>].

33. See Peery, *supra* note 31, at 5. The statistics are far worse for women of color. In 2019, women of color made up just 4 percent of non-equity partners and 3 percent of equity partners. Breaking in down even further, only 0.9 percent of all law firm partners are African American women, only 1 percent are Hispanic/Latinx women, and only 1.8 percent are Asian American women. See LAW FIRM DIVERSITY SURVEY 2021, MCCA (last accessed Mar. 25, 2023), <https://mcca.com/wp-content/uploads/2021/12/2021-MCCA-Law-Firm-Diversity-Survey-Report.pdf> [<https://perma.cc/2BKY-3TGH>].

34. See Peery, *supra* note 31, at 9.

35. *Id.*

36. *Id.* at 10.

37. Forster-Long LLC, *2022 US State Court Women Judges*, AM. BENCH (Feb. 23, 2023, 3:08 PM), <https://www.nawj.org/statistics> [<https://perma.cc/7LXT-UA4V>].

38. *Profile of the Legal Profession 2021*, AM. BAR ASS'N 7, <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf> [<https://perma.cc/2GYA-ELGN>]; Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. AM. PROG. (Oct. 3, 2019), <https://americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary> [<https://perma.cc/CQP8-RYCD>]; Alaina

Women make up 29 percent of general counsel positions at corporate 1000 companies.<sup>39</sup> Further, women are far less likely than men to be chosen as first chairs at trial<sup>40</sup> or as leads on corporate deals.<sup>41</sup> They are significantly less likely to appear before the U.S. Supreme Court; to be afforded the opportunity to do so, they must be much more experienced and accomplished than their male counterparts.<sup>42</sup>

In academia, women make up 38 percent of law school faculty (excluding legal writing and clinical professors, who generally have lower status and pay and are predominantly female),<sup>43</sup> and 32 percent of law school deans.<sup>44</sup> Scholarship, one of the primary ways in which law school faculty is evaluated for promotion, is also infected with inequity.<sup>45</sup> The most recent study of law review publications found that “flagship law reviews for the top twenty schools did not

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Purvis, *Women in the Legal Profession: How Gender Barriers and Attrition Are Keeping Women Out of the Judiciary*, 43 J. LEGAL PROF. 283, 286–87 (2018–2019).

39. 2020 MCCA Fortune 1000 GC Survey, MCCA 3, <https://www.mcca.com/wp-content/uploads/2021/08/2020-MCCA-Fortune-1000-GC-Survey.pdf> [<https://perma.cc/SJ53-AXR3>].

40. See *supra* note 16.

41. See *supra* note 17. This study found that for the largest 100 deals in terms of dollar value upon announcement over the seven years between 2014 and 2020, twenty-four women were named as lead counsel on the buyer side out of 243 lead counsel, comprising on average 10.1 percent of lead counsel roles. On the target side, thirty-three women were named as lead counsel out of 263 lead counsel, comprising on average 12.43 percent of lead counsel positions in the top 100. *Id.* at 25.

42. Jonathan S. Hack & Clinton M. Jenkins, *The Attorneys’ Gender: Exploring Counsel Success Before the U.S. Supreme Court*, 75 POL. RSCH. Q. 632, 638, 642 (June 1, 2021). The percentage of women arguing in a year before the U.S. Supreme Court at its highest, has never been above 25 percent. Notably, however, “the number of unique appearances for women attorneys—in any given year—never reaches beyond twenty-nine, indicating that the women who argue before the Court are limited to a small cadre of repeat attorneys.” *Id.* at 7.

43. Robert Kuehn, *Shifting Law School Faculty Demographics*, BEST PRACTICES FOR LEGAL EDUC. (Jan. 5, 2022), <https://bestpracticeslegaled.com/2022/01/05/clinical-legal-education-by-the-numbers> [<https://perma.cc/9NEU-7JG9>] (citing 2020 ABA LAW SCHOOL ANNUAL REPORTS (last visited Feb. 23, 2023), <https://www.abarequireddisclosures.org/Disclosure509.aspx> [<https://perma.cc/5Q7C-N73L>]) (noting that although “schools are hiring increasingly more female faculty, women continue to be disproportionately hired into traditionally lower status/lower paying clinical and legal writing positions”).

44. Kristen K. Tiscione, *Gender Inequity Throughout the Legal Academy: A Quick Look at the (Surprisingly Limited) Data*, 69 J. LEGAL EDUC. 116, 116–19 (2019) (noting that there is limited data on the demographics of female law professors and pay, which makes “raising awareness about and making progress on gender equity issues . . .” difficult).

45. Pant, *supra* note 17.

publish men and women at equal rates during the 2013–14, 2014–15, 2015–16, 2016–17, and 2017–18 journal cycle years.”<sup>46</sup> During those years, journals published “2074 articles authors in total and of those, 1414 (68.17 percent) were men and 660 (31.82 percent) were women.”<sup>47</sup>

In terms of pay equity, in its 2021 Profile of the Legal Profession, the American Bar Association (ABA) reported that “average compensation for female equity partners was 85% of average compensation for men.”<sup>48</sup> The most recent survey released by Major, Lindsey & Africa, a global legal recruitment firm, indicated that male partners make on average 44 percent more than female partners.<sup>49</sup> Similarly, a 2020 study of solo lawyers and small firms by Martindale-Avvo, a legal advertising service, found that women partners made 35 percent less income than their male counterparts.<sup>50</sup> Further, “ninety-three percent of firms report that their highest compensated partner is a man and of the ten top earners in the firm, either one or none is a woman.”<sup>51</sup>

In academia, the pay disparity is equally distressing. In a recent study—the first of its kind to examine the gender pay gap in the legal academy—the authors found that tenured “women of color and white women earned less than \$24,000 and nearly \$14,000 less than [tenured] white men, respectively.”<sup>52</sup> Further, this study found that “law schools give non-financial perks and salary increases at higher rates to faculty members who are men than their peers of the opposite gender, even accounting for tenured status and faculty rank.”<sup>53</sup>

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46. *Id.*

47. *Id.*

48. AM. BAR ASS'N, *supra* note 38.

49. Jeffrey Lowe, *2020 Partner Compensation Survey*, MAJOR, LINDSEY, AND AFRICA 10 (last accessed Mar. 25, 2023), <https://www.mlaglobal.com/en/insights/research/2020-partner-compensation-report> [<https://perma.cc/4VUL-W97J>].

50. *2020 Attorney Compensation Report*, MARTINDALE AVVO 4 (last accessed Mar. 25, 2023), [https://www.martindale-avvo.com/wp-content/uploads/Attorney-Compensation-Report.Final\\_.pdf](https://www.martindale-avvo.com/wp-content/uploads/Attorney-Compensation-Report.Final_.pdf) [<https://perma.cc/V9KA-BYUX>].

51. Liebenberg & Scharf, *supra* note 12, at 1.

52. Christopher J. Ryan, Jr. & Megan Dawe, *Mind the Gap: Gender Pay Disparities in the Legal Academy*, 34 GEO. J. LEGAL ETHICS 567, 598 (2021), <https://www.law.georgetown.edu/legal-ethics-journal/wp-content/uploads/sites/24/2022/08/GT-GJLE210028.pdf> [<https://perma.cc/5X79-HYUS>] (finding also that “both white women and women of color have lower odds of earning a salary at or exceeding \$150,000 than white men [and that] [t]hese odds are especially low for women of color, who were more than seventy-five percent less likely to earn salaries at or above \$150,000 than white men.”).

53. *Id.* at 592.

Although one may imagine that it is just a matter of time before women achieve equal pay and status in legal employment, (especially considering that law was one of the last professions to admit women),<sup>54</sup> current projections indicate that parity will not be achieved until 2181.<sup>55</sup> Further hindering that possibility, women who have achieved relatively high positions of power within the profession are deciding to walk out in droves.<sup>56</sup> In fact, the attrition level of experienced female attorneys is twice the rate of men in private law practice.<sup>57</sup> Further, studies show that 30 percent of female lawyers during the prime career building ages of thirty-five to forty are underemployed (working twenty hours or less per week) or unemployed.<sup>58</sup>

## II. THE ROLE OF IMPLICIT GENDER BIAS

Some researchers have posited that the lack of gender parity in legal employment is mostly traceable to women's personal decisions to divest in their careers.<sup>59</sup> The theory posits that women structure their careers around raising their children and taking care of households, resulting in productivity discrepancies that lead to lower pay and attrition.<sup>60</sup> While certainly self-selection causes some women to leave their careers or to work less to fulfill other responsibilities, this is not a complete explanation.<sup>61</sup>

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54. Women made up only 4 percent of the legal profession in 1970 (11,000) and only 21 percent in 1991. As late as 1983, 65 percent of male attorneys had no female colleagues. *A Short History of Women in the Law*, LAW CROSSING (May 21, 2013), <https://www.lawcrossing.com/article/900014530/A-Short-History-of-Women-in-the-Law> [<https://perma.cc/3929-L2NB>] (“[l]aw was the last profession to admit women in more than token numbers”).

55. Sterling & Chanow, *supra* note 12, at 2–3.

56. See Bambauer & Rahman, *supra* note 18, at 807–08; Maryam Ahranjani, “Toughen Up, Buttercup” Versus #Timesup: Initial Findings of the ABA Women in Criminal Justice Task Force, 25 BERKELEY J. CRIM. L. 99, 113 (2020), [https://digitalrepository.unm.edu/law\\_facultyscholarship/828](https://digitalrepository.unm.edu/law_facultyscholarship/828) [<https://perma.cc/2YXD-DS47>] (examining data on attrition and experiences of women in criminal law through listening sessions); *Why Women Leave the Profession*, AM. BAR ASS'N (Dec. 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/aba-summit-searches-for-solutions-to-ensure-career-longevity-for> [<https://perma.cc/AFQ5-QQES>].

57. Sterling & Chanow, *supra* note 12, at 3.

58. See Bambauer & Rahman, *supra* note 18, at 807.

59. See *id.* at 802–06.

60. See *id.*

61. See *id.* at 814–15 (noting that “regressions with controls for time spent child-rearing cannot disprove the influence of discrimination on female careers, even if women often do spend less time working”).

Legal employment surveys and studies are reaching a consensus that the high level of dissatisfaction of female lawyers cannot be adequately explained by looking purely at work-life balance or caretaker responsibilities. The ABA's 2019 report entitled "WALKING OUT THE DOOR," which surveyed women who had worked fifteen years or more at the nation's largest 500 law firms, found that women reported relatively the same level of satisfaction as men on issues like intellectual challenge, levels of responsibility, opportunities for building skills, and balance between personal life and work.<sup>62</sup> Instead, the main discrepancies were seen in satisfaction surrounding recognition for their work, the methods by which compensation is determined, opportunities for advancement, firm leadership, and firm performance evaluation processes.<sup>63</sup> Further, women were substantially more likely to report that because of their gender, they had experienced a lack of access to business development opportunities, had been perceived as less committed to their careers, and had been overlooked for advancement or promotion.<sup>64</sup> Though women's home and childcare responsibilities are an impactful consideration, as the ABA itself contemplates, these specific findings point to something less concrete and more pervasive impacting women in their legal careers: implicit gender bias.<sup>65</sup>

In the past ten years, legal employers have made genuine efforts to eradicate open and obvious sex and gender-based discrimination and harassment in the workplace through antidiscrimination policies and initiatives. Though these overt forms of discrimination have arguably decreased, what remains may be harder to see and combat. Second-generation bias, or implicit bias, involves a complex system of attitudes, prejudices, and stereotypes that underlie human thinking and behavior and that are activated without "intention, deliberation, awareness, or effort."<sup>66</sup> Indeed, the unconscious nature of implicit bias can make it extraordinarily difficult to pinpoint as the specific cause of any particular decision. Yet

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62. See Liebenberg & Scharf, *supra* note 12, at 4.

63. *Id.* at 5–6.

64. *Id.* at 8.

65. See *id.* at 9; AM. BAR ASS'N, *supra* note 38, at 34; Sterling & Chanow, *supra* note 12, at 2; Peery, *supra* note 31; Hersch & Meyers, *supra* note 18, at 934–35 ("Given the lack of explanatory power that the pay gap and satisfaction with work/life balance provide, unconscious bias may be the most likely of the three explanations set forth by the ABA. This explanation also aligns with media reports, lawsuits, and surveys alleging mistreatment of women.").

66. John T. Jost, et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RSCH. ORG. BEHAVIOR 39, 43 (Nov. 8, 2009).

these unconscious cognitive processes can prevent individuals from objectively evaluating and reacting to an individual's performance.<sup>67</sup> For example, because men have traditionally filled the roles of leaders, people will seek out or interpret information that confirms that men have the qualities to fulfill these leadership roles.<sup>68</sup> Bias can also cause individuals to overestimate the abilities of the in-group and to fear or have negative stereotypes about outsiders.<sup>69</sup> Again, where men have traditionally filled certain roles, implicit bias can lead to favoritism towards that group, resulting in better coaching, more favorable reviews, or more opportunities for advancement.<sup>70</sup>

The sources of implicit bias are varied and seemingly endless. Bias can manifest in reaction to almost any quality or attribute that is different from the norm of a particular community or that reinforces existing stereotypes.<sup>71</sup> Gender bias, or the tendency to prefer one gender over another, can be directed at a myriad of traits and characteristics attributable to gender, including stereotypes about societal roles, sexuality, behavior, dress, language, and communication style.<sup>72</sup>

In the workplace, gender bias arises due to barriers existing within "workplace structures, practices, and patterns of interaction that inadvertently favor men."<sup>73</sup> Many of these subtle and invisible barriers "are supported by gender norms and practices entrenched within the institution."<sup>74</sup> And while there has been a plethora of research directed at gender bias in the workplace from the "organization, management, political, psychological, and sociological perspectives, there is relatively little scholarship from a sociolinguistic ('language in society') perspective."<sup>75</sup>

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67. *Id.* at 43.

68. Latonia Haney Keith, *Visible Invisibility: Feedback Bias in the Legal Profession*, 23 J. GENDER RACE & JUST. 315, 333–34 (2020).

69. *Id.* at 335.

70. *Id.*

71. *Id.* at 327–30.

72. Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 9–13 (2010), <https://scholarship.law.duke.edu/djglp/vol18/iss1/1> [<https://perma.cc/5YQU-CW69>].

73. Amy B. Diehl & Leanne M. Dzubinski, *Making the Invisible Visible: A Cross-Sector Analysis of Gender-Based Leadership Barriers*, 27 HUM. RES. DEV. Q. 181, 183 (2016).

74. *Id.*

75. Judith Baxter, *Sociolinguistic Approaches to Gender and Leadership Theory*, HANDBOOK OF RSCH. ON GENDER AND LEADERSHIP 113, 113 (Susan R. Madsen, ed. 2017), <http://www.e-elgar.com/shop/handbook-of-research-on-gender-and-leadership> [<https://perma.cc/7P8K-878A>].

### III. DECADES OF LINGUISTICAL STUDIES HAVE CHARTED THE DIFFERENCES IN COMMUNICATION STYLES BETWEEN MEN AND WOMEN

The possibility that bias manifests based upon gendered communication style is rooted in the work of linguists who, in the early 1970s, began documenting lexical differences in communication between the sexes. Linguists define gendered communication style as a “propensity toward gendered ways of talking, using language, and orienting to human relationships” that “shapes interactional tendencies” in a specific context.<sup>76</sup> Importantly, when discussing the studies that have found lexical differences between men and women, the more accurate description “is not one of male and female, per se, so much as their respective performances of gendered language.”<sup>77</sup>

In 1975, linguist, Robin Lakoff, in her groundbreaking work, *Language and Women's Place*, helped establish the intersection of linguistics and gender as an essential field of study.<sup>78</sup> Lakoff was the first to document gender linked linguistic differences.<sup>79</sup> Controversially, she was also the first to argue that society devalues women's linguistic practices, resulting in a lack of access to positions of power in society.<sup>80</sup> This theory, known as the “dominance theory,” triggered an avalanche of linguistic research examining the existence and ideological effects of differences in oral and written communication styles linked to gender.<sup>81</sup>

Scholars have hotly debated the reasons behind the findings of gendered communication differences. Recent scholarship has suggested that the gendered differences highlighted in the linguistic studies may be wholly or partially explained by factors such as socialization, cultural expectations, and power, “which may just happen to correlate and interact with gender.”<sup>82</sup> Indeed, the underlying reasons as to why the findings discussed below indicate that women, overall, use language differently from men are beyond the scope of this Article. Thus, while these studies and this Article refer to differences that are linked to “women's” styles and “men's” styles

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76. Weinberg, et al., *supra* note 29.

77. *Id.*

78. Robin Lakoff, *Language and Woman's Place*, 2 LANGUAGE IN SOC'Y 45 (Apr. 1973) [https://web.stanford.edu/class/linguist156/Lakoff\\_1973.pdf](https://web.stanford.edu/class/linguist156/Lakoff_1973.pdf) [<https://perma.cc/6R9M-WX26>].

79. *Id.*

80. Mary Bucholtz, THE HANDBOOK OF LANGUAGE, GENDER, SEXUALITY 22, 29 (Susan Ehrlich et al., 2nd ed. 2014).

81. *Id.* at 26–27.

82. Deutschmann & Steinvall, *supra* note 29.

of communication, this is in no means meant to essentialize those groups or to propose that these differences are biological, inherent, or unchanging. Indeed, on an individual level, a person may communicate anywhere along the spectrum of “male” to “female” linguistic style.<sup>83</sup> Ultimately, the results of these studies may be best used to understand the stereotypical norms of feminine and masculine communication style that can form the underpinnings of communication bias.

#### A. *Gendered Oral Communication*

After decades of studying communicative speech styles, findings have been generally consistent that “language encodes gender in very subtle ways” through speech patterns and technical usage.<sup>84</sup> On the whole, and in general, “women’s speech” has been characterized as more affiliative, while men’s, more direct and assertive.<sup>85</sup> Affiliative speech uses verbal cues that affirm the speakers connection to the listener, such as praise, reflective comments, probing questions, and displays of support.<sup>86</sup> Assertive speech uses verbal cues to influence the listener, such as descriptive statements or explanations, disagreement, and task oriented speech.<sup>87</sup>

Studies involving the analysis of large data sets have found that women are more likely than men to use hedges (“I guess that,” “it seems like”) and tag questions (“ . . . aren’t you?”) in order to facilitate conversation.<sup>88</sup> They are more likely to structure their

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83. *Id.* “It is very difficult to predict or assess a particular individual’s traits and behavior at a particular time based on simplistic identity categorization . . . it is more accurate to see gender and language as a ‘continuous construction of a range of masculine and feminine [and other] identities within and across individuals of the same biological sex.’”

84. See Jennifer J. Jones, *Talk “Like a Man”: The Linguistic Styles of Hillary Clinton, 1992–2013*, 14 *PERSPECTIVES ON POL.* 625, 630 (Sep. 2016), <https://web.stanford.edu/~eckert/Courses/11562018/Readings/Jones2017> [<https://perma.cc/9SFW-SL6Q>].

85. Campbell Leaper & Melanie M. Ayres, *A Meta-Analytical Review of Gender Variations in Adults’ Language Use: Talkativeness, Affiliative Speech, and Assertive Speech*, 11 *PERSONALITY & SOC. PSYCH. REV.* 328, 333–34 (2007) (finding that women used significantly more affiliative speech and men used significantly more assertive speech).

86. *Id.* at 333.

87. *Id.* at 334.

88. Janet Holmes, *Hedges and Boosters in Women’s and Men’s Speech*, 10 *LANGUAGE & COMM’N* 185, 195–96 (1990). Facilitative language allows the addressee to more easily and naturally contribute to the conversation. *Id.* at 196. In contrast, men are more likely to use tag questions and hedges to express uncertainty or seek confirmation. *Id.* See also Matthew L. Newman et al., *Gender Differences in Language Use: An Analysis of 14,000 Text Samples*, 45 *DISCOURSE PROCESSES* 211, 230, 232 (2008), <https://www.joycerain.com/>

sentences in the declarative form (imparting information) or interrogatory form (asking a question).<sup>89</sup> Men are more likely to employ imperative sentences (issuing commands or directives).<sup>90</sup> Men also tend to use more direct verbs, while women use conditional verbs (constructions that include auxiliary verbs such as may/might, can/could, will/would).<sup>91</sup> Men also generally lack the indicators of hyper-politeness, such as “please,” “excuse me,” “okay,” “would you mind,” and “thank you.”<sup>92</sup> Indeed, historically, studies have confirmed that women are more polite than men.<sup>93</sup>

Researchers have found that women tend to use pronouns (especially first-person singular pronouns) more frequently than men.<sup>94</sup> “Men tend to use nouns, big words (words greater than six letters), articles, prepositions, anger, and swear words more frequently than women.”<sup>95</sup> Women use emotional words (“brave,” “cried,” “relief,” “safe”) and cognitive words (“because,” “believe,” “result,” “think”) more frequently than men.<sup>96</sup>

In their professional interactions, women tend to have a more “facilitative, personal style” while men employ a more “assertive, authoritative style.”<sup>97</sup> As such, men tend to use more interactional

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uploads/2/3/2/0/23207256/gender\_differences\_in\_language\_use.pdf [<https://perma.cc/VYV2-XQB8>] (finding women were more likely to use the hedge, “I guess,” as an indicator of politeness or as a reluctance to force their views onto others). In one study of an online discussion board for a psychology class where women outnumbered men 3 to 1, the researchers found that women were more likely to use hedges and express agreement, whereas men were more likely to express disagreement and use authoritative language. See J. Guiller & A. Durndell, “*I Totally Agree with You*”: *Gender Interactions in Educational Online Discussion Groups*, 22 J. COMPUT. ASSISTED LEARNING 368 (May 4, 2006).

89. Euodia Inge Gavenila et al., *Directive Forms Expressed by Male and Female Respondents in Different Situational Contexts*, 10 HUMANIORA 35, 40 (Mar. 2019).

90. *Id.*; see also Leaper, *supra*, note 85, at 352.

91. See Jones, *supra* note 84, at 630.

92. Faye Crosby & Linda Nyquist, *The Female Register: An Empirical Study of Lakoff's Hypotheses*, 6 LANGUAGE SOC. 313, 313–15, 317 (1977), <https://www.jstor.org/stable/4166942> [<https://perma.cc/QWV5-97HV>].

93. See JENNIFER COATES, MEN, WOMEN AND LANGUAGE, A SOCIOLINGUISTIC ACCOUNT OF GENDER DIFFERENCES IN LANGUAGE 120–22 (Geoffrey Leech & Mick Short eds., 3d ed. 2004); see generally, JANET HOLMES, MEN, WOMEN AND POLITENESS (Routledge 1995); Newman *supra* note 88, at 232.

94. Newman, *supra* note 88, at 232.

95. *Id.* at 229.

96. *Id.*

97. Sheri Kendall & Deborah Tannen, *Gender and Language in the Workplace*, GENDER AND DISCOURSE 80, 84 (Ruth Wodak ed., 1997), <https://time.com/wp-content/uploads/2017/06/d3375-genderandlanguageintheworkplace.pdf> [<https://perma.cc/WGJ9-DRG3>].

“strategies that appeal to authority and maintain status distinctions, such as appealing to objectivity instead of personal experience and giving direct commands.”<sup>98</sup> Women tend to use more engaging interactional strategies that work to minimize status differences and encourage cooperation, such as “backchannelling, adding to others’ comments to shift topics, and using modal constructions (‘You must have realized this was incorrect.’) rather than imperatives (‘This is incorrect.’).”<sup>99</sup>

Linguists have also extensively studied gendered differences in volubility in mixed-sex group settings finding that women are more comfortable talking when the structure is “collaborative,” “synergistic,” and “solidarity building,” while men are more comfortable in situations that call for “instrumental skills” and “competence at a task.”<sup>100</sup> Overwhelmingly, studies have found that when a group is given a formal task to perform (e.g., meetings where participants are asked to solve problems or come to decisions), women speak notably less than men.<sup>101</sup> In casual mixed-sex group settings, however, when there is no defined task (e.g., meetings where individuals are reporting, managing the agenda, or soliciting responses), studies have found no differences in talking time between men and women.<sup>102</sup>

Finally, across research methods and environments, findings are consistent that women are interrupted more than men.<sup>103</sup>

98. *Id.*

99. *Id.*

100. *Id.*

101. Deborah James & Janice Drakich, *Understanding Gender Differences in Amount of Talking Time: A Critical Review of Research*, GENDER AND CONVERSATIONAL INTERACTION 281, 289 (D. Tannen ed., 1993); Victoria L. Brescoll, *Who Takes the Floor and Why: Gender, Power, and Volubility in Organizations*, 56 ADMIN. SCI. Q., 622 (2011). Even in the context of online conferences, where interaction was only permitted through the chat feature, men took up more time and space during the sessions. See Shoshana N Jarvis et al.,

*Do Virtual Environments Close the Gender Gap in Participation in Question-and-Answer*

*Sessions at Academic Conferences? In Search of Moderation by Conference Format* (May 16, 2022) (preprinted manuscript), psyarxiv.com/hkba6 [https://perma.cc/WT6S-HJ5C].

102. James, *supra* note 101, at 230.

103. One recent study looking at interactions in business meetings at a tech company found that 60 percent of interruptions were made by men. Kieran Snyder, *How to Get Ahead as a Woman in Tech: Interrupt Men*, SLATE MAG. (July 23, 2014), https://slate.com/human-interest/2014/07/study-men-interrupt-women-more-in-tech-workplaces-but-high-ranking-women-learn-to-interrupt.html [https://perma.cc/44GP-HB4W] (in fact, men were three times more likely to interrupt women than to interrupt other men); see also Shari Kendall,

Though these interruptions may be partially the result of simple power dynamics, some linguists have linked the tendency of men to interrupt women at increased rates to the “mismatch” of interactional styles between men and women.<sup>104</sup> Under this theory, women are disadvantaged because men approach discussions through an oppositional format and women approach discussions in a way that seeks to maintain equality—resulting in men dominating the conversation through interruptions.<sup>105</sup> Interruptions have the effect of silencing speakers.<sup>106</sup> Once an individual has been interrupted, she is more likely to remain silent longer than someone who was not interrupted.<sup>107</sup>

### B. *Gendered Written Communication*

Girls and women, through their secondary and post-secondary academic careers, are objectively judged to be stronger writers than boys and men. This is borne out through standardized testing. For example, National Association of Educational Progress (NAEP) writing assessment results from 1988 to 2015 showed that females perform better “across time and from middle school (eighth grade) to high school (twelfth grade).”<sup>108</sup> On standardized tests for graduate education, women score better on both direct and indirect measures of writing skills.<sup>109</sup> In fact, the addition of the

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*supra* note 97, at 83 (noting that studies on workplace interruptions indicate that men interrupt women more than women interrupt men); *see also* Arin N. Reeves, *Mansplaining, Maninterrupting & Bropropriating: Gender Bias and the Pervasive Interruption of Women*, YELLOW PAPER SERIES (2015), <https://research.umich.edu/wp-content/uploads/2021/12/maninterruptions-bropropriation-and-mansplaining-2-yellow-paper-series.pdf> [<https://perma.cc/R8L2-PPH5>] (finding that in business meetings, approximately 68 percent of interruptions were by men and 32 percent were by women).

104. *See* Kendall, *supra* note 97, at 85.

105. *Id.*

106. COATES, *supra* note 93.

107. *Id.*

108. NAEP data establishes that women outperform men on the writing portions of group and individually administered standardized testing. NAEP writing assessment results from 1988 to 2015 showed these group differences to persist at medium effect sizes across time and from middle school (8th grade) to high school (12th grade). Mo Zhang et al., *Are There Gender Differences in How Students Write Their Essays?* 38 EDUC. MEASUREMENT ISSUES & PRAC. 14, 15 (2019).

109. Ryan K. Boettger & Stefanie Wulff, *Gender Effects in Student Technical and Scientific Writing – A Corpus-Based Study*, 62 IEEE TRANSACTIONS ON PROF. COMM’N 239, 241 (June 2019). Direct testing measurements are those that require “authentic” assessment approaches, such as essay writing, while indirect testing measurements are those that assess knowledge without authentic application, such as multiple choice or sentence reordering. *See*

writing assessments in these higher education standardized tests “often balances the gender ratio of high performers, in which there are, otherwise, more men scoring in the top percentile.”<sup>110</sup> There is some evidence, however, that the test designs for writing skills favor women and, therefore, “underestimate the true performance of males (particularly at an early age).”<sup>111</sup> This may be due to the fact that adolescent boys are “often considered analytical writers or writers of plot-driven narratives, while girls are associated with the emotive descriptions common to the approved “literary canon” promoted in most English classrooms.”<sup>112</sup>

Many of the original studies on writing styles examined fictional or personal letter writing and found gendered differences in choice of topic and word choice.<sup>113</sup> The extent to which gender is encoded in professional writing or in the writing of students studying within a professional field is less clear and has resulted in mixed findings.<sup>114</sup> In many of the studies finding no measurable differences, it was “hypothesized that males and females practice similar linguistic behaviors in the workplace but then adjust these behaviors in other contexts.”<sup>115</sup> Indeed, there is some support for the notion that students’ training in professional writing eviscerates any gendered differences and creates a “genderless” writing style.<sup>116</sup>

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Thomas Darrin, *Direct and Indirect Test Items*, *EDU. RSCH. TECHNIQUES* (Sept. 2, 2015), <https://educationalresearchtechniques.com/2015/09/02/direct-and-indirect-test-items/> [<https://perma.cc/2TC5-GHSV>].

110. *Id.*

111. *Id.*

112. *Id.*

113. Shlomo Argamon et al., *Gender, Genre, and Writing Style in Formal Written Texts*, *TEXT & TALK: INTERDISC. J. STUDY DISCOURSE* 321–46 (Dec. 2003).

114. See Newman, *supra* note 88, at 230. See also Boettger, *supra* note 109, at 240. Boettger and Wulff argue many of the inconsistencies in results of prior gendered linguistic studies are attributable to the metric of language study: most studies prior to 2000 had been coded by hand and involved small samples with limited amounts of data. *Id.* at 240. Researchers would typically base their studies on limited observations, self-reporting questionnaires and surveys, or relatively small samples of written or transcribed texts. *Id.* at 240. The advent of digitized content, however, has changed the playing field for linguists studying the gendered effects of language use. *Id.* at 243. Corpus linguistics is the study of language that uses computer-assisted technology to facilitate large-scale empirical analysis through digitized collections of transcribed or written texts taken from a natural setting (as opposed to surveys, interviews, or observation). *Id.* Corpus linguistics allows researchers to study huge samples of writings or oral communications allowing for much greater statistical certainty, consistency, and objectivity in the results. See *id.*

115. Boettger, *supra* note 109, at 241.

116. See Elizabeth Tebeoux, *Toward and Understanding of Gender Differences in Written Business Communications: A Suggested Perspective for*

Despite these findings, however, more recent corpus data studies of professional writing texts have found a correlation between gender and the use of certain strategies for setting out information.<sup>117</sup> Unsurprisingly, the results of these large data studies mirror many of the findings of the oral communication linguistic studies. These studies have found that in general, when engaging in professional writing, men tend to convey information in a more direct, impersonal style while women tend to employ strategies that personalize their writing with the attempt to involve their reader.<sup>118</sup>

In particular, these studies have found a significant difference in pronoun usage between men and women writers.<sup>119</sup> Women tend to use more personal pronouns while men use more generic pronouns.<sup>120</sup> Specifically, the pronouns, “I,” and “you,” are used more by females, while males use the pronoun, “it” more often.<sup>121</sup> Female writers use more personal pronouns that make the gender of the thing explicit (third person singular pronouns), while men include more generic pronouns (third person plural pronouns).<sup>122</sup> The use of personal pronouns versus generic pronouns is typically associated with the writer encoding the relationship between the writer and the reader, drawing both the reader (“you”) and the writer (“I”) into the text.<sup>123</sup> Scholars posit that these findings as a whole indicate that women personalize their texts more so than men, who tend to use strategies to depersonalize their writing.<sup>124</sup>

Studies have also revealed that women use more adverbs and a wider range of adverbs in professional writing.<sup>125</sup> In one large

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*Future Research*, 4 J. BUS. THEORY COMM., 25, 29 (1990) (noting that prior work experience “seems to produce androgyny in responses (in terms of quality and appropriateness), while lack of this experience highlights gender differences documented in other studies”).

117. See Boettger, *supra* note 109; Argamon, *supra* note 113, at 323.

118. See Argamon, *supra* note 113, at 323. This study examined a range of genres, including fiction and non-fiction texts. *Id.* at 324–25. Within the non-fiction genre, the authors looked at 179 male documents and 179 female documents, with topics that included natural science, applied science, social science, world affairs, commerce, arts, belief and thought, and leisure. *Id.* Specifically, within each document, the authors researched the use of pronouns and certain type of noun modifiers and sought to discover whether men and women employ different strategies in setting out information. *Id.* at 325–26.

119. *Id.* at 327.

120. *Id.*

121. *Id.*

122. *Id.* at 330.

123. *Id.*

124. *Id.* at 331.

125. See Boettger, *supra*, note 109, at 245. This study examined whether certain linguistic gendered differences existed in student technical and scientific

corpus study of student technical writing, the top adverbs distinctive to female writers were additive/restrictive adverbs (“also/only”); degree (“further,” “minimally,” “too,” “fully,” “widely,” “enough”) or stance (“maybe,” “really,” “simply”).<sup>126</sup> These adverb types are used to communicate intensity of a characteristic or to evaluate.<sup>127</sup> Notably, females were distinctly associated with the use of three adverbs that are common in conversation and expository writing, but are generally disfavored in legal and other technical writing: “really,” “maybe,” and “too.”<sup>128</sup> The top adverbs distinctive to male writers were linking: “thus,” “hence,” and “moreover;” and manner: “socially,” “environmentally,” “inherently,” and “relatively.”<sup>129</sup> The adverb types associated with males are more common to academic writing and are used to connect information or to express how an action was performed.<sup>130</sup>

This same data study found that females use passive voice significantly more than males.<sup>131</sup> Females use passive voice to report findings, interpret meaning, and make connections to other research.<sup>132</sup> Males use passive voice to describe methods and analysis.<sup>133</sup>

In sum, although individually, a person may speak or write anywhere along the spectrum of communication styles, linguistic scholars analyzing large data sets have found a significant correlation between communication style and gender. Arguably because language gives expression to and reinforces implicit gender norms, women tend to write and speak in a more personal, synergistic, collaborate style (“female register”), while men tend to write and speak in a more impersonal, oppositional, and authoritative style (“male register”).

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writing, and how those linguistic features were used by men versus women. *Id.* at 239–40. The study examined 1096 texts by 87 writers, including policies and procedures, reports, abstracts, correspondence, white papers and proposals, and job materials. *Id.* at 243. The writers were enrolled in sophomore level technical writing courses, senior level scientific writing courses, and graduate level professional writing courses. *Id.* 53 percent of the group were females and 47 percent were males. *Id.* The authors looked specifically at two linguistic features: whether gender influenced student writers’ use of adverbs and the use of passive voice. *Id.*

126. *Id.* at 246–47.

127. *Id.* at 248.

128. *Id.* at 248–49.

129. *Id.* at 246–47.

130. *Id.*

131. *Id.* at 247.

132. *Id.*

133. *Id.*

C. *The Feminist Perspectives on Gendered Communication and Barriers in the Workplace*

Linguistic scholars have argued that bias based upon gendered communication differences has an extraordinary impact on women in their attempts to achieve parity in male dominated professions.<sup>134</sup> Three general perspectives have emerged in feminist linguistic scholarship that work to provide explanations for how gendered interactions may define but also limit women's opportunities in their professions.<sup>135</sup>

First, in line with Lakoff, "dominance" theorists posit that women's interactional style is devalued, resulting in barriers to power.<sup>136</sup> Lakoff was the first to describe a culture wide ideology that scorns and trivializes "women's language."<sup>137</sup> Dominance theorists are primarily focused on how women must constantly monitor their language to conform to the masculine norm and how men use language to control conversational interactions.<sup>138</sup>

Second, "difference" theorists focus on ways in which women use language that is contrasting yet complementary to men.<sup>139</sup> These scholars see women's language as highly sophisticated, particularly with regard to lexical techniques that aid cooperation and egalitarianism.<sup>140</sup> Ultimately, difference theorists believe that women's language is more advantageous to the modern style of participatory leadership.<sup>141</sup> Still, these scholars recognize that their optimistic views of women's potential is challenged by workplaces with a culture of corporate masculinity.<sup>142</sup>

Most recently, gender and language scholarship has leaned toward an approach known as Critical Discourse Analysis.<sup>143</sup> "Discourse" theorists argue that women and men are not ultimately constrained by their gender and that communication style is largely a performative social practice.<sup>144</sup> These scholars are generally

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134. Baxter, *supra* note 75, at 113.

135. *Id.* at 114.

136. *Id.* at 115–17.

137. *Id.*

138. *Id.*

139. *Id.* at 117–19.

140. *Id.* at 118.

141. *Id.* at 119.

142. *Id.*

143. *Id.* at 119–20.

144. See Frankie J. Weinberg et al., *Gendered Communication and Career Outcomes: A Construct Validation and Prediction of Hierarchical Advancement and Non-Hierarchical Rewards*, 46 COMM'N RSCH. 456, 459 (2019) (agreeing that there is an important distinction between masculine and feminine, yet noting that there is a "cultural and performative approach to gender that

critical of the assumption behind both dominance and difference theory, arguing that there is no “clear, binary division between men’s and women’s speech and behavior.”<sup>145</sup> Instead, gender is just one (though significant) “facet of our diverse, multiple, and fluid identities that often comes into play when power relations are salient.”<sup>146</sup> Any speaker may employ masculine or feminine gendered conversational tactics at any time depending upon the communicative context, the balance of power, and a myriad of other factors that are present.<sup>147</sup>

Importantly, this theory suggests that there are culturally determined discourses that exist in the workplace.<sup>148</sup> These discourses are assumptions about language that reward appropriate speech and penalize inappropriate speech.<sup>149</sup> In terms of gendered discourse, this theory suggests that there are patriarchal norms and expectations within organizations that seek to solidify “gender identities and relationships in male-dominated or gendered-divided ways.”<sup>150</sup> Though discourse theory conceives of language as a more fluid and inclusive concept than dominance or difference theories, these “gendered discourses” can cause women to be judged differently while using the same interactional techniques as men.<sup>151</sup>

In legal employment and legal institutions, gendered discourses are significantly impacted by an organizational structure in which masculine traits are considered the norm.<sup>152</sup> This structure has been both “constructed and defended” by the persistent and historical exclusion of women in the profession.<sup>153</sup> Indeed, scholars have argued that “[t]he Anglo-American legal adversarial system values qualities such as individualism, autonomy, and competition,” which are qualities stereotypically associated with men.<sup>154</sup> In fact, one sociologist argues that the public’s confidence in the extends this notion to recognize that the important distinction is not one of male and female, per se, so much as their respective performances of gendered language”).

145. See Baxter, *supra* note 75, at 133.

146. *Id.* at 125.

147. *Id.*

148. *Id.* at 120.

149. *Id.*

150. *Id.*

151. *Id.*

152. Ann C. McGinley, *Masculine Law Firms*, 8 FIU L. REV. 423, 428–29 (2013), <https://scholars.law.unlv.edu/facpub/924> [<https://perma.cc/KAY9-UCJZ>].

153. See Weinberg, *supra* note 144, at 458 (stating that “[r]esearch has documented the embeddedness of masculinities in organizational settings and it has been shown that organizational masculinities have been constructed and defended by processes such as the exclusion of women.”).

154. See McGinley, *supra* note 152, at 429.

legal system in part depends on the “masculine ideals which have become synonymous with lawyers.”<sup>155</sup>

As such, these sociolinguistic theories provide explanations for the documented experiences of women in the legal profession. As the sociolinguistic studies establish, there is evidence that there are subtle but meaningful differences in the way men and women practice language use—whether it be the result of cultural expectations, socialization, power dynamics, and/or education. As discussed below, there is also clear data that women are penalized in the workplace for both failing to conform to as well as for conforming with deeply ingrained assumptions about effective workplace discourse.<sup>156</sup> Indeed, the literature reveals that the deliberate choices that women make to perform language in the legal workplace and in their legal advocacy often result in penalties that ultimately diminish their success.

#### IV. EVIDENCE THAT FEMALE LINGUISTIC STYLE DIMINISHES WOMEN’S SUCCESS IN THE OFFICE AND THE COURTROOM

The possibility of gender bias directed at communication styles is particularly concerning in the legal industry given the extent to which language use is inextricably and powerfully linked to professional practice and advocacy. In traditionally male-dominated workplaces like the law, sociolinguistic scholars have found direct links between professional leadership advancement, power, compensation, and the use of stereotypical male communication styles.<sup>157</sup> Further, in the courtroom, studies indicate that biases favoring stereotypical male discourse leads to greater success overall.<sup>158</sup>

##### A. *Gendered Communication and Power at the Office*

Like other professionals, lawyers use language to construct their identities, roles, and relationships within the workplace.<sup>159</sup>

155. *Id.*

156. See *infra* discussions in Part IV–V.

157. See Weinberg, *supra* note 144, at 458.

158. See e.g., Tonja Jacobi & Dylan Schweers, *Justice Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV., 1408–14 (2017), [https://www.virginialawreview.org/wp-content/uploads/2020/12/JacobiSchweers\\_Online.pdf](https://www.virginialawreview.org/wp-content/uploads/2020/12/JacobiSchweers_Online.pdf) [<https://perma.cc/3A6N-SFGX>]; Adam Feldman & Rebecca Gill, *Echoes from a Gendered Court: Examining the Justices’ Interactions During Supreme Court Oral Arguments* (Jan. 31, 2017) (draft), <https://ssrn.com/abstract=2906136> [<https://perma.cc/K7TH-B52U>]; Shane A. Gleason, *Beyond Mere Presence: Gender Norms in Oral Arguments at the U.S. Supreme Court*, 73 POL. RSCH. Q., 596, 601 (2020).

159. See Baxter, *supra* note 75, at 113.

Lawyers communicate with clients to generate business by building trust. They communicate with other lawyers to establish the perception of competence and skill. To attain leadership positions, they strive to communicate in a way that grants them likability, respect, and power.

Management texts agree that “across all industries, . . . communication skills rank as the single most important reason that people [advance or] do not advance in their careers.”<sup>160</sup> Thus, as Judith Baxter, a linguist who has spent her career studying gender, language, and leadership, notes, “[i]f leadership language and the discourses that circulate within organizations are so influential, they could provide a key reason to explain why women are underrepresented at senior levels . . . .”<sup>161</sup> Though there are few studies of legal employers per se, studies of other male-dominated organizations have consistently found that masculine agentic traits are linked to upward mobility and the perception that men are more effective leaders.<sup>162</sup> One study of a Fortune 500 company found that “being a female was associated with managers’ assessments of lower career motivation,” which, according to the authors, supported the “persistent view that men are viewed as more suited for management careers . . . and that women will suffer negative evaluations when they occupy or seek traditionally male-typed jobs.”<sup>163</sup> This study also found that because women were viewed as less suited for management, they were given fewer opportunities for professional development, such as challenging work assignments, training and development, and career encouragement from their managers.<sup>164</sup>

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160. Weinberg, *supra* note 144, at 458; see also Erika Darics, *Critical Language and Discourse Awareness in Management Education*, 43 J. MGMT. EDUC. 651, 654 (2019) (noting that the way that speakers draw on language-as-social practice reinforces and legitimizes “power inequities in the workplace, encourage[s] the romanticization of leadership, and . . . claims ‘the natural superiority of a leader who has the right stuff which others are lacking.’”).

161. See Baxter, *supra* note 75, at 113.

162. Anne M. Koenig et al., *Are Leader Stereotypes Masculine: A Meta-Analysis of Three Research Paradigms*, 137 PSYCH. BULL., 616, 617, 634 (2011) (finding that stereotypes of leaders are “decidedly masculine”); Weinberg, *supra* note 144, at 482; Samantha C. Paustian-Underdahl, *Gender and perceptions of leadership effectiveness: A Meta-Analysis of Contextual Moderators*, 99 J. APPLIED PSYCH., 1129, 1138 (2014) (finding that organizations that were male-dominated showed a greater tendency for men to be perceived as more effective leaders).

163. Jenny M. Hoobler et al., *Women’s Managerial Aspirations: An Organizational Development Perspective*, 40 J. MGMT. 703, 720 (Dec. 2, 2011), [https://repository.up.ac.za/bitstream/handle/2263/39804/Hoobler\\_Women\\_2014.pdf;sequence=1](https://repository.up.ac.za/bitstream/handle/2263/39804/Hoobler_Women_2014.pdf;sequence=1) [<https://perma.cc/MH2B-ZGJQ>].

164. *Id.*

Unsurprisingly, particularly in these male-dominated workplaces that value and promote agentic behavior, men who employ communication styles that are hierarchical, dominant, and authoritarian tend to achieve greater success in terms of hierarchical advancement.<sup>165</sup> A 2015 study found a direct connection between a feminine linguistic style and the inability to attain leadership positions.<sup>166</sup> There, the researchers determined that having a masculine communication style predicts greater hierarchical advancement, including number of promotions, advancement to higher managerial levels, and promotions from within the organization, leading to higher compensation.<sup>167</sup> The researchers examined language using such measures as whether the communication was direct and authoritative, and used to emphasize ideas, get attention, or attempt to control others (masculine communication style) versus whether the communication was receptive and nondirective, fostered cooperation and egalitarian relationships, and prompted others to talk (feminine communication style).<sup>168</sup>

Moreover, volubility in the workplace directly correlates with the perception of power and hierarchical advancement. Studies have found that individuals who dominate conversations and interrupt others tend to gain more status and are perceived as more influential than those who do not.<sup>169</sup> In turn, those individuals who are interrupted by others are perceived as less dominant, less influential, and less competent.<sup>170</sup> Sociolinguists posit that power hierarchies are formed largely based on how much members participate in the group.<sup>171</sup> The more an individual verbally participates, the more likely that the group members will perceive the individual as having power.<sup>172</sup> Therefore, “volubility not only plays an important role in establishing power hierarchies but also

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165. Weinberg, *supra* note 144, at 480.

166. *Id.* Notably, although this study separated the variables of “biological sex” and “gendered communication style,” it found that respondents who reported using a masculine communication style were mostly male while respondents who reported using a feminine communication style were mostly women. *Id.*

167. *Id.*

168. *Id.*

169. Sally D. Farley, *Attaining Status at the Expense of Likeability: Pilfering Power Through Conversational Interruption*, 32 J. NONVERBAL BEHAVIOR 241, 250 (Dec. 2008) (finding, however, that those same individuals are perceived as less likeable).

170. *Id.*

171. Brescoll, *supra* note 101, at 623.

172. *Id.*

in communicating one's power to others."<sup>173</sup> Thus, the documented unequal participation rates of women during meetings or in other mixed group interactions, and the evidence that women are often interrupted by men, negatively impact the perception of women's power in the workplace, which directly correlates with their hierarchical advancement into leadership positions.<sup>174</sup>

B. *Gendered Communication and Success and Power in the Courtroom*

Along with language use as a means to achieve leadership advantages in the workplace, lawyers, to a degree much greater than other professionals, use language as the very tool with which they perform their craft. Language is the way in which lawyers accomplish the goals of the profession—primarily, to advocate on behalf of a client, whether it be to a judge, mediator, arbitrator, or some other judicial body.

Professor Kathryn Stanchi, a feminist theory and writing scholar, has described the framework and purpose of legal advocacy.<sup>175</sup> According to Stanchi, whether written or oral, legal advocacy is defined by formalistic, rigid rules and conventions that are designed to appeal to the “psychology and personality of the legal audience.”<sup>176</sup> The goals of legal discourse are to control the audience's reaction to the message as well as to make the audience comfortable, at ease, and receptive to the message.<sup>177</sup>

To achieve these goals, lawyers strive to use language that is “direct, declarative, and simple.”<sup>178</sup> Lawyers employ objective, logical reasoning, and avoid direct references to subjectivity, unless they are exceptionally subtle.<sup>179</sup> They avoid rhetorical or poetic devices that encourage interaction with the speaker or writer or encourage interpretation of the message.<sup>180</sup> They likewise avoid use of the personal pronoun “I,” as this coincides with the convention to avoid personal narrative and engagement.<sup>181</sup>

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173. *Id.*

174. *See id.* at 624.

175. Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387–90 (2020), <https://digital.sandiego.edu/sdlr/vol39/iss2/4> [<https://perma.cc/J3TV-SUXB>].

176. *Id.* at 389–90.

177. *Id.* at 391.

178. *Id.* at 392.

179. *Id.* at 396.

180. *Id.*

181. *Id.*

Lack of emotion is also a hallmark of legal discourse.<sup>182</sup> Overt appeals to emotion are considered poor lawyering and perhaps even unethical.<sup>183</sup> It is considered inappropriate to address a judge or jury in the second person and to ask them to put themselves into the shoes of the client.<sup>184</sup> To the extent emotion has its place in legal discourse, it must be disguised and “subtly embedded” in the lawyer’s argument.<sup>185</sup> Emotion must be used with restraint and is considered most effective when the audience is not fully aware that it is being swayed by an emotional appeal.<sup>186</sup>

Professor Kathryn Stanichi proposes that the conventions of legal discourse are not necessarily “elemental” or “natural,” and that in fact, its conventions can and should be questioned.<sup>187</sup> Feminist scholars in particular have noted how the conventions of legal advocacy “greatly limit [its] substance,” often to the “detriment of outsiders.”<sup>188</sup> Indeed, while legal advocacy eschews emotion and subjectivity, studies show that women are more likely to use emotional language and use linguistic markers that seek to connect with their reader or listener. While legal advocacy rewards directness and objectivity, women tend to be more facilitative, personal, and polite.

How these lexical distinctions or the biases surrounding these distinctions work to penalize women in their practice of legal advocacy has been the subject of very few studies. The studies that do exist primarily involve oral argument and brief writing before the U.S. Supreme Court.<sup>189</sup> These studies generally find that breaking the norms of legal advocacy with respect to language use results in less success in the courtroom for litigants and less power in the courtroom for judges.<sup>190</sup>

For example, one recent study examined the success of litigants before the U.S. Supreme Court based upon the amount of emotive language used during oral arguments.<sup>191</sup> As a whole, the study found that litigants who used more emotive language during argument had lessened success before the Court.<sup>192</sup>

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182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 397.

186. *Id.*

187. *Id.* at 398.

188. *Id.*

189. *See supra* note 158.

190. *See Jacobi, supra* note 158; *Feldman, supra* note 158, at 53.

191. *Gleason, supra* note 158, at 601.

192. *Id.*

Other studies have linked the “female register” to the high degree of interruptions of female Justices by male Justices, and in turn, to lower effectiveness as a judge.<sup>193</sup> A 2017 Northwestern University study replicated many others that have found that men interrupt women more frequently than women interrupt men.<sup>194</sup> Looking specifically at interruptions on the U.S. Supreme Court, the study found that, even though “female Justices speak less often and use fewer words than male Justices, they are nonetheless interrupted during oral arguments at a significantly higher rate,” even when accounting for seniority and other mediating factors like ideology.<sup>195</sup> Notably, the study linked these interruptions to the tendencies of Justices O’Connor, Ginsburg, Kagan, and Sotomayor to begin their questioning with a polite framing often associated with women’s register.<sup>196</sup> For example, the female Justices often began their questioning with phrases such as “may I ask,” or “could I ask,” or an apology, such as “sorry,” rather than simply asking the substance of the question directly.<sup>197</sup> The data showed that it was during this tentative and polite framing period that the female Justices were most often interrupted by the male Justices.<sup>198</sup>

This study and others have posited that such interruptions lead to less power and effectiveness for female Justices.<sup>199</sup> Oral

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193. See Jacobi, *supra* note 158, at 1447.

194. See *id.* at 1408.

195. The authors of this study concluded that the findings were “stark.” *Id.* at 1466. The study found that, between 1990 and 2015 “even without controlling for the fact that women have made up for between only 11% and 33% of the justices on the Court, they are interrupted more often than their male counterparts.” *Id.* “On average women constituted 22% of the Court, yet 54% of interruptions were directed at them.” *Id.* “Overwhelmingly, it was men doing the interrupting: women interrupted only 15% of the time, which is disproportionately low, and men interrupted 85% of the time, more than their 78% representation on the Court.” *Id.* The study also found that seniority was “mildly” predictive of interruptions and that conservatives interrupt liberals at significantly higher rates than liberals interrupt conservatives. *Id.* at 1368, 1427, 1451.

196. *Id.* at 1408–13.

197. *Id.*

198. *Id.* at 1447 (finding that the while it is possible that women are interrupted more simply because they are women, the “common use of the ‘female register’—saying “sorry,” “excuse me,” “may I ask,” “could I ask,” or beginning with the name of the advocate before asking a question—could be very significant in the rate at which speakers are interrupted”).

199. *Id.* at 1494; see also Feldman, *supra* note 158, at 61 (“Our data show a power disparity between male and female Justices at oral argument, where female Justices have fewer opportunities to complete their questions and statements due to interruptions from male Justices. The data also show that the female Justices tend to speak less often than male Justices and incorporate

arguments are influential to a Justice's vote.<sup>200</sup> Indeed, it has been found that through the use of a Justice's questions and the answers they elicit, a Justice may be able to sway others on the Court.<sup>201</sup> Therefore, to influence that conversation, it is necessary that the Justices are allowed to ask the questions that they want to ask.<sup>202</sup> Interruptions threaten that ability, and the fact that the female Justices are interrupted at a far greater rate than male Justices arguably comes at great cost to the power and influence of female Justices on the high Court.<sup>203</sup>

In one of the few studies to examine how the female register may impact legal writing style, the authors found a link between the use of emotional language in briefs and less successful case outcomes before the U. S. Supreme Court.<sup>204</sup> Researchers found that for petitioners, using emotional language in briefs is associated with a 24 percent decrease in the probability of capturing a Justice's vote, while for respondents, using emotional language is associated with a 46 percent decrease in the probability of winning a Justice's vote.<sup>205</sup>

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a generally high-level of polite speech into their interactions as is typical of behavior we would expect based on prior analyses of elite women in the workplace.”).

200. *Id.*; see also Feldman, *supra* note 158, at 52–53.

201. See Jacobi, *supra* note 158, at 1395–96, 1494.

202. *Id.*

203. *Id.* at 1494; see also Feldman, *supra* note 158, at 41 (“When these opportunities are lost, the previous potential to make these points or ask these questions cannot be remanufactured. The oral proceedings necessarily move on to other topics and will never be at the exact same position as they were when the interrupted Justice attempted to make his or her prior point.”).

204. Ryan C. Black et al., *The Role of Emotional Language in Briefs Before the US Supreme Court*, J.L. & COURTS 377, 390–91 (2016).

205. *Id.* Though there has been little direct research on whether and how writing style impacts women in law school, several studies have posited that there may, in fact, be a connection between writing style and gender disparity in law review membership and student note publication. There is wide agreement that, nationally, women are underrepresented on the board of law reviews. See Guinier et al., *supra* note 1, at 28–30 (reporting low female representation on the University of Pennsylvania Law Review); see also Mark R. Brown, *Gender Discrimination in the Supreme Court's Clerkship Selection Process*, 75 OR. L. REV. 359, 372 (1996) (documenting the low number of women on law reviews at various law schools); Bowers, *supra* note 11, at 163; Balachandran et al., *supra* note 11, at 680. In a few of the studies that have examined disparities in law review membership in greater detail, it has been hypothesized that bias against female writing style could be a contributing factor. In the University of Texas study, for example, although the submissions were anonymous, the data established that women received significantly lower writing scores than men. Bowers, *supra* note 11, at 155. The authors hypothesized that the writing score data suggested that there was “a systematic devaluation of women's writing over time by the Law Review Editorial Board.” *Id.* Similarly, the 2019

In sum, studies of the effects of oral and written gendered communication in the legal profession indicate that women are harmed when they conform to norms of a feminine communication style. This is unsurprising given that the communication norms of leadership discourse as well as legal advocacy are aligned with the characteristics of the “male register.”

## V. THE LINGUISTIC MINEFIELD

Because language practices can harm women in the workplace, women are taught to alter their language use to more closely conform to the male norm.<sup>206</sup> Yet, sociolinguistic studies show that conformity often does not result in women achieving greater professional success.<sup>207</sup> In fact, there is evidence that such accommodation may have unintended consequences of harming career advancement, thus resulting in the phenomenon known as the double bind.<sup>208</sup>

### A. *Accommodating to the Male Linguistic Norm*

Sociolinguists theorize that “expectations of leadership as well as institutional arrangements have significant consequences for the communication strategies women adopt.”<sup>209</sup> Because a woman’s communication style is perceived and experienced as a barrier in the workplace, it is not surprising that studies have found that women deliberately alter their communication styles to minimize the salience of their gender by conforming to masculine norms.<sup>210</sup> In one recent empirical study that sought to examine the experiences of women and people of color who had reached high level corporate positions, the study participants uniformly commented that they had to manage “their language, both written and verbal, in ways that reduced the salience of their outsider status.”<sup>211</sup>

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University of Chicago study found that the disparity in law review membership could in part be due to gendered grade differentials in the first-year class since two thirds of the membership of law review “graded on.” Balachandran et al., *supra* note 11, at 677. This led the researchers to hypothesize that since first year grades were anonymous at the University of Chicago, the discrepancy could be at least partially explained by a “stereotypically masculine writing style [that] is favored by law professors grading exams.” *Id.* at 680.

206. See COATES, *supra* note 93, at 216; Jones, *supra* note 84, at 628.

207. See Courtney Von Hippel et al., *Stereotype Threat and Female Communication Styles*, 37 PERSONALITY & SOC. PSYCH. BULL. 1312, 1318 (June 6, 2011).

208. See COATES, *supra* note 93, at 217.

209. Jones, *supra* note 84, at 628.

210. See *id.* at 626–27.

211. Christy Glass & Alison Cook, *Performative Contortions: How White*

Respondents further “identified language as a significant source of scrutiny and contortion . . . .” Finally, the study authors noted that “[f]or outsiders in particular, linguistic errors risked highlighting their outsider status and harming perceptions of their competence and capability as leaders.”<sup>212</sup>

The concepts of stereotype threat and stereotype reactance are useful in explaining why women alter their communication styles in the workplace. Individuals experience stereotype threat when they encounter the psychological fear of “confirming or being reduced to a negative stereotype.”<sup>213</sup> Study after study has shown that this type of threat can result in performance deficits when people attempt difficult tasks in “domains in which they are negatively stereotyped.”<sup>214</sup> Indeed, individuals who are reminded of negative stereotypes will perform less well on tests of their memory, will encounter increased stress and anxiety, and as a whole will experience decreased performance.<sup>215</sup>

When confronted with stereotype threat, individuals will attempt to counteract the stereotype by accommodating to a different norm through a process known as stereotype reactance.<sup>216</sup> In one study, researchers set out to study the impact of stereotype threat on communication style. There, the researchers observed how the speaking styles of women changed after reading a fictitious article in a business magazine that informed them that stereotypical masculine characteristics such as being direct and assertive, are linked to more successful organizational leadership.<sup>217</sup> The researchers found that when “female participants were explicitly reminded of a masculine stereotype of leadership and associated gender differences, participants responded by adopting a more masculine communication style.”<sup>218</sup> In particular, participants reacted against the stereotype by speaking more directly with fewer hedges, hesitations, and tag questions.<sup>219</sup>

Another study examining the linguistic styles of Hillary Clinton supports the notion that women who work in a masculine environment are more likely to employ oral communication

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*Women and People of Color Navigate Elite Leadership Roles*, 27 GENDER, WORK & ORG. 1232, 1238 (2020), <https://onlinelibrary.wiley.com/doi/10.1111/gwao.12463> [<https://perma.cc/CSS2-AWVK>].

212. *Id.*

213. Von Hippel et al., *supra* note 207, at 1312–13.

214. *Id.* at 1312.

215. *Id.*

216. *Id.* at 1313.

217. *Id.*

218. *Id.* at 1315–16.

219. *Id.*

styles consistent with that environment.<sup>220</sup> This study documented the way Hillary Clinton altered her interactional style in response to her professional position by examining her debate transcripts and interviews from 1992–2013.<sup>221</sup> This study looked specifically at functional words such as use of pronouns, verbs, social references, emotion words, cognitive mechanisms, and tentative words.<sup>222</sup> The findings were stark and indicated a clear transition from a more feminine to a more masculine linguistic style as Clinton’s role in politics expanded.<sup>223</sup> For example, between 1992 and 1996, when she was campaigning for Bill Clinton, Hillary Clinton employed a higher rate of feminine versus masculine linguistic markers.<sup>224</sup> Then, in 1993, when Hillary Clinton took on the role within the administration’s Health and Reform Task Force, Clinton’s language became more masculine.<sup>225</sup> In 1995, when she left this position in the administration, her language once again returned to a more feminine style.<sup>226</sup> Clinton’s linguistic presentation became more masculine around 2000 during her first U.S. Senate campaign and remained masculine throughout her time in the U.S. Senate.<sup>227</sup> When running for president in 2007 and 2008, some of her masculine language was dropped, and the author of the study hypothesized that this “reflects the inconsistent gender strategies promoted by the Clinton campaign.”<sup>228</sup> Again, after losing the presidential election and becoming Secretary of State in 2009, Clinton’s style once again turned more masculine.<sup>229</sup>

When examining how women accommodate their language to the male norm while performing legal advocacy, the 2017 North-western U.S. Supreme Court study charted how the female Justices on the U.S. Supreme Court altered their style of questioning in order to avoid interruptions by the male Justices.<sup>230</sup> That study found that the more senior female Justices—Justices O’Connor, Ginsberg, and Kagan—had, through their tenure, transitioned from a more tentative to a more masculine, aggressive style of questioning, resulting in fewer interruptions.<sup>231</sup> For example, at the beginning of her tenure

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220. See Jones, *supra* note 84, at 636.

221. *Id.* at 632.

222. *Id.*

223. *Id.*

224. *Id.* at 632–33.

225. *Id.* at 633.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. See Jacobi, *supra* note 158.

231. *Id.* at 1409–13, 1448 (finding that Justices O’Connor, Ginsburg, and

on the Court, Justice O'Connor was often interrupted during the framing period of her question—"a kind of throat clearing that indicates to the listener that she is about to ask a meaningful question."<sup>232</sup> By the 2015 term, however, she had abandoned this approach for a more direct style that allowed her to "fight through the interruptions."<sup>233</sup>

Even with respect to professional writing style, sociolinguists posit that women may be altering their writing to counteract gender effects.<sup>234</sup> It has been hypothesized by researchers examining gendered writing styles in business communication that "because men are known to hold the power in business situations and because the language of the powerful group is usually adopted by the less powerful group, women may be changing their style of communication in a business writing situation to gain more power."<sup>235</sup>

Such studies are mirrored by public perception. The plethora of media reports, articles, and books advising women how to successfully communicate in the workplace is evidence that society at large is infected with the deeply ingrained stereotype that a woman's interactional style will harm her in the workplace. Indeed, women are inundated with advice on how to succeed at work by altering the way they interact with men.<sup>236</sup> A 2017 Practice Points

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Kagan showed "clear downward trends in their use of polite prefatory phrasing [and] have each approximately halved their uses of polite language . . . [v]ery few of the men show similar patterns. . .").

232. *Id.* at 1409.

233. *Id.* at 1409–10.

234. See Tebeoux, *supra* note 116, at 27–28; Karen S. Sterkel, *The Relationship Between Gender and Writing Style in Business Communication*, 25 J. BUS. COMM'N 17, 35 (1988). See also Bryan N. Larson, *Gender/Genre: The Lack of Gendered Register in Texts Requiring Genre Knowledge*, 33 WRITTEN COMM'N, 360, 360–79 (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2843640](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2843640) [<https://perma.cc/9WKU-LK5U>] (finding that there were no significant gender differences in memorandum of law written after one year of legal writing training and hypothesizing that even if the students had come to law school with gender-linked differences in writing (which the study did not seek to confirm or dispute), students were able to conform to audience expectations and abandon any "gendered communicative practices entirely").

235. Sterkel, *supra* note 234, at 35.

236. See e.g., Bridget Warren, *Effective Communication in the Workplace Between the Sexes*, AM. BAR ASS'N (2017), <https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2017/effective-communication-workplace-between-sexes> [<https://perma.cc/TZ73-98J6>]. The advice to conform to a masculine style of performance in the workplace goes beyond and includes modes of communication. For example, in the recent study by the American Bar Foundation on the scarcity of women lead counsel, some of the concluding advice to women was as follows: "It is also important to be aware of gender dynamics in the courtroom and take steps to deal with or overcome them. Body

publication by the ABA entitled “Effective Communication in the Workplace Between the Sexes,” as its name suggests, purportedly sought to help men and women communicate better with each other.<sup>237</sup> Yet, the author directed the article only to women, listing skills that will help “*women* more effectively communicate with their male counterpart,” including avoiding hedges, “getting to the point,” saying “what you think, not what you feel,” and generally speaking more “assertively.”<sup>238</sup> These types of articles are ubiquitous—namely those that assume that to succeed in leadership roles, women must alter the way they communicate to conform to masculine norms.<sup>239</sup>

### B. *The Double Bind*

Yet, altering communication style to the masculine norm in the workplace has generally not worked to increase participation of women in leadership positions or to attain more successful results in court. In fact, it has arguably had the opposite effect. Widely known as the double bind theory, scholars posit that women are penalized for using a stereotypical female communication style, but are also penalized for violating prescriptive norms and adopting a more masculine communication style.<sup>240</sup> Women who assume a masculine communication style are rated as more threatening and less persuasive and influential compared to women who use a traditionally feminine communication style.<sup>241</sup> Therefore, women who react to gender-based stereotypes by adopting a more masculine communication style “run the risk of being less effective interpersonally, less likeable, and less likely to exert influence.”<sup>242</sup>

Workplace feedback gives an indication of the extent to which implicit bias against the communication styles of women

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language is critical, including maintaining an outward appearance of calm, even in moments of stress and pressure. Women need to “own” the courtroom with their presence and also with their voices. Soft voices of either gender can be distracting or ineffective at trial, but some women naturally have softer voices. Thus, they will need to adjust their volume so as to take full command of the courtroom.” SCHARF & LIEBENBERG, *supra* note 12, at 17.

237. Warren, *supra* note 236.

238. *Id.* (emphasis added).

239. *Id.*

240. See Von Hippel, *supra* note 207, at 1318.

241. *Id.*

242. *Id.* at 1321 (finding that “women who react against the stereotype by adopting a more masculine communication style are evaluated as less warm, and people are less willing to comply with their requests . . . [f]urthermore, this masculine style did not result in women being viewed as more competent, suggesting that reacting to stereotype threat in such a manner may result in social penalties with few if any gains.”).

works to bind women into an untenable position and prevent them from advancing into positions of power. Studies have shown that women are significantly more likely to be the recipients of poor performance reviews, regardless of whether the reviewer is male or female.<sup>243</sup> Notably, studies show that communication style is one of the primary bases for much of that critical feedback.<sup>244</sup>

A recent Harvard Business School study found that when women received specific developmental feedback, it tended to address being too aggressive in the way that they communicated with others.<sup>245</sup> In fact, in this study, 76 percent of references to an employee being “too aggressive” occurred in evaluations of female employees’ performances, while such comments occurred in only 24 percent of male evaluations.<sup>246</sup> This is similar to another study which found that in the tech industry, 76 percent of the evaluations that noted an overly aggressive communication style occurred in women’s evaluations.<sup>247</sup> In fact, 10 percent of all women’s evaluations mentioned the employee was too aggressive in her communication style, compared to only 3.9 percent of men’s evaluations.<sup>248</sup>

In the legal profession, the studies assessing the impact of women adopting masculine communication styles within their legal advocacy have largely centered around courtroom effectiveness.<sup>249</sup>

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243. See Shelley Correll & Caroline Simard, *Research: Vague Feedback Is Holding Women Back*, HARV. BUS. REV. (Apr. 29, 2016), <https://hbr.org/2016/04/research-vague-feedback-is-holding-women-back> [<https://perma.cc/L46Y-QF8L>]; Keith, *supra* note 68, at 337; ANNA JAFFE ET AL., *RETAINING AND ADVANCING WOMEN IN NATIONAL LAW FIRMS* 28 (2016), <https://law.stanford.edu/publications/retaining-and-advancing-women-in-national-law-firms> [<https://perma.cc/D3BT-7UQ4>] (women receive more negative feedback about overly aggressive communication styles than do men). See generally Rachel Emma Silverman, *Gender Bias at Work Turns Up in Feedback*, WALL ST. J. (Sept. 30, 2015, 5:44 AM), <https://www.wsj.com/articles/gender-bias-at-work-turns-up-in-feedback-1443600759> [<https://perma.cc/EH4L-PHNP>].

244. See Correll & Simard, *supra* note 243 (finding that “when women received specific developmental feedback, it tended to be overly focused on their communication style . . . [and] [w]hile ability to communicate can be an important skill for leaders, it is noteworthy that women received most of the negative feedback about communication styles.”).

245. *Id.*

246. *Id.*

247. Shelley J. Correll et al., *Inside the Black Box of Organizational Life: The Gendered Language of Performance Assessment*, 85 AM. SOCIO. REV. 1022, 1037 (2020).

248. *Id.*

249. See Jessica M. Salerno, et al., *Closing with Emotion: The Differential Impact of Male Versus Female Attorneys Expressing Anger in Court*, 42 LAW & HUM. BEHAV. 385, 396 (2018); Jessica M. Salerno & Hannah J. Phalen, *Traditional Gender Roles and Backlash Against Female Attorneys Expressing Anger in*

For example, one 2018 study found that female trial attorneys are in fact penalized for aggressive advocacy.<sup>250</sup> This study examined the likelihood of whether an attorney would be hired based upon the degree of anger he or she expressed in closing arguments.<sup>251</sup> The study found that when male attorneys expressed anger, “people thought they were more competent, which in turn increased hireability,” yet when females expressed anger, they were perceived as less competent and thus, their hireability was decreased.<sup>252</sup>

Similar findings occurred in studies of success before the U.S. Supreme Court. In one study examining how gendered language—specifically, emotional content—in briefs impacts an attorney’s effectiveness, the authors found that “male [J]ustices reward attorneys, both male and female, for conforming to traditional gender norms in briefs.”<sup>253</sup> While briefs with emotional language were likely to be less successful overall, women were more likely to be successful when they employed more emotional language in their briefs.<sup>254</sup> Building on that research, a recent study found that despite the professional norm to avoid emotive language in oral argument, women who conform to gender norms by employing emotional language at U.S. Supreme Court oral argument were more successful than women who adopted a more masculine style.<sup>255</sup>

Because women who adopt masculine communication styles are penalized in the professional arena, there is evidence that women intentionally work to adjust their style to meet gendered

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*Court*, 16 J. EMPIRICAL LEGAL STUD. 909, 928 (2019) (finding that angry female attorneys were penalized more by study participants than angry male attorneys particularly where the study participants expressed conservative viewpoints leading the researcher to conclude that the results were due, in part, to the fact that angry female attorneys are violating linguistic gender norms); Christian B. May, *Anger in the Courtroom: The Effects of Attorney Gender and Emotion on Juror Perceptions* (Apr. 2014) (B.S. thesis, Georgia Southern University) (on file with the Psychology Department, University Honors Program, Georgia Southern University), <https://digitalcommons.georgiasouthern.edu/honors-theses/29/> [<https://perma.cc/P6AF-CNX8>] (finding that the participants in the survey rated “the angry male attorney as the most competent and the angry female attorney as the least competent.”); Lara Bazelon, *What It Takes to Be a Trial Lawyer If You’re Not a Man*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778> [<https://perma.cc/WY7Z-566V>].

250. See Salerno et al., *supra* note 249, at 394.

251. *Id.*

252. *Id.* at 397.

253. Shane A. Gleason et al., *The Role of Gender Norms in Judicial Decision-Making at the U.S. Supreme Court: The Case of Male and Female Justices*, 47 AM. POL. RSCH. 494, 513 (2018).

254. *Id.*

255. Gleason, *supra* note 158, at 604.

expectations of female communication. Women's fear of backlash against using a more masculine style of communication was recently studied in the political arena.<sup>256</sup> In a study examining speaking time of U.S. Senators on the floor during the 2005 and 2007 U.S. Senate sessions, the author found that high powered<sup>257</sup> women spoke less than equally high-powered men in a group setting.<sup>258</sup> Although as men grew in power, they became more vocal, women did not.<sup>259</sup> The author of this study found that the "specific pattern of data revealed that only high-power women adjusted their volubility such that their reported talking time was virtually identical to low-power women and low-power men, a pattern that is consistent with a fear-of-backlash explanation . . . ."<sup>260</sup> Further, the author found that the fear of backlash was justified as "a female CEO who talked disproportionately longer than others was rated as significantly less competent and less suitable for leadership than a male CEO who was reported as speaking for the same amount."<sup>261</sup>

## VI. REPERCUSSIONS AND PROPOSALS FOR CHANGE

The compromise of one's own voice has far reaching implications for the individual and the community. For female lawyers, the struggle to perform language and the often penalizing consequences of those performances renders the workplace a fraught landscape. In one recent empirical study of women who had attained leadership roles in a variety of industries, a frequent participant response was that a "flawless adherence to unstated norms and rules" regarding communication style was constantly required.<sup>262</sup> And the hypervigilance needed to negotiate this adherence to the shifting linguistic demands led to emotional burnout, lower job satisfaction, fatigue, and underperformance.<sup>263</sup>

Organizationally, the implications are serious as well. The evidence is clear that in the legal industry, despite the diversity initiatives, programs, and outreach, there has been little recent change in women's participation and hierarchical advancement into senior positions.<sup>264</sup> Women still leave the profession at much higher rates

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256. Brescoll, *supra* note 101, at 622.

257. In this study, power was measured by position, indirect influence, legislative activity, and earmarks. *Id.* at 627.

258. *Id.* at 633.

259. *Id.*

260. *Id.*

261. *Id.* at 635.

262. See Glass & Cook, *supra* note 211, at 1238.

263. See *id.* at 1246.

264. See Peery, *supra* note 31 ("Despite approaching near universal

than men, ultimately depleting the legal industry of people with unique talents, experiences, and capabilities.<sup>265</sup>

And while increasing the number of women in the law profession should be a certain goal, there is evidence that this in itself may be insufficient to disrupt existing performative norms, hierarchies, and status differences. In Northwestern's U.S. Supreme Court Justice interruption study, for example, it was found that as more women joined the Bench, the male Justices interrupted the female Justices at an *increased* rate.<sup>266</sup> The authors called the data "astounding," noting that from 2010 to 2015, when for the first time in history women made up one third of Court, female Justices were interrupted dramatically more often than men, and more often than when there were fewer female Justices on the Bench.<sup>267</sup> The authors posited that this data "lends support to research results in other areas that show that men react against women entering their domain in more than token numbers by increasing their aggressiveness towards the women."<sup>268</sup>

In fact, it has been forcefully argued that the actions of women and other "outsiders" to conform to professional masculine norms reinforces the structural hierarchies within the system by obscuring the "systematic nature of bias and discrimination."<sup>269</sup> Indeed, cultural movements like "lean in"<sup>270</sup> that show a preference for changing women instead of changing the system have been

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adoption of diversity initiatives, including diversity committees and dedicated diversity officers, and increased awareness of the challenges women and diverse attorneys face in their advancement through the law firm, there has been little progress made in recent years that is reflected in noticeable increases in representation of women and diverse attorneys, particularly at the more senior levels at law firms.").

265. See Glass & Cook, *supra* note 211, at 1246 (noting that "[a] lack of support for their leadership combined with continual pressures to accommodate and overcome bias likely contribute to the shorter tenure of top leaders in large organizations.").

266. See Jacobi, *supra* note 158, at 1467.

267. *Id.*

268. *Id.* at 1468.

269. See Glass & Cook, *supra* note 211, at 1246.

270. The "lean in" movement, started by former Facebook CEO, Sheryl Sandberg, presented women with a self-empowerment message that advised woman to individually act to address gender inequality in the workplace by working hard and asserting themselves. See Caitlin Gibson, *The End of Leaning In: How Sheryl Sandberg's Message of Empowerment Fully Unraveled*, WASH. POST (Dec. 20, 2018, 11:06 AM), [https://www.washingtonpost.com/lifestyle/style/the-end-of-lean-in-how-sheryl-sandbergs-message-of-empowerment-fully-unraveled/2018/12/19/9561eb06-fe2e-11e8-862a-b6a6f3ce8199\\_story.html](https://www.washingtonpost.com/lifestyle/style/the-end-of-lean-in-how-sheryl-sandbergs-message-of-empowerment-fully-unraveled/2018/12/19/9561eb06-fe2e-11e8-862a-b6a6f3ce8199_story.html) [https://perma.cc/TP7G-JSTW].

shown to yield potentially harmful societal beliefs.<sup>271</sup> For example, one study found that women's empowerment messages calling for women to combat workplace stereotype by pushing themselves harder to reach high level positions, resulted in the greater attribution of responsibility to female employees for both causing and solving gender-related problems in the workplace.<sup>272</sup>

As such, there is significant skepticism in the social science literature that diversity outreach on the organizational level or personal empowerment on the individual level can entirely cure the problem. And the harm to the legal industry of being unable to budge much beyond a 37 percent female participation rate in the profession cannot be understated. As is relevant to this discussion, with the continuation of the masculine norm of communication firmly settled into the legal landscape, the profession risks the continuation of a significant gender gap, a "suppression of certain unique and valuable voices, cultures and concepts in law," and ensures that the law "remains a language of power and privilege."<sup>273</sup>

Research from a discourse perspective supports the notion that a workplace that is neither wholly masculine, feminine, nor androgynous, but instead, that envisions the use of both feminine and masculine interactional norms best suits the needs of the organization and the individual.<sup>274</sup> Good lawyering requires individuals and organizations who can serve client needs. This in turn demands a rich combination of skills, approaches, characteristics, and traits. Teaching male and female lawyers that "language can be a versatile, creative, and context-rich set of strategies for achieving the transactional, relational, and transformational goals" of the profession would go a long way in making the industry more habitable for women and, in the end, more effective in achieving its goals.<sup>275</sup>

Scholars of organizational management theory have suggested that to effect significant communication change within an organization, "two kinds of closely intertwined thinking need to be modified: the collective, organizational-level thinking embodied in communication structures and individuals' interpretive schemes

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271. Jae Yun Kim et al., *Lean in Messages Increase Attributions of Women's Responsibility for Gender Inequality*, 115 J. PERSONALITY SOC. PSYCH. 974 (2018); see also Glass & Cook, *supra* note 211, at 1246 (noting that "individual strategies of empowerment increase rather than decrease the emotional, embodied and social labour required of women and people of colour seeking inclusion into elite roles, resulting in the reproduction of racial and gendered hierarchies.").

272. See Kim, et al., *supra* note 271, at 989.

273. Susie Salmon, *Reconstructing the Voice of Authority*, 51 AKRON L. REV. 143, 146 (2017).

274. See Baxter, *supra* note 75, at 125.

275. See *id.*

that guide communication behavior in specific situations.”<sup>276</sup> In accordance with this theory, to interrupt the bias associated with gendered communication within the legal industry, the legal academy and the legal profession need to address both the structural conventions that reinforce the masculine norms of communication as well as the individual beliefs that support these conventions.

Yet altering the hardened communication norms of an organization or individual is extraordinarily challenging.<sup>277</sup> There is a general understanding in the social science literature that the traditional prescriptive nature of altering communication skills through diversity training is ineffective.<sup>278</sup> In other words, “do and don’t lists” which call for “easy recipes and quick fixes,” provide no long term, or limited change, at best.<sup>279</sup>

Instead, to effectuate lasting change in an organization, participants need to be able to recognize, define, and assess the current effectiveness and value of the communication norms within that organization.<sup>280</sup> Although certain groups may have benefited personally from the existence of those current norms, making them explicit and evaluating their worth allows for the opportunity to create a new language that better aligns with a more diverse and effective workplace.<sup>281</sup>

Scholars within language-centered disciplines have repeatedly called for a “deeper understanding of the role of language and linguistic choices” in the workplace as well as for the development and implementation of strategic guidance to solve language

276. Jim Suchan, *Changing Organizational Communication Practices and Norms A Framework*, 20 J. BUS. & TECH. COMM’N. 5, 12 (Jan. 2006). Effecting such change requires workers to rethink their communication interpretative schemes in order to solidify new practices that alter existing communicative norms. *Id.* at 9–10. This requires workers to “think about and practice communication in new ways . . .” *Id.* at 9.

277. *Id.* at 11 (arguing that “[b]ecause these communication structures are essential elements of the sense-making processes that both the individual and the organization use to simplify and routinize ongoing experience, these structures, particularly in large, functionally organized bureaucracies, tend to be conservative and self-protective, making it difficult for organizational workers to determine when a major communication change is needed.”).

278. Darics, *supra* note 160, at 659; see generally Frank Dobbin & Alexandra Kalov, *Why Doesn’t Diversity Training Work? The Challenge for Industry and Academia*, 10 ANTHROPOLOGY NOW 48 (2018) (noting that “two-thirds of human resources specialists report that diversity training does not have positive effects, and several field studies have found no effect of diversity training on women’s or minorities’ careers or on managerial diversity.”).

279. See Darics, *supra* note 278, at 659.

280. See Suchan, *supra* note 276, at 10.

281. See *id.*

problems through observation and feedback.<sup>282</sup> Indeed, the process of effecting communication change in the workplace has, in the past decade, been an increasing area of interest of applied linguistics.<sup>283</sup> Applied linguistics is a field of study that has developed to help solve real-world problems in which “language plays a central role.”<sup>284</sup>

Scholars in the field of applied linguistics have recently sought to construct partnerships with practitioners in order to solve specific language problems in areas involving communication in the workplace.<sup>285</sup> This interdisciplinary approach has been employed in such areas as second language learning, health care settings, speech and language therapy, and forensic linguistics.<sup>286</sup> In the field of forensic linguistics, for example, lawyers work with linguists to employ linguistic methods, analysis, and insights to resolve issues in forensic areas of the law.<sup>287</sup>

Although there are few studies to rely upon, Judith Baxter has made the case for practitioners to partner with linguists to help workplaces resolve gender related communication problems.<sup>288</sup> In one instance, Baxter, acting as a linguistic consultant, aided a female senior executive who was struggling in the workplace due to what she believed to be gender-related interactional issues.<sup>289</sup>

The general concept of these partnerships holds promise and is worthy of further investigation and study. Although most diversity training today incorporates some communication bias training,

282. See Darics, *supra* note 160, at 653–55; Baxter, *supra* note 75, at 125; Erika Darics & Jonathan Clifton, *Making Applied Linguistics Applicable to Business Practice. Discourse Analysis as a Management Tool*, 40 APPLIED LINGUISTICS 917–36 (2019); Baxter, *supra* note 30, at 159; see also e.g., Elizabeth H. Stokoe & Janet Smithson, *Making Gender Relevant: Conversation Analysis and Gender Categories in Interaction*, 12 DISCOURSE & SOC’Y 243, 263 (2001).

283. See G.R. Tucker, *Applied Linguistics*, LINGUISTIC SOC’Y AM., <https://www.linguisticsociety.org/resource/applied-linguistics> [<https://perma.cc/8YGN-XYGQ>] (last visited Feb. 26, 2023); see Baxter, *supra* note 30, at 145 (describing the benefits of consultancy research in the area of applied linguistics in the field of leadership and gender).

284. See Tucker, *supra* note 283.

285. See Baxter, *supra* note 30, at 141–42.

286. *Id.* at 143–44.

287. S. Ashraf, *What Is Forensic Linguistics?*, LANGUAGE HUMANITIES (Jan. 27, 2023), <https://www.languagehumanities.org/what-is-forensic-linguistics.htm> [<https://perma.cc/AL9Q-DGJK>].

288. See Baxter, *supra* note 30, at 141–59.

289. *Id.* In this instance, the female senior executive articulated that she was encountering problems in managing her team due to her naturally vocal, direct, and opinionated style, which was engendering what she felt was resentment and resistance between her and her team members. *Id.* at 146–47.

it typically falls within the prescriptive “do and don’t lists” that have been found to be largely unsuccessful at changing practices. By partnering with linguists, law schools and legal employers could strengthen diversity training protocols. These protocols could focus on teaching law students and lawyers to recognize and evaluate the effectiveness of the current norm of interactional techniques and to consider and practice using other linguistic styles along the feminine-masculine continuum that may serve them better, both in terms of leadership in their profession as well as in courtroom effectiveness.

For instance, such training protocols could seek to train law students and lawyers to recognize the dominating communication styles that are often present in mixed group interactions, like interruptions and differences in volubility. These learning opportunities may involve gathering audio or video recordings of the classroom or workplace interactions and using them as a basis for reflection and discussion. According to Baxter, by using recordings or transcripts of actual interactions, it is possible to show a group of individuals “how small moments of interaction . . . can construct gendered practices.”<sup>290</sup> This in turn, can prompt peer discussion about how bias is perpetuated through classroom or workplace communication.<sup>291</sup>

Training protocols could help lawyers recognize and evaluate the dispassionate and impersonal linguistic techniques that are traditionally employed in persuasive oral and written advocacy. These trainings could teach methods of incorporating personalizing linguistic techniques that aim to better connect the client to the reader or listener. The training and practice in alternative styles of persuasive advocacy could nudge the profession toward a more inclusive norm of legal discourse that better recognizes emotion and the human element as essential to achieving justice in written and oral advocacy and decision-making.<sup>292</sup>

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290. *See id.* at 156.

291. *See id.*

292. Notable is the ongoing and global “feminist judgment movement,” which is an “informal, international collaboration of feminist scholars and lawyers who decided to use feminist reasoning and methods to write ‘shadow,’ or alternate, judicial opinions.” *See* Bridget J. Crawford et al., *Teaching with Feminist Judgments: A Global Conversation*, 38 *LAW & INEQ.* 1 (2020) (memorializing an exchange between fourteen professors on the value and uses of teaching with the feminist judgments). The movement involves rewriting and re-imagining legal opinions from a feminist perspective to envision different outcomes as well as different processes of legal analysis and writing. *Id.* at 3–5. As such, these opinions could be used as a way to introduce to law students and lawyers different approaches to writing style, as well as analysis and perspective, as many of these re-written opinions employ a more personalized, relational,

Training protocols could also teach students and lawyers facilitative and engaging interactional linguistic techniques that may be more effective in areas of practice such as collaboration, mediation, problem solving, and client counseling.<sup>293</sup>

Finally, training protocols could teach lawyers how to vary linguistic styles to achieve different leadership objectives. While certain interactions may require a more direct and authoritative approach, recent research has identified women as having a potential leadership advantage due to their “transformational” communication style.<sup>294</sup> This type of leadership involves using engaging and inspiring communication strategies to help subordinates reach a higher level of motivation.<sup>295</sup> Thus, training can focus on specific linguistic strategies that range from the masculine norm of authoritative, direct, instructional, and abstract to the feminine norm of indirect, participatory, facilitatory, and encouraging, depending upon the context and the circumstances.

Intentionally teaching all law students and attorneys strategies such as these places the burden on both men and women to alter their interactions depending upon the context, increases structural acceptance of different communication styles, and decreases bias.

## CONCLUSION

Gendered communication bias is a significant component of gender bias in the legal workplace. Conceptualizing the barriers to success through the lens of communication bias can help the profession frame a more pointed solution to the problem. Building interdisciplinary partnerships with experts in the field of language could provide a path to first deconstruct and then reconstruct communicative norms in the legal profession.

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and narrative approach in communicating law and facts. *Id.* at 32–34.

293. Caitlin Howell, *Combating Gender Inequities in Law School: Time for A New Feminist Rhetoric That Encourages Practical Change*, 4 *MOD. AM.* 36, 38 (2008) (noting that the current law school curriculum does not adequately teach the skills lawyers need in alternative dispute resolution techniques and client communication).

294. *See* Paustian-Underdahl, *supra* note 162, at 1129–30 (discussing the current literature related to the female leadership advantage theories); *see* Baxter, *supra* note 75, at 118 (discussing “difference theory” and the notion that “many of the qualities needed by leaders in the modern age are congruent with those associated with women.”).

295. *See* Baxter, *supra* note 75, at 118.