

# Designing Equality in the Legal Profession: A Nudging Approach

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*Designing equality in the legal profession requires the adoption of a systems thinking approach similar to those developed by Dispute System Design scholars. Specifically, law firms that adopt a systematic approach to gender issues will be able to redesign organizational procedures and systems to remove gender biases that have crept in and to reach long-term goals to diversify leadership. This approach is referred to as Gender Balance System Design. As a whole, the legal profession can nudge itself to foster a level playing field and an environment that ensures both men and women can excel in leadership roles.*

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I. INTRODUCTION

As a fundamental premise, Dispute System Design (DSD) scholars recognize that neutral organizational design does not exist and that this void is evident in the handling and resolution of conflicts.<sup>1</sup> The normative starting point of this Article stems from the same idea. It recognizes that gender is embedded in the “structure of organizations” and that most organizational designs in effect today in the legal profession are not advantageous for women to attain leadership roles.<sup>2</sup> Law firm leaders, in general, do not manage gender balance issues in the same manner as other issues that arise in the course of business. Instead, gender balance issues are normally viewed and managed in a piecemeal, ad hoc fashion and as isolated incidents. This Article argues that viewing and managing gender balance issues more systematically, instead, provides unparalleled opportunities for law firms to learn critical information about their operations, population (including individual and group behavior), and environments. By taking this view, organizations can achieve a more holistic and global perspective.

Research shows that most default rules in organizations, by their design, impede the process of attracting, recruiting, and promoting more women.<sup>3</sup> Gender biases are enacted in varying and complex ways through organizational behavior, organizational structures, and

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1. See WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 3, 34, 67 (1988).

2. See IRIS BOHNET, WHAT WORKS: GENDER EQUALITY BY DESIGN 1, 67 (2016); ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 32, 120 (2005).

3. See BOHNET, *supra* note 2, at 30–34, 40.

organizational policies.<sup>4</sup> In fact, despite the extensive efforts made by the legal profession in general (and especially law firms) to address the lack of women in senior positions, the results remain disappointing.<sup>5</sup> For instance, only 21.9 percent of law firm partners and 21.6 percent of Fortune 500 general counsels are women.<sup>6</sup> In the 200 highest-grossing law firms, about 18 percent of equity partners are women, and just 4 percent of managing partners are female.<sup>7</sup> Further, women lawyers are far less likely to be credited as “rainmakers” at the same rate as men, in positions of firm-wide leadership at the same rate as men, and compensated by firms at the same level as men.<sup>8</sup> Much to the concern of both gender equity advocates and law firms, who understand the strategic and competitive need for having women in the ranks and the leadership, gender gaps persist in the legal profession.

Designing equality in the legal profession requires the adoption of a system-thinking approach similar to DSD utilized by organizations to deal with disputes. The adoption of a systemic view of gender balance issues will allow law firms to re-design organizational procedures and systems to remove biases that have crept into attracting, recruiting, and promoting more women in leadership and reaching long-term goals to diversify the legal profession and its leadership. Yet, the realization of more equal gender representation in the legal profession requires choices and actions that are not yet part of the law firm management thinking and procedures.

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4. See Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1043–44 (2011); Joyce S. Sterling & Nancy Reichman, *So, You Want to Be a Lawyer? The Quest for Professional Status in a Changing Legal World*, 78 FORDHAM L. REV. 2289, 2300 (2010); Susan Sturm, *Activating Systemic Change Toward Full Participation: The Pivotal Role of Mission-Driven Institutional Intermediaries*, 54 ST. LOUIS L.J. 1117, 1128 (2010); Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 HOFSTRA L. REV. 1001, 1004, 1006, 1008 (2002); Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221, 2225 (2002).

5. See Eli Wald, *Glass Ceilings And Dead Ends: Professional Ideologies, Gender Stereotypes, And The Future Of Women Lawyers At Large Law Firms*, 78 FORDHAM L. REV. 2245, 2251–53 (2010); Crystal L. Hoyt, *Women, Men, and Leadership: Exploring the Gender Gap at the Top*, 4 SOC. & PERSONALITY PSYCHOL. COMPASS 484, 488–89, 491 (2010).

6. *A Current Glance at Women in the Law 2017*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/groups/women/resources/statistics.html>; *2017 Annual Survey Report on the Promotion and Retention of Women in Law Firms*, NATIONAL ASSOCIATION OF WOMEN LAWYERS, <http://www.nawl.org/p/cm/ld/fid=1163>.

7. *Id.*

8. See Paola Cecchi-Dimeglio & Hugh A. Simons, *Retaining Women Laterals: What Can Be Learned from the Data on Female Lawyer Lateral Moves*, 40 AM. LAW. 46, 48 (2018); SPENCER HEADWORTH ET AL., *DIVERSITY IN PRACTICE* 124 (2017).

As a step forward in the conversation of addressing systemic issues related to gender, this Article introduces a Gender Balance System Design (GBSD) approach, which will be useful for scholars, law practitioners, judges, and legislators across the world to design and/or improve upon a system that levels the playing field for the genders within an organization. This approach provides new solutions for closing the gender gaps in law firms and the legal profession generally. This Article reviews the challenges faced by women in their education and in the legal profession, considers the steps that are necessary to make changes happen in the legal profession, and provides solutions to nudge the legal profession in designing equality.

## II. ASSESSING CHALLENGES FACED BY WOMEN IN THE LEGAL PROFESSION

Since Ury et al.'s 1988 book, *Getting Disputes Resolved: Designing Systems To Cut The Costs Of Conflict*, a robust literature has appeared in the field of DSD. Since the 1960s, a growth in research has focused on providing solutions to tackle conflict situations. In some of the early literature on the subject, scholars from all of the social sciences sought to understand factors leading to conflicts.<sup>9</sup> This led conflict literature to identify and compare ways of dealing with conflicts.<sup>10</sup> Conflict literature found that a problem-solving approach to prevent and solve conflict efficiently was the most sustainable one in the long run. Building on this approach, conflict scholars have differentiated between types of conflict (e.g., cooperative-constructive versus competitive-destructive conflicts) and have extensively studied conflict styles in organizational settings.<sup>11</sup>

Progressively, conflict scholars developed a more detailed and systematic approach to conflict, which included distinctions between interpersonal, intragroup, and intergroup conflict.<sup>12</sup> They then derived the structures (and the values supporting these structures) developed in organizations, which facilitated the management of

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9. See Warren Schmidt & Robert Tannenbaum, *Management of Differences*, 38 HARV. BUS. REV. 107, 108, 112–14 (1960).

10. See ROBERT R. BLAKE & JANE S. MOUTON, *THE MANAGERIAL GRID; KEY ORIENTATION FOR ACHIEVING PRODUCTION THROUGH PEOPLE* 88, 97 (1968).

11. See M. Rahim, *A Measure of Styles of Handling Interpersonal Conflict*, 26 ACAD. OF MGMT. J. 368, 370–74 (1983); see also generally MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* (1973).

12. See ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 74, 89 (2005); Henri Barki & Jon Hartwick, *Conceptualizing The Construct Of Interpersonal Conflict*, 15 INT'L J. CONFLICT MGMT. 216, 222–30, 244 (2004);

conflict in organizations.<sup>13</sup> Subsequently, they differentiated and integrated power-based, right-based, and interest-based approaches into ways to tackle conflicts.<sup>14</sup> In this effort, in the late 1980s, conflict scholars proposed principles and models of DSD. DSD falls into the field of Alternative Dispute Resolution (ADR). ADR concerns a set of dispute resolution processes and techniques designed to provide alternatives to adjudicated conflict settlements. The purpose of the introduction of such techniques is to reduce caseloads of traditional court and litigation expenses, as well as to provide disagreeing parties with more control over the process and results in a dispute resolution process as well as achieve a higher level of mutual satisfaction. Since then, the field has flourished through the multitude of inputs and works of both practitioners and scholars. DSD can be described as an intentional and methodical creation of an effective, efficient, and fair dispute resolution process model based on the unique needs of a particular system or organization.

The different models have helped to shape the theory of DSD and have provided different pillars for understanding the rationale of DSD.<sup>15</sup> All the different models have recognized that effective DSD

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Karen Jehn, *A Multimethod Examination of the Benefits and Detriments of Intra-group Conflict*, 40 ADMIN. SCI. Q. 256, 263–70, 274, 282 (1995).

13. See John P. Conbere, *Theory Building For Conflict Management System Design*, 19 CONFLICT RES. Q. 215, 224, 229, 232 (2001).

14. See URY ET AL., *supra* note 1, at 20–45.

15. See, e.g., NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES 20–26 (2013); Deborah A. Katz & Judith Cohen, *What Corporations Need to Know About How to Install an Integrated Conflict Management System*, 27 ALTERNATIVES TO HIGH COST LITIG. 99, 127–29 (2009); Hallie Fader, *Designing the Forum to Fit the Fuss: Dispute System Design for the State Trial Courts*, 13 HARV. NEGOT. L. REV. 481, 485–89 (2008); Lisa B. Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 12–18, 22–25, 36–39 (2008); Michael Hamilton & Dominic Bryan, *Deepening Democracy? Dispute System Design and the Mediation of Contested Parades in Northern Ireland*, 22 OHIO ST. J. ON DISP. RESOL. 133, 136, 143, 166, 177 (2006); Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 19–23, 42–47, 61–63 (2005); Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 L. & CONTEMP. PROBS. 221, 232–36, 244–49 (2004); Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133, 139, 142–46 (2003); DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 80–87 (2003); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 71, 74, 77 (2002); Jennifer F. Lynch, *Beyond ADR: A Systems Approach to Conflict Management*, 17 NEGOT. J. 206, 208–12 (2001); Lawrence Susskind, *An Alternative to Robert's Rules of Order for Groups, Organizations, and Ad Hoc Assemblies that Want to Operate By Consensus*, in THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 189–230

must include a step design process and an in-depth assessment of the current system, including identification of the challenges faced by users of the system before implementing, evaluating, and adapting a new design. This Article argues that a similar approach should be crafted and applied to issues faced by women in their legal career. In fact, an approach with a clear step design process and assessments of the current system is key to assessing the systemic issues affecting women while in law school and when they enter and evolve in the legal profession.

### A. *Educational Challenges*

In the last half of the twentieth century, women's access to education has grown, and the very nature of available employment has provided women with more opportunities.<sup>16</sup> Today, in the United States, women constitute nearly 50 percent of the country's work force and comprise 50.8 percent of the population.<sup>17</sup> Similarly, studies have documented an increase in the number of women students across academic disciplines. Overall, women currently constitute more than 60 percent of all Bachelor's and Master's cohorts and almost 50 percent of professional degree graduates.<sup>18</sup> Yet, in academic areas that have been historically male-dominated, gender gaps persist and, although subtle, are still pernicious. The law is an example of such an area.

For a long time, women's broadening educational paths, including their increased attendance of law schools, were expected to lead to a proportional increase in female leaders, including in the legal profession. That expectation has not yet occurred.<sup>19</sup> "The passage of

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(1999); CATHY A. CONSTANTINO & CHRISTINA S. MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 58–64 (1996); Mary P. Rowe, *The Post-Tailhook Navy Designs an Integrated Dispute Resolution System*, 9 *NEGOT. J.* 203, 203–07 (1993); Jeanne M. Brett et al., *Designing Systems for Resolving Disputes in Organizations*, 45 *AM. PSYCHOL.* 162, 164, 166, 170 (1990); Mary P. Rowe, *People Who Feel Harassed Need A Complaint System With Both Formal And Informal Options*, 6 *NEGOT. J.* 161, 162–64, 169–70 (1990); William R. Drake, *Practice Dispute Systems Design: A Special Section-Statewide Offices Of Mediation*, 5 *NEGOT. J.* 359, 364–66, 372 (1989); Mary P. Rowe, *Disputes and Conflicts Inside Organizations A Systems Approach*, 5 *NEGOT. J.* 149, 149–51 (1989).

16. See Paola Cecchi-Dimeglio, *Pursuing Diversity In The Legal Market*, in *OVERCOMING CHALLENGES TO GENDER EQUALITY IN THE WORKPLACE: LEADERSHIP AND INNOVATION* 35, 42–49 (Patricia M. Flynn et al. eds., 2016).

17. See *Women in the Labor Force*, U.S. DEP'T OF LABOR, WOMEN'S BUREAU, [https://www.dol.gov/wb/stats/stats\\_data.htm](https://www.dol.gov/wb/stats/stats_data.htm).

18. *Id.*

19. See Paola Cecchi-Dimeglio, *Legal Education And Gender Equality*, in *INTEGRATING GENDER EQUALITY INTO BUSINESS AND MANAGEMENT EDUCATION* 140, 153–57

time, for years cited as a reason for hope, has failed to put a major dent in the huge disparities” in both career advancement and leadership positions for women in law.<sup>20</sup> In fact, it took almost a century of struggle for women, both at the state and federal levels, to gain the right to be admitted to practice law, and it is only relatively recently that women were admitted at approximately the same rate as men into law school.<sup>21</sup>

For example, in the 1950s and 1960s, women made up just 4 percent of first-year law students.<sup>22</sup> Women represented 20 percent in 1974 and 40 percent in 1985 of registered law students.<sup>23</sup> Still, it was not until 2001 that women matriculated at law school at approximately the same rate as men.<sup>24</sup> 2016 was the first year in which the number of female enrollees surpassed male enrollees at United States law schools.<sup>25</sup> In 2017, women made up the majority of law school attendees at 51.3 percent.<sup>26</sup>

Even though legal education has made important steps toward closing the gender gap, a robust body of empirical research on gender and diversity in law schools consistently demonstrates how and why legal education makes it more difficult for female students to succeed in law school and well beyond, including obtaining leadership roles.<sup>27</sup>

(2015); DEBORAH L. RHODE, *BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE* 19 (2001).

20. Justin D. Levinson & Danielle Young, *Implicit Gender Bias In The Legal Profession: An Empirical Study*, 18 *DUKE J. GENDER L. & POL’Y* 1, 18–26 (2010).

21. In 1869, Iowa was the first state to admit a woman to practice law. Over the next 81 years, states slowly admitted women to practice law, but it was not until 1950 before all states had opened their courtrooms to female lawyers. See Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established by Women for Women*, 47 *AM. U. L. REV.* 613, 616, 634 (1998).

22. See Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 *J. LEGAL EDUC.* 313, 322, 325–27 (2000). The statistics in this paragraph come from *First Year Enrollment in ABA Approved Law Schools (1947–2012)*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/legal\\_education/resources/statistics/statistics-archives/](https://www.americanbar.org/groups/legal_education/resources/statistics/statistics-archives/).

23. See Neumann, *supra* note 22, at 325–27.

24. See Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 *YALE J. L. & FEMINISM* 389, 394, 396 (2006); see also *Current Volume Summaries by Region, Race/Ethnicity, Sex & LSAT Score*, LAW SCHOOL ADMISSION COUNCIL, <https://www.lsac.org/data-research/data/current-volume-summaries-region-raceethnicity-sex-lsat-score>.

25. *Where Women Go (And Don’t Go) To Law School*, AMERICAN BAR ASSOCIATION, Mar. 30, 2018 <https://abaforlawstudents.com/2018/03/30/where-women-go-and-dont-go-to-law-school/>.

26. *Id.*

27. See generally Eli Wald, *Primer On Diversity, Discrimination, And Equality In The Legal Profession Or Who Is Responsible For Pursuing Diversity And Why*, 24 *GEO. J. LEGAL ETHICS* 1079, 1082, 1088 (2011); Alice H. Eagly et al., *Transformational*,

One of the key, fundamental problems identified is that law schools constitute environments founded on a culture of masculinity.<sup>28</sup> Despite appearing gender-neutral, inequalities in law schools result from “unconscious biases” and structures that fundamentally and disparately affect women.<sup>29</sup>

Several systemic issues that contribute to these inequalities include the experience of the recipients of the legal knowledge, curriculum design, its content and its delivery, and the disproportionate number of role models between genders stemming from the gendered difference in faculty members teaching law school courses. First, gender legal scholars have recognized that men seem to be the primary recipients of legal knowledge and classroom attention.<sup>30</sup> Experiences in law school for men seem to be significantly different than for women and minorities. Most of the theorizing and research on women’s experiences in law school demonstrates that women in law school seem to be disproportionately alienated and intimidated by their experiences.<sup>31</sup> The competitive classroom environment in law school

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*Transactional, and Laissez-Faire Leadership Styles: A Meta-Analysis Comparing Women and Men*, 129 PSYCHOL. BULL. 569, 571–73 (2003); Alice H. Eagly and Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 583 (2002); Cynthia F. Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 298, 322–29 (1995); CYNTHIA F. EPSTEIN, *WOMEN IN LAW* 55, 72 (1981); Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 12–24 (1994).

28. See Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 107–15, 124, 136 (2009).

29. Dan Subotnik, *The Cult of Hostile Gender Climate: A Male Voice Preaches Diversity to the Choir*, 8 U. CHI. L. SCH. ROUNDTABLE 37, 40 (2001); JOAN WILLIAMS, *UNBENDING GENDER* 71 (2000).

30. See generally Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209, 1211–17 (2005); Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U. J. GENDER SOC. POL’Y & L. 511, 592 (2005); Allison L. Bowers, *Women at the University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117, 132–37 (2000); Paula Gaber, “Just Trying to Be Human in This Place.” *The Legal Education of Twenty Women*, 10 YALE J. L. & FEMINISM 165, 167–71 (1998); Marsha Garrison et al., *Succeeding in Law School: A Comparison of Women’s Experiences at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515, 517–22 (1996); Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 314 (1994); Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 142–47 (1988); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1302–04, 1310 (1988).

31. See MARY BECKER, *DON’T JUST HEAR IT THROUGH THE GRAPEVINE: STUDYING GENDER QUESTIONS AT YOUR LAW SCHOOL* 28–34 (1998); *Elusive Equality: The Experiences Of Women In Legal Education*, COMMISSION ON WOMEN IN THE PROFESSION, AMERICAN BAR ASSOCIATION 14, 18 (1996) (describing surveys of students and grade



significantly discourages women from participating in class.<sup>32</sup> Overall, women are less comfortable with the classroom experience—particularly with the use of the Socratic method.<sup>33</sup> The adverse impact of the Socratic method on female students exists and is widely recognized; this negative impact on women contrasts startlingly with the impact on their male counterparts.<sup>34</sup> Women in law schools also report to be less confident in their abilities.<sup>35</sup> As a result, compared to men, women consistently underperform in law school in terms of grades.<sup>36</sup> Scholars have attributed this phenomenon to a mismatch between goals of law schools, on the one hand, and individual law students or distinct groups of students, on the other.<sup>37</sup>

Additionally, individual courses are gendered both in the male/female proportion of the faculty teaching the subjects and in the nature of the courses.<sup>38</sup> For instance, Merritt and Reskin's study showed that men were significantly more likely than women to teach Constitutional Law and women were more likely than men to teach skills courses and Trusts and Estates.<sup>39</sup> Professor Marjorie Kornhauser's seminal empirical study on gender and law school demonstrated that 80 percent of law school courses she examined suffered from a gender disparity. She defines this as a "statistically significant

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analysis); LINDA F. WIGHTMAN, *WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN* 11 (1996).

32. See generally Bowers, *supra* note 30, at 130; Guinier et al., *supra* note 27, at 14; Krauskopf, *supra* note 30, at 314; Banks, *supra* note 30, at 312; Weiss & Melling, *supra* note 30, at 1304; 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, 1239–40 (1988).

33. See generally Bowers, *supra* note 30, at 132, 134; Guinier et al., *supra* note 27, at 14, 16; Krauskopf, *supra* note 30, at 314; Banks, *supra* note 30, at 310; Weiss & Melling, *supra* note 30, at 1305; Janet Taber et al., *supra* note 32, at 1239–40.

34. See David D. Garner, *Socratic Misogyny? Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*, 2000 *BYU L. REV.* 1597, 1602 (2000).

35. *Id.*

36. *Id.*

37. See HEADWORTH ET AL., *supra* note 8, at 112–14; Guinier et al., *supra* note 27, at 14, 16; ANDREW L. KAUFMAN ET AL., *PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION* 82, 86 (2017).

38. See generally Bowers, *supra* note 30, at 132, 134; Guinier et al., *supra* note, 27 at 14, 16; Krauskopf, *supra* note 30, at 314; Banks, *supra* note 30, at 310; Weiss & Melling, *supra* note 30, at 1305; Janet Taber et al., *supra* note 32, at 1214–16, 1239–40.

39. See Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 *COLUM. L. REV.* 199, 202, 219, 237–38 (1997).

gender distortion.”<sup>40</sup> The nature of the class is more or less perceived as inherently gendered. For instance, students are more inclined to perceive a course in corporate finance as gendered male, compared to family law, which is more likely to be perceived as gendered female.<sup>41</sup> Professor Kornhauser notes that women are more likely to teach classes that are viewed as less prestigious, meaning courses that faculty members are less interested in teaching and therefore confer less power on the teaching faculty member, than those taught by men. Faculty members with more power in shaping the institution generally do not teach, what she refers to as “low-status courses.”

Consequently, these perceptions and their effects may influence law students’ career choices and options well beyond law school, especially for women.<sup>42</sup> Indeed, research has repeatedly demonstrated that experiences in law school are indicative of future career options and experiences in a legal career.<sup>43</sup>

### B. *Challenges to Achieving Leadership Positions*

Without a doubt, women’s experiences in law school affect their career trajectories long after graduation, including the leadership roles and opportunities that will arise along their careers.<sup>44</sup> In fact, over the last two decades, a rich body of literature across disciplines has developed on the structural barriers or hurdles women face in the legal profession in attaining leadership positions.<sup>45</sup>

The first hurdle that affects women’s likelihood of attaining positions of leadership is that they are more likely to leave the practice of law than men.<sup>46</sup> This movement affects the pool of women that remain on trajectories to leadership positions. In fact, women leaving

40. Marjorie E. Kornhauser, *Rooms Of Their Own: An Empirical Study Of Occupational Segregation By Gender Among Law Professors*, 73 UMKC L. REV. 293, 295–99 (2004).

41. *Id.*

42. *Id.*

43. See Bowers, *supra* note 30, at 132; Guinier et al., *supra* note 27, at 14, 16; Krauskopf, *supra* note 30, at 313; Banks, *supra* note 30, at 312; Weiss & Melling, *supra* note 30, at 1304; Janet Taber et al., *supra* note 32, at 1214–16, 1239–40.

44. See DEBORAH L. RHODE ET AL., LEGAL ETHICS 54, 58 (2012); DEBORAH L. RHODE & AMANDA PACKEL, LEADERSHIP: LAW, POLICY, AND MANAGEMENT 75–79 (2011); Rhode, *Gender and the Profession*, *supra* note 4, at 1002, 1006.

45. See, e.g., Steven A. Boutcher & Carole Silver, *Gender and Global Lawyering: Where are the Women?*, 20 IND. J. OF GLOBAL LEGAL STUDIES 1139, 1142, 1147 (2013); RHODE & PACKEL, *supra* note 44, at 80–88; Linda L. Carli & Alice H. Eagly, *Overcoming Resistance to Women Leaders: The Importance of Leadership Style*, in WOMEN & LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 127 (2007); KARIN KLENKE, WOMEN AND LEADERSHIP: A CONTEXTUAL PERSPECTIVE 162 (1996).

46. See Boutcher & Silver, *supra* note 45, at 1142, 1147.

the practice of law begins early in their career and accelerates over time.<sup>47</sup> Overall, women are more likely to leave the practice of law before they reach leadership positions (e.g., before partnership decisions are made).<sup>48</sup> Up until now, most of the empirical research has focused on the barriers preventing women from becoming leaders in law, but very few studies have been able to document the factors that lead women to decide to leave their positions in law.<sup>49</sup>

The second hurdle is the under-representation of women in senior positions in law, which leaves young women aspiring to leadership positions with few role models.<sup>50</sup> Research has shown that women's under-representation in senior positions can signal that being female is a liability.<sup>51</sup> As a result, would-be women leaders are discouraged from turning to senior women for developmental advice and support.<sup>52</sup> For instance, in a study comparing experiences of women law associates as a function of women's representation in their firm's partnership, those in firms with few women partners were less likely to experience gender as a positive basis for identification with senior women. Those women were also less likely to perceive senior women as role models with legitimate authority.<sup>53</sup> Not only were senior women scarce, but their scarcity made others perceive them unfit as role models.<sup>54</sup> As such, limited access to leadership positions for women has historically diminished both role modeling and opportunities for aspiring female professionals.

Third, women are often left out of vital mentoring relationships in the legal world, and their exclusion results in a negative cycle. Women lacking mentors are less likely to advance and more inclined to leave practice settings. Therefore, fewer women rise and act as mentors to new female associates in these settings.<sup>55</sup>

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47. See RHODE & PACKEL, *LEADERSHIP*, *supra* note 44, at 80–88.

48. See KATHLEEN HALL JAMIESON, *BEYOND THE DOUBLE BIND: WOMEN AND LEADERSHIP* 120 (1995); see also HEADWORTH ET AL., *supra* note 8, at 46, 117.

49. See JAMIESON, *supra* note 48, at 120.

50. See ALICE H. EAGLY & LINDA L. CARLI, *THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS* 124, 138 (2007).

51. *Id.*

52. *Id.*

53. See Robin J. Ely, *The Effects Of Organizational Demographics And Social Identity On Relationships Among Professional Women*, 39 ADMIN. SCI. Q. 203, 207–09, 222, 236 (1994).

54. *Id.*

55. *Id.*

Fourth, lack of networking access and opportunities for women presents a lasting hurdle for women to make it to leadership positions. Networking is conceptually distinct from mentoring, with a definition somewhat more fluid. It constitutes a part of the informal organizational system that is crucial for both men and women to advance through the organizational hierarchy.<sup>56</sup> When women lack access to networking, they struggle to advance in the organization.

Lastly, inflexibilities in law firm work schedules and structures are recognized as barriers to women attaining leadership roles.<sup>57</sup> Women typically assume the principal role for caregiving over their lifetime. As a result, women frequently have to take time out from their careers to fulfill the caregiver role. Research has shown that women continue to pay a high penalty for “off-ramping” and leaving their careers.<sup>58</sup> Such off-ramps keep women from taking or being considered for promotional opportunities, and when they do re-enter the career stream, it is difficult for them to gain momentum in the promotion process and parity in earning power with their male counterparts.<sup>59</sup>

### III. MAKING STEPS TO CHANGE: GENDER BALANCE SYSTEM DESIGN

#### A. *An Interdisciplinary Approach*

The concept of Gender Balance System Design (GBSD) originates in DSD and builds on DSD’s interdisciplinary and systemic approach to solving conflict to level the playing field for the genders.<sup>60</sup> Karl Popper noted, “[w]e are not students of some subject matter, but students of problems. And problems may cut right across the borders of any subject matter or discipline.”<sup>61</sup> Popper’s statement reflects the truth that scholars are, much of the time, compelled to refer to other disciplines to solve problems. Social science scholarship abounds with examples of the integration of knowledge from various research fields. For example, in the nineteenth century, Louis Pasteur laid down the foundations of microbiology and immunology by addressing

56. *Id.*

57. *Id.*

58. *Id.*

59. See *Time-Outs Take an Increasing Toll on Women’s Career Finds New Study from the Center for Work-Life Policy*, CENTER FOR WORK-LIFE POLICY (May 18, 2010), <https://www.amanet.org/training/articles/time-outs-take-an-increasing-toll-on-womens-careers.aspx>.

60. See Paola Cecchi-Dimeglio, *Solving Conflict Efficiently: A Multi-Dimensional Model, Integrating Organizational Culture In Dispute System Design*, in INTERDISCIPLINARY HANDBOOK OF DISPUTE RESOLUTION 279 (2015).

61. KARL R. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 54, 59 (2002).

practical questions about diseases and wine spoilage.<sup>62</sup> Similarly, social scientists must respond to the myriad of forces influencing human society when conducting research.<sup>63</sup> The integration and synthesis of ideas and methods from other disciplines creates a platform for conversations and connections among disciplines. Furthermore, research demonstrates that, on an individual basis, the exposure to ideas outside one's own discipline positively impacts researchers within their own disciplines.<sup>64</sup>

Among the most cited motives for interdisciplinary research is the increased need to address complex problems that must be attacked simultaneously with deep knowledge from different perspectives. Such motives have led scholars, including those in the field of law, to powerfully combine knowledge in an interdisciplinary manner. Take, for instance, the initiative of Dean Christopher Columbus Langdell, who applied the principles of pragmatism to the study of law to support breakthrough ways to solve legal problems, which led to the emergence of the field of Law and Economics.<sup>65</sup> As a result, the study of law is not just a technical pursuit but also a dialectical process of inference. Langdell suggested that law students must be given some means of experimentation and research to discover the fundamental scientific axioms that ought to be used in studying, teaching, and judging the law. His idea grew out of the observation of the process used in other fields such as philosophy, chemistry, and biology, where experimentation based on a series of questions led to a logical conclusion. In addition, the field of Law and Economics was developed in response to the need for "gaining a better understanding of the economic nature and consequences of law."<sup>66</sup> This field has

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62. Kendall A. Smith, *Louis Pasteur, the Father of Immunology?*, 3 FRONTIERS IN IMMUNOLOGY 68, 68–69 (2012).

63. See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 34, 39 (1970).

64. See DEAN KEITH SIMONTON, CREATIVITY IN SCIENCE: CHANCE, LOGIC, GENIUS, AND ZEITGEIST 14, 18 (2004); Gregory J. Feist & Michael E. Gorman, *The Psychology of Science: Review and Integration of a Nascent Discipline*, 2 REV. GEN. PSYCHOL. 3, 4–8, 31–39 (1998).

65. Christopher Columbus Langdell was recruited as Dane Professor of Law at Harvard Law school in 1869 to help revitalize the school, which had been criticized by the legal community as stagnant. One year later, Professor Langdell was voted Dean, allowing him to change the method of legal instruction at Harvard and well beyond. See Bruce A. Kimball, *Young Christopher Langdell, 1826–1854: The Formation of an Educational Reformer*, 52 J. LEGAL EDUC. 189, 193–98, 226 (2002); W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 238–39 (1997); Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 536–39 (1991); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6, 25, 47 (1983).

66. RICHARD A. POSNER & FRANCESCO PARISI, LAW AND ECONOMICS 24–29 (1997).

adroitly handled the phenomenon of internationalization and has proposed better understandings of several areas of law that now can be studied in conjunction with economic analyses.

### B. *Designing Gender Based Systems*

Designing gender equality in the legal profession should be informed by these interdisciplinary experiences. Closing the gender gap in the legal profession requires raising unexplored issues and studying different disciplines and systems of thinking, including DSD.<sup>67</sup> DSD is the result of organizational decision-making dynamics. Designing gender equality entails attention to the same dynamics. Both dispute and gender issues revolve around changing the understanding and behavior of agents towards a specific topic, as well as the processes for managing the issues at individual, group, and organizational levels. The successes of such an endeavor are dependent on the understanding and appreciation of the organizational procedures that stem from decision-making processes of leaders of organizations.

In theory, such decision-making processes seem rather straightforward: leadership defines a goal and course of action. If a problem emerges, possible options and actions are identified for solving the problem. The different options are then analyzed and compared, and the most effective one is selected and adopted by the organization. This account of organizational function and procedure seems linear, logical, and capable of addressing and disposing of any challenges that might arise.<sup>68</sup> If it were this simple, then the legal profession and, more particularly, law firms, would not continue to struggle with attracting, retaining, and promoting women. Given that the legal profession houses individuals who are adept at problem solving, lawyers are disposed to assume that the challenge is easily resolved. Were it this simple, a solution would have been devised and implemented, and more women would work in law firms and at senior level positions. However, practice proves to be more difficult to change than theory suggests. A solution, therefore, requires planned, intentional actions that remove biases in the existing system and approaches that nudge more women into leadership in law firms.

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67. In 2008, the Program on Negotiation (PON) at Harvard Law School organized a symposium on DSD. The symposium aimed to enhance thought and offer tools to approach complex problems through DSD practice and theory. The author is thankful for the guidance, advice, and suggestions that she received from Cathy Costantino, Orna Rabinovich-Einy, Ethan Katsh, Carrie Menkel-Meadow, Peter Kamminga, and other participants in the University of Tilburg TISCO conference on "Exploring the Key Tasks of Dispute Systems" in 2009.

68. See OSTROM, *supra* note 2, at 30–45.

I argue that the only way to do this is by using a systematic and systemic approach. The framework I developed is called “Gender Balance System Design” (GBSD).<sup>69</sup> GBSD consists of designing solutions based on data that are tailored to an organization’s specific needs and of redirecting systems to remove biases.<sup>70</sup> Just as in DSD, the smallest details matter in GBSD. GBSD represents a step-change in an organization’s management culture and requires action from an organization’s leadership, including a visible and consistent commitment, as well as the necessary resources, incentives, and accountability systems.<sup>71</sup> Given the various ways in which GBSD may be developed, the outcomes of institutional efforts may vary widely.<sup>72</sup>

GBSD is the process of assessing planned action with respect to its implications for women and men. Elements assessed include procedures, policies, metrics, and programs, in all areas and at all organizational levels. GBSD’s key objective is to design better procedures that align with organizational strategy and seek to bring more women to all aspects of institutions. GBSD is a system-thinking approach for making women’s and men’s concerns and experiences an integral dimension of the design, implementation, monitoring, and evaluation of procedures.

Implementation of GBSD uses nudging techniques to improve outcomes and impacts.<sup>73</sup> First, GBSD fosters a better understanding of individuals and organizations, especially with respect to their decision-making processes. Second, design-thinking and organizational behavior help the legal profession develop solutions and nudges that

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69. See Paola Cecchi-Dimeglio, *Nudges to Increase Diversity*, 3 THE PRACTICE (Jan./Feb. 2017), <https://thepractice.law.harvard.edu/article/nudging-to-increase-diversity/>; Paola Cecchi-Dimeglio, Harvard Law School, Women’s Leadership Roundtable: Creating a Competitive Advantage: The Advancement of Women in Leadership Roles (Mar. 27, 2016); Cecchi-Dimeglio, *supra* note 60, at 286, 290; Paola Cecchi-Dimeglio, Harvard Kennedy School, Pursuing Diversity in the Legal Market (Mar. 12, 2015).

70. See Paola Cecchi-Dimeglio, *White Paper: Nudging Law Firms To Hire And Promote More Women*, LEGAL EXECUTIVE INSTITUTE (2017), <http://legalexecutiveinstitute.com/white-paper-nudging-law-firms/>; Paola Cecchi-Dimeglio, *To Hire More Women, Follow These Steps: Three “Nudges” Translate Into Tangible Hiring Gains*, 38 AM. LAW. 68, 69–71 (2016).

71. See Cecchi-Dimeglio, *To Hire More Women, Follow These Steps*, *supra* note 70, at 70–71.

72. See PAOLA CECCHI-DIMEGLIO, BEYOND TRADITIONAL ANALYSIS OF INTERNATIONAL FRANCHISE CONTRACTS 35–39, 68 (2012).

73. See Paola Cecchi-Dimeglio, *What Works: Nudging Your Firm to Attract and Recruit More Female Talent*, 24 PRO. DEV. Q. 35, 39, 42–43 (2017); Paola Cecchi-Dimeglio, *Three Nudges That Translate Into Hiring More Women*, 102 WOMEN LAW. J. 16, 18–20 (2017).

can influence processes and decisions, aligning them to an organization's long-term goal of removing biases that have infiltrated the system. The knowledge and utilization of nudges by the legal profession is still in its infancy, but is increasingly receiving attention.<sup>74</sup>

Similar to DSD, GBSD offers a framework for how individuals should behave with respect to each other and within organizations. As such, the design adopts policies and procedures to instill new behaviors. In other words, organizations devise and implement more effective ways of recognizing when and where gender biases might occur and intervene to prevent these biases.

Biases affect the manner in which group members interact with each other and how individuals from different groups relate to one another. Biases also underpin the results of people's interactions. If policies or procedures work well, people within organizations are likely to use and repeat them. With this in mind, GBSD focuses on the design structure of organizations, with the objective of leveling the playing field by removing biases in the system.

#### IV. IMPLEMENTING CHANGES: NUDGING OUR PROFESSION TO LEVEL THE PLAYING FIELD

Before designing a gender balance system within a law firm, it is necessary to ask several questions. These questions include, but are not limited to: "What is the observed behavior that needs to be changed?" "What is the target behavior that we would like the users to exhibit?" "What are the barriers that are keeping the users from the target behavior?" "How can the behavior change be measured for effectiveness?"<sup>75</sup>

Consider the scenario in which a group of hiring attorneys is tasked with choosing between candidate X and candidate Y. Each attorney has a preference for either candidate X or candidate Y, based on the extent to which each candidate furthers that attorney's personal goals and objectives. GBSD analysis begins with the assumption that individual and group decisions are driven by two factors: first, by the incentives and constraints faced by decision-makers and, second, by seemingly arbitrary features of the decision-making process that may also affect which candidate people choose.

A "nudge" approach can address these incentives, constraints, and other features of the decision-making process. A nudge approach

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74. Cecchi-Dimeglio, *To Hire More Women, Follow These Steps*, *supra* note 70, at 69.

75. *Id.*



refers to a system created or designed to change a specific behavior. It is an umbrella term for many different methods and strategies that can be utilized to change organizational behavior.<sup>76</sup> Nudges are ways of inducing behavioral change, but not all things inducing behavioral change are nudges.<sup>77</sup> Nudges are intentional, strategic, and incremental. Most of these methods and strategies have been tried and tested in the field or in laboratory settings. Finally, the design of nudges is data-driven.<sup>78</sup> The ability to tap into the power of data is essential in designing and assessing the impact of nudges. When data is correctly leveraged, decisions can be made more efficiently and confidently.<sup>79</sup>

For instance, in the hiring context, data can assist individuals and organizations in making better overall decisions in hiring and candidate selection processes.<sup>80</sup> In considering the hiring data for every current male and female attorney, tens of thousands of data points enable us to pinpoint bias in the process.<sup>81</sup> As the research confirms, during the interview process, various problems arise, often simultaneously, in terms of biases and inconsistent hiring standards.<sup>82</sup> Biases influence perceptions and evaluations, and this psychological dynamic is particularly prominent during the hiring process.<sup>83</sup>

There are several causes of bias in the hiring process. First, hiring decisions are based on limited information about applicants.<sup>84</sup> Furthermore, hiring often necessitates relatively fast decision-making and is routinely performed under the pressure of compressed timeframes.<sup>85</sup> Compounding these challenges and increasing the likelihood of reliance on bias, the interview process presents multiple

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76. See RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 12, 37, 67 (2008).

77. See George Loewenstein & Nick Chater, *Putting Nudges in Perspectives*, 1 *BEHAV. PUB. POL'Y* 26, 29–31, 39–43 (2017).

78. See Paola Cecchi-Dimeglio, *Ask Dr. Paola: Do I Need to Use Data Analytics in My Law Firm?*, *LEGAL EXECUTIVE INSTITUTE* (Mar. 27, 2017), <http://www.legalexecutiveinstitute.com/ask-dr-paola-march/>.

79. *Id.*

80. See KENNETH CUKIER & VIKTOR MAYER-SCHÖNBERGER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* 122 (2013).

81. Cecchi-Dimeglio, *Creating a Competitive Advantage*, *supra* note 69.

82. *Id.*

83. See BOHNET, *supra* note 2, at 57, 78.

84. See Henry Tosi & Steven Einbender, *The Effects of the Type and Amount of Information in Sex Discrimination Research: A Meta-Analysis*, 28 *ACAD. MGMT. J.* 712, 718, 720 (1985).

85. *Id.*

temptations to assess candidates in ways that are particularly vulnerable to bias.<sup>86</sup> Nonetheless, many lawyers erroneously believe that their training and aptitude renders them adept at fairness and less prone to biases; they tend to believe that biases do not influence them as much as they influence others.<sup>87</sup>

Second, by nature of their diversity and in the absence of governing or overriding policy or strategy, interviewers diverge with respect to how they rate applicants, as well as how they apply evaluation standards in the hiring process.<sup>88</sup>

Third, many personnel are involved in hiring decisions. Participants range from hiring partners, to managing partners, to practice or group leaders, and so on. The interface between candidates for employment and these wide-ranging personalities generate communications from organizations that can be inconsistent or ambiguous.<sup>89</sup>

Fourth, interviewers misinterpret candidate information as well as misconceive or ignore an applicant's motivation to join the firm.<sup>90</sup>

Fifth, several common cognitive biases arise in the hiring process. For example, employers can make assumptions about candidates based on their own past experiences.<sup>91</sup>

Cognitive dissonance is the tendency to rationalize or modify evidence that does not support our choices. Employers' decisions are shaped by a "framing effect": the way data is presented affects the conclusions drawn from it. These decisions are also influenced by an "anchoring effect": decisions tend to be based on information that is acquired early on in the hiring process.<sup>92</sup> Decision frames—the ways in which outcomes of candidates are presented—can be affected by norms, habits, personal characteristics, and the environments in which options are presented.

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86. See C. Neil Macrae et al., *Stereotypes as Energy-Saving Devices: A Peek Inside The Cognitive Toolbox*, 66 J. PERSONALITY & SOC. PSYCHOL. 37, 39–43 (1994).

87. See Linda Babcock, et al., *Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289, 293, 296 (1995).

88. See Daniel Read & George Loewenstein, *Diversification Bias: Explaining the Discrepancy in Variety Seeking Between Combined and Separated Choices*, 1 J. EXPERIMENTAL PSYCHOL.: APPLIED 34, 40–47 (1995).

89. See Madeline E. Heilman, *Information as a Deterrent Against Sex Discrimination: The Effects of Applicant Sex and Information Type on Preliminary Employment Decisions*, 33 ORG. BEHAV. & HUM. PERFORMANCE 174, 180, 182 (1984).

90. See Mahzarin R. Banaji, Curtis Hardin & Alexander J. Rothman, *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 272, 274, 276 (1993).

91. *Id.*

92. See generally Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 455–58 (1981).

Finally, other factors that impact the evaluation process include the pool of applicants interviewed. The day that interviews are conducted also affect the relative impression of the quality of the applicant.<sup>93</sup>

Thorough, well-designed interview processes consider how applicants, including women, are treated before, during, and after interviews. Any hiatuses in the design processes of interviews can put women in a disadvantageous position. A consistent process with well-defined decision points and different levels of evaluators is a strategy that ensures that all applicants who reach a particular stage in the system, including women, are advantageously positioned.

These nudges have been applied at national and international law firms. A summary of the extensive empirical analysis and interventions conducted at those firms follows.<sup>94</sup> The discussion below also includes the most significant forms of nudges currently being used.<sup>95</sup>

#### A. *Encouragement Nudge*

The first form of nudge being used to reduce gender bias is the so-called “encouragement nudge.” Before meeting a candidate, an email is sent to people involved in the hiring process, primarily partners and associates, requesting their targeted feedback on specific skills the practice group seeks from the potential hire.<sup>96</sup>

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93. See Madeline E. Heilman, *Gender Stereotypes and Workplace Bias*, 32 RES. IN ORG. BEHAV. 113, 117, 121 (2012).

94. Randomized field experiments have grown increasingly popular in economics and social sciences, yet their application to the legal field overall is relatively new. The practice of conducting randomized experiments is drawn from medicine, where drugs and treatments are tested on animal and human subjects in controlled conditions to assess their efficacy. Randomized field experiments are used to test theories and treatments among humans in a natural, real-world setting (the “field”), where participants face the incentives, constraints, and settings that govern their daily lives. The randomized control trial (RCT) is a trial in which subjects are randomly assigned to one of two groups: one (the experimental group) receiving the intervention that is being tested, and the other (the comparison group or control) receiving an alternative (conventional) treatment.

95. See Cecchi-Dimeglio, *To Hire More Women, Follow These Steps*, *supra* note 70, at 69. These field experiments suggest that the application of the various nudges increases the likelihood of women getting hired and joining a law firm. This likelihood increases by 18 percent for junior associates, 15 percent for associates, 28 percent for senior associates, and 14 percent for partners. See Paola Cecchi-Dimeglio, *Nudging Recruitment: Designs that Work for Increasing the Pool of Female Talent at Law Firms* (Harvard Univ. Working Paper, 2016).

96. See Cecchi-Dimeglio, *Three Nudges That Translate Into Hiring More Women*, *supra* note 73, at 17, 36.

The encouragement consists of two parts. First, there is bold text at the top of the page in the subject area of the email that explicitly asks hiring partners and associates to keep in mind how important it is for the firm to recruit more women and how much the firm values women as employees.<sup>97</sup> Second, associates and partners participating in the hiring process are asked to state how many women they have been working with over the last week and within the last month, and then are asked to rank those women among the employees within their practice groups.<sup>98</sup> These questions are designed to remind participants about their own personal experience at the firm and compel individuals to reflect on the presence of women at the firm, the number of women at the senior level, and the distribution or clustering of women across practice groups. Participants are able to see how the actual number of women might differ compared to the professed values of the firm and its expressed commitment to having more women in the organization.<sup>99</sup> The encouragement email and two short questions serve as a reminder for participants involved in hiring.

This information disclosure serves as a nudge that may make employers more likely to select one behavior over another, but it does so without affecting existing choice incentives or options.<sup>100</sup> The idea behind targeted information-giving as a nudge is not to induce in-depth thinking, but for the message to act as a heuristic, a “rule of thumb.”<sup>101</sup>

## B. *Structural Nudge*

The second form of nudge currently being used is a so-called “structural nudge.”<sup>102</sup> One example of a “structural nudge” is a “competency and work model” analysis. Law firms employing this model take into account the core competencies that the firm is seeking in employees and strives to close gender gaps in top ranks based on those core competencies.

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. The most basic component of structural consistency is standardization of questioning. Early studies stipulated question content and sequence through interview guides and question patterns or arrays. *See generally* Eldon F. Wonderlic & Carl I. Hovland, *The Personnel Test: A Restandardized Abridgment of the Otis S-A Test for Business and Industrial Use*, 23 J. APPLIED PSYCHOL. 685, 687 (1939); Carl I. Hovland & Eldon F. Wonderlic, *Prediction of Success from a Standardized Interview*, 23 J. APPLIED PSYCHOL. 537, 541, 544 (1939).

Law firms establish a clear list of criteria in advance, both at the firm level and at the group level.<sup>103</sup> The list includes what is required for associates based on their years of practice.<sup>104</sup> This list is provided to each interviewer in advance of their interviews.<sup>105</sup> Each competency is asked about in interviews by at least one interviewer across the several interview rounds, and the most important competencies are asked about several times. Some of these competencies are evaluated either through situational questions or by asking the candidate to use concrete examples from their experience demonstrating each competency.

Situational questions present applicants with a hypothetical situation relevant to a specific legal issue and ask how they would respond. This type of exercise yields a high degree of job-relevant information about the applicant, eliminating guessing and the reliance on differences in gender stereotyping for both male and female applicants. Situational interview questions are based on the premise that people's intentions, decision-making, and actions are predictive of their future behavior. They are also useful in assessing competencies from a gender-neutral point of view.<sup>106</sup> Applicants are also asked to describe a previous event that occurred during their time as a lawyer or in school that is relevant to the competencies sought.<sup>107</sup> Answers can include descriptions of the most challenging deal, merger, or litigation in which they were involved. These questions are meant to prompt the candidate to demonstrate competencies through the use of concrete, experience-based examples of how he or she would perform in a particular practice area.<sup>108</sup> While levels of expertise and competencies vary from entry-level attorneys to more experienced lawyers, past experiences in both cases can also serve as a good indicator of potential.<sup>109</sup>

Custom behavioral interview questions are designed to focus on specific competencies, whether an applicant can do the job, and assessment of motivational fit for the job and the firm.<sup>110</sup> Such interview questions can assess applicants' ability to investigate facts,

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103. See Cecchi-Dimeglio, *To Hire More Women, Follow These Steps*, *supra* note 70, at 69.

104. *Id.*

105. *Id.*

106. See Gary P. Latham et al., *The Situational Interview*, 65 J. APPLIED. PSYCHOL. 422, 425–26 (1980).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

professionalism when working with clients, and effort to understand instructions given by clients. Interview questions relating to job fit and firm fit are designed in a gender-neutral way and seek to explore applicants' preferences.

Interviewers can also evaluate interviewees' responses against pre-determined rating scales. Different points on rating scales should correspond to specific behaviors.<sup>111</sup> This precision will promote a shared, standardized scale for what kinds of behaviors represent weak, moderate, and strong performance on interview questions. These scales should be based on important criteria pre-established by the firm and the firm's list of competencies.

### C. *Altering-Conditions Nudge*

The third form of nudge is the so-called "altering-conditions nudge."<sup>112</sup> After interviewers assign independent ratings for each applicant, firms compute a general review of an applicant's responses. Interviewers do not review the other interviewers' questions. This approach ensures the use of a single rating for each competency across the different interviewers.<sup>113</sup> Upper and lower bounds and standard deviations are included in the final ratings of all candidates. In this system, interviewers rate specific applicants against set criteria before making their own judgments about whether or not to hire an applicant.

Finally, evaluators are asked to decide whom to *include* rather than whom to *exclude* from a list of individuals for a job offer.<sup>114</sup> This nudge helps employers to evaluate each candidate in isolation and, subsequently, to evaluate candidates after seeing all the options available.<sup>115</sup> The nudge also helps steer interviewers away from subjective or biased strategies and arrive at decisions based on more objective criteria, especially when considering female candidates.

## V. CONCLUSION

The late Nobel Prize winner, Elinor Ostrom, observed that interdisciplinary research inspires creative breakthroughs. This Article

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

aims to contribute to a “second generation” of DSD research by providing a novel approach for using system design to solve gender issues. Increasingly, organizations find themselves undertaking efforts to attract, hire, and promote more diverse candidates, and especially women, to leadership roles. However, even the best intentions, actions, and expectations are failing to close the gender gap, particularly in leadership positions in law firms. Closing this gap is achievable through the creation of consistent, bias-reducing systems and sets of procedures that level the playing field in the workplace. Gentle nudges and consistent processes will enable law firms and other organizations to achieve the goals that continue to elude them. By removing obstacles and barriers in our understanding of how to solve these problems, we can mitigate biases to allow both women and men to compete and excel in the legal profession.

