



Paving the Way

A Look at 139 Years of Steps Forward, Implicit Bias, and Micro-Moments

By Anne Swoboda Cruz

April 2018 marked 139 years since the first woman lawyer was admitted to practice before the Supreme Court of the United States of America. In the late 1800s, federal and state bars alike had a practice of prohibiting women's admissions to practicing law. The explicit and implicit attitudes regarding women had profound effects on the legal profession. One 1872 opinion reflects the prevailing attitude at the time. The United States Supreme Court, in *Bradwell v. The State*, 83 U.S. 130 (1872), upheld a decision allowing the State of Illinois to prohibit a woman from practicing law. Justice Bradley's concurrence stated:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Bradwell, 83 U.S. at 141. When did the door crack open, and what gains have women in the legal profession in the United States achieved? Seven years after the *Bradwell* decision, and after a long struggle, Ms. Belva A. Lockwood cracked the looking glass in 1879 and was admitted to practice law in front of the United States Supreme Court. Amazingly, just the year after she was admitted, during the October 1880 term, Ms. Lockwood became the first woman lawyer to argue a case before this highest court, in *Kaiser v. Stickney*. 1880 WL 18564, 26 L. Ed. 176, 131 U.S. Append. CLXXXVII (Dec. 13, 1880).

Flash forward to 2018: Our profession remains challenging for women lawyers. As an example, in the years since those curtains were drawn back to allow access to the highest court, women advocates increased in num-

ber in both presence and arguments. Research indicates that "as of the close of 2016, a total of 726 women have presented argument at the Supreme Court 1,430 times." Marlene Trestman, "Women Advocates Before the Supreme Court," History of Oral Advocacy – Women Advocates, Supreme Court Historical Society, *available at* supremecourthistory.org. Yet women still remain a smaller percentage compared with men as advocates before the Court.

Additionally, among the world of lawyers in the United States, the National Association of Women Lawyers (NAWL) 2017 Annual Survey Report *The Promotion and Retention of Women in Law Firms* reflects only some slow improvement in these areas. *Available at* <https://www.nawl.org>. In the 2017 report, 19 percent of equity partners were women, compared to 15 percent in 2012. Women remained about 30 percent of non-equity partners, 46 percent of associates, and 42 percent of non-partner-track attorneys.

What accounts for this lower percentage of leadership and equity positions for women lawyers, despite relatively equal numbers entering the practice of law after the long road of 139 years of access to the highest courtroom? Implicit bias has been increasingly identified and studied in recent decades across the social spectrum as a likely culprit. "Implicit biases" have been explained as "attitudes and stereotypes that are not consciously accessible through introspection. If we find out that we have them, we may indeed reject them as inappropriate." Jerry Kang *et al.*, *Implicit Bias in the Courtroom*, 59 U.C.L.A. L. Rev. 1124, 1132 (2012). In contrast, explicit biases are openly challenged and can likewise be more clearly rejected. Because we can look at a timeline showing that women lawyers have had access to the Supreme Court and other courts for 139 years, the more subtle implicit bias is now often viewed as the basis for the underrepresentation and exclusion of women in various strata.

The underlying points in literature on implicit bias, particularly in the legal profession, focus on unraveling the reasons for decisions in the everyday, small moments of the profession that are the stepping stones to building skill and credibility for all lawyers. When and why is one person given an invitation to meet an existing client in



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person with senior firm attorneys, or the chance to argue a substantive motion, examine a first witness or a key witness, or to develop fact investigations or case strategy as a lead? Why is one person championed for speaking opportunities, or chosen in interviews? These “micro-moments” are the ones that pave the way to greater inclusion and equality at all the foundational stepping stones in careers. How are we to spur meaningful thought and change in the decisions related to these “micro-moments”?

There are practical tips to help all lawyers and decision makers take more successful steps forward toward broad inclusion. Implicit bias continues to be the subject of hot debate, and gender and equality compensation studies, tool kits, and articles on

implicit bias for companies and law firms alike have become increasingly available. Articles with tips on how to handle the many shades of bias in the courtroom and legal profession have keen information on what to look for and should be regularly reviewed in organizations. A list is provided at the end of this column.

Continued improvement of this profession, rooted in equality and justice, means that we must maintain a consistent focus on achieving meaningful thought and change in these “micro-moments.” Unlike Justice Bradley’s suggestion, we do not need protectors and defenders. We all need to be zealous advocates in the small stepping stones of our profession: We need to improve, focus, and champion.

Resources: Handling Implicit Bias in the Courtroom and Legal Profession

- Jerry Kang *et al.*, *Implicit Bias in the Courtroom*, 59 U.C.L.A. L. Rev. 1124 (2012).
- Diversity and Inclusion Took Kit, DRI’s Diversity Committee (2015).
- Caroline Turner and Stewart Hirsch, *Find and Defeat Implicit Bias*, ABA Law Practice Today, July 14, 2017, available at <http://www.lawpracticetoday.org>.
- Diversity and Inclusion Tool Kit, DRI—The Voice of the Defense Bar (2013).
- Nicole D. Galli & Marta L. Villarraga, *Does Your Expert’s Gender Matter? Explicit and Implicit Bias in the Courtroom*, ABA The Woman Advocate Comm., Aug. 17, 2017, available at <https://www.americanbar.org>. 