"TRADING ACTION FOR ACCESS": THE MYTH OF MERITOCRACY AND THE FAILURE TO REMEDY STRUCTURAL DISCRIMINATION

> [S]elective incorporation of individuals [into an organization] disarm[s] the critics by trading action for access.[1]

Many Americans believe we now live in a meritocratic society in which everyone has an equal opportunity for success regardless of race or sex.[2] Half of the white respondents to a 2001 national survey believed that blacks enjoyed comparable or superior access to jobs.[3] Female employment in traditionally male fields is viewed as evidence that sex discrimination is no longer an obstacle to women's success in the workplace.[4] Facts, however, tell a different story. As of 2005, women were making seventy-seven cents for every dollar made by men.[5] Equally qualified employees with African American–sounding names have a more difficult time obtaining interviews than employees with white-sounding names.[6] Our society remains occupationally segregated.[7] In a word, it is unequal.

This Note examines two contrasting explanations of inequality in the workplace, the reasons individuals might attribute inequality to one of the two explanations, and the detrimental consequences of such

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[1] LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 129–30 (2002).

[2] The ideal of meritocracy is arguably at the very foundation of American society. *See* DAVID LEEMING & JAKE PAGE, MYTHS, LEGENDS, AND FOLKTALES OF AMERICA: AN ANTHOLOGY 120–21 (1999) (excerpting Horatio Alger's depiction of Abraham Lincoln's prototypical rags-to-riches journey). This ideal is a bedrock of our legal system. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2758 n.14 (2007) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

[3] *See* THE WASHINGTON POST ET AL., RACE AND ETHNICITY IN 2001: ATTITUDES, PERCEPTIONS, AND EXPERIENCES 4, 6 (2001); *see also* Steven A. Tuch & Michael Hughes, *Whites' Racial Policy Attitudes*, 77 SOC. SCI. Q. 723, 726 (1996) (summarizing studies finding that most white Americans believe race discrimination has been effectively eliminated).

[4] *See* DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 143 (1997).

[5] *See* National Organization for Women, Women Deserve Equal Pay, http://www.now.org/issues/economic/factsheet.html (last visited May 12, 2008).

[6] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 2–3 (Mass. Inst. of Tech., Working Paper No. 03–22, 2003), *available at* http://ssrn.com/abstract_id=422902.

[7] *See, e.g.*, K.A. DIXON ET AL., JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 8 (2002) (noting that 37% of white respondents indicated that their workplace does not employ any African Americans). *See generally* Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241 (1993).

attributions. The first explanation of workplace inequality suggests that the workplace is meritocratic and therefore individuals, through the choices they make, are responsible for any resulting inequality. The second takes the position that discrimination in the form of institutional, structural, and organizational constraints on the achievement of women and minorities still exists, and that numerical disparities in the workplace can largely be attributed to such discrimination.[8] This Note argues that the first explanation — the myth of meritocracy — has its origin in the "just world phenomenon," the cognitive desire to view our society, the organizations of which we are a part, and ourselves as just and legitimate. Even individuals who are members of groups that have been traditionally disadvantaged — individuals who might perceive subtle discrimination more readily — may perpetuate the myth of meritocracy, especially if they are upwardly mobile. This myth coopts possible system challengers, who instead legitimize the existing social structures. It also gets translated into law by judges who assume that individual failings — and not structural discrimination — are responsible for the numerical disparity between races and sexes. The resulting stringent legal standards make it difficult to prove the existence of structural discrimination.

Using law firms as a case study, this Note examines how this phenomenon plays out in the workplace. Law firms point to minorities' and women's "success stories" as proof that the law firm is a meritocracy. Women and minorities who have achieved positions of power at law firms themselves may also suggest that such law firms are just and fair. Unqualified legitimation of the system, however, may obscure the vast amount of structural discrimination that remains and lead to institutional complacency regarding diversity, making it more difficult to eradicate structurally discriminatory barriers to the advancement of women and minorities in the workplace.

Part I examines the two predominant explanations for an unequal and segregated workforce: individual merit and structural discrimination. It analyzes why individuals, especially upwardly mobile members of disadvantaged groups, are motivated to attribute inequality to individual failings. Part II explains the foundation of system-legitimizing rhetoric by upwardly mobile members of disadvantaged groups and analyzes the negative consequences of the resulting myth of meritocracy, focusing in particular on legal standards that are inadequate to combat structural discrimination and on the cooptation of potential system challengers. Part III applies the foregoing theory to the case of

[8] The contrast between the two frameworks does not imply that the "meritocracy" and "discrimination" explanations for inequality are mutually exclusive. The two explanations, however, function as broad umbrella frameworks that help individuals thinking about inequality in the workplace to categorize their thoughts, and therefore serve as useful counterpoints to each other.

the law firm. It examines how law firms view themselves as meritocratic and use the success of women and minorities as proof of an absence of institutional barriers to advancement. It then details the theoretical and empirical evidence demonstrating that inequality in the legal profession is due to structurally discriminatory organizational policies and practices. Finally, it considers how the lack of conversation regarding structural discrimination can lead to institutional complacency regarding diversity. Part IV concludes.

I. CONTRASTING ACCOUNTS OF INEQUALITY AND CHOICE OF ACCOUNTS

A. Accounts of Inequality

There is a wealth of empirical research and anecdotal evidence supporting the argument that the American workforce is segregated by race and sex and that white men are disproportionately represented in the most lucrative, prestigious, and powerful positions.[9] To take but one particularly salient statistic, as of 2007, there were thirteen female CEOs and four African American CEOs of Fortune 500 companies.[10]

This Note now turns to the question of how individuals explain this inequality. Whether in personal musings or in answers to asked questions, the framework that one uses to explain apparently unequal results has a significant impact on the kind of solutions one considers adopting in order to remedy the inequality.

1. Individual Failings in a Meritocracy. — Put simply, the ideal of meritocracy presumes that "opportunity [is awarded] based on individual merit rather than inherited status."[11] The meritocracy ideal is congruent with other fundamental American values: "[u]pward mobility and individualism are both core values of the American Dream; they legitimate our democratic ideal of equal opportunity for all."[12] In the employment context, the meritocracy ideal is founded on two interconnected beliefs: "that employment discrimination is an anomaly" and that "merit alone determines employment success."[13] Many Americans persist in viewing the workforce as meritocratic. Many agree that "if blacks would only try harder, they would be just as well off as

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[9] *See* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 599–602 (2000) (summarizing statistics and sources).

[10] *See* Yoji Cole, *Why Are So Few CEOs People of Color and Women?*, DIVERSITYINC, Nov. 7, 2007, http://www.diversityinc.com/public/2696.cfm.

[11] Lani Guinier, *The Supreme Court, 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 139 (2003).

[12] *Id.* at 137–38.

[13] Lawton, *supra* note 9, at 590.

whites"[14] or that "success within the workplace [is due] to the choices that women make and to the role that inherent capabilities play in the selection of the most qualified candidate to perform the job."[15] Any unequal outcomes in the workforce are attributed to personal shortcomings such as a lack of "talent, education, effort, or desire," not "systemic flaws in selection procedures."[16]

2. Structural Discrimination. — There are reasons to question the meritocratic account described above.[17] Many scholars agree that the numerical disparities in the workplace cannot be attributed solely to individual choice or failings.[18] The most compelling scholarly and social scientific explanations for the lack of numerical diversity in the workplace can be brought together under the umbrella of structural discrimination. Structural discrimination is the consequence of institutional or organizational practices and policies that have unequal effects on certain groups though they are neither designed nor intended to have such effects. "Discrimination under this view becomes more than a problem of bias in isolation at discrete moments of formal decision-making; it becomes a problem of the workplace structures and environments that facilitate bias in the workplace on a day-to-day basis."[19] Structural discrimination is unintentional and often not perceived because it is based on subconscious beliefs, attitudes, and shared cultural values.[20] It is widely acknowledged as the most prevalent type of discrimination and more difficult to eradicate than overt discrimination.[21]

Structurally discriminatory practices may be vestiges of an earlier, pre–civil rights era, but they continue today. Implicit bias is one way that structurally discriminatory practices are perpetuated. Implicit bias is differential treatment of others perpetuated unconsciously, as a result of "cognitive structures and processes involved in categorization and information processing."[22] Individuals may be implicitly biased

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[14] PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 41 (1993) (reporting that nearly fifty percent of whites surveyed agreed with that proposition).

[15] Lawton, *supra* note 9, at 598.

[16] *Id.* at 597.

[17] *See, e.g.*, *id.*

[18] *See, e.g.*, Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1841–42 (1990) (noting that one should be skeptical of lack of interest arguments when a group has been systematically deprived of an opportunity to attain a high-status job).

[19] Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 857 (2007).

[20] *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–22 (1987).

[21] *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

[22] Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187 (1995).

toward certain groups even though they explicitly disavow any biased beliefs.[23] Recent studies have suggested that the magnitude of implicit bias toward members of outgroups or disadvantaged groups is significant and that the bias is widespread throughout society.[24] Implicit bias transforms into workplace structural discrimination because individuals evaluate and classify each other through cognitive processes that are "accompanied by stereotyping, attribution bias, and evaluation bias."[25] These cognitive processes, along with remaining traditional deliberate discrimination, then manifest themselves in multiple obstacles that hinder the advancement opportunities of the targets of the bias. Examples of structurally discriminatory practices will be discussed in more detail in Part III, but a paradigmatic example is subjective evaluations that allow implicit biases to be translated — unnoticed — into detrimental employment effects on the individual subject to bias.[26]

B. Choice of Accounts: Why Do We Adopt One Over Another?

This Note now proceeds to examine why people adopt one explanation for an unequal workplace over another. To this end, it discusses social psychological research regarding how individuals perceive themselves, others, their small groups, and their society, and how gender and race influence those perceptions.[27]

System justification is a "tendency to perceive the status quo as legitimate or just . . . result[ing] from a fundamental motive to perceive the system to which [individuals] belong, or the world more generally,

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[23] *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 953 (2006).

[24] *See id.* at 954–58.

[25] Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 320 (2000).

[26] *See id.* at 325.

[27] This Note adopts social psychological terminology that classifies individuals into different groups for the purposes of empirical research and analytic study. A basic tenet of social cognition theory is that "people automatically categorize others into ingroups and outgroups," often relying on the socially salient categories of race and sex as bases of the classification. *Id.* at 320. An ingroup would be the group with which a particular individual identifies on the basis of a shared characteristic like race or sex. For the purposes of analysis — and not on the basis of self-identification — individuals could be further categorized into high-status and low-status groups. General group dominance theory assumes that most human societies can be "viewed as group-based hierarchies in which at least one dominant group enjoys a disproportionate share of positive social value (e.g., wealth, health, leisure time, education), and at least one subordinate group endures a disproportionate share of negative social value (e.g., social restrictions, poor health, low-status occupations, prison sentences)." Jim Sidanius et al., *Racism, Conservatism, Affirmative Action, and Intellectual Sophistication: A Matter of Principled Conservatism or Group Dominance?*, 70 J. PERSONALITY & SOC. PSYCHOL. 476, 477 (1996). Partners in law firms, for example, could be classified as a high-status group.

as a just place in which people's outcomes reflect what they deserve."[28] Such legitimizing ideologies "include beliefs in a just world, in personal causation, in personal control, in a meritocratic society, and in the Protestant work ethic," and, as such, "help to sustain the perception of the social system as just and fair and justify the hierarchical and unequal relationships among groups in society."[29] It may arise out of "hedonic benefits to minimizing the unpredictable, unjust, and oppressive aspects of social reality."[30]

This legitimizing ideology prompts the adoption of the myth of meritocracy as an explanation for unequal outcomes. Legitimizing ideology relies on "the belief that people can get ahead . . . based on hard work and individual merit," "that the American system is open to advancement of individuals from all ethnic backgrounds."[31] System-legitimizing rhetoric may thus lead to a perception of an organization as a meritocracy and attribution of inequality to individual responsibility.

It is perhaps unsurprising that individuals who are members of groups that traditionally have been advantaged by society, and who have achieved high-status positions, believe that the system that has elevated them is a meritocracy.[32] More interesting is the fact that members of socially disadvantaged groups are often willing to adopt these system-legitimizing ideologies and ascribe inequality to individual failings, especially when they are upwardly mobile. One might expect that disadvantaged group members, who are more conscious of prejudice against their group,[33] would be more likely to attribute inequality to structural discrimination.[34] Several studies found that better-educated[35] and more race-conscious[36] respondents report higher levels of experience with discrimination than other respondents. And it is true that many women and minorities, as well as many tradition-

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[28] Brenda Major & Toni Schmader, *Legitimacy and the Construal of Social Disadvantage*, *in* THE PSYCHOLOGY OF LEGITIMACY 176, 179 (John T. Jost & Brenda Major eds., 2001).

[29] *Id.* at 181 (citations omitted).

[30] John T. Jost & Orsolya Hunyady, *Antecedents and Consequences of System-Justifying Ideologies*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 260, 261 (2005).

[31] Major & Schmader, *supra* note 28, at 186.

[32] *See* Lawton, *supra* note 9, at 594–95 (reporting that male CEOs believe well-educated and experienced women and minorities face no discriminatory obstacles to employment success).

[33] In one survey, 50% of black respondents believed that blacks face discriminatory treatment in the workplace, but only 10% of whites agreed. *See* DIXON ET AL., *supra* note 6, at 8.

[34] It is a common — and damaging — misconception that minorities use racism as a "cover" for poor performance. *See* Nancie Zane, *Interrupting Historical Patterns: Bridging Race and Gender Gaps Between Senior White Men and Other Organizational Groups*, *in* OFF WHITE: READINGS ON RACE, POWER, AND SOCIETY 343, 345–46 (Michelle Fine et al. eds., 1997).

[35] *See* JENNIFER L. HOCHSCHILD, FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION 72–75 (1995).

[36] *See* Lawrence D. Bobo & Susan A. Suh, *Surveying Racial Discrimination: Analyses from a Multiethnic Labor Market*, *in* PRISMATIC METROPOLIS: INEQUALITY IN LOS ANGELES 523, 541–43, 548 (Lawrence D. Bobo et al. eds., 2000).

ally advantaged individuals, such as white men, are cognizant of structurally discriminatory barriers to the advancement of disadvantaged group members and do not generally view our society as fundamentally meritocratic. Most importantly, some upwardly mobile women and minorities represent true "success stories," achieving their accolades on their own merit and overcoming structural obstacles. The problem occurs when these individuals perceive discriminatory structures but minimize their significance or avoid challenging them publicly, creating the impression of a meritocracy. This Note is concerned with the universal meritocracy image created by such "success stories," and the detrimental consequences of believing this illusion.

Upwardly mobile women and minorities may be used as proof of equal opportunity, their presence legitimizing the system. Psychologists conclude that the possibility of individual movement into a high-status group may make the status quo of intergroup relations between the high- and low-status groups seem acceptable.[37] In one experimental study, individuals were divided into two groups — one led to believe that exit out of the group was possible, and the other led to believe that exit was impossible. Professor Naomi Ellemers found that group members who thought the group boundaries were permeable saw differences between the groups as more legitimate than did members of the group in which the boundaries were fixed.[38] She concluded that the possibility of individual mobility makes intergroup differences seem more legitimate.[39]

Further, upwardly mobile individuals may themselves adopt the rhetoric of system legitimacy. Social identity theorists predict that isolated members of disadvantaged groups who have permeated the high-status group boundary — like women and minority partners in law firms — will identify with the high-status group and reject the low-status group.[40] Consequently, the disadvantaged group members will "reinforce and legitimize the dominant ideology that individual merit is the criterion for success" and "become staunch supporters of the existing social structure."[41] The reasons for outgroup members to embrace the legitimizing ideology of the ingroup are complex. A focus on the superordinate identity, such as membership in the partnership

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[37] Naomi Ellemers, *Individual Upward Mobility and the Perceived Legitimacy of Intergroup Relations*, *in* THE PSYCHOLOGY OF LEGITIMACY, *supra* note 28, at 205, 210.

[38] *Id.* at 211.

[39] *Id.* Professor Ellemers applied this hypothesis to the case of female professionals in the Netherlands and concluded that her predictions held true in a real-life case study. *Id.* at 212–17.

[40] Stephen C. Wright, *Restricted Intergroup Boundaries: Tokenism, Ambiguity, and the Tolerance of Injustice*, *in* THE PSYCHOLOGY OF LEGITIMACY, *supra* note 28, at 223, 242; *see also* H. Tajfel & J.C. Turner, *The Social Identity Theory of Intergroup Behavior*, *in* PSYCHOLOGY OF INTERGROUP RELATIONS 7 (S. Worchel & W.G. Austin eds., 2d ed. 1986).

[41] Wright, *supra* note 40, at 242.

of a law firm, may "obfuscate[] the boundary between the advantaged and disadvantaged group and obscure[] intergroup inequalities."[42] Isolated outgroup members in high-status groups also understand that "socially disruptive actions by the disadvantaged group are likely to be unpopular among advantaged group members," and so "may feel strong social pressure not to support these actions."[43] Thus, even if the outgroup members perceive the existence of structural discrimination, they may be unwilling to describe it as such or to confront it.

One may doubt whether such system-legitimizing cognitive processes function the same way in a workplace as they do in a laboratory setting. Social psychologists have concluded that they do, predicting that the cognitive processes are even stronger in work organizations.[44] Thus, it is possible that many high-achieving members of disadvantaged groups have system-legitimizing world views that may be reflected in the views of their advantaged group colleagues. Together, these groups advance the notion that the organization of which they are a part is a meritocratic one that treats equally all individuals regardless of race or sex.

II. CONSEQUENCES OF SYSTEM LEGITIMATION AND THE MYTH OF MERITOCRACY

This Note now turns to the question of why these system-legitimizing ideologies may be a problem in the employment context, and posits that the system-justifying rhetoric adopted by some upwardly mobile women and minorities and by their white male colleagues leads to a perception of meritocracy, which may lead to ignorance of structural discrimination. The implication of this Note is not that a meritocratic organization should not be acknowledged; on the contrary, diverse and accessible workforces have positive effects on the achievement of socially disadvantaged groups.[45] In essence, this Note cautions only against a false perception of a universal meritocracy that could lead to cooptation of system challengers and inadequate legal response to structural discrimination.

A. Individual-Level Consequences of System Legitimation

There is evidence that system-justifying beliefs and ideologies serve the "palliative function of . . . increasing . . . satisfaction with one's si-

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[42] *Id.* at 239. *See generally* Samuel L. Gaertner et al., *Across Cultural Divides: The Value of a Superordinate Identity*, *in* CULTURAL DIVIDES 173 (Deborah A. Prentice & Dale T. Miller eds., 1999) (describing the effect of group boundaries on bias).

[43] Wright, *supra* note 40, at 244.

[44] *See* William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120, 122 (2000).

[45] *See generally* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998).

tuation."[46] However, there are detrimental consequences of subscription to legitimizing ideologies by members of disadvantaged groups and their advantaged group colleagues: "Because moral outrage inspires efforts to remedy injustice and participate in social change, the lessening of moral outrage triggered by system justification ultimately contributes to a withdrawal of support for social change."[47] Detrimental consequences, as detailed below, include a lowered likelihood that women and minorities will perceive discrimination, psychological barriers to change by remaining disadvantaged group members, and self-satisfaction and a lack of urgency on the part of advantaged group members.

Studies confirm that minorities with legitimizing ideologies are less likely to perceive discrimination. Professors Brenda Major and Toni Schmader tested the hypothesis that "the more members of low status groups chronically endorse system legitimizing ideologies, the less likely they would be to explain potentially biased events (e.g., being . . . passed over in favor of a member of a higher status group) as due to unfair discrimination."[48] Testing the responses of ethnic minorities and women against those of European Americans and men, the researchers concluded that "[a]mong low status [participants] . . . greater endorsement of these system justifying ideologies was associated with significantly less perceived personal discrimination."[49]

Further, social psychologists have long noted that the "pursuit of individual mobility may harm rather than help chances of other group members to improve their social standing" because "pursuit of individual mobility requires a fundamentally different way of perceiving oneself and one's social environment than does the pursuit of social change."[50] This is so because "individuals who have overcome discrimination are likely to perceive themselves as non-prototypical group members."[51] Psychologists have suggested that "group members [are] only willing to sacrifice their own outcomes to benefit their group when they [have] no opportunity to individually escape their group's fate."[52] The potential of escaping a low-status group actually induces more competitive behavior toward fellow group members.[53] Thus, some members of the disadvantaged group who have been upwardly mobile may be unwilling to engage in the struggle to change the sys-

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[46] Jost & Hunyady, *supra* note 30, at 262.
[47] *Id.* at 263.
[48] Major & Schmader, *supra* note 28, at 185 (emphasis omitted).
[49] *Id.* at 186; *see also id.* at 188.
[50] Ellemers, *supra* note 37, at 208.
[51] *Id.* at 217.
[52] *Id.* at 212.
[53] *Id.* at 211–12.

tem in order to aid the remaining struggling members of the disadvantaged group.[54]

Additionally, members of the disadvantaged group who remain in low-status groups may experience "psychological barrier[s] to opposing a system that now includes at least some of 'those who look like you.'"[55] They may blame not the institutional practices, but their fellow group members who are now inside the institution but have failed to alter the practices.[56] In addition, when upwardly mobile members of disadvantaged groups promote a belief in individualism and meritocracy,[57] in effect, they may be experiencing the "coopting effect of . . . 'robust tokenism,' or superficial diversity in leadership roles."[58] Access by some disadvantaged individuals into high-status groups replaces system-altering action because such access hides the fact that "less visible rules are more important to the allocation of power than are more visible individuals," obscures the "ability of the powerful to discourage others from acting in their own self-interest," and "diminishes the possibility that unfair rules will be challenged."[59]

This Note, however, should not be interpreted as placing the burden to resolve the remaining inequality and discrimination solely on women and minorities. It simply argues that system-justifying ideologies adopted by high-status women and minorities make it possible for the advantaged group members — who make up the dominant portion of high-status groups and therefore bear the lion's share of responsibility for maintaining structurally discriminatory practices — to overlook the discriminatory practices. Even in the absence of such rhetoric by upwardly mobile women and minorities, however, advantaged group members now working alongside them may view the presence of isolated members of minority groups as proof "that discriminatory barriers are gone and that existing practices are fair."[60] Advantaged group

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[54] *See* Henri Tajfel, *The Exit of Social Mobility and the Voice of Social Change: Notes on the Social Psychology of Intergroup Relations*, 14 SOC. SCI. INFO. 101, 112–13 (1975); *see also* RANDALL KENNEDY, SELLOUT: THE POLITICS OF RACIAL BETRAYAL 3 (2008) ("A long-oppressed minority situated in the midst of a dominant white majority, blacks fear that whites will favor and corrupt acquiescent Negroes who, from positions of privilege, will neglect struggles for group elevation.").

[55] GUINIER & TORRES, *supra* note 1, at 115.

[56] *See id.* at 129.

[57] *See* Major & Schmader, *supra* note 28, at 185.

[58] GUINIER & TORRES, *supra* note 1, at 114 (crediting Professor Randall Kennedy with the coining of this term).

[59] *Id.* at 115.

[60] Wright, *supra* note 40, at 246; *see also* Beth Bonniwell Haslett & Susan Lipman, *Micro Inequities: Up Close and Personal*, *in* SUBTLE SEXISM: CURRENT PRACTICE AND PROSPECTS FOR CHANGE 34, 39 (Nijole V. Benokraitis ed., 1997) ("[M]en believe that both judicial appointments and the hiring and promotion decisions made within law firms are merit-based." (quoting THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1993), *reprinted in* 67 S. CAL. L. REV. 745, 786 (1994))).

members who adhere to system-legitimizing beliefs may therefore experience self-satisfaction regarding the workplace as a meritocracy and a lack of urgency regarding fixing structurally discriminatory practices.

B. Societal Consequences of the Myth of Meritocracy

1. Inadequate Legal Response. — One possible socially damaging effect of the myth of meritocracy is that the myth becomes reflected in legal standards that are, as a result, inadequate to fight the real threat of structural discrimination. This effect on legal standards occurs when judges attribute unequal employment outcomes to individual failings and thus find that structural practices are not discriminatory.[61] The myth of meritocracy is reflected in discrimination law generally, and in employment discrimination law in particular. From the top of the judicial hierarchy, the Supreme Court has emphasized the ideal of individual merit in its discrimination decisions. The Court's refusal to use the Equal Protection Clause to strike down laws unless they were created with a discriminatory purpose reflects the ideal of individual responsibility and meritocracy by making structurally discriminatory laws — like veteran preference statutes — not legally actionable, thus effectively placing the blame for unequal outcomes on the disadvantaged group members.[62] The concept of discrimination as an intentional act is also at the foundation of the original interpretation of employment discrimination laws.[63]

Contemporary courts still view disparate treatment as resulting from conscious and intentional animus,[64] despite scholarly criticisms of this limiting conception.[65] They have been unwilling to accept that structurally discriminatory practices established without intent to discriminate are in fact disparate treatment unlawful under Title VII.[66]

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[61] *Cf.* James R. Kluegel, *Trends in Whites' Explanations of the Black-White Gap in Socioeconomic Status, 1977–1989*, 55 AM. SOC. REV. 512, 524 (1990) ("As long as white Americans blame blacks for their economic condition, they have reason to oppose [policies to improve the economic status of black Americans,] or to with[h]old support for them in their private actions.").

[62] *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that for purposes of Fourteenth Amendment equal protection, "'[d]iscriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group" (citation and footnote omitted)); *see also* Lawrence, *supra* note 20, at 321–22 (arguing that the intent standard ignores the fact that "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation"); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136–37 (1997) (arguing that the Supreme Court's form of discriminatory purpose "is one that the sociological and psychological studies of racial bias suggest plaintiffs will rarely be able to prove").

[63] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[64] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

[65] *See generally* Krieger, *supra* note 21.

[66] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000); Ramona L. Paetzold & Rafael Gely, *Through the Looking Glass: Can Title VII Help Women and Minorities*

By narrowing the inquiry into the legitimacy of the employer's hiring, promotion, or termination decision, courts refuse to examine critically practices that have unintentional — but adverse — effects on disadvantaged groups.[67] Especially in elite, professional organizations such as law firms, courts have been unwilling to find that institutional practices rise to the level of invidious, actionable discrimination.[68] In effect, Title VII decisions "reinforce the prevailing belief that merit, not subtle or systemic discrimination, accounts for the significant disparities in pay, position, and employment status between blacks and whites, and men and women, in today's workplace."[69] Title VII has been rendered powerless to address structural discrimination and implicit bias.

Title VII is distinct from other civil rights laws in that it ostensibly protects not only against employment mechanisms that impose disparate treatment, but also against those that have a disparate impact[70] — a provision precisely aimed at the elimination of unintentionally discriminatory structural practices. Nevertheless, the disparate impact theory is still not sufficient to eliminate the effects of implicit bias on decisionmaking.[71] This is so because the disparate impact standard does not "ask institutions to refrain from any actions that perpetuate racial inequality; it only asks that institutions refrain from adopting certain disadvantaging practices and policies if they cannot be rea-

Shatter the Glass Ceiling?, 31 HOUS. L. REV. 1517, 1520 (1995) ("The courts' interpretation of Title VII has not been sufficiently sensitive to the subtle ways in which women and minorities come to be excluded from mid-level and upper level positions within organizations — ways so subtle that employers themselves are not always aware of them.").

67 *See* Lawton, *supra* note 9, at 616.

68 For example, in *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992), the Third Circuit reversed a trial court finding that an associate's opportunities for training were systematically limited because of her sex, holding that the law firm was not accountable for such deficiencies. *See id.* at 542 ("Title VII requires employers to avoid certain prohibited types of invidious discrimination, including sex discrimination. It does not require employers to treat all employees fairly, closely monitor their progress and insure them every opportunity for advancement."). In *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549 (D.C. Cir. 1997), the D.C. Circuit reversed a trial court finding that a black associate was discriminated against in his salary, work assignments, and consideration for partnership, intimating that such practices do not constitute adverse employment decisions when there is no decrease in salary or change in work hours.

69 Lawton, *supra* note 9, at 617.

70 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (establishing that plaintiffs can prevail under Title VII without a showing of discriminatory intent). While the Supreme Court retreated from this position in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (requiring proof of individual animus on the part of the employer), Congress partially overruled this holding with the Civil Rights Act of 1991, which established, in part, that proof of intent is not required. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. § 2000e-2(k) (2000)).

71 *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 753 (2006).

sonably justified."[72] It is especially difficult to apply "Title VII and other similar anti-discrimination laws to high-level jobs in which quality judgments are inherently subjective [because n]either disparate treatment nor disparate impact analysis is well suited to rooting out the kind of adverse employment practices" critiqued by scholars of structural discrimination in law firms.[73]

The myth of meritocracy is absorbed into the law through various processes. Legal norms can be thought of as "endogenous," meaning constructed "within the social field [they are] designed to regulate" and then incorporated by the courts into legal rules.[74] The societal norm of meritocracy can be reflected in the law through the combination of the lawmakers' own experience and daily interactions with society — many judges and congresspersons have migrated from the private sector, carrying along perceptions of meritocracy that they then generalize to other employment contexts.[75] The very presence of women and minorities in high-status positions such as partnerships, along with the system-justifying rhetoric adopted by members of these groups, could suggest to courts and legislatures that there is equal treatment within the organization in question, leading to their refusal to acknowledge structural discrimination.

2. Cooptation. — The myth of meritocracy may lead to the cooptation of some of the most likely challengers to this unequal system. If the targets of structurally discriminatory practices — individuals who seem most likely to perceive and oppose such practices — instead perceive the practices as legitimate, the most promising system critics have been coopted. Justice Clarence Thomas is a quintessential example of the highly mobile racial minority, whose personal success has led him to validate our society as meritocratic, to himself[76] and to others.[77] Thomas's rise to the Court "reinforced the basic American belief that any person in the United States, black or white, rich or poor, can reach the pinnacle of success if he has talent, works hard, and is determined

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[72] Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 376 (2007).

[73] David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 585 (1996) (footnote omitted); *see also id.* at 586 ("[T]he institutional practices that tend to keep blacks off the training track [are not] likely to be condemned under a disparate impact analysis, given that changing these practices would involve a fundamental restructuring of the way corporate firms do business.").

[74] *See* Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 407 (1999).

[75] *See* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1006 (2006) (arguing that judges use intuitive — and often inaccurate — psychology in making their decisions).

[76] KENNEDY, *supra* note 54, at 100.

[77] *See* JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 31–61 (1994) (discussing how Justice Thomas and his supporters used his rise from poverty as proof that success is attributable to hard work and individualism).

to succeed"[78] — a narrative he used to his advantage during the nomination.[79] Justice Thomas also believes that "blacks can achieve in every avenue of American life without the meddling of university administrators,"[80] and he translates this idea of meritocracy into case law. He is a vigorous opponent of affirmative action,[81] and his opinions on this issue are especially salient in legitimizing existing group differences because they represent an endorsement of the dominant group's ideology by an individual from a group that is traditionally disadvantaged.[82] At the same time, Justice Thomas is deeply aware of the legitimizing power of superficial diversity. He vigorously attacked the University of Michigan Law School in *Grutter v. Bollinger*[83] for "do[ing] nothing for those too poor or uneducated to participate in elite higher education and therefore present[ing] only an illusory solution to the challenges facing our Nation."[84] Professor Randall Kennedy suggests that Justice Thomas is not coopted by the system but is in fact working, by his own methods, to improve the situation of his fellow African Americans.[85] Still, Justice Thomas's persistent disregard of structurally discriminatory practices and implicit biases that hinder blacks from succeeding suggests that he has partaken in system-justifying ideologies that further the myth of meritocracy.

III. CASE STUDY: THE MYTH OF MERITOCRACY IN LAW FIRMS

This Note now takes the legal profession as a case study of the myth of meritocracy, and seeks to examine how system-legitimizing rhetoric could lead to the myth of meritocracy and to ignorance of structural discrimination. This examination will allow the analysis to take into account both organizational and market forces.[86] Law firms

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[78] Lawton, *supra* note 9, at 593 n.21.

[79] Justice Thomas concluded that his story of professional success in the face of significant obstacles enables him "to stand in the shoes of . . . people across a broad spectrum" of American society. *Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 283 (1991).

[80] Grutter v. Bollinger, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part).

[81] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2770–71 (2007) (Thomas, J., concurring) ("[A]s a general rule, all race-based government decisionmaking — regardless of context — is unconstitutional.").

[82] *See* Major & Schmader, *supra* note 28, at 182.

[83] 539 U.S. 306.

[84] *Id.* at 354 n.3 (Thomas, J., concurring in part and dissenting in part).

[85] KENNEDY, *supra* note 54, at 129.

[86] *See* ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY 4–11 (1999); *see also* James N. Baron & Andrew E. Newman, *For What It's Worth: Organizations, Occupations, and the Value of Work Done by Women and Nonwhites*, 55 AM. SOC. REV. 155, 173 (1990) ("[T]he organizational context . . . is critical, not simply because organizations mediate —

are a pertinent choice for such a case study for three reasons. First, lawyers in law firms are often viewed as role models and leaders of society. As the ranks of this high-status profession expand, lawyers have an increasingly significant role in politics and in the global marketplace.[87] They also are, and see themselves as, agents of legal change.[88] Second, lawyers, well educated in antidiscrimination law, in law firms that are committed to diversity, likely think of themselves as enlightened individuals working in places that are free of anything as backward as racism. They — the educational and socioeconomic elite — may see racism as something perpetrated by the poor and in blue collar professions.[89] Third, the profession's various segments "carry distinct profiles of earnings, status, and work demands, making [it] a rich context for examining intraoccupational patterns of stratification."[90] Thus, ignorance of structural discrimination as a consequence of system-legitimizing rhetoric may be especially dangerous in this arena. While law firms may differ from other organizations on a number of levels,[91] they are an example of the upper-level, high-status profession in which it is most difficult to eradicate structurally discriminatory practices.[92]

It is beyond the scope of this Note to undertake an empirical examination of the actual tendency by women and minorities to internalize system-legitimizing views.[93] This Note attempts only to demonstrate that women and minority attorneys help law firms propagate the image of meritocracy and eschew honest discussion of structurally discriminatory practices. The numbers demonstrate that women and mi-

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and sometimes depart from — market forces, but also because organizational policies and practices often help *define* the relevant 'market' in the first place.").

87 *See* ROBERT B. REICH, THE WORK OF NATIONS 190 (1991).

88 ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 270 (1988).

89 This idea may be bolstered by the fact that many of the major Title VII Supreme Court cases have been brought in blue collar professions. *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (warehouse worker); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (cannery workers); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (mechanic).

90 Kathleen E. Hull & Robert L. Nelson, *Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers*, 79 SOC. FORCES 229, 230 (2000).

91 Law firms typically have only two tiers of employees; the management power is widely dispersed across the partnership rather than concentrated; the partners as a whole generally tend to lack management training; and evaluations tend to be highly subjective. *See* David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1591–92, 1632 (1998).

92 *See generally* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982).

93 It is hopefully uncontroversial to argue that some outgroup lawyers have actually internalized the myth. *See* PAUL M. BARRETT, THE GOOD BLACK 30, 41–43 (1999) (describing how Larry Mungin, later a plaintiff in a race discrimination case, *see supra* note 68, originally believed in the adage "play by the rules, and the system will treat you right").

norities have not yet achieved parity with their white male colleagues in law firms. As of 2007, women represented only 18.34% of partners at major law firms, and members of racial or ethnic minority groups nationally made up about 5.40% of law firm partners, with only 1.65% minority women.[94]

A. Accounts of Inequality in Law Firms

1. Individual Responsibility in a Meritocracy. — System-legitimizing tendencies "may be especially powerful within institutions highly steeped in the ideology of merit, such as the legal profession."[95] Law firms are imbued with the rhetoric of merit. They have proudly pointed to the progress made by women and minorities in the last few decades as evidence that, in their organizations, individuals are judged on their merits alone, not on immutable characteristics such as race or gender.[96] In addition to proclaiming themselves equal opportunity employers, many law firms engage in diversity recruitment, have committees or staff members devoted to diversity issues,[97] and sponsor events that examine or foster diversity in the legal profession.[98]

Law firms do have to explain, however, the lack of numerical diversity at the partnership level. Like many other organizations, they tend to explain these unequal outcomes as a consequence of the labor market and the choices made by the individuals within that market.[99] For example, the chair of one of the nation's leading law firms has stated:

> One of the problems that the profession is struggling with at present concerns the perception of women that they must make a choice between success at a firm and being a good parent and building a healthy family environment. Many women leave the profession because of this perception. . . . With minority lawyers, we see, in addition, an extraordinary

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[94] Press Release, National Association for Law Placement, Minority Women Still Underrepresented in Law Firm Partnership Ranks — Change in Diversity of Law Firm Leadership Very Slow Overall (Nov. 1, 2007), *available at* http://www.nalp.org/press/details.php?id=72.

[95] Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679, 690 (2007). "Settings where the belief in meritocracy is especially pronounced discourage perceptions of bias against those who do not rise to the top." *Id.*

[96] *See, e.g.*, Sidley Austin LLP, Our Firm: Women @ Sidley, http://www.sidley.com/ourfirm/highlights/womeninleadership (last visited May 12, 2008) ("Sidley is that rare combination of a successful global law firm and a professional service workplace where women thrive.").

[97] *See* Adam Liptak, *Sidebar: In Students' Eyes, Look-Alike Lawyers Don't Make the Grade*, N.Y. TIMES, Oct. 29, 2007, at A10.

[98] *See* Timothy L. O'Brien, *Up the Down Staircase: Why Do So Few Women Reach the Top of Big Law Firms?*, N.Y. TIMES, Mar. 19, 2006, § 3, at 1.

[99] *See* PHILIP MOSS & CHRIS TILLY, STORIES EMPLOYERS TELL: RACE, SKILL, AND HIRING IN AMERICA 246–47 (2001).

> range of opportunities to leave the firm for corporate legal departments or for the government.[100]

While admitting that integration has not been a complete success at his firm, this attorney focused directly on the choices of women and minorities to leave the firm, ignoring the possibility of structural constraints on these "choices."

Female and minority partners may not internalize this view, but some do participate in the attribution of inequality to individual failings in a meritocracy. Many of them actively promote diversity efforts, and in doing so, they advertise the firm as providing equal opportunities to succeed — legitimating it as a meritocracy.[101] If and when these attorneys personally perceive structurally discriminatory practices, the strategy of adopting the dominant rhetoric of meritocracy and refraining from making those personal views a part of their message may be adaptive — a way of fitting in with the firm culture.[102] Once again, this Note does not suggest that women and minority attorneys need to sacrifice their own careers in order to take on the law firm as a structurally discriminatory system. Its primary concern is that espousing unqualified accounts of a meritocracy while eschewing discussion of structurally discriminatory practices may send the wrong message to law student applicants and members of society who consequently believe that legal workplaces are bastions of equal opportunity.

2. Structural Discrimination. — Researchers and scholars have argued that structural practices are responsible for a lack of integration in employment generally and in law firms in particular.[103] The general

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[100] *Responding to the Critics: A Leader of the Profession Points to Substantial Progress in Diversity*, METROPOLITAN CORP. COUNS., Feb. 2007, at 49.

[101] Law firm diversity web pages, for example, are typically adorned with portraits of women and people of color coupled with broadly worded and generalized statements regarding the firm's commitment to equal opportunity. *See, e.g.*, Christopher V. Bacon Testimonial, Vinson & Elkins, http://www.velaw.com/overview/overview_pages.asp?page_name=Christopher%20Bacon%20Testimonial (last visited May 12, 2008) ("Vinson & Elkins recognizes the importance of being inclusive and it has always been ahead of the curve on diversity issues.").

[102] For example, the attorneys generally refrain — in the website testimonials, in recruiting sessions, and in press releases — from admitting or discussing structurally discriminatory practices. These attorneys may be combating negative stereotypes by adopting the dominant rhetoric of meritocracy. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1276 & n.35 (2000).

[103] *See* David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 60 (1998) (arguing that "the organizational structure of firms . . . is an important feature in analyzing the causes of discrimination and the effects of anti-discrimination law"); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 93 (2003) (arguing that discrimination should be viewed "a problem of overlapping individual and institutional dimensions"); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 660 (2003) (suggesting that recent class action lawsuits are efforts to change organizational practices with the goal of reducing individual bias).

consensus is that gender and race disparity in law firm partnerships is not due to "choice" by women and minorities as typically understood but rather due to organizational practices and policies of law firms. Examining this phenomenon illustrates how implicit bias results in structurally discriminatory practices that disadvantage women and minorities.[104] In general, structural discrimination in law firms arises from institutional practices such as high partner-to-associate ratios, which reduce direct monitoring; disunified training opportunities; and subjectivity in promotion standards, selection and compensation decisions, assignments to challenging tasks, performance appraisals, and developmental experiences such as mentoring.[105] Recruitment strategies, entrance requirements, job-assignment policies, seniority and promotion systems, and retention strategies appear neutral on their face but differentially affect workers of different races and sexes.[106]

Analyzing individual-level data collected in 1995 in Chicago, Professors Kathleen Hull and Robert Nelson tested three different theories of possible career trajectories for women attorneys. The "gender assimilation theory" posits that over time, "as obstacles to equal opportunity erode and women's . . . resources increase," women will achieve rough employment parity with males.[107] "Gendered choice" posits that gender differences do exist, but are due to the choices of individual women workers: either an underinvestment in skills or differential career choices.[108] Finally, "gendered constraint" posits that gender differences are attributable to choices and decisions by employers themselves, either as a result of overt discrimination or structural barriers.[109] The study rejects both the theory of equality over time, finding significant gender differences even for the most recent cohort of lawyers, and the gendered choice hypothesis, finding that neither the skills developed in school and practice nor differences in career choices immediately after school account for the gender differences.[110] The study found that "gender differences in careers of lawyers are in significant part the product of . . . gendered constraints."[111]

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[104] AM. BAR ASS'N, EXECUTIVE SUMMARY, COMM'N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 10 (2006), *available at* http://www.abanet.org/women/VisibleInvisibility-ExecSummary.pdf (explaining that women of color are at a higher risk of harassment, denial of promotions and choice work assignments, and unfair evaluations compared to white men).

[105] *See* Wilkins & Gulati, *supra* note 73, at 564–84.

[106] Patricia A. Roos & Barbara F. Reskin, *Institutional Factors Contributing to Sex Segregation in the Workplace*, *in* SEX SEGREGATION IN THE WORKPLACE 235 (Barbara F. Reskin ed., 1984).

[107] Hull & Nelson, *supra* note 90, at 231 (citation omitted).

[108] *Id.* at 231–32.

[109] *Id.* at 233.

[110] *Id.* at 251.

[111] *Id.* at 253.

Professors David Wilkins and Mitu Gulati conducted a similar empirical study of the effects of organizational practices on the experience of men and women of color in law firms.[112] They posit that "the inherent subjectivity of quality assessments and the difficulty and expense of monitoring" attorneys' work have incentivized firms to pay above-market wages to motivate relatively unsupervised work, to have a high associate-to-partner ratio to weed out poorly performing lawyers, and to institute a two-track system, training some associates in preparation for partnership, and doling out relatively menial work to others.[113] They suggest that these institutional practices disproportionately disadvantage black lawyers. Black associates are less likely than whites to find mentors who will give them challenging work and provide them with career advice and counseling about how to succeed at the firm, face higher costs from making mistakes than their white peers, and find that their future employment prospects with other elite firms diminish more rapidly than those of similarly situated associates because other law firms may assume that they have not been trained as adequately as their white counterparts.[114]

Finally, Professor Elizabeth Chambliss takes the debate a step further, arguing that differential individual characteristics are the result of the interactions between individuals and organizations.[115] She finds that size generally is negatively correlated with racial integration within a firm; that at the partnership level, size negatively affects gender integration; that increased bureaucratization negatively affects gender and race integration; that the length of the partnership track negatively affects gender integration; that geographic diversification has a significant positive effect on gender and race integration; and that the racial composition of firms tends to mimic the racial composition of the firm's clients.[116] She concludes that changes in structural conditions, such as shortening the partnership track and diversifying the clientele, could have a significant positive effect on gender and race integration, respectively.[117]

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112 *See* Wilkins & Gulati, *supra* note 73.

113 *Id.* at 499.

114 *Id.* at 500, 568.

115 Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 685 (1997).

116 *See id.* at 724–38.

117 *Id.* at 739–40.

B. Consequences of System-Legitimizing Rhetoric in Law Firms: Institutional Complacency

As described above, firms view themselves as meritocratic, committed to the practice of equal treatment and nondiscrimination.[118] They point to the "success stories" of women and minorities achieving high ranks in their firms, and the women and minorities themselves are often telling the story. However, this rhetoric of meritocracy ignores that the structures and institutions of law firms have not changed to accommodate a heterogeneous workforce, parts of which are afflicted by implicit biases.[119] For example, evaluation standards remain subjective, though predominantly white male senior partners — some of whom may hold implicit biases against women and minorities — are in charge of evaluating diverse associates. This arrangement results in the increased likelihood that women and minority associates will get lower marks on evaluations and be pushed off the partnership track or denied mentoring opportunities.[120] And while the number of billable hours worked is an objective standard, scholars have pointed out that a focus on quantity as opposed to quality of work disadvantages women.[121] This is especially true of women who may be more efficient in light of the greater demands on their time.

One possible consequence of this myth of meritocracy is institutional complacency: the idea that "enough has been done" for women and minorities toward equal treatment in the workforce.[122] For example, analyzing the military, Professor Mario Barnes concludes that when "an organization views itself as generally succeeding with regard to integration, the danger arises that a type of complacency with that success may develop."[123] A similar critique has been issued by Profes-

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118 *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 57 (1991).

119 *See* Martha Albertson Fineman, *The New "Tokenism,"* 23 VT. L. REV. 289, 289 (1998).

120 *See* Chambliss, *supra* note 115, at 682, 691–92; *see also* Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 365 (1995).

121 *See* Elizabeth K. Ziewacz, *Can The Glass Ceiling Be Shattered?: The Decline of Women Partners in Large Law Firms*, 57 OHIO ST. L.J. 971, 986–88 (1996).

122 Wright, *supra* note 40, at 246. Of course, another reason that individuals may be complacent about diversity is an actual lack of commitment to diversity. *See* Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1504 (1997) (describing how "the same cognitive process that causes us to denigrate 'the other' is likely to influence white Americans to believe that employment discrimination is largely a past plague and that efforts to deal with it, such as affirmative action, have already gone too far").

123 Mario L. Barnes, *"But Some of [Them] Are Brave": Identity Performance, the Military, and the Dangers of an Integration Success Story*, 14 DUKE J. GENDER L. & POL'Y 693, 718–19 (2007). Professor Barnes explains that the military was able to achieve relatively impressive racial diversity of its membership through explicitly race-conscious policies that were eliminated as a

sor Lani Guinier, who argues that the election of black officials to office "legitimated the electoral process" because "their election signals that society's institutions are 'color-blind' pure meritocracies."[124] Social complacency occurs when remaining gender and racial disparities are met with indifference.[125] The perception "that the organization already supports [affirmative action or equal opportunity] implies that no additional action is needed to help women and racial-ethnic minorities advance in the hierarchy."[126] This commitment to continuing whatever worked in the past is "backward-looking; it tends to encourage complacency rather than self-reflection and experimentation."[127]

For example, Professor Guinier criticizes academic admissions as a system in which "decisionmakers select a few deserving group members, whose presence then legitimates the institution's educational and democratic missions,"[128] because such "sponsored mobility . . . can also be perceived as a means to coopt or pacify potential challengers to the governing regime."[129] She suggests that "when individuals are selected for qualities of 'merit' primarily possessed by those who are already privileged, the chances of widely dispersed upward mobility are seriously eroded . . . because the proxies for merit that are familiar and accepted tend to credentialize the existing social oligarchies."[130]

In law firms, institutional complacency may be fueled by the system-justifying and legitimizing rhetoric of their women and minority members in four ways. First, if women and minority attorneys are less likely to perceive and acknowledge structural discrimination within the firm, they will be less likely to voice opposition to the structural discrimination that does exist, and therefore, there is less of a chance that the discriminatory structures will be eradicated.[131] Second, even if the upwardly mobile minorities and women do perceive inequalities within their organization, their failure to identify with their groups

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result of a series of lawsuits. Consequently, the promoting officers became more complacent in their striving for a diverse corps of officers. *Id.* at 714–18.

124 Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1100, 1106 (1991). Professor Guinier warns that the idea of a meritocracy is sustained by "the shorthand of counting elected black officials," *id.* at 1091, without analysis of actual experience.

125 *See* GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 83 (2002).

126 Christopher P. Parker et al., *Support for Affirmative Action, Justice Perceptions, and Work Attitudes: A Study of Gender and Racial-Ethnic Group Differences*, 82 J. APPLIED PSYCHOL. 376, 384 (1997).

127 Guinier, *supra* note 11, at 154.

128 *Id.* at 153.

129 *Id.* at 157–58.

130 *Id.* at 191–92.

131 *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30–43 (1970) (discussing role of "voice" in preventing complacency within institutions).

may result in a lack of motivation for transformative change. Third, even if they do identify with their racial or gender groups and work toward increasing diversity in the firm, their avoidance of discussion and denunciation of structurally discriminatory practices legitimizes the law firm as a meritocracy, mischaracterizing the organization to the outside world. Fourth, their white male colleagues — the majority of attorneys in most firms — are likely to perceive the women's and minorities' "success stories" as evidence of meritocracy. Therefore, unless these attorneys are vigilant in framing their "success stories" as not dismissive of the possibility of structural discrimination, the presence of women and minorities and the legitimizing rhetoric they espouse may be taken as evidence of a meritocracy and may lead to institutional complacency.

IV. CONCLUSION

This Note has attempted above all to be a cautionary tale against a tempting belief in a post-racial or post-gender — a fully meritocratic — society. It may be easy to look at increasingly diverse workforces, consider the presence of women and minorities in high-status careers, and believe that our society, if not already equal, reflects meritocratic and equal treatment principles. These attitudes, however, only lull us into a state of false consciousness. Structural discrimination is very real and, in concert with remaining vestiges of deliberate discrimination, is responsible for creating the racial and gender inequalities of our society and our workforce. There are ways to combat structural discrimination, but they involve difficult and large-scale institutional changes, such as "constructing heterogeneous groups, . . . replacing subjective data with objective data, and making decision makers accountable for their decisions."[132] This cannot be accomplished unless all the relevant actors — ingroup and outgroup employees and employers, judges, and legislators — are at least conscious of the structural discrimination problem itself. Institutions should still be committed to the ideal of merit, but that commitment must be "framed and tempered by an awareness of how structures . . . tend to privilege some groups of people over others,"[133] and include a willingness to change those structures in order to ensure that individual merit can truly explain all outcomes.

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[132] Reskin, *supra* note 25, at 323.
[133] Guinier, *supra* note 11, at 159.