



Diversify and Prosper

Though most people try very hard to be fair, very few people are capable of true impartiality. The ever-expanding dataset from the Implicit Association Test shows that almost all of us are unconsciously biased, even those who spend their sentient hours fighting racism or sexism. Unconscious biases shape human behavior in surprising ways; a recent study by the National Academy of Sciences suggests that hurricanes with female names are more deadly because many associate femininity with docility and take fewer precautions than for storms with male names. Some of the biases lead to true injustices: Unarmed black men are viewed as inherently dangerous, and are detained, shot, and incarcerated with staggeringly disproportionate frequency; assertive women are labeled “abrasive” or worse, and are paid and promoted less than men.

These unconscious biases slip into the judicial system. Professor Maya Sen, Harvard University John F. Kennedy School of Government, has published data suggesting that the American Bar Association (ABA) consistently underrates women and minority candidates for judicial appointment¹ and that appellate panels are more likely to overturn black judges than white judges.² Many studies have shown that appellate-panel composition has profound effects on results: Panels with three conservative judges or three liberal judges skew further right and left, and mixed panels move to the center. The ideology of a judge’s colleagues is a better predictor of a judge’s vote than the judge’s own ideology.³

Today’s unconscious biases are amplified by yesterday’s intentional sexism, racism, and xenophobia, which have created social environments and institutions that limit options for women and minorities. To blithely say our society should now be colorblind and nondiscriminatory, but to take no action to redress unequal representation in a bar association, the workforce, or the judiciary, is to ignore existing social and institutional impediments to true equality. It’s the equivalent of a casino saying to a gambler bankrupted by a crooked roulette table, “Sure, the game was rigged, but we’ll play fairly now.” The player left with no money can’t play the game. Demanding that all decisions be based on test scores or grades, without regard to systemic barriers, is similarly flawed: Achievement is a function of opportunity, and opportunity is not distributed evenly, even now.

Sir Percy Henry Winfield, in his admirable 1925 study *The Chief Sources of English Legal History*, notes that the “[l]aw expresses the needs of human beings.” For the law to truly express those needs, the human beings making the law—the judges, lawyers, and litigants—should represent a fair cross section of its citizens. An inclusive system of justice is a fairer system of justice. More diversity reduces unconscious biases and leads to better decision-making.

More diversity is also an effective strategy for optimal growth. Gerd Gigerenzer, the director of the Max Planck Institute for Human Development in Berlin, has spent a lifetime explaining statistical thinking to the general public. His delightful *Calculated Risks: How To Know When Numbers Deceive You* demonstrated abuse of statistics by Big Pharma to sell drugs, by doctors to obtain funding, and by lawyers to bamboozle jurors. His most recent book, the highly-recommended *Risk Savvy: How To Make Good Decisions*, shows how simple rules of thumb can produce better and more predictable results than complicated optimization strategies of so-called experts. In uncertain environments, simple heuristics trump complicated strategies, hands down. So, the best system for personal investing is simple diversification—divide resources equally over x number of investments. The rule is simple, easy, and effective.

The same simple rule of thumb applies to bar organizations, whose main asset is people. Diversification brings new voices, new ideas, and new energy. The Federal Bar Association (FBA) has done great things. We can do even greater if we make diversity a priority, if we branch out, not only to attract members from across the broad spectrum of federal practice but also to broaden the demographics of the lawyers who engage in federal practice. The aims are complementary but different. One maximizes our membership from our base. The other seeks to expand that base.

These efforts will not only improve the health of our organization but will also correct a historical injustice. Our bar association, like most bar associations, has not always been the open organization it is today. Although many of the overt barriers have fallen, the playing has yet to be equalized.

Sidebar continued on page 7

Phil Schatz is a partner at New York City litigation firm Wrobel Schatz & Fox LLP, a former president of the Southern District of New York (SDNY) Chapter of the Federal Bar Association, and a member of the editorial board of The Federal Lawyer.

CALL FOR NOMINATIONS TO THE FBA ISSUES AGENDA

FBA members—as well as chapters, sections, and divisions—are invited to nominate issues for inclusion in the FBA Government Relations Issues Agenda for 2015–16.



The deadline for all agenda nominations is Friday, April 3, 2015.

For full details, please visit www.fedbar.org/Advocacy/Call-for-Nominations-to-2015-Issues-Agenda.aspx.

SIDEBAR continued from page 3

President Dwight D. Eisenhower concluded his 1961 farewell address—at a time when “whites only” signs dotted the South and women were relegated to their kitchens—with a plea “that those now denied opportunity shall come to enjoy it in the full” and that “all peoples will come to live together in a peace guaranteed by the binding force of mutual respect and love.”⁴

We are certainly a more inclusive and tolerant nation than we were in 1961. But the persistence of unconscious biases indicates that more needs to be done. The FBA should be committed, as an organization, to locating and removing whatever unfair barriers may be preventing reasonably proportional representation of women and minorities in federal practice and elsewhere. Nationally, we should establish programs to expand opportunities for women and minorities in federal practice and in the federal judiciary. Locally, we should encourage chapters to reach out to women and minorities, not just to be members but to take leadership roles. The FBA will be better and stronger with a broader base of women and minorities engaged in federal practice. And our society will be fairer when the composition of our judiciary mirrors the population of our citizens. ☺

Endnotes

¹Maya Sen, *How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates*, JOURNAL OF LAW AND COURTS (Spring 2014). Available online at www.ash.harvard.edu/extension/ash/docs/How_Judicial_Qualification_Ratings_May_Disadvantage_Minority_and_Female_Candidates.pdf.

²Maya Sen, *Is Justice Really Blind? Race and Reversal in*

U.S. Courts (Sept. 12, 2014). Available online at www.ash.harvard.edu/extension/ash/docs/Is_Justice_Really_Blind_Race_and_Appellate_Review_in_U.S._Courts.pdf.

³Kevin M. Quinn, *The Academic Study of Decision Making on Multimember Courts*, 100 CAL. L. REV. 1493, 1498 (2012) (citing Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1764 (1997)). Available at: scholarship.law.berkeley.edu/californialawreview/vol100/iss6/6.

⁴The whole speech is worth reading, but here’s the quoted part in context:

We pray that peoples of all faiths, all races, all nations, may have their great human needs satisfied; that those now denied opportunity shall come to enjoy it to the full; that all who yearn for freedom may experience its spiritual blessings; that those who have freedom will understand, also, its heavy responsibilities; that all those who are insensitive to the needs of others will learn charity; that the scourges of poverty, disease, and ignorance will be made to disappear from the earth, and that, in the goodness of time, all peoples will come to live together in a peace guaranteed by the binding force of mutual respect and love.