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## **Progress Is a Chameleon**

Melanie Wilson

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## PROGRESS IS A CHAMELEON

MELANIE D. WILSON\*

Progress is a chameleon. Its hue changes with our perspective, which is influenced by our race, gender, socio-economic status, religious affiliation, sexual orientation, age, and ancestry, among other influences. The amount of progress we perceive also varies from person to person and depends on the type of law we practice and whether we work in a small town or big city. Perhaps most importantly, how we view the rapidity of change in the legal profession — as stagnant, developing, or somewhere in between — is impacted by our unique experiences, our psychology, the length of time we have been lawyers, and other life circumstances we have encountered along our journey.

I write this essay purely from my perspective. My conclusion — the legal profession has taken significant strides. The profession is much more welcoming and inclusive than when I began practicing, but there is plenty of room for more improvement.

I attended law school at the University of Georgia from 1987 to 1990. That education equipped me with remarkable knowledge and some key practical and communications skills. But, during my three years of law study, something was definitely lacking — role models. There were few female professors and even fewer professors of color. I don't know exactly how many female professors there were at Georgia when I was a student, but only three taught my courses, even though I took every core course offered and almost every bar-tested course too. One of my three female professors was a young woman who was not on the tenure track and, therefore, enjoyed no job security.<sup>1</sup> Unlike the male professors who taught my doctrinal courses, she taught first-year legal writing. Today, courses in legal writing tend to seat 15-20 students. In 1987, my legal writing section included me and seventy-one other needy first-year law students, so my professor didn't have much time to mentor the budding female lawyers in her class. She was neck-deep in grading papers.

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1. She also was not considered a "professor." She was called an instructor.

The second female law professor to teach one of my courses was Ellen Jordan, a tenured full professor (who later became the dean at the University of California, Davis). What did she teach? Women in the Law, a course which sounds gendered and may have been.<sup>2</sup> Did Professor Jordan ask to teach the course? Was she assigned? I don't know. I learned a great deal in the course and was impressed with Professor Jordan's vast knowledge and talent for teaching. Nevertheless, I cannot imagine one of my male professors being asked to teach a course by a similar name.

In my third and final year, a new assistant professor, Rebecca White (later to become the first female dean at the University of Georgia School of Law), joined the faculty on the tenure track and taught an upper-level mainstream doctrinal course on employment discrimination. I don't remember thinking too much about Professor White's gender. She was<sup>3</sup> wickedly smart, and I was focused on learning the material and handling her challenging Socratic questioning.

There were probably one or two other tenured female professors on the faculty,<sup>4</sup> but I was not assigned to their courses. So, of the thirty or so courses I took in law school, three were taught by females, and only two of my female professors were tenured or on a path to tenure. And, while women professors were few, professors of color were even rarer. Only one of my professors at Georgia Law was a person of color — Professor Larry Blount, who taught federal income tax. While I was not particularly focused on these race and gender disparities at the time, they did signal fairly loudly to me that women and people of color were not the norm in important lawyering roles. It seemed to me that as women and people of color, we were expected to operate at the fringes, in positions that were less than.

Since I graduated, the number of female faculty and faculty of color have increased substantially — both at Georgia Law and the University of Tennessee College of Law, where I now serve as dean. Because this symposium is primarily focused on gender, I will too.

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2. Whatever the reason for the name of the course, it was grounded in challenging concepts of U.S. constitutional law, not issues of policy unique to women.

3. And, still is.

4. I remember that Professor Sarajane N. Love taught first-year property and upper-level courses on estate planning.

At Tennessee Law, roughly 44% of the full-time faculty are women.<sup>5</sup> And, approximately 46% of the student body is female. As with the increase in women professors in law schools in the past three decades, the number of women in other positions of prestige and leadership in the legal profession have increased. Women make up approximately half of all law students in the United States,<sup>6</sup> about 35% of lawyers in major U.S. law firms, and 46% of all associate attorneys.<sup>7</sup> As of 2019, 35% of law schools are also led by women.<sup>8</sup> Until recently, the University of Georgia School of Law was led by Rebecca White as dean, and for the past four years, I have had the privilege of leading the University of Tennessee College of Law.

But women's progress still trails that of men in many areas of the legal profession. Women lag substantially behind men in the rate they advance to partner.<sup>9</sup> And, "[i]t's not just less pay and fewer promotions" that women experience.<sup>10</sup> A recent study by the American Bar Association's Commission on Women in the Legal Profession and the Minority Corporate Counsel Association found that female attorneys, especially female attorneys of color, are often mistaken for "custodial staff, administrative staff, or court personnel" with "57% reporting mistaken identity" compared to only 7% of white

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5. See STANDARD 509 INFORMATION REPORT, UNIV. OF TENN. 1 (2018), <https://law.utk.edu/wp-content/uploads/2018/12/Std509InfoReport-139-139-12-10-2018-07-39-14.pdf>.

6. Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html>.

7. Debra Cassens Weiss, *Percentage of Women and Minorities at Law Firms Increased Slightly in 2017*, NALP Report Says, ABA J. (Dec. 15, 2017), [http://www.abajournal.com/news/article/percentage\\_of\\_women\\_and\\_minorities\\_at\\_la\\_w\\_firms\\_increased\\_slightly\\_in\\_2017](http://www.abajournal.com/news/article/percentage_of_women_and_minorities_at_la_w_firms_increased_slightly_in_2017).

8. See Karen Sloan, *More Minority Women Ascend to Law Dean Jobs*, NAT'L L.J. (Jan. 10, 2019), <https://www.law.com/nationallawjournal/2019/01/10/more-minority-women-ascend-to-law-dean-jobs/>.

9. See Meghan Tribe, *New Report Finds Female Path to Law Firm Partnership a Sluggish Crawl*, AM. LAW. (Oct. 10, 2018), <https://www.law.com/americanlawyer/2018/10/10/new-report-finds-female-path-to-law-firm-partnership-a-sluggish-crawl/> (finding that "only 30 percent of the nonequity partnership tier and 31 percent of entering equity partner classes" are comprised of women).

10. See Kim Elsesser, *Female Lawyers Face Widespread Gender Bias, According to New Study*, FORBES (Oct. 1, 2018), <https://www.forbes.com/sites/kimelsesser/2018/10/01/female-lawyers-face-widespread-gender-bias-according-to-new-study/#2ce23f2e4b55>.

male lawyers being mistaken for non-lawyers.<sup>11</sup> The ABA survey of almost 3,000 lawyers also revealed that female lawyers perform more office “housework,” are penalized for assertiveness and self-promotion, often resulting in advice to “act more like a woman,” and are paid less than their male counterparts, among other disparities.<sup>12</sup>

Have I personally experienced some of this inequity, sure — most of it implicit rather than explicit. But the profession has made progress, and thankfully that progress continues.

When I first began practicing law as a trial lawyer in the early 1990s, I regularly was the only female lawyer in the courtroom during calendar calls, even when there were 50 or 60 cases on the docket. Nearly all of my opposing counsel were men, and women judges were virtually nonexistent. Perhaps because women lawyers were rare visitors in courtrooms, it was not uncommon for judges to address me with words such as “little lady lawyer.” Spotting me in a room full of men, I vividly remember one, senior male judge who leaned forward, peered over his reading glasses, and offered, “Well, little lady lawyer — come on up. Who do you represent?”

Because I was accustomed to being the only woman (besides the court reporter) in the courtroom, these labels didn’t faze me much. I was, indeed, little — I’m thin and back then, I was also young, making me seem even smaller. I am a lawyer. And, I always tried to behave like a lady. No, it wasn’t these labels that gave me pause. But, I did feel a strong sense of responsibility to be extraordinarily prepared for every case. I was determined that my clients were not going to suffer for my gender (or my youth). I would not give in to bullying — from opposing counsel or old, crusty judges either. I would not be out worked or out maneuvered. I overprepared for everything.

While there were few women trial lawyers, women judges were even rarer. The first women judges I remember were appointed to the federal bench. Later in my career, the governor of Georgia elevated two of my female bosses from the Georgia Attorney General’s office<sup>13</sup> to the state court bench. Both Stephanie Manis, my first boss at the Attorney General’s office, and her successor, Brenda Cole, (a woman of color), were appointed to the bench in the middle and late 1990s, respectively. Even later in my career, Beverly Martin, my boss at the

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11. *Id.*

12. *Id.*

13. I served as an assistant attorney general for the State of Georgia from 1995 to 1999.

U.S. attorney's office in the Middle District of Georgia<sup>14</sup> was appointed to the federal district court bench in Atlanta by President Clinton in 2000.<sup>15</sup>

There are more female trial lawyers now and many more, very able, women judges. The Tennessee Supreme Court, for example, includes a majority of women on the five-person court.<sup>16</sup> And, in March of this year, the Governor of North Carolina chose UT Law alumna Cheri Beasley as the Court's first black woman to serve as the Chief Justice.<sup>17</sup> As we all know, the U.S. Supreme Court also boasts one third women.<sup>18</sup> Such progress has reached law schools too. Recently, I attended a budget meeting in my role as dean, accompanied by my three associate deans and the assistant dean of finance. Looking around during that meeting, I realized that four out of five of us are women. And, remember, the only two female tenure-track law professors I had as a law student both became deans at Tier 1 law schools. These demographics show that women are definitely advancing in the legal profession.

Nevertheless, progress is slower than some of us would like. Rather than a sprint, progress in the legal profession feels more like a dance. We take a few steps forward, one or two back, and occasionally a dip or step to the side. In my view, the lateral moves and the setbacks are typically the result of subconscious sexism (implicit bias). In this way, the legal profession mirrors business and academia. At least subconsciously, the expectation remains that men will (and should) hold the most prestigious positions. As dean, I have seen these biases play out. I am sometimes mistaken for a subordinate when I travel with a white male colleague, and I have

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14. I served as an assistant U.S. attorney in the Middle District from 1999 to 2001 and in the Northern District of Georgia from 2001 to 2005.

15. Judge Martin was subsequently elevated to the United States Court of Appeals for the Eleventh Circuit by President Obama. She still serves in that role. *See Hon. Beverly B. Martin*, U.S. CT. APPEALS FOR ELEVENTH CIR., [www.ca11.uscourts.gov/judges/hon-beverly-b-martin](http://www.ca11.uscourts.gov/judges/hon-beverly-b-martin) (last visited Apr. 13, 2019).

16. Justices Cornelia A. Clark, Holly Kirby, and Sharon G. Lee (a UT Law graduate) are members of the Court. *See Supreme Court Justices*, TENN. ST. CTS., <https://www.tncourts.gov/courts/supreme-court/justices> (last visited Apr. 13, 2019).

17. *See* Press Release, N.C. Judicial Branch, Cheri Beasley Takes Oath of Office as Chief Justice of the Supreme Court (Mar. 17, 2019), <https://www.nccourts.gov/news/tag/press-release/cheri-beasley-takes-oath-of-office-as-chief-justice-of-the-supreme-court>.

18. *See Biographies*, SUPREME CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Apr. 13, 2019).

seen the look of surprise on some faces when I'm first introduced. More than once, I've heard someone exclaim: "You're the dean?"

These setbacks, pauses, and sidesteps on the heels of progress are often the most frustrating. Even increasing the number of women in the legal profession and increasing the number of women in positions of influence and power does not dissolve implicit bias or guarantee the fair treatment of women. Because of the stubborn nature of implicit bias, adding women to the profession does not necessarily increase the number of women who are promoted to partner, reduce the housekeeping duties that women lawyers are expected to perform, or improve issues of equitable pay and other fair treatment. Because of implicit bias, women, as well as men, treat women in discriminatory ways.<sup>19</sup> Even women who view themselves as supportive of other women may find themselves distinguishing "that woman." She may be "too aggressive," "too assertive," or "arrogant."

"Tight-rope" bias is a significant challenge for women lawyers and leaders. The overwhelming majority of women leaders report experiencing the "tight-rope" walk between behaving in ways that are perceived as too masculine (and therefore garnering respect but not popularity) and being perceived as nurturing and kind—qualities that are stereotypically female (and therefore garnering friends but not respect). Joan Williams<sup>20</sup> has written and lectured extensively about this challenge. Just as it sounds, a woman who is assertive and confident may be viewed as arrogant and aloof, even by (or perhaps especially by) other women.

Studies also show that women (and minorities) who actively pursue goals involving diversity and who visibly engage in diversity-valuing behaviors – such as hiring and promoting women and other underrepresented individuals – are viewed as less competent and receive worse performance ratings than female and non-white counterparts who do not actively promote diversity. In other words, the research shows that while white and male leaders receive higher performance ratings for engaging in diversity-valuing behaviors,

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19. As a trial lawyer, I observed that women judges were at least as demanding of women lawyers as were male judges. In fact, female judges often were particularly discriminating because they demanded that women wear skirts (or dresses) and panty hose to court. A female magistrate judge once pulled me aside to tell me never to wear a pants suit to her courtroom again. (It was a nice pants suit, but message received).

20. See *Joan Williams*, U.C. HASTINGS C.L., <https://www.uchastings.edu/people/joan-williams/> (last visited Apr. 12, 2019).

women and ethnic minorities are penalized for the same behaviors.<sup>21</sup> I have always actively and aggressively championed diversity. I know now that, as a woman, I pay a success tax for those efforts. Although I understand the costs associated with my commitment to inclusivity, I would not change my emphasis on inclusion or walk back my efforts. I am willing to pay the price.

For these reasons and many more still unknown (and probably unknowable), the legal profession maintains strong incentives – mostly subconscious – to perpetuate the status quo of a white, male, heterosexual dominated law profession. But, the profession is changing. We are making headway, and we hold the power to speed that progress.

For those of us committed to more progress, we need to take concrete steps and — “be a doer.”<sup>22</sup> We must push the progress, rather than reflecting on the need for more and hoping it happens. Progress demands that we actively support women who are outstanding. One of the best suggestions I have heard requires a modest 36 minutes each week to support excellent women and other underrepresented people.<sup>23</sup> JP Morgan launched an internal public relations campaign a few years ago, urging its executive employees to: “Spend 30 minutes a week having coffee with a talented up and coming woman. Spend 5 minutes a week congratulating a female colleague on a win or success. Spend 1 minute a week talking up the woman who had that win to other colleagues around the firm.”<sup>24</sup>

I love this idea – and not just for women, but especially for women and people of color who are excellent lawyers, law students, and budding leaders.

Progress is necessary for excellence. So is diversity. I hope this message catches on – of spending 36 minutes every week developing relationships with talented women and other exceptional individuals. Progress is worth it. And, this very limited exercise is the same type

21. See, e.g., David R. Hekman et al., *Does Diversity-Valuing Behavior Result in Diminished Performance Ratings for Non-White and Female Leaders?*, 60 ACAD. MGMT. J., 771, 774 (2017).

22. Inky Johnson, a motivational speaker, has urged his audience to “be a doer.” Mr. Johnson played football at the University of Tennessee until he suffered a career-ending injury that paralyzed his arm. See *Who Is Inky?*, INKY BE INSPIRED, <http://www.inkyjohnson.com/about/> (last visited Apr. 13, 2019).

23. See *How Long Does It Take to Help Advance Women? 36 Minutes a Week*, JPMORGAN CHASE & CO., <https://www.jpmorganchase.com/corporate/news/stories/how-long-to-advance-women.htm> (last visited Apr. 13, 2019).

24. See *id.*



of promotion and networking that goes on in the “good ole boy” network<sup>25</sup> that has been thriving and effective for many decades.

The key is to act and to do so intentionally. Is the legal profession progressing? Yes. But, let’s keep it going. We must not leave progress to chance.

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25. “The ‘old boy network’ refers to an informal system of friendships and connections through which men use their positions of influence by providing favors and information to help other men.” Audrey Nelson, *Women and the Good Ole Boys Club: Is it Right? Is it Fair? Of Course Not, but it Exists*, PSYCH. TODAY (Mar. 28, 2017), <https://www.psychologytoday.com/us/blog/he-speaks-she-speaks/201703/women-and-the-good-ole-boys-club>.

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