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Toppling the Barriers to Success for Asian American Female Litigators

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If you are a woman, if you're a person of color, if you are gay, lesbian, bisexual, transgender, if you are a person of size, if you are a person of intelligence, if you are a person of integrity, then you are considered a minority in this world. For us to have self-esteem is truly an act of revolution and our revolution is long overdue. — Margaret Cho

I. Introduction

266. Law students are taught that appearance matters, especially when engaging in oral advocacy. Why? Because appearance itself can be hugely persuasive. Not only do law students learn how to craft strong legal arguments, they learn how to stand up straight when making them, to project and enunciate, to dress neutrally in order to convey rationality, to cover visible tattoos, to move confidently about the well, and to use tone and body language strategically. In a discussion of the future of online court proceedings after the COVID-19 pandemic, Richard Gabriel emphasizes the importance of appearance when he recounts a judge's concern that they "won't be able to judge the body language" of jurors, attorneys, and witnesses during virtual proceedings. Gabriel acknowledges that achieving "authentic communication" requires more effort in online proceedings than in-person and provides tips on how to soften and neutralize lighting in order to more persuasively convey the appearances of attorneys and witnesses.²

¹ Adriena Clifton is a recent graduate of the Seattle University School of Law. She is beginning her career with a civil litigation firm and hopes to become a great oral advocate someday.

² Richard Gabriel, *The Online Courtroom and the Future of Jury Trials*, [NITA](#) (February 6, 2023).

267. Nobody can deny that appearance matters when it comes to the art of persuasion. Unfortunately, this puts certain litigators at an immediate disadvantage. In particular, litigators who do not fit the stereotypical idea of what an oral advocate “should” look like, i.e., a straight, white, cisgender male, often face the uphill task of convincing an audience that they are credible before they have said a word. They must gracefully challenge harmful stereotypes that arise immediately and unconsciously in response to their physical appearance as they make their first argument. Litigators who do fit the traditional mold often do not have to try as hard to appear rational, strong, and confident right away because, as Kimberlé Crenshaw writes, “what is understood as objective or neutral is often the embodiment of a white middle-class world view.”³

268. If this profession can continuously acknowledge the importance of physical appearance in the context of oral advocacy, it must also acknowledge the parallel importance and effects of implicit bias. Physical appearance and implicit bias present a unique challenge to Asian American female litigators because they are members of a group that is often perceived to be more docile or meek, which does not fit the traditional oral advocate mold. This research paper seeks to draw attention to the extraordinary, and often invisible, experiences of Asian American female litigators who face prejudicial stereotypes about both their race and gender.

269. This paper’s discussion is limited to the barriers Asian women face in the legal field due to external forces like implicit bias and media stereotypes, it does not consider internal factors. This paper also acknowledges that, because American society often mistakes all Asian Americans as belonging to the same group, Asian American women share many experiences despite coming from varied cultural backgrounds. This author further acknowledges the limitations of using the words “female” and “women” to describe the subjects of this paper given that some people do not subscribe to the sex/gender binary. Accordingly, please read “female” and “women” as words inclusive of anyone who identifies with them, and be aware that queer and gender-fluid people often experience different, heavier, and more numerous forms of oppression than their cisgender and heterosexual counterparts.

270. Part II of this paper discusses the historic exclusion of Asian American women from all aspects of American society and the law. Part III describes the effects that stereotypes and implicit bias have on Asian American female litigators in the context of oral advocacy and career success. Part IV examines solutions that can be used to address discrimination against Asian American female litigators. This paper concludes with a discussion of how Asian American female litigators can develop a strong sense of self and self-worth in a world that insists their value is tied to fitting the stereotypes about them.

3 Kimberlé Crenshaw, *Foreword: Toward A Race-Conscious Pedagogy in Legal Education*, 4 *S. CAL. REV. L. & WOMEN’S STUD.* 33, 35 (1994).

II. The Exclusion of Asian Women

271. For Asian American women, race and gender cannot be separated, and they often face compounded discrimination as a result of their intersectional identities. In March 2021, the targeted murders of Asian women in a mass shooting in Atlanta, Georgia highlighted the combined dangers that Asian women face as a result of racism and misogyny. These dangers are partly the result of harmful stereotypes about Asian women that persist to this day thanks to xenophobic legislation passed in the 1800s, World War II propaganda, and inaccurate portrayals of Asian women in popular media. They are also the result of the historic, violent, and continued subjugation of women as a social class. This section will explain the origins of the exclusion of Asian women from American society and the legal field in more detail.

272. In the United States, Asians as a whole were denied citizenship under the Naturalization Act of 1790.⁴ They were only allowed into the country as immigrants to provide cheap labor for sugar plantations, mines, railroads, factories, canneries, and farms.⁵ Without the rights that come with citizenship, Asians were ostracized and prohibited from testifying against white men in court, obtaining gainful employment, accessing white public classrooms, and owning property.⁶ In 1882, the Chinese Exclusion Act suspended immigration of Chinese laborers altogether for ten years and forbade Chinese immigrants from naturalizing.⁷

273. This pattern of excluding Asians from American society continued with the internment of Japanese Americans during World War II. Ten weeks after Pearl Harbor was bombed in a surprise attack by the Japanese military, President Franklin Roosevelt authorized the removal of more than 110,000 Japanese Americans from their homes and forced them to live imprisoned in isolated camps.⁸ The United States also engaged in propaganda campaigns against Japanese people at this time in an effort to dehumanize the enemy. Posters from this time period often depicted Japanese people as demonic or animalistic, drawn with slanted eyes, exaggerated buck teeth, and pointed ears.⁹ In 1941, Life Magazine published an article about how to tell Japanese people from Chinese people, wherein skin color and facial features were generalized for each race.¹⁰ The barbaric and sub-human stereotypes that resulted were reinforced during

4 Charles Gordon, *The Racial Barrier to American Citizenship*, 93 PA. L. REV. 237, 238 (1945).

5 *Chinese Immigration and the Chinese Exclusion Acts*, OFFICE OF THE HISTORIAN (January 26, 2022).

6 Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 BERKELEY J. GENDER L. & JUST. 140, 153 (2014).

7 CHINESE EXCLUSION ACT, Ch. 126, 22 Stat. 58 (1882).

8 Donna K. Nagata, Jacqueline H. J. Kim, Kaidi Wu, *The Japanese American Wartime Incarceration: Examining the Scope of Racial Trauma*, 73 AMERICAN PSYCHOLOGIST 36, 36 (2019).

9 Hannah Miles, *WWII Propaganda: The Influence of Racism*, ARTIFACTS (January 27, 2022).

10 *How to Tell Japs from Chinese*, WASHINGTON STATE UNIVERSITY DIGITAL EXHIBITS (January 27, 2023).

the COVID-19 pandemic, and Anti-Asian hate crimes increased 339% in 2021.¹¹

274. Broad gender bias across all cultures and fields also affects Asian women. In a study of women in science, the authors found that the stereotype of women's inferior performance on mathematics-related tasks is pervasive and affects the rate at which female scientists are hired. The study also found that men tended to be more self-promoting than women and overestimated their math skills more frequently.¹² In law, women, of course, have been prohibited from participating due to their perpetual characterization as "the weaker sex." In 1873, the U.S. Supreme Court denied a woman a license to practice law on the grounds that it is a fact that God and nature intended women for the domestic sphere and only men for the occupations of civil life.¹³ With the same sexist mindset, the American Bar Association refused to admit women until 1935.¹⁴ Harvard Law refused to admit women until 1950, and other law schools kept the number of female students artificially low by admitting a far smaller percentage of qualified women than men. Women made up only 4 percent of the legal profession in 1970 and only 21 percent in 1991.¹⁵ Today, they continue to lag behind their male counterparts, making up just 38.3% of U.S. attorneys while males make up 61.5%.¹⁶

275. In the American legal field, Asian women must sprint to succeed. They do not encounter the same challenges as their male Asian counterparts, and simultaneously, do not encounter the same challenges as their white female counterparts. Instead, Asian American women have been set back for centuries due to the compounding effects of discrimination that come with being both female and Asian. It will take significant work to level the playing field for Asian American female litigators.

III. How Stereotypes Affect the Success of Female Asian Litigators

276. The difficulty that Asian American women face can also be attributed to harmful stereotypes about Asian women that have been perpetuated throughout history and to this day. Stereotypes are dangerous because they help to create implicit bias and discriminatory behavior, but they are more prevalent now than ever due to technological

11 Kimmy Yam, *Anti-Asian hate crimes increased 339 percent nationwide last year*, [NBC](#) (January 27, 2023).

12 Ernesto Reubena, Paola Sapienzab, and Luigi Zingales, *How Stereotypes Impair Women's Careers in Science*, [PNAS](#) (February 3, 2023).

13 *Bradwell v. State*, [83 U.S. 130, 132](#) (1872).

14 *A Short History of Women in Law*, [LAW CROSSING](#) (January 27, 2023).

15 *History of the WLA*, [HARV. L. SCHOOL WOMEN'S ASS'N](#). (January 27, 2023).

16 ABA, *Profile of the Legal Profession* at 25 (2022).

developments in media. This section will explain how stereotypes and implicit bias harm Asian American female litigators in particular.

A. Implicit Bias

277. First, what is implicit bias? Bias results from the human need to efficiently classify individuals into categories as people move quickly through their environment. Automatic classifications require few mental resources and little conscious thought, but snap judgments quickly become assumptions people use when faced with new encounters. When these assumptions are used to categorize people by age, gender, race, or other criteria, they are called stereotypes. Implicit bias involves an automatic positive or negative preference for a group, based on one's knowledge of stereotypes.¹⁷

278. Work in the social psychology field has clearly established that attitudes and beliefs about different kinds of people can exist both at implicit and explicit levels, and that these types of attitudes do not necessarily coincide. Thus, implicit bias can be just as problematic as explicit bias when producing discriminatory actions because the individual may be unaware that stereotypes, rather than the facts of a situation, are driving their judgments.¹⁸ This makes implicit bias more difficult to address because people can hold certain harmful beliefs based on inaccurate stereotypes but not feel responsible for changing those beliefs. In the context of oral advocacy, when neutrality is expected but judges and juries are essentially tasked with gauging credibility based on physical appearance, stereotypes are especially dangerous.

279. Asian American women are caught between two restrictive stereotypes: the sexualized ultra-feminine stereotype pushed by popular media, and the model minority myth that has been weaponized against politically active African Americans.¹⁹ Hollywood has pushed one prevailing sexual stereotype — the Lotus Flower trope — which depicts Asian women as subservient, submissive, docile, and helpless.²⁰ Simultaneously, the model minority myth posits that Asian Americans have overcome discrimination entirely because they are obedient, overly competent, hardworking, educated, intelligent, and ambitious, yet lacking warmth and social skills.²¹ Accordingly, Asians, and especially Asian women, are not historically seen as leaders but perfect followers. These

17 U.S. Dept. of Justice, *Understanding Bias: A Resource Guide* at 1-2 (February 2, 2023).

18 Patricia G. Devine, *Implicit Prejudice and Stereotyping: How Automatic Are They? Introduction to the Special Section*, 81 J. PERSONALITY & SOCIAL PSYCHOLOGY 757, 759 (2001).

19 Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 BERKELEY J. GENDER L. & JUST. 140, 153 (2014).

20 Isabella Oishi, *Where Sexism and Racism Meet: The Danger of Existing as an Asian American Woman*, 22 GEO. J. GENDER & L. (January 27, 2023).

21 Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 BERKELEY J. GENDER L. & JUST. 140, 153 (2014).

stereotypes portray Asian women as weak and antisocial, and as a result, Asian women must often work much harder to be taken seriously in their careers. According to the BBC:

[o]ne study of five Silicon Valley companies showed that while white women and Asian men were also under-represented at the highest levels, Asian women were the least likely to be executives, relative to their proportion of the workforce . . . [e]ven people of Asian descent who were born in majority-white countries, and who consider themselves far removed from immigration and don't speak Asian languages, experience career setbacks because of the lack of role models, expectations of their timidity and prejudice of non-Asians.²²

280. Similarly, a survey conducted by the American Bar Foundation and the National Asian Pacific American Bar Association found that Asian Americans appear to face significant obstacles in selection processes:

that involve not only objective measures of ability, but also access to mentorship and subjective criteria such as likability, gravitas, leadership potential, and other opaque or amorphous factors that may inform whom judges, faculty members, or law firm partners regard as their protégés . . . We conclude that Asian Americans would benefit greatly from more institutional supports that counteract stereotypes and facilitate relationship building, development of soft skills, and leadership opportunities.²³

281. These factors also contribute to why it is notoriously difficult for Asian American women to advance in the legal profession. The American Bar Association reported in 2020 that 2% of all United States lawyers are Asian.²⁴ According to the National Association for Law Placement, Asian women made up just 1.17% of partners at law firms in 2016.²⁵

B. Oral Advocacy and Physical Appearance

282. Jonathan Shapiro writes that “[t]he practice of law is the business of persuasion.”²⁶ Aristotle, famed Ancient Greek philosopher, posits that the most potent element of

22 Christine Ro, *The Docility Myth Flattening Asian Women's Careers*, [BBC](#) (January 27, 2023).

23 Tyler Dang, et al., *A Portrait of Asian Americans in the Law*, [AMERICAN BAR FOUNDATION & NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION 77](#) (2022).

24 ABA, *Lawyers by Race & Ethnicity* [at 1](#) (January 27, 2023).

25 *Women and Minorities at Law Firms by Race and Ethnicity: New Findings for 2016*, [NALP](#) (January 27, 2023).

26 Jonathan Shapiro, *Lawyers, Liars, and the Art of Storytelling* (2016).

persuasion is ethos, which depends on the personal character of the speaker.²⁷ Ethos concerns the persuasive effect that results from what the audience thinks of the speaker and is usually based on what the listener has previously seen or heard about them.²⁸ Thus, Shapiro adds that, “[a]pppearance can be deceiving. Which is all the more reason to make sure one’s appearance does not deceive others into assuming the worst about you or your client.”²⁹ For the same reason, Brian K. Johnson and Marsha Hunt urge trial lawyers to meticulously control their lower bodies, faces, hands, and tone.³⁰ Because appearance is so important when it comes to oral advocacy, there is high risk that implicit bias will skew an oral advocate’s ethos before an observer has even realized it.

283. When Americans see trial lawyers on television shows, the characters are often credible because they are feisty, demanding, outspoken, and showy. Unfortunately, these ideas about what make an ideal oral advocate are at odds with the stereotypes about Asian American women. In one study of Asian American women who had experienced discrimination, 34% reported that others had assumed they were submissive or passive.³¹ This is a problem when clients believe a fiery “bulldog” attorney will be the most persuasive on their behalf, and it is an issue if a judge or jury assumes that an Asian American female litigator is weaker or submissive.

284. Because oral advocates occupy a position that relies so heavily on appearance, what can be done to ensure that Asian American female litigators will not fall victim to stereotypes about them? Asian American female litigators face disapproval for defying stereotypes in order to be seen as strong advocates, and simultaneously, they risk not being seen as a strong advocate if they do fit certain stereotypes. How can the legal community counter these contradictory forces and challenge the common belief that Asian American women are too soft-spoken and demure to stand their ground in the courtroom?

IV. Alleviating Discrimination Against Asian American Female Litigators

285. To combat racism and sexism in the legal field, particularly in the context of oral advocacy, the legal community must become aware of, and constantly challenge, implicit bias. This must take place on individual and systemic levels. Because implicit bias

²⁷ Aristotle, *Rhetoric*, [DOVER PUB.](#) (2004).

²⁸ Ronald J. Waicukauski, JoAnne Epps, and Paul Mark Sandler, *Ethos and the Art of Argument*, 26 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 31, 31 (1999).

²⁹ Jonathan Shapiro, *Lawyers, Liars, and the Art of Storytelling* (2016).

³⁰ Brian K. Johnson and Marsha Hunt, *The Articulate Advocate: New Techniques of Persuasion for Trial Lawyers* (2009).

³¹ Christine Ro, *The Docility Myth Flattening Asian Women’s Careers*, [BBC](#) (January 27, 2023).

is unconscious, it is more prevalent and difficult to control. However, if our institutions commit to education and spreading awareness, attorneys and judges can gain the knowledge needed to identify implicit bias within themselves and others. Once someone can identify implicit bias, they can begin working to consciously challenge that bias and alter their judgments accordingly.

A. Mitigating Implicit

286. Bias Renee Nicole Allen and Deshun Harris posit that “[l]aw schools . . . are in an opportune position to take the lead in confronting social justice.” They suggest implementing law school training programs that treat implicit bias like a habit.³² Researchers have realized that the habit of implicit bias requires long-term solutions because “the implicit system is highly contextual and only changes in an enduring way after considerable time, effort, and/or intensity of experience.” Some general dual-process psychological theories suggest that short, intermittent trainings only lead to temporary changes that are equally short-lived.

287. Researcher Patricia Devine and colleagues tested a multifaceted prejudice habit-breaking intervention in a three-month study, comparing a group of people who completed the intervention to a control group who did not. Throughout the study, participants completed a Black–White Implicit Association Test (IAT) at three time points: just prior to the intervention manipulation (baseline) and 4 and 8 weeks after the manipulation. Participants also engaged in explicit measures that gauged racial attitudes, motivations to respond without prejudice, prejudice-relevant discrepancies, and concern about discrimination in society. The explicit measures were administered at three time points as well: 4 weeks prior to the manipulation in a classroom setting (baseline) and 2 and 6 weeks after the manipulation.

288. During the intervention, participants viewed a 45-minute narrated and interactive slide show separated into education and training sections. The education section introduced the idea of prejudice as a habit and described how implicit biases develop and are automatically activated without intention. Participants were then taught about the prevalence of implicit race biases and how they can lead people to unwittingly perpetuate discrimination that results in a wide range of discriminatory outcomes in domains such as health, employment, and everyday interpersonal interaction. After the education section, participants were trained on strategies for reducing implicit race bias, including stereotype replacement, counter-stereotypic imaging, individuation, perspective taking, and increasing opportunities for contact with out-group members.

32 Renee Nicole Allen & Deshun Harris, *#SocialJustice: Combatting Implicit Bias in an Age of Millennials, Colorblindness & Microaggressions*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 1 (2018).

289. Overall, the results provide compelling evidence of the effectiveness of multifaceted intervention in reducing implicit bias. Reductions in implicit bias that emerged by week 4 following the intervention persisted to week 8. The study also revealed an increase in participants' self-reported concern about discrimination and prejudice-relevant discrepancies.³³ Law schools are in an excellent position to implement the fairly simple methods of this study and empower people to break the prejudice habit. Breaking this habit across the board would lead more and more people to challenge their own automatic assumptions about different kinds of oral advocates.

B. Increasing Diversity

290. The legal community should also take affirmative steps towards increasing diversity. Diversity is crucial to the legal field because it promotes teamwork, raises different perspectives, provides opportunities to learn from those who come from other environments, contributes to deeper understanding, and makes the legal field more accessible to future attorneys. Diversity has been shown to contribute to fairer trial outcomes and better business performance.

291. A McKinsey & Company study showed that companies in the top 25% for racial/ethnic and gender diversity were respectively 36% and 25% more likely to have superior financial returns.³⁴ According to one UK-based Cloverpop study that covered 600 business decisions made by 200 teams across a range of industries, diverse teams outperform individuals about 87% of the time during business decision-making processes and make decisions faster than individuals. Gender-diverse teams were found to be especially effective, outperforming individuals 73% of the time, compared to 58% for all-male teams.³⁵

292. Studies on racially diverse juries show that diverse juries spend more time deliberating, make fewer errors, and result in fairer trials than non-diverse juries. For example, psychologist Samuel Sommers invited 200 adults to participate in a mock jury experiment. Each jury consisted of six participants. Each jury group was assigned to one of two conditions: in the diverse group condition, two of the jurors were Black and the other four jurors were white. In the all-white group condition, all six of the jurors were white.

293. The jurors watched a video trial where a Black defendant faced sexual assault charges. Even before deliberation, members of diverse juries were nearly 10% less likely

33 Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 *J. EXPERIMENTAL SOC. PSYCHOLOGY* 1267, 1268-1276 (2012).

34 Sundiatu Dixon-Fyle, et al., *Diversity Wins: How Inclusion Matters*, MCKINSEY (April 28, 2023).

35 *Diversity Drives Better Decisions*, PEOPLE MANAGEMENT (April 28, 2023).

to presume the defendant's guilt than members of all-white juries. On average, diverse juries deliberated longer, discussed more facts about the case, and made fewer factual errors than all-white juries. Notably, white participants were found to have made fewer inaccurate statements when in diverse versus all-white groups, and diverse juries were more open to talking about the role of race in the case.

294. In April 2019, the Washington Supreme Court became the first court in the nation to adopt a court rule aimed at eliminating both implicit and intentional racial bias in jury selection. Under General Rule 37, objections to peremptory jury selection challenges will no longer be restricted to instances of purposeful discrimination but can also be used if an "objective observer" could view race or ethnicity as a factor in use of the peremptory strike. The rule defines an objective observer as someone "aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington state."³⁶ States across the nation should follow in Washington's footsteps to increase diversity of juries.

295. Law firms deserve the benefits of diverse thinkers. Diverse defendants deserve diverse juries. Diverse law students should see attorneys like them occupying the spaces they have historically been excluded from. They will be able to develop important mentorships and relationships with trailblazers who have come before them and understand them. Diversifying the legal profession will expand client access to law as well. Members of the community who require translators or heightened cultural competence from their attorneys would benefit significantly from working with people who come from the same backgrounds that they do.

296. Mitigating implicit bias and increasing diversity in the legal field will make room for people who do not fit the traditional idea of what makes an ideal oral advocate. Seeing different kinds of oral advocacy styles can promote the idea that there is also value in being able to sit back and listen, that there are situations where someone who is quieter or less showy is just as, if not more, effective. Diversity of people, cultures, and appearances gives birth to acceptance, not mere tolerance. In the courtroom, where justice is the ultimate goal, deeply-ingrained acceptance of many different kinds of people and advocates will lead to a more equitable justice system.

V. Conclusion

297. I want to conclude this paper on a personal note. It may seem odd that an academic article would shift into the first-person, but I am an Asian American female law student,

36 ACLU, *Washington Supreme Court is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection* at 37 (April 28, 2023).

and this subject is deeply personal to me. I believe that there are some things that cannot be supported with a footnote or citation but that are still worthy of being heard.

298. I have lived the statistics this paper has discussed. I have seen the effects of implicit bias first-hand. Before court, I have been asked if I am the translator. When I have proudly written home to say that I work at a law firm, it has been assumed that I was answering phones and managing calendars. I saw a white male judge tell an Asian female attorney to adjust the microphone and “speak up” before she had even spoken. I have a mentor who is the first Asian American female partner in her law firm’s 133-year history. I have watched as white male attorneys attempt to bully and speak over Asian American female attorneys during depositions. As a Chinese adoptee raised in primarily white communities, I have felt the disapproval that comes with not being what people expect me to be. I have lost myself in fighting against stereotypes to be my strong-willed, outspoken, daring, bulldog self.

299. I think constantly about how Asian American female litigators can find and maintain a strong sense of self in a sea of stereotypes. I do not yet have an easy answer. I have found it helpful to seek out mentors who look like me because there is healing in having one’s struggles and victories validated, in hearing that you are not alone. The bulk of the advice I have received so far is to “be myself” and hope for the best, and while I have found this advice to be on point, I still believe it is the duty of the legal community as a whole to acknowledge and confront discrimination. We must all strive to become aware of our individual thoughts and behaviors and be brave enough to challenge them when we learn they are harmful. Only then can we achieve truer justice.