

A Scientific Path For Improving Diversity At Law Firms

By **Ali Shahidi and Bess Sully**

The scale and intensity of challenges in 2020 taught us countless lessons in our professional and personal lives. Our character, wisdom, empathy and value system were tested beyond anything we could have imagined.

The 2020 test was akin to a simulated assessment of our basic human elements. We have discovered more about who we are as parents, friends, colleagues and as a society through such a difficult shared experience.

Looking forward to what lies ahead in our personal and professional lives, and in particular the future of legal profession in 2021 and beyond, this last year's shared experiences will be formative and foundational, in particular those experiences that validated our beliefs and biases in the value of diversity and science.

Formula for Sustainable Legal Innovation: Diversity and Science

McKinsey & Co.'s well-cited 2018 report, "Why Diversity Matters,"[1] scientifically reconfirmed the correlation between diversity and organizational success. The study found that companies with higher degrees of racially and ethnically diverse workforces have a statistically significant performance advantage over companies relying on a "culture fit" that tends to trend to white and monocultural.



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To its credit, the legal community has long established the ethical and moral obligation to improve the diversity of legal profession with a focus on symptomatic methods to accelerate the number of minority professionals within the law.

This approach has resulted in measurable sustained improvements as reported by the Diversity Lab under its Mansfield Rule initiative, now supported by more than 117 major law firms, which measures whether law firms have considered at least 30% women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions.

Among other Mansfield Rule results, 94% of participating firms reported that their candidate pool for pitch teams was more diverse, 79% of firms reported that their lateral partner hiring pool was more diverse, and 76% said their equity partner promotions pool was more diverse.[2]

However, long-term positive retention of minority legal professionals remains elusive.

According to the American Bar Association's 2020 Profile of the Legal Profession report,[3] the number of law firm associates who are lawyers of color is rising slowly. In 2019, 25% of all associates were lawyers of color, compared to nearly 20% in 2009.

This improvement has not translated into retention and success at the top, however.

In 2009, 6% of law firm partners belonged to racial minority groups — Hispanic, African American, Asian, Native American or mixed race. In 2019, nearly 10% were lawyers of color

as they continued to make small gains among the law firm partner ranks. But the data consistently shows that women and minorities leave big law firms at far greater rates than their white male counterparts.

So, what is causing this disparity between the intake pipeline and long term-success? Biases.

While we cannot blame a single factor for this disparity between short-term metrics and long-term outcome, a critical and scientific review of the decision data identifies a combination of cognitive biases that influence how decisions are made at every decision gate of the legal profession. These are the same biases that result in unequal access to justice in the legal system and social inequalities in our society.

Using Buster Benson's Cognitive Bias Codex[4] as the bias pallet, we can identify outcomes that are statistically significant and correlate to each of the biases, regardless of which side of the selection process we are on. There is a reason for every cognitive bias, but the end result is that they also introduce errors into our thinking and decision making.

These decision-making points include selecting law as a profession, selecting a law school, selecting a law firm, selecting a candidate, selecting transactional or adversarial practices, selecting a case and judge, selecting a jury, selecting a client, selecting an attorney, selecting mentors and mentees, and selecting partners and corporate general counsel.

What if we could build scientific models that are tested for bias and designed to minimize bias and its adverse impact? Such models could then be used as extra input to facilitate the decision-making process at the critical gates in the legal system.

In a paper published in September 2020 by the Harvard Civil Rights-Civil Liberties Law Review, [Harvard University](#) professors Michael Brenner and Jeannie Suk Gersen, among others, argue that for a model to "operate within the bounds of our constitutional system," it must meet three benchmarks: accuracy, simplicity and fairness.[5] The same can be said about any algorithmic models developed with the intention of improving diversity and retention metrics of the legal profession.

Algorithmic Models

Is the legal system ready to allow an unbiased algorithmic model to be a factor in the decision-making process? Some recent legislation — some proposed and some enacted — might provide some perspective. For example:

- On Nov. 3, 2020, in one of the first public opinion tests about use of algorithms instead of judges in the judicial system, the California voters rejected the concept of allowing an algorithm to assess risk by voting no on Proposition 25.[6]
- The Algorithmic Accountability Act, which was introduced in the [U.S. House of Representatives](#) in 2019, would require entities to conduct bias testing and "assessments of high-risk systems that involve personal information or make automated decisions," such as systems that use artificial intelligence or machine learning. Such systems include those that may contribute to inaccuracy, bias or discrimination.[7]

- A proposed New York City law would regulate the use of automated employment decision tools, which encompass certain systems that use algorithmic methodologies to filter candidates for hire. This bill, introduced early last year, if passed would prohibit the sale of such tools if they were not the subject of an audit for bias.[8]
- In 2019, the state of Washington introduced the most detailed proposed companions bills focused on eliminating algorithmic-based bias. The bills call for requiring consideration of fairness, accountability and transparency — and allowing private right of action by those harmed.[9]
- Illinois is the only state which, through its Biometric Information Privacy Act[10] and the Artificial Intelligence Video Interview Act,[11] requires employers to tell candidates if artificial intelligence is being used to evaluate them and allows the candidates to opt out.
- There are detailed provisions concerning AI in the 2021 National Defense Authorization Act with a focus on "trustworthy AI" and that endorse a whole-of-government approach to leadership in AI, creating a new National Artificial Intelligence Initiative Office to be led by the White House. As summarized by Stanford University's Human-Centered Artificial Intelligence, part of the funding is aimed at supporting a risk management framework for AI and establish best practices for data sets to train AI systems that are free of bias.[12]

The above underscore a glaring contradiction — that we require bias testing for algorithms, but we don't require statistical and scientific analysis of judicial bias or that of the human element.

Combining Industrial Organizational Psychology and Ethical Machine Learning to Address Bias in the Legal System

The field of industrial organizational psychology has been in existence for more than 100 years with the primary objective of using science to improve the effectiveness of organizations and life for employees.

Industrial-organizational psychologists study workplace issues of critical relevance to business, including talent management, diversity, coaching, assessment, selection, training, organizational development, performance and work-life balance — all factors influenced by the human element and its biases.

Advances in the field of artificial intelligence, in particular machine learning, which is used to build predictive models, have brought the fringe disciplines of explainable AI — tools that produce details or reasons to make their functioning clear or easy to understand — and ethical machine learning into boardroom discussions.

The focus on explainable AI has prompted data scientists to ensure that their prediction models are free of bias, fair, robust and transparent. This is consistent with the guidance in academia, such as those in the Harvard paper mentioned above, as well as proposed and existing governmental regulations at state and federal levels.

As a part of this framework, predictive models are systematically tested for bias and are also used to detect bias in the underlying data. In contrast to human decision makers, the algorithmic models take no offense when called out for having a bias — and those models are not afraid to highlight bias if they find it in the underlying data. It is common to adjust or throw out a model and start from the ground up when and if a model is found to have bias.

So, how might law firms use industrial organizational psychology and ethical machine learning to improve diversity, increase retention, identify and reduce bias, enhance firm cultures, and empower long-term success of their attorneys?

In a pilot program by recruiting firm Suited, select law firms, including ours and four other BigLaw firms, have developed and applied unbiased predictive models that measure more than 100 human element attributes of job candidates; these include analytical thinking, dependability, resilience, self-awareness, conformity and stress response.

Combined with each firm's internal metrics, the models, which are unique to each law firm, have shown a statistically significant correlation between human element attributes and long-term success that is unique to each organization and its culture, regardless of race and gender.

Machine learning has allowed each firm to consider nonlinear correlations, where more than 10,000 statistical relationships between human traits and outcomes are considered — with the primary objective of minimizing selection, confounding and information biases.

Initial machine learning results have shown that there is a demonstrable statistically significant correlation between retention and success of diverse candidates and unbiased human element attributes. Conversely, the pilot results revealed that there is no statistically significance correlation between LSAT scores, law school GPA and ranking, and success or retention of candidates, especially those of candidates belonging to minority groups.

These initial results are consistent with the findings of **recent law school research studies**, including a two-year study done by the Florida State University College of Law. FSU is now is planning a phase III study with over 200 participants in early 2021, given the findings.

At the outset, combining industrial organizational psychology with machine learning will allow law firms to scale their recruiting beyond the traditional T14 law schools, and hopefully to a more diverse candidate pool. It also allows candidates, especially minority candidates, to scale and be matched with firms that are most aligned with their personal goals and values.

Law schools, including T14 and others, will also benefit from a scientific approach to data collection and tracking over time. Early results of such foundational shifts in approach will take three to five years to assess. Regardless of the outcome, the legal industry will be in a more informed position to take action, tackle bias and address diversity issues.

Looking Back and Looking Ahead

One of the great lessons of 2020 has been how resilient and perseverant humans are. When tackling the systemic issues of bias and lack of diversity that have resulted in undesired and painful outcomes in our society, and in particular in the justice system, relying on just one possible solution is never enough. It would be akin to relying on just one vaccine.

So, while this approach has scientific merits, with support from industry leaders and experts, we should not get complacent and sit on our laurels. As we do with all challenges, we must continue to forge ahead — and when we don't succeed initially, we need to keep trying.

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[1] https://www.mckinsey.com/~media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20diversity/delivering-through-diversity_full-report.ashx.

[2] <https://www.diversitylab.com/mansfield-rule-4-0/>.

[3] https://www.americanbar.org/news/reporter_resources/profile-of-profession/.

[4] https://upload.wikimedia.org/wikipedia/commons/1/18/Cognitive_Bias_Codex_-_180%2B_biases%2C_designed_by_John_Manooqian_III_%28jm3%29.jpg.

[5] <https://harvardcrcl.org/wp-content/uploads/sites/10/2020/09/Brenner-et-al.pdf>.

[6] <https://voterguide.sos.ca.gov/propositions/25/>.

[7] <https://www.congress.gov/bill/116th-congress/house-bill/2231>.

[8] <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9>.

[9] <http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5527.pdf>.

[10] <https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3004&ChapterID=57>.

[11] <https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=4015&ChapterID=68>.

[12] <https://hai.stanford.edu/policy/policy-resources/summary-ai-provisions-national-defense-authorization-act-2021>.