

# Law Firm Diversity: How Race, Gender, Age, Social and Economic Divisions Impact the Hiring, Retention and Advancement of Law Firm Attorneys

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ATTORNEY SEARCH

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## Introduction: Approaching Taboo Topics

One of the biggest misperceptions attorneys have is that they can practice law on their own terms, being the person they are most comfortable being, and still work for a major law firm. I believe law firms expect a high degree of conformity. They do not want their employees to be “too different” because that is unwanted baggage and opens the door to problems involving control. Many law firms want to hire people with whom they feel comfortable, and this means, despite policies to the contrary, they can seek to impose a certain type of uniformity in the way they hire and advance their attorneys.

I have been studying, writing about, working in, and working for law firms for most of my career. As an observer, my interest in law firms has always been why certain people get hired and others do not. As the head of a legal recruiting firm, I work to give people an “edge” with law firms, and I do everything in my power to make sure they get hired. If a law firm says it’s interested in diversity, so am I. I want my candidates to have every advantage they possibly can.

In addition, I have strong personal reasons to support diversity in law firms. My personal life story as well as my professional life have been touched and influenced by issues related to diversity. I grew up near Detroit, a city populated by all kinds of people in all kinds of situations. This was in the seventies and eighties, and my family moved about, broke apart, reconnected, and moved up and down the ladder of economic success throughout my early years. After my parents divorced, I lived with my mom for a time and then with my dad in a steady succession of new neighborhoods and new schools. I experienced diversity from many different vantage points, including what it meant to be marginalized and different from my peers and what it meant to be part of the mainstream majority group. From a young age, I learned how a person’s background, upbringing, exposure, experiences, and cultural milieu combined to create that unique person, with various motivations, a certain sense of class consciousness, and an ingrained set of values and beliefs that affected that person’s prospects.

I believe women, people of color, people of any gender and sexual identity, and all the other unique individuals out there no doubt deserve equal access to participating in the legal profession. Different people bring to bear different viewpoints and experiences that help firms better navigate in today’s global society.

My recruiting firm makes hundreds of permanent placements in law firms of all sizes each year, so my team and I are uniquely positioned to see what law firms favor and do not favor in applicants.<sup>1</sup> We provide ample support for attorneys seeking jobs; we collect immense amounts

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<sup>1</sup> Harrison Barnes, The BCG Attorney Search 2017 State of the American Lateral Law Firm Legal Market Report (BCG Attorney Search, 2017), <http://www.bcgsearch.com/article/900047676/State-of-the-American-Legal-Market-2017-Hot-and-Weak-Practice-Areas-of-2017/#01>.

of data, filling databases that track the pulse of the legal profession, to help our candidates find the jobs they want. I also write articles and share what I learn about the current state of employment in law firms across the nation, and my articles are read by tens of thousands of attorneys per week.

Every day headlines across the nation blare the negative consequences of racism, sexism, classism, and every other kind of -ism. At every turn, someone is calling out discrimination or injustice or disadvantage or entitlement. It seems our society is divided along innumerable lines and truly intolerant—despite all the talk about embracing diversity—of all the ways we are different from each other.

The goings-on inside law firms reflect what is happening in the larger society. Race, gender, and social economic divisions are the most toxic and inflammatory subjects we can try to discuss.

Diversity is a complicated and multifaceted issue, with intellectual, practical, ethical, moral, and deeply personal aspects. I share the more personal parts of my story with you because they influence the way I see the diversity issue. They also influence the way I handle—perhaps unwittingly at times—my legal recruiting and related businesses.

There are two main themes of this book. The first relates to the growing problem of censorship and apparent demand for ideological conformity when it comes to discourse on controversial issues such as diversity.

The second theme relates to my efforts to reconcile market economics with diversity goals. I believe in diversity, and I know that many of my candidate attorneys and client law firms certainly do as well. At the same time, I understand that not every diversity initiative is compatible with the way law firms operate. However, there are concrete ways law firms can better meet diversity goals without fundamentally altering the way they do business. The goal of this book is to expose the issues surrounding diversity inside law firms and propose solutions that may help remedy diversity concerns.

## Part I: Diversity and Controversy in the World

The Sentinelese, a small indigenous group on North Sentinel Island off the coast of India, have fiercely refused all meaningful contact with the outside world to the present day. North Sentinel, an Andaman Island approximately twenty-three square miles in size in the Bay of Bengal, has never been settled by outsiders. In fact, the Sentinelese meet outsiders' efforts to visit the island with hostility. The Indian government, which controls the island, has declared it an "exclusion zone" and does not allow people to visit.

In 2011, a census counted fifteen people on the island's shore. The total population of North Sentinel is estimated at thirty-nine.<sup>2</sup>

Perhaps no people on Earth remain more genuinely isolated than the Sentinelese. They are thought to be directly descended from the first human populations to emerge from Africa and have probably lived on the Andaman Islands for up to 60,000 years. The fact that their language is so different from even other Andaman islanders' suggests that they have had little contact with people for thousands of years.<sup>3</sup>

After the 2004 tsunami, the Indian government sent a helicopter to fly over the islands, and a native of the island shot arrows at it. In 2006, a boat mistakenly strayed close to shore, and the Sentinelese killed the fishermen onboard. The Sentinelese chased away, again with bows and arrows, the helicopter that attempted to recover the bodies. A recent report on the island states:

Unlike uncontacted tribes hidden away in places like the Amazon Rainforest, we've known about the Sentinelese for centuries, and they want nothing to do with us. They have violently rejected the contact with the groups of various nationalities that have attempted to communicate with the tribe, from European colonial explorers to the Indian coast guard.<sup>4</sup>

The Sentinelese do not care about diversity or about integrating with the larger society around them. These indigenous people have been isolated for so long, any contact with the outside world could be biologically catastrophic as well as threaten culture loss. They want nothing to do with the rest of us, and in this case it is likely in their best interest.

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<sup>2</sup> *Andaman and Nicobar Islands Census 2011* (Directorate of Economics and Statistics, 2011), [http://andssw1.and.nic.in/ecostat/basicstatPDF2013\\_14/1.Demogrpahy.pdf](http://andssw1.and.nic.in/ecostat/basicstatPDF2013_14/1.Demogrpahy.pdf).

<sup>3</sup> "The Most Isolated Tribe in the World?" Survival International, <http://www.survivalinternational.org/campaigns/mostisolated> (last visited August 9, 2017).

<sup>4</sup> Sean Kane, "This Isolated Tribe Has Rejected Contact for Centuries and Remained Hostile Toward Outsiders," *Business Insider*, May 5, 2016, <http://www.businessinsider.com/sentinelese-uncontacted-island-tribe-photos-2016-5/#other-than-colonial-europeans-visiting-the-larger-andaman-islands-and-occasional-shipwreck-survivors-surviving-being-stranded-on-hostile-north-sentinel-the-island-remained-largely-untouched-6>.

## Chapter 1: Diversity

The Sentinelese are one of the few groups in the world who have had their wishes to remain separate honored. Except perhaps for North Korea, everywhere else seems more interested in integration and diversity than in separation and isolation.

Diversity means *difference, variation, dissimilarity*. It refers to the differences among people regarding their sexual orientation, race, socioeconomic status, gender, religion, and other characteristics.<sup>5</sup> In social contexts, it is defined as “inclusion of individuals representing more than one national origin, color, religion, socioeconomic stratum, sexual orientation, etc.”<sup>6</sup>

A peek into the word’s historical roots reveals that the concept of diversity arose in the late 1700s as a virtue of democracy that prohibited a single faction from accruing all the power. Our modern sense of diversity, as a positive quality celebrating differences in ethnicity, racial background, gender identity, sexual identity, and other human characteristics, developed in the early 1990s. Diversity is a concept that refers to everyone being treated equally despite their differences.

The definition given in the online etymology dictionary is instructive in both the word’s meaning and its history:

### **diversity (n.)**

mid-14c., “quality of being diverse,” mostly in a neutral sense, from Old French *diversité* (12c.) “difference, diversity, unique feature, oddness:” also “wickedness, perversity,” from Latin *diversitatem* (nominative *diversitas*) “contrariety, contradiction, disagreement;” also, as a secondary sense, “difference, diversity,” from *diversus* “turned different ways” (in Late Latin “various”), past participle of *divertere* (see *divert*).

Negative meaning, “being contrary to what is agreeable or right; perversity, evil” existed in English from late 15c. but was obsolete from 17c. Diversity as a virtue in a nation is an idea from the rise of modern democracies in the 1790s, where it kept one faction from arrogating all power (but this was not quite the modern sense, as ethnicity, gender, sexual identity, etc. were not the qualities in mind):

<sup>5</sup> See, generally, “Diversity and Inclusion Defined,” George Washington University, <https://diversity.gwu.edu/diversity-and-inclusion-defined> (as an example, “the term diversity is used to describe individual differences [e.g. life experiences, learning and working styles, personality types] and group/social differences [e.g. race, socio-economic status, class, gender, sexual orientation, country of origin, ability, intellectual traditions and perspectives, as well as cultural, political, religious, and other affiliations] that can be engaged to achieve excellence in teaching, learning, research, scholarship, and administrative and support services”).

<sup>6</sup> “Diversity,” Dictionary.com, <http://www.dictionary.com/browse/diversity?s=t>.

“The dissimilarity in the ingredients which will compose the national government, and still more in the manner in which they will be brought into action in its various branches, must form a powerful obstacle to a concert of views in any partial scheme of elections. There is sufficient diversity in the state of property, in the genius, manners, and habits of the people of the different parts of the Union, to occasion a material diversity of disposition in their representatives towards the different ranks and conditions in society.” [“The Federalist,” No. 60, Feb. 26, 1788 (Hamilton)]

Specific focus (in a positive sense) on race, gender, etc. is from 1992.<sup>7</sup>

As shown, the meaning of diversity has changed a great deal through time. Whereas it once was considered negative, it is now considered positive.

## Why Does Diversity Arise?

Major changes in modern society have prompted people, from governments to families, to embrace and promote diversity—out of necessity. We now live in a global society where we each must coexist, relate, and do business with others who are different from us. In the United States, the Millennials are the most racially diverse generation than any generation to come before it, and post-Millennial demographics are minority white.<sup>8</sup>

Likewise, the demographic makeup of nations is changing as more and more people move around the world, with more mixing of different ethnic, religious, and national groups than at any time in the past. When people from one area relocate to a different region or country, they are no longer expected to ignore their background and culture in order to fit in or assimilate with the dominant culture; instead, these days people fight to maintain and display their distinctions as an expression of freedom.<sup>9</sup>

People form groups on the basis of shared characteristics, whether skin color, religious beliefs, hometown, interests, gender identity, or any number of other traits. Living in groups helps us meet our basic psychosocial needs of belonging, safety, freedom, and identity by sharing culture, values, and beliefs with certain others. People’s preference to associate and connect with others who are like them is called homophily.

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<sup>7</sup> “Diversity—Origin and History of Diversity,” Online Etymology Dictionary, [http://www.etymonline.com/index.php?allowed\\_in\\_frame=0&search=diversity](http://www.etymonline.com/index.php?allowed_in_frame=0&search=diversity).

<sup>8</sup> William H. Frey, “Diversity Defines the Millennial Generation,” Brookings Institution, June 28, 2016, <https://www.brookings.edu/blog/the-avenue/2016/06/28/diversity-defines-the-millennial-generation/>.

<sup>9</sup> “Why Do We Need to Be Concerned with Diversity?” Penn State Extension, <https://extension.psu.edu/an-overview-of-diversity-awareness>.

While we form an individual identity, we also create a social identity based on our group memberships. But identity is fluid—rarely can people be placed into discrete categories. At any moment in different situations, we consider ourselves as members of various groups, such as a friend in a friendship, a family member, or an affiliate of any number of interest groups, communities, ethnicities, nationalities, and societies.<sup>10</sup>

In-group bias, the tendency to prefer our group, whichever ones we identify with, is a powerful motivator.<sup>11</sup> We increase our self-image and self-worth by raising the status of our group, emphasizing our positive qualities, and by vilifying outsiders by stereotyping them in ways that highlight their negative attributes.<sup>12</sup> Our desire to belong, to be accepted, and to feel connected to others in a group can shape our choices and behavior.

## Power and Hierarchy

The struggle for power comes up in most human interactions, sometimes blatantly, other times more subtly, in negotiating benefits and a place in the social hierarchy.

Aristotle had the idea to put all the world's creatures and objects in order, from the least complex to the most complex. In the Middle Ages, this ranking system became known as the Great Chain of Being. In it, God and the Angels reigned at the top of the order, and all the rest of creation fell below them. People's roles in life were determined by where they fell in the order of things:

- At the top, the king—considered God manifest in human form.
- Beneath the king was a descending lot of nobles, knights, people in various guilds and professions (tailors, bakers, carpenters, shoemakers, butchers, etc.), and peasants. The guilds were further subdivided into masters of the craft, junior members, and apprentices.
- Serfs were at the bottom of the chain. Animals came below them.

One of the characteristics of Medieval society was conformity. The world was divided into these groups, and everything functioned so long as people stayed in these groups and understood their place. Serfs needed to know that they would always be serfs, and butchers knew they would always be butchers. A butcher could not become a carpenter. With limited exceptions, people were born into their position, and that was their role in life. Medieval society functioned when everyone bought into this worldview.

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<sup>10</sup> Saul McLeod, "Social Identity Theory," Simply Psychology, 2008, <https://www.simplypsychology.org/social-identity-theory.html>.

<sup>11</sup> "Ingroup Bias," AlleyDog.com, <https://www.alleydog.com/glossary/definition.php?term=Ingroup+Bias>.

<sup>12</sup> McLeod, "Social Identity Theory," <https://www.simplypsychology.org/social-identity-theory.html>.



Emile Durkheim, a sociologist in the late 1800s, studied the structure of modern societies. He posited that people differ in their abilities, which leads them to take on different roles in life and in the labor force. He observed that social hierarchies seem to follow naturally from this division of labor because some people had better jobs than others in which they experienced more freedom, respect, status, and prestige, which ranked them higher in the hierarchy.<sup>13</sup>

Social hierarchy has two main dimensions, power and status, and a third that modulates the effects of the others: influence. Power is the ability to make things happen, to produce effects on others, to control resources or outcomes. A simple definition is “the capacity to make others do what you would have them do.”<sup>14</sup> Status is respect and esteem earned from others; it’s the social worth others ascribe to an individual<sup>15</sup> (a type of labeling with significant consequences). Influence, the third factor, is gained by earning respect based on contribution, not rank.<sup>16</sup>

Power is a term (as is class) that disturbs us because it goes against our principles to think that only some individuals or groups wield influence over the rest of us. Our country was founded on the belief that there can be no fixed power elite when power is distributed among the people (by the Constitution) and when people participate actively in the democracy.<sup>17</sup>

The fact is, although today we are no longer subject to a tyrannical ruler, certain groups in society have more power, status, and influence, and they do set the terms under which other groups and classes must operate.

Throughout history, power has traditionally accrued to those who had money, the people who owned income-producing land or businesses. In the United States today, similarly, a small power network exists, mainly based on economics. This group continues to hold power because no other rival groups, united in strength, challenge it politically or publicly; less-

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<sup>13</sup> Michael W. Kraus, “Status Hierarchies: Do We Need Them?” Psychology Today, October 2, 2012, <https://www.psychologytoday.com/blog/under-the-influence/201210/status-hierarchies-do-we-need-them>.

<sup>14</sup> Eric Liu, “Why Ordinary People Need to Understand Power” (transcript), TED talk, 17:15, September 2013, [https://www.ted.com/talks/eric\\_liu\\_why\\_ordinary\\_people\\_need\\_to\\_understand\\_power/transcript](https://www.ted.com/talks/eric_liu_why_ordinary_people_need_to_understand_power/transcript).

<sup>15</sup> Steven Blader and Ya-Ru Chen, quoted in Aimee Groth, “The Most Important Difference between Power and Status,” Business Insider, August 10, 2010, <http://www.businessinsider.com/steven-blader-ya-ru-chen-power-and-status-research-2012-8>.

<sup>16</sup> Valerie Maltoni, “The Difference between Power and Status,” Conversation Agent, <http://www.conversationagent.com/2016/02/the-difference-between-power-and-status.html>.

<sup>17</sup> G. William Domhoff, “The Class-Domination Theory of Power,” Who Rules America? [http://www2.ucsc.edu/whorulesamerica/power/class\\_domination.html](http://www2.ucsc.edu/whorulesamerica/power/class_domination.html).

powerful groups remain divided among themselves—along myriad lines of race,<sup>18</sup> class, sex, ethnicity, religion, and so forth.<sup>19</sup>

Even with free speech, regular democratic elections, and organized opposition, in this day and age, those with money still hold the most power and influence, sitting at the top of the social hierarchy, making up the rules of the system. In institutional positions and decision-making groups, look for those who are highly overrepresented in relation to their proportion in society. In any system, ask: Who makes decisions? Who governs? Who benefits? Who wins? These are the powerful.

## Right versus Left

Two prevailing decision-making groups that create the political and business climate in the United States are liberals and conservatives, and the clashes between them as they hash out the rules are ever present in the news, affecting our working and personal lives at all levels.

Briefly, liberalism is a worldview founded on liberty and equality. Liberals tend to support free speech, free press, free markets, and civil rights, among many other values, and they are novelty-seeking and tolerant of change.<sup>20</sup> Conservatives support tradition and emphasize patriotism, stability, and continuity of tradition and traditional institutions. They believe hierarchy and the social order are natural results of social differences.<sup>21</sup>

Despite their increasingly rancorous confrontations, both groups base their beliefs on a certain morality. Liberal morals and values include equality, caring for vulnerable people, protection from harm, and fairness, which they take to mean sharing resources equally. Conservative morals revolve around loyalty, patriotism, respect for authority, moral purity, and fairness rooted in proportionality: you get what you deserve based on how much effort you expend.<sup>22</sup>

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<sup>18</sup> The term *race* has been used to categorize people into groups on the basis of shared distinctive traits. Genetic evidence has disproved the idea of racial divisions in the human species, so *race* is no longer used as a biological or anthropological system of classification. Today, it is a socially constructed term used to refer to a large group of people who share some characteristics.

<sup>19</sup> Domhoff, “The Class-Domination Theory of Power,” [http://www2.ucsc.edu/whorulesamerica/power/class\\_domination.html](http://www2.ucsc.edu/whorulesamerica/power/class_domination.html).

<sup>20</sup> “Liberalism,” Wikipedia, edited November 14, 2017, <https://en.wikipedia.org/wiki/Liberalism>.

<sup>21</sup> “Conservatism,” Wikipedia, edited November 13, 2017, <https://en.wikipedia.org/wiki/Conservatism>.

<sup>22</sup> Emily Laber-Warren, “Unconscious Reactions Separate Liberals and Conservatives,” *Scientific American*, September 1, 2012, <https://www.scientificamerican.com/article/calling-truce-political-wars/>; Robb Willer, “How to Have Better Political Conversations,” TED talk, 12:05, September 2016, [https://www.ted.com/talks/robb\\_willer\\_how\\_to\\_have\\_better\\_political\\_conversations](https://www.ted.com/talks/robb_willer_how_to_have_better_political_conversations).

“Conservatives recognize that democracy is a huge achievement and that maintaining the social order requires imposing constraints on people. Liberal values, on the other hand, also serve important roles: ensuring that the rights of weaker members of society are respected; limiting the harmful effects, such as pollution, that corporations sometimes pass on to others [sharing resources, such as clean air and water, equally]; and fostering innovation by supporting diverse ideas and ways of life.”<sup>23</sup>

Moral values are deeply held beliefs that are resistant to change. People do not give up their fundamental values or compromise them just to agree with you on a divisive issue, especially when they do not want to agree on the issue to begin with but believe their position is the correct one. Research has shown that the gulf between liberals and conservatives, Democrats and Republicans, the left and the right, in this country is widening. People are further apart today on issues than before in American history.<sup>24</sup> People wall themselves off (sometimes literally in the case of the border wall) from others who are different, listen to only like-minded people, and the animosity between the sides grows as they wrestle for the power to influence outcomes for society.

I learned early on how much the power vested in one person—of a particular political bent—can influence decisions that shape the course of peoples’ lives. For one year after law school, I clerked for one of the Republican judges on the bench at the time. Appointed as a U.S. District Court judge by George H. W. Bush and a conservative Republican, he sat in a courthouse in Bay City, Michigan. From what I was told, his courtroom had never seen a plaintiff’s verdict in a civil case or an acquittal in a criminal case. The atmosphere in the chambers was formal in all respects. I wore a coat and tie to work each day and spent my time writing opinions for the judge. I enjoyed the experience immensely, until I didn’t.

The judge’s conservative viewpoint influenced his rulings. This is not a criticism—this is the way it works with all federal judges, including liberal ones; I found it fascinating. Having political opinions about issues means judges have great power to influence how situations turn out for people on the basis of race, class, and other characteristics. This is why appointing judges is such an important part of the job of the president of the United States: presidents create policy with the judges they appoint.

Bay City was a working-class town, and the courthouse was located over a post office. The town had once been a lumber-processing hub. Then it got into auto manufacturing and fell into a major slump for a few decades. The lumber companies left, and then the automobile

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<sup>23</sup> Laber-Warren, “Unconscious Reactions Separate Liberals and Conservatives,” <https://www.scientificamerican.com/article/calling-truce-political-wars/>.

<sup>24</sup> Willer, “How to Have Better Political Conversations,” [https://www.ted.com/talks/robb\\_willer\\_how\\_to\\_have\\_better\\_political\\_conversations](https://www.ted.com/talks/robb_willer_how_to_have_better_political_conversations).

companies left. Things were so bad economically in Bay City that selling real estate often did not even require hiring a real estate agent. Instead, to advertise a home's availability people simply scrawled the sales price on the windows using a bar of soap.

Bay City was about twenty minutes from Midland, a small city where Dow Chemical was based. Most of the engineers and professionals from Dow Chemical lived in Midland; very few of these people would consider living in Bay City.

Both the judge and my co-clerk lived in Midland. I stayed in Bay City. Like me and the judge, my co-clerk had also attended the prep school Cranbrook. She went to Princeton for her undergraduate degree (where her dad and sister also went) and George Mason University School of Law (now the Antonin Scalia Law School), a very conservative institution, in Washington, D.C. Her father was a conservative editorial writer for the *Detroit News*, and she was quite right-wing.

At the time, Bay City had the highest number of bars per capita of any city in the United States. It also was known for growing sugar beets. It had the interesting combination of working-class people and farmers. There was a mall, of sorts, filled with mostly abandoned stores. I found the area intriguing from an ethnographic perspective. My co-clerk and the judge would never have considered living in such a place.

The dynamic at the courthouse was similarly interesting. The federal judge, a federal magistrate judge (a judge who helps federal judges with various hearings), and a few U.S. attorneys worked in an office down the hall from ours. All the administrators were nonattorneys and were women, and they had one gripe about the judge after another (most of which were not serious). I noticed the separation between the staff and the attorneys.

I thought it was unusual not to have any plaintiff's verdicts or criminals acquitted in our court. Despite the fact that the politics of the judge and my co-clerk were apparent, I was oblivious to their conservative mentality and Republican politics, in general. I didn't understand what was going on until the court stenographer came into my office one day and explained. Prospective jurors in our court were sent a list of rules they were expected to follow when they appeared for jury selection. Although I never saw these rules, the stenographer said they included dress requirements for jurors, such as certain skirt lengths for women, long-sleeved shirts and ties for men, and no tennis shoes.

Because Bay City was an economically depressed area and its citizens were working class, it seemed the simple fact of a dress code that required a professional's wardrobe precluded them from serving on juries in our court. Instead, the juries tended to be made up of the white-collar engineers from Dow Chemical and other professionals from around the area—almost all of whom were white and Republican. People who showed up dressed in ways that did not meet the code were almost always dismissed from the jury pool before they were even seated. I do

not know whether this was fact, but it certainly seemed to be a possible explanation for what was going on in trials. The judge effectively selected a jury that was similar to him and that held his values in common; therefore, the outcomes of trials skewed to conservative verdicts.

At the time, I did not subscribe to a particular political ideology. I was doing well at my job and had a lot of energy. I wrote long memos and did other extra work for the judge. But as the situation came more to light, I began to feel as though an injustice was being done to people who were not from a certain background. The rulings I wrote up came out on the side of corporations, not those suing them. People accused of crimes lost their suits. Companies and the government seemed to win all the time and never lose to individuals.

An older court reporter said something I will never forget: “The judge told someone years ago that everything good that had ever happened to him came from being a conservative, and for the rest of his career he intended to honor the people who put him where he is because of his background.”

My clerkship was originally scheduled to be two years, but after I was there about nine months, I started challenging the judge about his opinions. I told him that I thought his jury rules made no sense, and I acted in ways that I now understand were inappropriate for someone in his first real office job, let alone someone in the legal profession. I did not understand the rules of working in an office environment, the political nature of judging, or the importance of doing what I was asked to do. I resigned—before I could be fired—after exactly one year on the job.

## Homophily and Power Differentials

When we highlight differences in power, status, rank, and group membership, as diversity efforts do, people tend to feel uncomfortable with what’s unfamiliar about others instead of open to appreciating it. The reason has to do with homophily, our preference to bond and connect with similar others, and uncertainty about standing in the social hierarchy. How fiercely the boundaries between groups are challenged or defended—whether with bows and arrows or policy and practice—depends on how strongly people resort to homophily and whose voice (based on power, status, and influence) is heard.

Words have power. We label ourselves with words; others use words to label us. When we categorize and label people, we focus on some traits more than others, and we assign consequences to the presence or absence of those traits. How a group defines itself or is defined often determines who has access to group benefits or is entitled to group advantages. “Society enacts the consequences in which roles and opportunities are available to

individuals.”<sup>25</sup> For example, consequences of exclusion from a group can be significant: loss of job, livelihood, citizenship, safety, freedom.

In normal cognition our brains search for and recognize patterns and group things into categories, in the process collapsing distinguishing details into larger classes so that we can deal with an overwhelming amount of stimuli. A stereotype, a shortcut for the brain, is a belief about another person or group based on real or imagined characteristics. Identity is fluid through time and context, and labels can help define groups, but they also limit.

Reducing individuals to stereotypes, though mentally efficient, can be offensive and objectifying. It robs people of dignity and emphasizes difference; it tells only one side of the story about identity.<sup>26</sup> Labeling or stereotyping of outsiders usually focuses on their negative attributes. Often we perceive outgroups as threatening to us in some way.<sup>27</sup>

Though the human tendency to form social groups serves our fundamental needs for belonging and acceptance, this us-versus-them mentality can lead to prejudice, the forming of opinions based on negative stereotypes.<sup>28</sup> When a prejudice induces us to treat an individual or another group negatively, denying them benefits or advantages, discrimination occurs.<sup>29</sup>

When the larger society calls for diversity, people have to reconcile their sense of identity and their status in the social hierarchy with those of so many dissimilar others. Naturally, this leads to friction.

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<sup>25</sup> Facing History and Ourselves, *Holocaust and Human Behavior* (Boston: Facing History and Ourselves, 2017), 26.

<sup>26</sup> Facing History and Ourselves, *Holocaust and Human Behavior*, 26.

<sup>27</sup> Susan Krauss Whitbourne, "In-groups, Out-groups, and the Psychology of Crowds," *Psychology Today*, December 7, 2010, <https://www.psychologytoday.com/blog/fulfillment-any-age/201012/in-groups-out-groups-and-the-psychology-crowds>.

<sup>28</sup> Facing History and Ourselves, *Holocaust and Human Behavior*, 32.

<sup>29</sup> *Ibid.*

## Chapter 2: Attempts at Equity and Social Justice

If society aspires to diversity as the higher goal, appreciating individuals for their differences and allowing everyone equal opportunity in the pursuit of life, liberty, and happiness, the Golden Rule is the way. Treating others as we want to be treated implies extending empathy and respect. Empathy brings understanding—it does not necessarily mean agreement or approval, but identification, recognizing the ways we are like one another in our daily struggles. With understanding comes respect and tolerance of differences and equal respect for similarities—what we share as people, regardless of skin color, gender, class, or creed.

We're not there yet. Actual differences in roles and opportunities of groups (partially held in place by homophily and the social hierarchy, as discussed earlier) exist in a social, economic, and political climate that seems to advance some groups over others. Privilege may be invisible to those who benefit from it, but it is familiar to those who must consciously operate in a system that exposes them to unfair treatment and discrimination. That unacknowledged privilege influences people's opportunities calls into question the idea that our society is a meritocracy, where we succeed based solely on our ability and effort, and not because of the unspoken advantages or disadvantages our rank in the social hierarchy accords us.<sup>30</sup>

Social justice deals with how people are treated unequally in society because of their personal characteristics and how government policies affect people unequally.<sup>31</sup> "Social justice is a political and philosophical concept which holds that all people should have equal access to wealth, health, wellbeing, justice and opportunity." This concept is generally associated with the political left. "Self-identified advocates of social justice are often at odds with each other over specific policies and priorities, but share a broad vision of an ideal society in which no one race, class, religion, sexual orientation, gender identity or language group is singled out for oppression or enjoys special privileges."<sup>32</sup>

No discussion of social justice would be complete without noting some facts about American history that no one is proud of. In colonial times, Native Americans were stripped of their land and were killed, raped, and treated horribly; injustice on reservations continues to this day. Black people were forced into slavery and only gradually accorded the rights of full citizenship. People from Mexican and Asian backgrounds were also treated as second-class citizens and continue to be recognized as minorities. And women have been discriminated against in the

<sup>30</sup> Jesse Marczyk, "Privilege and the Nature of Inequality," *Psychology Today*, June 2, 2015, <https://www.psychologytoday.com/blog/pop-psych/201506/privilege-and-the-nature-inequality>.

<sup>31</sup> Kris Seavers, "How 'Social Justice Warrior' Went from Hero to Joke," *Daily Dot*, October 2, 2017, <https://www.dailydot.com/irl/social-justice-warrior-sjw/>.

<sup>32</sup> "Social Justice Definition," Investopedia, <https://www.investopedia.com/terms/s/social-justice.asp#ixzz51qNspzrG>.

workplace and in politics, with even the right to vote withheld until the twentieth century.

Throughout history, people have made attempts to deal with such social injustice.<sup>33</sup> Over the past fifty years, great strides have been made to eradicate these evils. Each move demonstrates the fine line between change that can bring increased equality among groups and change that backfires into further unfairness.

The civil rights movement in the 1950s and the 1960s made most forms of racial discrimination illegal. Through activism, protest, and legislation, Martin Luther King Jr. and other civil rights leaders brought racism into the public sphere and changed public opinion to believe that racial discrimination was wrong and needed to be fixed.

Society made a huge break with the past to ensure that a colorblind America could lawfully emerge. Similar movements gained rights for other marginalized groups, such as women and ethnic minorities. In those contexts, too, the idea was to ensure that treatment of citizens was blind to social differences.

However, rather than being colorblind (or genderblind or any other kind of “blind”), today society seems to be teetering in the opposite direction. We have made race and our differences overriding issues.

The Bill of Rights and the U.S. Constitution guarantee us our civil liberties, our basic freedoms, such as the right to free speech, privacy, and a fair trial.<sup>34</sup> In contrast, the government grants us our civil rights, the basic right to freedom from discrimination based on personal characteristics like race, sex, and age.

Because civil rights are granted by the government, they have varied over time, following society’s opinion of which types of discrimination it will and will not stand for (depending on whose voice is heard in public discourse).<sup>35</sup> Technically, civil rights allow us equal social opportunities, regardless of our personal traits, as guaranteed by equal protection under the law.<sup>36</sup>

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<sup>33</sup> The Business Dictionary defines social justice as “the fair and proper administration of laws conforming to the natural law that all persons, irrespective of ethnic origin, gender, possessions, race, religion, etc., are to be treated equally and without prejudice.” “Social Justice,” Business Dictionary, <http://www.businessdictionary.com/definition/social-justice.html>.

<sup>34</sup> “Civil Rights vs. Civil Liberties,” FindLaw, <http://civilrights.findlaw.com/civil-rights-overview/civil-rights-vs-civil-liberties.html>.

<sup>35</sup> Rebecca Hamlin, “Civil Rights,” Encyclopaedia Britannica, <https://www.britannica.com/topic/civil-rights>.

<sup>36</sup> Hamlin, “Civil Rights,” <https://www.britannica.com/topic/civil-rights>.



In 1961 President John F. Kennedy established the Committee on Equal Employment Opportunity to stop bias in hiring government contractors. The Kennedy and Johnson administrations required that minorities have equal access to jobs, education, and other opportunities and passed three pieces of civil rights legislation in 1957, 1960, and 1964.

The Civil Rights Act of 1957 passed in response to the purging of black voters in Louisiana;<sup>37</sup> however, when it did not produce one single new black voter registration, the Civil Rights Act of 1960 was passed to close loopholes in the original law.<sup>38</sup> Finally, the Civil Rights Act of 1964 “ended segregation in public places and banned employment discrimination on the basis of race, color, religion, sex, or national origin.”<sup>39</sup>

In 1967, with the signing of Executive Order 11375, President Lyndon Johnson added women as a group that required equal opportunity in hiring.<sup>40</sup> The list of protected groups grew to include Latinos, Native Americans, and gay people.<sup>41</sup>

Another outcome of the civil rights movement was affirmative action programs put in place to provide equal opportunities for “historically excluded groups,” including people of color and women, in the areas of education and employment.<sup>42</sup> President Johnson was an advocate and argued that affirmative action was necessary because

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say you are free to compete with all the others, and still just believe that you have been completely fair.<sup>43</sup>

<sup>37</sup> See Steve Barber, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 Harv. C.R.-C.L. L. Rev., 483, 487 (1988).

<sup>38</sup> *Ibid.*

<sup>39</sup> Staff, “Civil Rights Act,” History.com, 2010, <http://www.history.com/topics/black-history/civil-rights-act>.

<sup>40</sup> See Exec. Order No. 11375 3 C.F.R. § 747.1 (1967).

<sup>41</sup> See, generally, Steven Farron, “Why Affirmative Action for Hispanics and American Indians?” American Renaissance, December 2, 2016, <https://www.amren.com/features/2016/12/affirmative-action-hispanics-american-indians/>. This discusses how, since the 1960s, federal agencies enforcing affirmative action have continued adding groups to the term “minority” and that Hispanics and Native Americans have been the biggest beneficiaries. See also Further Amendments to Executive Order 11478, Equal Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 79 FR 42971, which prevents contractors from discriminating based on sexual orientation and gender identity.

<sup>42</sup> “Affirmative Action: Overview,” National Conference of State Legislatures, February 7, 2014, <http://www.ncsl.org/research/education/affirmative-action-overview.aspx>.

<sup>43</sup> “Lyndon B. Johnson, President, United States, Commencement Address at Howard University, June 4, 1965,” American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=27021>.

In higher education, affirmative action took the form of admissions programs that provided equal access to education for groups that had been underrepresented or excluded. Colleges and universities adopted recruitment policies that increased the admission and enrollment rates of black and Latino students.<sup>44</sup>

The pros and cons as well as the constitutionality of affirmative action policies are continually debated. Proponents of affirmative action believe that disadvantaged groups are generally those in lower socioeconomic classes. They are not exposed to the same opportunities or given access to the same resources as those in higher socioeconomic classes. Affirmative action policies attempt to compensate for the economic disparities while allowing students to compete on merit.<sup>45</sup>

Supporters also believe admissions policies can be used to help colleges and universities enroll classes more representative of their surrounding communities and to offer students from lower social strata or disadvantaged backgrounds the opportunity to better their life circumstances through education.<sup>46</sup>

General Motors, a multinational corporation that makes billions of dollars in yearly revenue, came out strongly in favor of diversity when it submitted an amicus brief in *Grutter v. Bollinger*, a case that challenged affirmative action at the University of Michigan. In its amicus brief, General Motors argued that “a ruling proscribing the consideration of race and ethnicity in admissions decisions would dramatically reduce diversity at our nation’s top institutions and thereby deprive the students who will become the corps of our Nation’s business elite of the interracial and multicultural interactions in an academic setting that is so integral to their acquisition of cross-cultural skills.”<sup>47</sup> General Motors further argued that “the future of American business and, in some measure, the American economy depends upon” racially diverse student bodies.

Opponents of affirmative action programs cite the fact that lowering admissions standards for special groups is not only unfair but may be counterproductive in that underrepresented groups may strive to meet only the lowered standards. Even though there is no correlation between skin color or gender and intelligence, affirmative action may emphasize prejudices while simultaneously creating a form of reverse discrimination that favors some groups over

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<sup>44</sup> “Affirmative Action: Overview,” National Conference of State Legislatures, February 7, 2014, <http://www.ncsl.org/research/education/affirmative-action-overview.aspx>.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Brief of General Motors Corporation as Amicus Curiae in Support of Appellants at 3, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2007) No. 01-1447, 2001 WL 34624915 at \*3.

others on the basis of personal characteristics rather than merit.<sup>48</sup> It is also condescending to imply that certain groups need special help to compete.

When I was in college, for a social science class I studied desegregation orders that passed in Detroit in the early 1970s. I was interested in this subject matter because my mother had spent the better part of her career working in the Michigan Department of Civil Rights in Detroit. For most of her career, she investigated charges of racism among employers who did not hire minorities—specifically, black employees. I became so interested in desegregation and Detroit that I chose to live in a black neighborhood there during law school, clerked in the same small federal courthouse where the desegregation orders came down, and considered getting a graduate degree in sociology.<sup>49</sup>

The desegregation orders mandated that black students were to be bused out of the city to primarily white schools in the suburbs. What happened in Detroit was unexpected. I interviewed black politicians in the city of Detroit who were around at the time, and they told me that they were against desegregation. In fact, this was the last thing they and their constituents wanted. Instead of being bused to white schools, the black community wanted separate schools. They wanted to come together as a group and succeed on their own without being coddled by whites and treated as if they needed special help. This was very interesting to me because it seemed that the efforts of primarily white liberals (including my mother, a social worker) were seeking to paternalistically continue to make blacks feel “less than,” when the black community wanted to prove they were capable on their own without intervention and assistance from the outside.

## Multiculturalism

Another social justice movement that started small in elite, liberal universities in the 1980s<sup>50</sup> has now become a major push in society. Multiculturalism is “the view that cultures, races, and ethnicities, particularly those of minority groups, deserve special acknowledgement of their differences within a dominant political culture.”<sup>51</sup> Multiculturalism aims for the coexistence of different cultures, including those of various ethnicities as well as other groups with shared traits. As a concept, society includes each group, their differences are respected,

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<sup>48</sup> “Affirmative Action: Overview,” <http://www.ncsl.org/research/education/affirmative-action-overview.aspx>.

<sup>49</sup> *Bradley v. Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971), *aff’d*, 484 F.2d 215 (6th Cir. 1973), *rev’d*, 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974).

<sup>50</sup> See Keith Windschuttle, “The Cultural War on Western Civilization,” Discover the Networks, January 2002, <http://www.discoverthenetworks.org/Articles/culturalwaronwesterncivilization.html>.

<sup>51</sup> Jennifer L. Eagan, “Multiculturalism,” Encyclopaedia Britannica, <https://www.britannica.com/topic/multiculturalism>.

and no demand is made for their assimilation into the dominant culture. Multicultural policies acknowledge differences and attempt to redress past exclusions, discrimination, and oppression by promoting cultural diversity.<sup>52</sup>

As the United States has grown, it has become multiracial, multilingual, multireligious, and multiethnic. Most large companies in the United States, for example, Coca-Cola,<sup>53</sup> Microsoft,<sup>54</sup> and Google,<sup>55</sup> require diversity training for their employees. Multiculturalism proposes using America's diversity to empower different groups in society and make them feel included (in the dominant culture).

Some people find that multiculturalism, because it calls for special treatment of diverse groups, goes against the American ideal of equality for all. Others point out that multiculturalism privileges the good of certain groups over the common good. It also focuses on differences so that groups compete to identify as those to be singled out for special treatment. The development of factions in society undermines the push for equality by reinforcing the dominant culture.<sup>56</sup> Fracturing into groups also presents the risk of internal oppression in the very groups that seek freedom from oppression:

Multicultural policies have come to be seen as a means of empowering minority communities and giving them a voice. In reality such policies have empowered not individuals but "community leaders" who owe their position and influence largely to their relationship with the state. Multicultural policies tend to treat minority communities as homogeneous wholes, ignoring class, religious, gender and other differences, and leaving many within those communities feeling misrepresented and, indeed, disenfranchised.

As well as ignoring conflicts within minority communities, multicultural policies have often created conflicts between them. In allocating political power and financial resources according to ethnicity, such policies have forced people to identify themselves in terms of those ethnicities, and those ethnicities alone, inevitably setting off one group against another.<sup>57</sup>

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<sup>52</sup> Ibid.

<sup>53</sup> See "Diversity Education & Training," Coca-Cola Company, <http://www.coca-colacompany.com/our-company/diversity/diversity-education-training> (last visited September 15, 2017).

<sup>54</sup> See "Global Diversity and Inclusion: Training," Microsoft, <https://www.microsoft.com/en-us/diversity/training/default.aspx> (last visited September 15, 2017).

<sup>55</sup> See Sarah Jeong, "Here's What Google's Diversity and Bias Training Looks Like," The Verge, August 9, 2017, <https://www.theverge.com/2017/8/9/16122072/google-diversity-bias-training-james-damore-memo>.

<sup>56</sup> Eagan, "Multiculturalism," <https://www.britannica.com/topic/multiculturalism>.

<sup>57</sup> Kenan Malik, "Multiculturalism Undermines Diversity," *Guardian* (Manchester), March 17, 2010, <https://www.theguardian.com/commentisfree/2010/mar/17/multiculturalism-diversity-political-policy>.

Multiculturalism and integration are popular policies around the world. Ashamed of the “master race” theories that spawned World War II, Germany has been allowing in scores of refugees, mostly Syrians, for the last three years. A record influx of refugees, mainly from Africa, has reached Italy, which is trying to integrate the refugees by hosting them in old cottages scattered around thirty villages.<sup>58</sup> Across the Atlantic, Canadian prime minister Justin Trudeau gave a speech in 2015 that promoted “inclusive diversity” as a major source of strength for Canada.<sup>59</sup>

## Backlash to Diversity

In some areas, however, a backlash to the demands for diversity and greater integration has swelled. To win the U.S. presidency, Donald Trump ran on a platform hostile to immigration, for instance. He was supported largely by working- and middle-class white voters in the middle of the country; twice as many voters in that demographic cast their ballots for Trump as for Hillary Clinton. Although some journalists argued that economic anxiety drove these voters to elect Trump, a postelection study conducted by the Public Religion Research Institute and *The Atlantic* found that *cultural* anxiety best predicted support for Trump. That is, “feeling like a stranger in America, supporting the deportation of immigrants, and hesitating about educational investment.”<sup>60</sup> The voting majority of Americans were sending a message that they were starting to feel like a minority group themselves.

Likewise, in 2016, England voted in favor of Brexit, the nation’s exit from the European Union. The measure was supported mainly by working-class white voters outside of the major population centers.<sup>61</sup> White voters cast their ballots for “leave” by a margin of 53 percent to 47 percent for “stay.” This group of voters is also largely hostile to immigration, as evidenced by one-third saying that exiting the EU “offered the best chance for the UK to regain control over immigration and its borders.”<sup>62</sup>

<sup>58</sup> See Silvia Marchetti, “Italy Pleads Europe for Help Amid Record Influx of Refugees,” *Time*, July 11, 2017, <http://time.com/4850999/italy-europe-refugees-frontex-boats-rome-ports-ngos/>.

<sup>59</sup> See Justin Trudeau, “Diversity Is Canada’s Strength” (speech), Office of the Prime Minister, November 26, 2015.

<sup>60</sup> See Daniel Cox et al., “Beyond Economics: Fears of Cultural Displacement Pushed the White Working Class to Trump,” Public Religion Research Institution, May 9, 2017, <https://www.prri.org/research/white-working-class-attitudes-economy-trade-immigration-election-donald-trump/>.

<sup>61</sup> See Will Franklin et al., “EU Referendum: Full Results and Analysis,” *Guardian* (Manchester), June 23, 2016, [https://www.theguardian.com/politics/ng-interactive/2016/jun/23/eu-referendum-live-results-and-analysis?CMP=twl\\_b-gdndata](https://www.theguardian.com/politics/ng-interactive/2016/jun/23/eu-referendum-live-results-and-analysis?CMP=twl_b-gdndata).

<sup>62</sup> See Michael Ashcroft, “How the United Kingdom Voted on Thursday... and Why,” Lord Ashcroft Polls, June 24, 2016, <http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/#more-14746>.

Are nationalism and multiculturalism incompatible? Taken at its worse, multiculturalism can “dramatically undermine the social cohesion necessary to maintain order or defend the nation in war.”<sup>63</sup> In his book *The Disuniting of America*, historian Arthur Schlesinger Jr. argues that “a liberal democracy requires a common basis for culture and society to function. In his view, basing politics on group marginalization fractures the civil polity, and therefore works against creating real opportunities for ending marginalization.”<sup>64</sup> At some level, if we are to bond together as a civil society, we must share an identity that supersedes our individual differences in skin color, ethnicity, sex, background, and class.

## Social Justice Wars

On a more significant level, the rise of Donald Trump represents what might be thought of as pushback by people who feel disenfranchised by the social justice movement and identity politics. Identity politics are “political and social movements that have group identity as the basis of their formation and the focus of their political action. Those movements attempt to further the interests of their group members and force issues important to their group members into the public sphere.”<sup>65</sup>

The term *social justice warrior* is applied pejoratively to anyone who presses issues related to social justice. The stereotype “implies that a person is engaging in disingenuous social justice arguments or activism to raise his or her reputation,” a move called “virtue signaling,” rather than because of any deep belief in a just cause.<sup>66</sup>

According to the Urban Dictionary: “Social Justice Warriors or SJWs are people with thin skin who always find something to be offended about.” That publication also uses the following words to describe SJWs: *intolerant*, *offensive*, *triggering*, *sexist*, and *racist*.<sup>67</sup> Words have power; stereotyping emphasizes negative traits over positive ones.

Social justice warriors tend to have a liberal leaning—tilting very far to the left.<sup>68</sup> They subscribe

<sup>63</sup> Eugene Volokh, “The American Tradition of Multiculturalism,” Volokh Conspiracy (blog), Washington Post, January 27, 2015, [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/27/the-american-tradition-of-multiculturalism/?utm\\_term=.eab0ea9e751a](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/27/the-american-tradition-of-multiculturalism/?utm_term=.eab0ea9e751a).

<sup>64</sup> “Identity Politics,” Wikipedia, edited November 21, 2017, [https://en.wikipedia.org/wiki/Identity\\_politics](https://en.wikipedia.org/wiki/Identity_politics).

<sup>65</sup> Eagan, “Multiculturalism,” <https://www.britannica.com/topic/multiculturalism>.

<sup>66</sup> “Social Justice Warrior,” Wikipedia, edited November 8, 2017, [https://en.wikipedia.org/wiki/Social\\_justice\\_warrior](https://en.wikipedia.org/wiki/Social_justice_warrior)

<sup>67</sup> O. G. Mchuggerton, “Justice Warrior,” Urban Dictionary, July 15, 2015, <http://www.urbandictionary.com/define.php?term=social%2Bjustice%2Bwarrior>.

<sup>68</sup> See, generally, Ben Sixsmith, “The Social Justice Left and the Alt-Right: Our Divided New World,” Quillette, December 1, 2016, <http://quillette.com/2016/12/01/the-social-justice-left-and-the-alt-right-our-divided-new-world/>. This article states that the social justice left encompasses both communists as well as liberals.

to a hierarchy of morality based on identity politics<sup>69</sup> and they practice classifying and grouping people based on their personal characteristics.<sup>70</sup> While social justice warriors call other people racist, homophobic, and so forth, they act like victims—even when they are not victims or oppressed.<sup>71</sup>

One warrior defined the movement this way:

Being a social justice warrior means taking on a role in this unjust society in which you don't ask for equality but instead, you demand it—and others see this as the “wrong tone.” People who think they are doing nothing wrong are going to be upset that we are telling them to change. People are not going to think these problems of inequality are significant because they have the privilege of it not affecting them. They will write us off as radical, overdramatic, and insignificant hypocrites. But social justice warriors must not change their “tone” to appease the oppressor. Oppressors must change, not the oppressed. Being an activist for justice—or a “social justice warrior” if they want to call it that—is about standing up to oppressors....The “wrong” tone is our tone. The wrong tone is a social justice warrior's tone.<sup>72</sup>

Social justice warriors tend to focus a lot of anger toward white men and anyone who is conservative. They try to get people fired who disagree with them. They bully into submission those who do not espouse their viewpoints. According to one commentator:

SJW's don't begin by storming an institution en masse, breaking down the doors, and sacrificing the secretary in the lobby to Satan before defecating on carpets and copulating madly on the table in the meeting room. SJW enter by stealth, using mousy middle aged women and little innocent men to whom no one could possibly object. They are outwardly good-natured individuals who tend to keep their political opinions to themselves and rapidly make themselves indispensable to the people in charge. They tend to gravitate towards positions of influence rather than authority and towards internally focused

<sup>69</sup> See, generally, James Kirchick, “Rock, Paper, Scissors: A Guide to the New Victim Politics,” *Tablet Magazine*, February 26, 2015, <http://www.tabletmag.com/jewish-news-and-politics/189030/victimhood-olympics>. “Many progressives would claim that they believe in ‘intersectionality’: that aspects of an individual cannot be separated out to highlight the oppression associated with that group”; however, they “obsesses over the minute concerns of ever-narrowingly defined minority groups, rather than those of broader segments of society.”

<sup>70</sup> *Ibid*

<sup>71</sup> See Jerry Sieczkowski, “Jerry Seinfeld Says Colleges Are Too Politically Correct, Kids Don't Understand Racism or Sexism,” *Huffington Post*, June 10, 2015, [http://www.huffingtonpost.com/2015/06/08/jerry-seinfeld-college-politically-correct-racism-sexism\\_n\\_7534978.html](http://www.huffingtonpost.com/2015/06/08/jerry-seinfeld-college-politically-correct-racism-sexism_n_7534978.html).

<sup>72</sup> See Austin Bryan, “On Being a ‘Social Justice Warrior,’” *Thought Catalog*, June 10, 2015, <https://thoughtcatalog.com/austin-bryan/2015/06/on-being-a-social-justice-warrior/>. “Social justice warriors . . . call people out for saying things like ‘that's so gay’ or ‘that's retarded’ . . . they don't let subtle sexism and racism go unnoticed.”



objectives that are hard to measure rather than externally focused responsibilities where success or failure obvious. In the corporate context, human resources is her natural habitat; are also found in marketing or as much appreciated assistance to the executives.

SJW entryists have two primary objectives. The first is to bring more SJWs into the organization. Sometimes it is blatant, such as when a large public corporations first female boardmember predictably declares of the organizations priority should be hiring more women. More often it is subtle, like when there is a vacancy and the stealth SJW notes that he just happens know someone who would be perfect for the job, even if that person doesn't appear to have any of the relevant skills required for. He will almost certainly have the qualifications, though. SJWs absolutely love qualifications, as they are easy to understand and provide an easy excuse for weeding out any problematic applicants who look as if they might threaten the Narrative.

The second entryist objective is to establish a code of conduct. This is an old bait-and-switch that is been used on everyone from the Go Programming Language community to British Prime Minister Margaret Thatcher by the advocates of the European Union. What happens is that the SJW proposes a code of conduct, explaining that due to the way in which the corporation or church or community is growing, it is now necessary to formalize and structure its rules. After making allusions to a few differences of opinion that a taken place in the past and expressing concerns about hypothetical future problems, the SJW search need for some behavioral guidelines, but guidelines are goal-oriented suggestions rather than specific hard-and-fast rules.<sup>73</sup>

The social justice movement incites extreme intolerance of free speech. Instead of open discussion and debate, a new type of censorship closes down discourse on sensitive topics. This new type of censorship "plaguing Western universities" is called no-platforming.<sup>74</sup>

Students have demanded their universities uninvite speakers whose viewpoints they do not agree with. According to the Foundation for Individual Rights in Education, nearly 40 percent of American colleges now enforce some sort of speech code, which prohibit expression protected by the First Amendment in the larger society.<sup>75</sup> Students seem to believe that any speech that is offensive does not deserve First Amendment protection.

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<sup>73</sup> See Vox Day, *SJWs Always Lie: Taking Down the Thought Police* (Castalia House, 2015).

<sup>74</sup> Jeff Sparrow, "We're Obsessed with 'no Platforming' but Aren't Resisting the Return of Harder Censorship" (opinion), *Guardian* (Manchester), November 5, 2015, <https://www.theguardian.com/commentisfree/2015/nov/05/were-obsessed-with-no-platforming-but-arent-resisting-the-return-of-harder-censorship>.

<sup>75</sup> See "Speech Code Reports," Foundation for Individual Rights in Education, <https://www.thefire.org/spotlight/reports/> (last visited September 15, 2017).



But even as students and social justice warriors invoke political correctness and safe spaces to blot out the opinions of others they disagree with or find offensive, those in opposition to the social justice movement practice their own kind of no-platforming, silencing social justice advocates with public insults and trolling—flame wars preclude any reasoned discussion of sensitive issues.

Elizabeth Nolan Brown, an associate editor at *Reason* magazine, found many similarities between social justice warriors on the left and those who oppose them, “such as victimhood, outrage, and portraying the other side as bullying and evil and their side as the truly oppressed.”<sup>76</sup> Both sides are closed to hearing opinions and ideas that do not match their group’s rhetoric because they are immediately offended by the existence and representation of the other side when confronting issues. They abandon the principles they are fighting for before the real issue even arises.

*Political correctness* “is used to describe language, policies, or measures that are intended to avoid offense or disadvantage to members of particular groups in society. Since the late 1980s, the term has come to refer to avoiding language or behavior that can be seen as excluding, marginalizing, or insulting groups of people considered disadvantaged or discriminated against, especially groups defined by sex or race.”<sup>77</sup>

“Political Correctness is not some powerful and sweeping movement designed to homogenize public discourse or to promote thought control. It is exactly the opposite. It is a symptom of hierarchy and proof of the eventuality that those at the bottom will strive for empowerment. That this is happening in colleges across America reminds us that our campuses are increasingly diverse, and that such diversity will instigate change.”<sup>78</sup>

Yet, “somewhere between political correctness and bald-faced bigotry is the First Amendment. It protects our right to believe and say whatever we want just as it protects the rights of those who disgust us to believe and say whatever *they* want.”<sup>79</sup> The legality of speech is not determined by agreement or disagreement with the speaker. “Free speech is a double-edged sword. Uncensored speech and its cousin, a free press, is an ally of the powerless. At the same

<sup>76</sup> “Social Justice Warrior,” Wikipedia, edited November 8, 2017, [https://en.wikipedia.org/wiki/Social\\_justice\\_warrior](https://en.wikipedia.org/wiki/Social_justice_warrior).

<sup>77</sup> “Political Correctness,” Wikipedia, edited November 6, 2017, [https://en.wikipedia.org/wiki/Political\\_correctness](https://en.wikipedia.org/wiki/Political_correctness)

<sup>78</sup> David Tomar, “Do Inclusion and Sensitivity Threaten Free Speech?” *Best Schools Magazine*, <https://thebestschools.org/magazine/go-political-correctness-university/>.

<sup>79</sup> Tomar, “Do Inclusion and Sensitivity Threaten Free Speech?” <https://thebestschools.org/magazine/go-political-correctness-university/>.

time, language has been used as a weapon of oppression by demagogues.”<sup>80</sup>

Although we can’t legislate against giving offense, we do get further in discussions and in problem solving when those on all sides of an issue seek not to offend—for its shock value or attention getting—and instead focus on collaborating to find a solution. In trying to preclude offensiveness, though, this is where the concept of political correctness has taken a wrong turn.

These days, *political correctness* has become a term conservatives use to criticize liberal policies and behavior. In 1991, President George H. W. Bush said: “The notion of political correctness has ignited controversy across the land. And although the movement arises from the laudable desire to sweep away the debris of racism and sexism and hatred, it replaces old prejudice with new ones. It declares certain topics off-limits, certain expression off-limits, even certain gestures off-limits.”<sup>81</sup>

The culture war between liberals and conservatives on this front is so out of control that comedians like Jerry Seinfeld,<sup>82</sup> Chris Rock,<sup>83</sup> and Larry the Cable Guy<sup>84</sup> will no longer play at colleges because they believe the kids are far too sensitive and will scream “racist” or “sexist” at their jokes.

Disallowing discussion of sensitive topics behind the guise of political correctness is not the answer. At the same time, hurling the accusation of political correctness also effectively shuts down the conversation. Focusing on political correctness “offers a quick exit from any honest discussion about racial disharmony, gender inequality, or the exclusion of marginalized groups.”<sup>85</sup>

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<sup>80</sup> Arthur Dobrin, “Political Correctness vs. Free Speech,” *Psychology Today*, January 4, 2016, <https://www.psychologytoday.com/blog/am-i-right/201601/political-correctness-vs-free-speech>.

<sup>81</sup> “Political Correctness,” Wikipedia, edited November 6, 2017, [https://en.wikipedia.org/wiki/Political\\_correctness](https://en.wikipedia.org/wiki/Political_correctness).

<sup>82</sup> See Sieczkowski, “Jerry Seinfeld Says Colleges Are Too Politically Correct, Kids Don’t Understand Racism or Sexism,” [http://www.huffingtonpost.com/2015/06/08/jerry-seinfeld-college-politically-correct-racism-sexism\\_n\\_7534978.html](http://www.huffingtonpost.com/2015/06/08/jerry-seinfeld-college-politically-correct-racism-sexism_n_7534978.html).

<sup>83</sup> See Tyler Kingkade, “Chris Rock Stopped Playing Colleges Because They’re ‘Too Conservative,’” *Huffington Post*, December 2, 2014, [http://www.huffingtonpost.com/2014/12/01/chris-rock-colleges-conservative\\_n\\_6250308.html](http://www.huffingtonpost.com/2014/12/01/chris-rock-colleges-conservative_n_6250308.html).

<sup>84</sup> See Michael Schramm, “Jerry Seinfeld Says Comedians Avoid College Gigs, Students Are ‘So PC,’” *USA Today*, June 8, 2015, <http://college.usatoday.com/2015/06/08/jerry-seinfeld-espn-college-campus-politically-correct/>.

<sup>85</sup> Tomar, “Do Inclusion and Sensitivity Threaten Free Speech?” <https://thebestschools.org/magazine/go-political-correctness-university/>.

Admittedly, talking about topics that call into question our identity, our status, and our future potential can get intense, “but that doesn’t mean that we should demand ideological conformity because people are made uncomfortable. ...We always have the right to respond with our own opinions, but there is no right not to be offended. We certainly have no right to harass people because we don’t like their views. Censorship diminishes true diversity of thinking; vigorous debate enlivens and instructs.”<sup>86</sup>

## Social Justice and the Legal Profession

In the legal realm, the effects of the social justice movement and laws like affirmative action have come to mean that formerly disenfranchised groups (and not white males) receive preferential access to law schools, preferential access to legal jobs, and preferential advancement in those jobs. The law is used to provide this access.

According to the Code of Federal Regulations, the purpose of affirmative action laws is to prevent discrimination in the workplace.<sup>87</sup> These laws are used to ensure that historically underserved people are given access to schools and public institutions and are accommodated in other areas.<sup>88</sup> Identification with a specific group confers social and political capital to group members. Today, many groups are struggling to prove they are the most oppressed because in identity politics the most oppressed get the most advantages.

In giving advantages to previously disadvantaged groups, colleges and law schools tend to promote a “homogenized” diversity that results in ideological conformity, stifles free speech and thought, and runs counter to the notion that a fundamental purpose of the practice of law is to debate and sometimes reconcile different points of view. Through admissions diversity, retention of mainly liberal faculty, and difference-aware housing and cultural programs, institutions of higher education emphasize diversity in a way that runs counter to equality and fairness.

Currently, colleges and law schools practice admissions diversity. “The theory is that campus

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<sup>86</sup> Michael Roth, Joyce Jacobsen, and Antonio Farias, “Black Lives Matter and So Does Free Speech,” *The Argus*, op-ed, September 19, 2015, <http://roth.blogs.wesleyan.edu/2015/09/19/black-lives-matter-and-so-does-free-speech/>.

<sup>87</sup> See Fed. C. Reg. 60-2.10. (2017).

<sup>88</sup> See, generally, “Affirmative Action in Education,” North Carolina State University, <https://oied.ncsu.edu/equity/affirmative-action-in-education/> (last visited September 15, 2017). This page states that “the primary purpose of affirmative action in education has been to involve qualified students of all backgrounds in our nation’s most rigorous educational offerings.” See also Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. Rev. 1195 (2002), arguing that “racial integration of mainstream institutions is necessary both to dismantle the current barriers to opportunity suffered by disadvantaged racial groups, and to create a democratic civil society.”

community members learn from one another by interacting, and thus various groups should be singled out for admission into the community.”<sup>89</sup> With this emphasis on diversity, students are admitted to colleges and law schools on the basis of their diversity.

According to the Law School Admissions Council (LSAC), law schools like to inquire about an applicant’s race and ethnicity because it helps admissions committees “form a more complete picture” of the applicant.<sup>90</sup> Although LSAC states that ethnic or racial status is “one of the many factors” taken into account in a “whole-file” review, it does not rule out that race, ethnicity, sexual orientation, and other characteristics of diversity can be *primary* factors in admissions.<sup>91</sup>

Inside of colleges and law schools, there is a struggle for access and power. According to UCLA law professor Richard Sandler, in states where racial preferences are allowed, blacks enjoy a five-to-one advantage in college admissions. In 2006 at the University of North Carolina, white and Asian students who scored within the second highest range on an academic scale were accepted only 42 percent and 43 percent of the time, respectively, whereas black applicants in the same academic range were accepted 100 percent of the time.<sup>92</sup>

In 2012 college admissions expert Dr. Rachel Rubin surveyed admissions officials at the seventy-five most competitive universities and colleges. She found that these schools initially narrowed down their applicant pool on the basis of two categories: academic fit and institutional fit. Forty-two percent of the schools that focused on institutional fit—“the fit between a college’s needs and an applicant’s qualities”—responded that membership in an underrepresented group was the most important factor in determining an applicant’s institutional fit.<sup>93</sup>

Admissions diversity policies encourage students to adopt a certain identity because of a spoils system that rewards certain groups with preferential housing, special advantages, and admission into the best colleges.

Once enrolled, students are then exposed to politicized ideas about diversity. The

<sup>89</sup> George R. La Noue, *Diversity in College Admissions: Issues for Trustees* (Washington, DC: Institute for Effective Governance, 2005), [https://www.goacta.org/images/download/diversity\\_in\\_college\\_admissions.pdf](https://www.goacta.org/images/download/diversity_in_college_admissions.pdf).

<sup>90</sup> See “Diversity in Law School,” Law School Admissions Council, <https://www.lsac.org/jd/diversity-in-law-school/racial-ethnic-minority-applicants> (last visited September 22, 2017).

<sup>91</sup> *Ibid.* The website subtly cautions LGBT applicants to make sure that the school will “value their diversity” when they “come out” on their application.

<sup>92</sup> Brief Amicus Curiae for Richard Sander in Support of Neither Party, *Fisher v. University of Texas*, No. 14-981 (September 10, 2015).

<sup>93</sup> See Rachel Rubin, “Who Gets In and Why? An Examination of Admissions to America’s Most Selective Colleges and Universities,” *International Education Research* 2, no. 2 (2014): 1–18.

overwhelming majority of college and law school professors are liberals.<sup>94, 95</sup> The liberal-leaning political bias in higher education is well known to the extent that there is even a website, Professor Watchlist, that documents over 150 college and university professors who “advance leftist propaganda in the classroom.”<sup>96</sup>

Despite the overall lack of political diversity on campuses, one of the more important functions of colleges and law schools should be imparting the importance of intellectual diversity to students. Students should be able to listen to diverting opinions and perspectives and know whether they agree or disagree. Being able to debate ideas reasonably is what lawyers do. Yet colleges and law schools and their politicized student body engage speech restrictions to ostracize those whose ideas they do not agree with. No progress is made on solving societal problems if we can’t talk about them.

In 2017, University of California, Berkeley, canceled the speaking engagements of Milo Yiannopoulos, Ann Coulter, and David Horowitz—all well-known conservative speakers.<sup>97</sup>

<sup>94</sup> See Mitchell Langbert, Anthony J. Quain, and Daniel B. Klein, “Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology,” *Econ Journal Watch* 13, no. 3 (2016): 422–451; Bradford Richardson, “Liberal Professors Outnumber Conservatives Nearly 12 to 1, Study Finds,” *Washington Times*, October 6, 2016, <http://www.washingtontimes.com/news/2016/oct/6/liberal-professors-outnumber-conservatives-12-1/>. A 2017 University of Chicago study found that of over ten thousand law professors across the country, 15 percent identified as conservative and only one out of every twenty law schools has more conservative professors than liberal ones. Five previous studies found that between 75 percent and 86 percent of law professors are liberal. With regard to universities, a study conducted in 2017 surveying faculty across four California state universities (across all academic disciplines) found that 71 percent of respondents identified as liberal, 15 percent as moderate, and 14 percent as conservative. A more wide-ranging study in 2016 investigated voter registration of faculty at forty leading U.S. universities across five different fields (economics, history, journalism/communications, law, and psychology) and found that Democrats outnumber Republicans by a measure of 3,623 to 314, or a ratio of nearly twelve to one.

<sup>95</sup> See C. E. Dyer, “Teacher under Major Fire After Insane Order to Trump Supporters in Class,” *Conservative Tribune*, December 14, 2016, <http://conservativetribune.com/teacher-insane-order-trump/>. There have been various instances in which conservative students have been alienated or singled out by faculty members. In her first class session since Donald Trump’s win in the presidential election, an assistant professor at the College of Charleston brought in chocolate for her students and allowed them to vent for half of the class period about their fears. Also in 2016, a community college professor in California was videotaped on an anti-Trump tirade, and then she called for any Trump supporters in the class to stand up.

<sup>96</sup> See “About Us,” Professor Watchlist, <http://www.professorwatchlist.org/index.php/about-us> (last visited September 15, 2017).

<sup>97</sup> See Madison Park and Kyung Lah, “Berkeley Protests of Yiannopoulos Caused \$100,000 in Damage,” CNN, February 2, 2017, <http://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html>; Guy Benson, “Here We Go Again: Conservative’s Speech Cancelled at Berkeley Over ‘Security Concerns,’” *Townhall*, April 13, 2017, <https://townhall.com/tipsheet/guybenson/2017/04/13/here-we-go-again-conservatives-speech-cancelled-at-berkeley-over-security-concerns-n2312756>; Susan Svrluga, William Wan, and Elizabeth Dwoskin, “Ann Coulter Speech at UC Berkeley Cancelled, Again, Amid Fears for Safety,” *Washington Post*, April 26, 2017, [https://www.washingtonpost.com/news/grade-point/wp/2017/04/26/ann-coulter-speech-canceled-at-uc-berkeley-amid-fears-for-safety/?utm\\_term=.091402bf5553](https://www.washingtonpost.com/news/grade-point/wp/2017/04/26/ann-coulter-speech-canceled-at-uc-berkeley-amid-fears-for-safety/?utm_term=.091402bf5553).

The previous year, Ben Shapiro was banned from speaking at California State University at Los Angeles, Anita Alvarez's speech at the University of Chicago was interrupted and could not continue, rapper Action Bronson was banned from performing at both Trinity College and George Washington University for his "misogynistic" lyrics and alleged transphobia, and Williams College revoked Suzanne Venker's lecture due to her self-described anti-feminist views.<sup>98</sup> Conservative comedian Gavin McInnes, who has "controversial" views on feminism, transgenderism, and Trump's proposed travel ban, was banned from DePaul University for vowing to fight back if attacked by protesters.<sup>99</sup> He was also previously stopped from speaking during a speech at NYU.<sup>100</sup>

The issue of intellectual diversity is not limited to speakers and concerts. College and university professors have also been fired for their views:

- In 2010, a University of Illinois adjunct professor was fired for engaging in hate speech when he cited his Catholic beliefs to argue that homosexual sex is immoral.<sup>101</sup>
- A University of Delaware professor was fired for saying that Otto Warmbier, a U.S. student who died after returning home from captivity in North Korea, "got exactly what he deserved."<sup>102</sup>
- A professor at Essex County College was suspended and then fired for defending the need for an all-black Memorial Day celebration on Fox News.<sup>103</sup>
- In 2017, UCLA fired popular conservative professor Keith Fink after an "excellence review." The review, conducted by a faculty committee who had exhibited prior bias against him, found that his teaching did not "meet the standard of excellence." However, Professor Fink routinely received rave reviews on end-of-term student evaluations and had earned an extremely high average course rating and instructor rating.<sup>104</sup>

<sup>98</sup> See Abby Jackson, "'Disinvitations' for College Speakers Are on the Rise—Here's a List of People Turned Away This Year," *Business Insider*, July 28, 2016, <http://www.businessinsider.com/list-of-disinvited-speakers-at-colleges-2016-7>.

<sup>99</sup> See Douglas Ernst, "DePaul Bans Gavin McInnes Event; Speaker Tells Protesters He Will 'Fight Back' If Attacked," *Washington Times*, May 18, 2017, <http://www.washingtontimes.com/news/2017/may/18/depaul-bans-gavin-mcinnis-event-speaker-tells-prot/>.

<sup>100</sup> See Chris Perez and Gina Daidone, "Protesters Storm NYU Over Conservative Speaker's Seminar," *New York Post*, February 2, 2017, <http://nypost.com/2017/02/02/protesters-storm-nyu-over-conservative-speakers-seminar/>.

<sup>101</sup> See "University of Illinois Instructor Fired Over Catholic Beliefs," *Fox News*, July 9, 2010, <http://www.foxnews.com/us/2010/07/09/university-illinois-instructor-fired-catholic-beliefs.html>.

<sup>102</sup> See S. E. Cupp, "Conservatives Should Speak Up When Liberal Professors Are Fired for Free Speech," *New York Daily News*, June 27, 2017, <http://www.nydailynews.com/opinion/liberal-professors-fired-speaking-freely-article-1.3281837>.

<sup>103</sup> *Ibid.*

<sup>104</sup> See Anthony Gockowski, "Conservative Prof Loses Job After Spat with UCLA Admins," *Campus Reform*, June 29, 2017, <https://www.campusreform.org/?ID=9378>.

Lack of intellectual diversity stops people from thinking about sensitive topics and tends to silence those with dissenting opinions. “If all the viewpoints we hear come from people who are like us, we assume that we have the same information and the same perspective. We think we have the right answer and, since we don’t hear otherwise, we have no reason to think otherwise. It’s these beliefs . . . that explain why creativity and innovation are more likely to spring from diverse rather than from identical groups.”<sup>105</sup>

Also in the name of diversity, incredibly, segregation now exists on many campuses in what universities and colleges call “living-learning communities.” A living-learning community is an “environment where students with similar interests live together and participate in programs that cater to their academic, social, and personal needs.”<sup>106</sup>

Many universities and colleges have implemented living-learning communities, where students segregate into living spaces based on their personal characteristics. UC San Diego opened segregated housing for black, Latino, and LGBTQ students.<sup>107</sup> The University of Connecticut launched a program in 2016 that enabled forty black male undergraduates to live together in on-campus dormitories so that they could “draw on their common experiences and help each other make it to commencement.”<sup>108</sup> UC Davis has an Asian Pacific American Theme House focused on “exploring Asian American cultures.”<sup>109</sup> UC Berkeley created a People of Color Theme House designed to cater to minority students; the university already has LGBT and black theme houses.<sup>110</sup> Cornell University has residences dedicated to Native American, Latino and Latina, and black students.<sup>111</sup>

<sup>105</sup> Joann Weiner, “Diversity Is Good. Why Doesn’t Everyone Agree?” *She the People* (blog), *Washington Post*, November 26, 2014, [https://www.washingtonpost.com/blogs/she-the-people/wp/2014/11/26/diversity-is-good-why-doesnt-everyone-agree/?utm\\_term=.893a6c980d77](https://www.washingtonpost.com/blogs/she-the-people/wp/2014/11/26/diversity-is-good-why-doesnt-everyone-agree/?utm_term=.893a6c980d77).

<sup>106</sup> “Living Learning Communities,” UCLA Residential Life, <https://reslife.ucla.edu/livinglearning/> (last visited September 15, 2017).

<sup>107</sup> See Gary Warth, “UCSD Opens Housing Based on Race, Sexual Identity,” *San Diego Union-Tribune*, September 26, 2016, <http://www.sandiegouniontribune.com/news/education/sd-me-ucsd-diverse-20160926-story.html>.

<sup>108</sup> See Cody Derespina, “University Living Space Gives Priority to Black Male Students, Sparking Controversy,” *Fox News*, February 2, 2016, <http://www.foxnews.com/us/2016/02/02/uconn-building-black-only-living-space-to-promote-scholarship.html>.

<sup>109</sup> See “UC Davis Student Housing: Living-Learning Communities,” UC Davis Student Housing, <http://housing.ucdavis.edu/education/communities/> (last visited September 15, 2017).

<sup>110</sup> See Pardes Seleh, “Cal Berkeley to Open Minority Themed House Next Fall,” *Campus Reform*, November 16, 2015, <https://www.campusreform.org/?ID=6992>.

<sup>111</sup> See “Program Houses,” *Living at Cornell*, <https://living.sas.cornell.edu/live/wheretolive/programhouses/> (last visited September 15, 2017).



Schools now even conduct separate graduation ceremonies for diverse students:

- Harvard held its first commencement exclusively for black students.<sup>112</sup>
- Emory and Henry College in Virginia held its first “Inclusion and Diversity Year-End Ceremonies,”<sup>113</sup> which included:
  - o A “First Generation Ceremony”
  - o A “Lavender Ceremony” for LGBT students
  - o A “Raza Ceremony” for Latino high-profile students
  - o A “Donning of the Kente” for black students of Ghanaian heritage
- Columbia University held separate ceremonies for Asian students, Native American students, black students, LGBT students, and Latino students.<sup>114</sup>

It may be more comfortable for students to stick with others who are just like them, but these efforts limit interactions students have with those who are different from them and they are counterproductive to the very diversity goals they claim to support. In voluntary segregation situations, fewer cross-group friendships develop and students have fewer contacts to draw on later in their careers for jobs, advancement, potential business, and more.

Power is being fought for and it is increasingly being assigned based on sexual orientation, gender, and racial identity—all classifications where there was past discrimination. People adopt a special identity because it is beneficial in college and law school admissions—and to gain power on campus.

We are at a very strange time in our nation’s history. Diversity has come to mean pointing out differences, separating people into groups based on certain characteristics, and underemphasizing the fact that everyone is basically the same.

What started out as a push for diversity, became a push for social justice, which then became a push for something different—something based in victimization and intolerance that is not only antithetical to American values of free thought and speech but also counterproductive for the very people the diversity movement purports to empower. Moreover, from a practical

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<sup>112</sup> See “Colleges Celebrate Diversity with Separate Commencements,” *New York Times*, June 2, 2017, <https://www.nytimes.com/2017/06/02/us/black-commencement-harvard.html?mcubz=3&mtrref=www.google.com>.

<sup>113</sup> See Brent Treash, “Emory & Henry Celebrates Student Diversity in Pre-Commencement Ceremonies,” Emory & Henry College, May 5, 2017, <http://www.ehc.edu/news/2017/05/emory-henry-celebrates-student-diversity-pre-commencement-ceremonies/>.

<sup>114</sup> See “Multicultural Graduation Ceremonies,” Columbia University, <https://www.cc-seas.columbia.edu/gradzone/multicultural> (last visited September 15, 2017).



perspective, an extreme social justice agenda does not work in the business context of modern-day law firms because we are keenly aware of our differences and difference then becomes an issue in everything we do. We have become a society in which people are terrified of bringing up differences and intelligently discussing them. We are too afraid to say or do anything that might be interpreted as racist or against diverse groups.

## An Extreme Social Justice Agenda Is Counterproductive in Law Firms

As discussed, *diversity* is a word and concept that has different meanings. In the beginning, people and law firms spoke of “diversity” as the concept of judging and advancing people based on their merit and capacity to do the job regardless of their personal characteristics, not using those personal characteristics as the basis on which to judge and advance people. This outgrowth of the social justice movement—specifically the way in which the social justice movement endorses a culture of victimization—has the most negative ramifications on true law firm diversity, advancement based on merit, and basic American values of free speech and thought.

Many aspects of the social justice movement are admirable, as are many of its goals. However, when taken to the extreme, the social justice movement can have the effect of quelling the very freedom of speech and debate that is necessary for a free society. Moreover, the social justice movement is ideological, and its ideology often involves a form of social engineering that is at odds with the business realities of law firms. I believe that a diversity agenda is laudable and viable within the law firm context, but I do not necessarily believe that a social justice movement agenda is a workable guiding force for law firms.

Law firms are consistently pointed out as organizations that are extremely low in diversity. The idea is that the white male attorneys who head law firms are racist and in general firms are not diverse enough.

- *Vault* posted an article in 2014 titled “Does This Study Prove that Law Firm Partners Are Racist?” wherein a study is cited that claims partners demonstrate an “unconscious or implicit bias when evaluating the writing of an African American male.”<sup>115</sup>
- Above the Law published an article titled “Back in the Race: Law Firms Privately Do Not Care About Hiring a Diverse Workforce,” wherein the author claims, “Law firms say they believe in diversity, but they rarely follow through on trying to increase minority hiring.”<sup>116</sup>

<sup>115</sup> Kaitlin Edleman, “Does This Study Prove That Law Firm Partners Are Racist?” *Vault*, April 22, 2014, <http://www.vault.com/blog/vaults-law-blog-legal-careers-and-industry-news/new-study-confirms-what-everyone-already-knew-law-firm-partners-are-racist>.

<sup>116</sup> Shannon Achimalbe, “Back in the Race: Law Firms Privately Do Not Care About Hiring a Diverse Workforce,” *Above the Law*, August 17, 2017, <http://abovethelaw.com/2016/08/back-in-the-race-law-firms-privately-do-not-care-about-hiring-a-diverse-workforce/>.

When I asked them, many attorneys admitted that, to escape the fallout of diversity issues, they avoid working with diverse attorneys and socializing with them outside of work. Inside law firms, racism or sexism is misattributed to certain actions. People are called racist or sexist or homophobic for taking actions that are actually unrelated to race, gender, or sexual orientation but that are related to the work—getting it done and getting it done well in the manner demanded by large law firms and their clients (more on this below).

If law firms are a microcosm of society, what is going on beneath the surface in law firms is much more serious and a much more fundamental conflict than just creating diversity. In fact, the issue is about what sort of society we are going to be. Are we going to be a society that cannot share our opinions and debate perspectives or are we going to be an open society that discusses issues as they arise and comes to conclusions about how best to deal with them?

Law firms are business organizations. To succeed, they need to function efficiently, and to do that they need to produce high-quality work and service their clients. When concerns with placating victims, social engineering, or silencing dissent become more important than economics, law firms as businesses will falter. When law firms falter, people are unemployed, and people (diverse or not) cannot advance without jobs and a sense of economic stability.

I believe that *diversity goals* not only are compatible with the law firm business model but also can help a firm become more profitable. The social justice movement agenda, however, is something else altogether and, I argue, has little place in law firms or a free society.

Most of the hostility toward Trump's isolationism and the United Kingdom's Brexit, for instance, comes out of the largest and most diverse population centers in Europe and the United States. In the United States, the large cities on the coasts tend to be very diverse compared to towns and cities in the center of the country. These multicultural cities also tend to host high-profile corporations, top universities, and major law firms.

Diversity is promoted in these settings. In December 2016, a group of sixty general corporate counsels from *Fortune* 1000 companies signed an American Bar Association resolution designed to give more business to minority and female lawyers.<sup>117</sup> *U.S. News & World Report*, the magazine that publishes the rankings of law schools in the United States, published an article in 2015 encouraging prospective students to ask prospective schools about their diversity statistics.<sup>118</sup> Schools like Yale and University of Southern California promote diversity

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<sup>117</sup> Laura Colby, "Law Firms Risk Losing Corporate Work Unless They Promote Women," Bloomberg, December 9, 2016, <https://www.bloomberg.com/news/articles/2016-12-09/corporate-america-pressure-law-firms-to-promote-minorities>.

<sup>118</sup> Delece Smith-Barrow, "Minorities Interested in Law May Find a Home at Schools That Value Diversity," *U.S. News & World Report*, February 2, 2015, <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2015/02/02/pursue-law-schools-that-value-diversity>.

on their campuses and on their websites, which provide massive amounts of resources for prospective students to evaluate.<sup>119</sup>

The call for diversity is powerful on campuses, in public companies, and in dense population centers. It can lead people to become hypersensitive to issues. On the one hand, those who resist diversity and inclusion are often in a relative position of power in relation to the underincluded groups, and they are uncomfortable with change and are not open to new ways of functioning. On the other hand, those who are pro diversity are overly attuned to any slight that has the whiff of unfair advantage, privilege, or discrimination about it. The discourse over diversity comes down to a discussion about power and influence in society.

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<sup>119</sup> See, generally, “Diversity in the Classroom,” Yale University, <http://ctl.yale.edu/teaching/ideas-teaching/diversity-classroom> (last visited September 15, 2017), which describes the resources provided by Yale to support diversity; “Diversity at USC,” University of Southern California, <https://diversity.usc.edu/> (last visited September 15, 2017), which describes the resources provided by University of Southern California to promote diversity.

## Chapter 3: Controversy

Recent violent encounters between police and black Americans led to a resurgence in protests around civil rights. Black Lives Matter (BLM) is an international activist campaign against violence and systemic racism. Both sides engage in violence to underscore their beliefs (which include broad and dangerous stereotyping of the other side, at a minimum). The American public is divided in its support of the movement, seemingly split between declaring support for law and order (the police) or equality in civil rights (black and other marginalized groups), two ideals that need not be pitted against each other. The underlying issue in BLM and the other movements it has spawned, such as All Lives Matter and Blue Lives Matter, is power and control and how they play out in people's everyday lives.

Racism occurs when people feel prejudice or practice discrimination against others whose racial background differs from their own and when a particular racial group believes it is superior to others. All the other *-isms* are manifestations of the same sentiment: one group forms stereotypes and prejudices against another and then acts on those beliefs in a way that diminishes the other in some way.

Discriminatory beliefs function as a rationale for using power as an advantage over the other. They justify treating the other in ways that we would judge to be cruel or unjust if we applied them to our group.<sup>120</sup> Conflicts over racism, sexism, transgenderism, and all other types of bias and bigotry make the news every day. In each situation, there are two sides to the story: two factions dispute the consequences of power around a facet of identity. In-group and outgroup dynamics are at work, forcing people into insular camps. Moreover, stereotyping, prejudice, and discrimination facilitate people becoming entrenched in their opinions.

### Racism in the News

In the summer of 2017, violence broke out between protesters and counter-protesters in Charlottesville, Virginia. White-power protesters had organized a rally to dispute the removal of a statue of Robert E. Lee from Lee Park, recently renamed Emancipation Park. This was one protest in response to the removal of other Confederate monuments around the South that resulted from the Charleston church shooting in 2015 in which a white supremacist murdered nine people in a church in North Carolina. Counter-protesters at Charlottesville were from a wide array of ideologies, but they united in opposition to white supremacy.

Police were criticized for not being more proactive in deescalating the violent skirmishes that erupted throughout the city during the rally. More than two dozen people were injured and one

<sup>120</sup> Facing History and Ourselves, *Holocaust and Human Behavior* (Boston: Facing History and Ourselves, 2017).

woman died in a vehicular attack against counter-protesters, and the city descended into chaos.

President Trump reacted to the event on camera: “We all must be united and condemn all that hate stands for. There is no place for this kind of violence in America. Let’s come together as one!” And, “We condemn in the strongest possible terms this egregious display of hatred, bigotry and violence on many sides, on many sides.”

He was criticized for not condemning white supremacists directly, and for the next two days he expanded and defended his initial statements in the face of criticism from numerous fronts. He placed blame on both sides, called out the very violent alt-left, and registered his objection to the removal of Confederate statues as an attempt to change history: “Does anybody want George Washington’s statue [taken down]? No. . . . They’re trying to take away our culture, they’re trying to take away our history. And our weak leaders, they do it overnight.”<sup>121</sup>

In the Charlottesville rally, opposing groups demonstrated their viewpoints publicly on an issue of identity. Acts of violence and hate showcased the underlying intolerance of difference and racism that has fractured this country since before the Civil War. Demonstrations and rallies are one form of protest around issues of perceived social injustice. Protest is a form of expression that is protected as one of our civil liberties.

In 1918, Theodore Roosevelt said, “Free speech, exercised both individually and through a free press, is a necessity in any country where people are themselves free.” The right to freedom of expression, or free speech, is closely linked to the right to peaceful protest: “free speech would mean nothing if there was no right to use public spaces to make your views known.”<sup>122</sup>

Protest can take the form of mass demonstrations or individual statements, in which a person tries to enact change him- or herself. Colin Kaepernick, former quarterback of the San Francisco 49ers who led the team in the Super Bowl in 2012, became a lightning rod of controversy for kneeling during the national anthem, an action he took since 2016. Kaepernick stated he was protesting social injustice and police brutality toward minorities, not the flag or the military.

Though Kaepernick has not played football since 2016 when he opted out of his 49ers contract, he remains in playing shape. He has not, however, been picked up by a team, even teams that need an effective quarterback. Some in the NFL, the media, and the public believe Kaepernick has not been picked up because of his sociopolitical beliefs and his biracial background.

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<sup>121</sup> “Unite the Right Rally,” Wikipedia, edited November 26, 2017, [https://en.wikipedia.org/wiki/Unite\\_the\\_Right\\_rally#First\\_statement](https://en.wikipedia.org/wiki/Unite_the_Right_rally#First_statement).

<sup>122</sup> “Free Speech and Protest,” Liberty, <https://www.liberty-human-rights.org.uk/human-rights/free-speech-and-protest>.

Kaepernick's protest sparked similar dissent throughout the NFL. It raised the ire of wealthy team owners, most of them white, as well as President Trump.<sup>123</sup>

In response to player protests during the national anthem, Jerry Jones, owner of the Dallas Cowboys, issued a statement that if any of his players knelt during the anthem, they would be benched for the game. After he issued his threat in October, all of the Cowboys players remained standing during the anthem, and President Trump praised Jones's resolve.

It was debated whether Jones had the power to bench players because of their beliefs. The NAACP informed Jones that benching players for not standing during the anthem is a violation of their First Amendment rights. Some contend that, in football, white owners still have ultimate power and control over their multiethnic teams.<sup>124</sup>

In other professional sports, seven-time world champion and NASCAR team owner Richard Petty and multimillionaire NASCAR team owner Richard Childress both issued near-simultaneous statements that if any individual on their respective teams did anything other than stand during the national anthem, that person would be fired. These statements sparked a firestorm of arguments over First Amendment rights.

However, no firings occurred on either team, and the entire NASCAR community continued to stand during the national anthem. Trump praised NASCAR for not tolerating protests during the anthem. However, retiring NASCAR legend and fan favorite Dale Earnhardt Jr. stated that he defends anyone's right to protest however they want.<sup>125</sup>

Richard Petty Motorsports named Darrell "Bubba" Wallace as a full-time driver, making him

<sup>123</sup> "Colin Kaepernick," Wikipedia, edited November 26, 2017, [https://en.wikipedia.org/wiki/Colin\\_Kaepernick](https://en.wikipedia.org/wiki/Colin_Kaepernick); Martenzie Johnson, "Colin Kaepernick's Parents Break Silence: 'We Absolutely Do Support Him,'" ESPN, December 10, 2016, [http://www.espn.com/nfl/story/\\_/id/18247113/colin-kaepernick-parents-break-silence-speak-support-criticized-quarterback](http://www.espn.com/nfl/story/_/id/18247113/colin-kaepernick-parents-break-silence-speak-support-criticized-quarterback).

<sup>124</sup> Scott Davis, "Jerry Jones Says Cowboys Players 'Disrespectful to the Flag' Will Not Play," Business Insider, October 9, 2017, <http://www.businessinsider.com/jerry-jones-cowboys-anthem-disrespect-flag-will-not-play-2017-10>; A. J. Perez, "NAACP to Cowboys Owner Jerry Jones: Benching Players for anthem Kneeling Violates Rights," USA Today, October 10, 2017, <https://www.usatoday.com/story/sports/nfl/2017/10/10/naacp-cowboys-owner-jerry-jones-benching-players-anthem-kneeling-violates-rights/750455001/>.

<sup>125</sup> Jordan Bianchi, "NASCAR Team Owners Threaten to Fire Anyone Who Doesn't Stand for national anthem," SBNation, September 24, 2017, <https://www.sbnation.com/nascar/2017/9/24/16358654/nascar-team-owners-richard-petty-richard-childress-stand-national-anthem-president-donald-trump>; Jordan Bianchi, "Dale Earnhardt Jr. Defends Right to Protest After NASCAR Owners Threaten to Fire Anyone Who Sits for Anthem," SBNation, September 25, 2017, <https://www.sbnation.com/2017/9/25/16360774/dale-earnhardt-jr-tweet-national-anthem-flag>; Ted Johnson, "Trump Praises NASCAR for Not Tolerating Protest During National Anthem," Variety, September 25, 2017, <http://variety.com/2017/politics/news/donald-trump-nascar-nfl-national-anthem-1202569734/>.

the first full-time black driver in NASCAR in over fifty years of the sport. Wallace was regarded as one of the most influential “new” drivers in NASCAR and won championships in NASCAR’s lower-division race series.

His appointment came after individuals inside and outside NASCAR complained that the sport was biased and an ole white boys’ game that was in need of the same diversity that other popular American sports have accepted. Yet Richard “The King” Petty said they decided on Wallace because of Wallace’s raw, fearless talent alone and that he could care less about the color of Bubba’s skin.

Incidentally, Wallace, who is biracial, disagreed with the decision of other professional sports figures to kneel during the national anthem.<sup>126</sup>

In Game 3 of the 2017 World Series, the Houston Astros first baseman Yuli Gurriel was seen on national television making an ethnically insensitive motion with his face toward Los Angeles Dodgers pitcher Yu Darvish. This occurred after Gurriel hit a second-inning homerun off Darvish.

Gurriel is Cuban and noted for his inability to hit against Asian pitchers. Darvish is Japanese-Iranian and was raised in Japan, where he is regarded as a superstar. After being criticized nationally for the gesture, Gurriel issued a strong apology to Darvish, and Darvish accepted Gurriel’s apology and left things at that, hoping to move on from the controversy.

As a consequence of Gurriel’s gesture, he was suspended for five games at the beginning of the 2018 MLB season. Although Gurriel was punished after his facial mocking of Darvish, his suspension did not occur during the World Series, which upset a great number of players and fans and deepened the controversy, which prompted some commentators to claim that advertising income and network ratings must out-value racial decency.<sup>127</sup>

## Bias in Business in the News

Even with laws in place to protect Americans from unequal treatment, discrimination still occurs. Sexism is prejudice, stereotyping, or discrimination on the basis of sex or gender. In the workplace, gender discrimination mostly centers around on hiring, pay inequity, and company culture. Injured parties claim that they were passed over for promotions based on their sex

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<sup>126</sup> Lars Anderson, “You Can’t Be Afraid to Go Fast,” Bleacher Report, November 8, 2017, <http://bleacherreport.com/articles/2742908-you-cant-be-afraid-to-go-fast>.

<sup>127</sup> Scott Lauber, “MLB Mulls Discipline After Yuli Gurriel’s Insensitive Gesture,” ESPN, October 28, 2017, [http://www.espn.com/mlb/story/\\_/id/21189685/houston-astros-yuli-gurriel-apparently-mocks-los-angeles-dodgers-yu-darvish](http://www.espn.com/mlb/story/_/id/21189685/houston-astros-yuli-gurriel-apparently-mocks-los-angeles-dodgers-yu-darvish).

or gender, received pay that was less than that of colleagues of another gender in similar positions, or were treated unfairly on the basis of their sex or gender. Discriminatory company culture is more subtle and insidious and adds up to everything that makes it more difficult for one sex or gender to advance or succeed in a workplace.

The Civil Rights Act prohibits harassment in the workplace related to race, sex, national origin, and religion. But employers can get around liability for harassment using the Faragher defense. To exploit this soft spot in the law, employers (1) must provide a channel for employees to complain to (such as an HR department) and (2) take reasonable measures to prevent further harm. This gives employers a lot of latitude in dealing with reported abuse, and sometimes the steps they take to stop or prevent abuse, especially abuse committed by an economically valuable high-ranking employee, may be superficial.

In weighing the options for how to deal with the reported abuse by a prized employee, employers take profit, the effort to replace the employee, and the potential for litigation to be brought by the terminated employee into consideration. It's often more practical for employers to allow the abuser to stay in place and to silence the matter with the aggrieved employee in other ways. Note that Fox News allowed Bill O'Reilly to keep his job until news of his sexual misconduct began to drive away advertisers.

Yet, "in a climate where victims speak freely, employers must now expect to publicly defend their employment decisions months or years later." Complicity in burying complaints of harassment or discrimination could balloon into a PR nightmare and threaten a company's all-important brand.<sup>128</sup> Public shaming of intolerable behavior, it turns out, is an effective way to trigger public discourse and spark a change in sexual harassment and gender discrimination policies.

Take Curt Schilling, a former All-Star baseball pitcher and analyst for ESPN, who was fired after he posted a message on social media deemed offensive. The image and his accompanying comment was in response to the North Carolina law barring transgender people from using public restrooms that did not match their gender assigned at birth. In a statement about his firing, ESPN said that it is an inclusive company and that Schilling was told his conduct was unacceptable.<sup>129</sup>

A Google engineer who wrote an "anti-diversity manifesto" was fired. The essay, titled "Google's Ideological Echo Chamber," recommended that, instead of focusing on gender

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<sup>128</sup> Elizabeth C. Tippet, "Public Shaming of Workplace Harassers May Force Employers to Stop Protecting Them," *The Conversation*, November 8, 2017, <https://theconversation.com/public-shaming-of-workplace-harassers-may-force-employers-to-stop-protecting-them-87139>.

<sup>129</sup> Richard Sandomir, "Curt Schilling, ESPN Analyst, Is Fired Over Offensive Social Media Post," *New York Times*, April 20, 2016, <https://www.nytimes.com/2016/04/21/sports/baseball/curt-schilling-is-fired-by-espn.html>.



diversity, the company should focus on ideological diversity. The manifesto also mentioned that women might not be in the company's leadership positions because of differences in their preferences and abilities, not because of sexism.<sup>130</sup>

## Sexual Harassment and Assault in the News

Sexual harassment and sexual assault are severe forms of sexism and are exactly about power and control, enacted in a sexual context. Perpetrators "feel entitled to other people's bodies and disregard other people's right to consent."<sup>131</sup> Sovereignty of the body is also called self-ownership and individual autonomy. It's the idea that your body is your property, that humans have a moral or natural right to have bodily integrity and exclusive control over their body and life.<sup>132</sup> "The principle of bodily integrity sums up the right of each human being, including children, to autonomy and self-determination over their own body. It considers an unconsented physical intrusion as a human rights violation."<sup>133</sup> Every human being has this right, but violations in gender-based violence, such as sexual assault and harassment, more often affect women.<sup>134</sup>

Although the act is sexualized, the motivation stems from the perpetrator's need for dominance and control. Such abuse arises in situations where there is a power differential between one person, who holds more power, controls more resources, wields more influence, and a target, who is in a less-powerful position and who needs or wants what the powerholder controls, such as a job, an opportunity, safety.<sup>135</sup> When "one person is in a position of authority over another, even the smallest gesture can acquire a new and different meaning."<sup>136</sup>

Harvey Weinstein, a Hollywood producer and film executive, sexually assaulted complete strangers and actresses alike, using repetitive manipulative tactics to wear women down, such

<sup>130</sup> See Elizabeth Weise, "Engineer Behind Google Anti-Diversity Memo Confirms Firing: Report," *USA Today*, August 8, 2017, <https://www.usatoday.com/story/tech/2017/08/07/engineer-behind-google-anti-diversity-memo-reportedly-fired/547348001/>.

<sup>131</sup> "Sexual Assault Misconceptions," Sexual Assault Prevention and Awareness Center, University of Michigan, <https://sapac.umich.edu/article/52>.

<sup>132</sup> "Self-Ownership," Wikipedia, edited October 5, 2017, <https://en.wikipedia.org/wiki/Self-ownership>.

<sup>133</sup> "Bodily Integrity," Child Rights International Network, <https://www.crin.org/en/home/what-we-do/policy/bodily-integrity>.

<sup>134</sup> "Bodily Integrity," Wikipedia, edited November 18, 2017, [https://en.wikipedia.org/wiki/Bodily\\_integrity](https://en.wikipedia.org/wiki/Bodily_integrity).

<sup>135</sup> Lyn Yonack, "Sexual Assault Is About Power," *Psychology Today*, November 14, 2017, <https://www.psychologytoday.com/blog/psychoanalysis-unplugged/201711/sexual-assault-is-about-power>.

<sup>136</sup> Jonathan Freedland, "On Sexual Harassment We Men Need to Be Clear: The Problem Is Not Women, It's Us," *Guardian* (Manchester), November 3, 2017, <https://www.theguardian.com/commentisfree/2017/nov/03/stop-blaming-sexual-harassment-victims-confront-culprits-men-exploiting-power>.

as “Don’t embarrass me” and “Don’t ruin your friendship with me,” in a decades-long pattern of sexual misconduct. He consistently set up supposed professional meetings or auditions with talent, asked them to his room, and if they refused he tried to coerce and terrorize them by threatening destruction of their career.

If he manipulated an actress into his room, he would begin by asking for a massage, giving a massage, or asking to be watched while showering. He bragged to his prey about how many actresses he had slept with in exchange for their roles to make it seem like it was an expected thing. Later, after allegations were made against him, he said he never had to resort to anything like Bill Cosby did, as in, drug women, which he deemed coercive.

Weinstein’s assistants were always complicit in his actions. In most of the rape cases, Weinstein had a key to the actresses’ rooms or intentionally sought them out in moments when he knew they would be vulnerable. He reached quiet settlements to make accusations go away and used spies to suppress allegations. When actress Rose McGowan was about to go public with her rape allegation against him, Weinstein hired Stella Penn Pechanac, an agent in a private Israeli intelligence firm who went by the name Diana Filip and posed as a women’s rights activist, to dissuade McGowan from accusing him publicly.<sup>137</sup>

Weinstein was fired from his company when his behavior was made public. Many of his friends, including notables such as Ben Affleck, came out against him. Many had feigned ignorance or remained silent until events prompted them to make public statements. Affleck posted a message to social media saying that the allegations against Weinstein make him “sick” and that he was “saddened and angry that a man who I worked with used his position of power to intimidate, sexually harass and manipulate many women over decades.”<sup>138</sup> Then women began making allegations against Affleck.

Quickly, this triggered the exposure of the sexual misconduct of numerous entertainment industry power players, including Affleck, Louis C.K., Andy Dick, Gary Goddard, David Guilloid, Dustin Hoffman, Ethan Kath, Andrew Kreisberg, Benny Medina, Jeremy Piven, Brett Ratner, Twiggy Ramirez, Chris Savino, Mark Schwahn, Steven Seagal, Tom Sizemore, Kevin Spacey, George Takei, Jeffrey Tambo, James Toback, Bob Weinstein, Matthew Weiner, and Ed Westwick.<sup>139</sup>

<sup>137</sup> Tamar Pileggi, “Israeli Stella Penn Pechanac named as Weinstein spy,” *Times of Israel*, November 9, 2017, <https://www.timesofisrael.com/idf-veteran-stella-penn-pechanac-identified-as-weinstein-spy/>.

<sup>138</sup> Kevin Slane, “What to Know About the Harvey Weinstein Scandal, the Ben Affleck Allegations, and How Matt Damon Fits In,” *Boston Globe*, October 24, 2017, <https://www.boston.com/culture/entertainment/2017/10/12/what-to-know-about-the-harvey-weinstein-scandal-the-ben-affleck-allegations-and-how-matt-damon-fits-in>.

<sup>139</sup> Sara M. Moniuszko, “List: All of the Hollywood Power Players Accused of Sexual Assault or Harassment,” *USA Today*, November 3, 2017, <https://www.usatoday.com/story/life/people/2017/11/03/list-all-hollywood-men-accused-sexual-assault-harassment/827004001/>.

Weinstein's downfall also sparked the #MeToo social media campaign in which women denounced sexual harassment and misconduct by sharing their experiences of misogyny. Within a day, 4.7 million people around the world joined the conversation on Twitter. Facebook reported that more than 45 percent of users in the United States were friends with someone who posted a message including the words "Me Too."

"On one side, it's a bold declarative statement that 'I'm not ashamed' and 'I'm not alone.' On the other side, it's a statement from survivor to survivor that says 'I see you, I hear you, I understand you and I'm here for you or I get it,'" said Tarana Burke, creator of the #MeToo movement. She had originally started the campaign a decade earlier as a way to help young women of color who had survived sexual abuse and exploitation.<sup>140</sup>

The public shaming and reprisal in the entertainment industry quickly surged into other male-dominated areas. Twenty-five women accused well-known New Orleans chef John Besh of fostering an environment of vulgarity and sexism in his kitchens. Multiple women complained of harassment and mistreatment, but their complaints were ignored from a lack of human resources support. Besh stepped down from his company, but many attested that the restaurant industry continued to be rife with bullying and coercion of a sexual nature, if not flat-out sexual violence.<sup>141</sup>

After the Besh news, a chef and restaurant owner in New Orleans conducted an informal phone survey of other professional chefs and owners. What respondents agreed on was that company culture is set at the top. "When the leader isn't setting an example of a welcoming, equitable and respectful workplace—and there's no impartial staffer to go to—the entire organization can become toxic."<sup>142</sup> Her findings also support the idea that employees need an objective agent, such as an effective human resources department, to register complaints with.

"Unless men in the restaurant industry, and in all industries, join the ranks, systemic change will never happen. As Jia Tolentino wrote...: 'A genuine challenge to the hierarchy of power will have to come from those who have it.'"<sup>143</sup>

<sup>140</sup> Cassandra Santiago and Doug Criss, "An Activist, a Little Girl and the Heartbreaking Origin of 'Me Too,'" CNN, October 17, 2017, <http://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html>.

<sup>141</sup> Jen Agg, "A Harvey Weinstein Moment for the Restaurant Industry?" *The New Yorker*, October, 26, 2017, <https://www.newyorker.com/culture/annals-of-gastronomy/a-harvey-weinstein-moment-for-the-restaurant-industry>.

<sup>142</sup> Chelsea Brasted, "16 New Orleans Chefs, Restaurant Owners Speak Out on John Besh Sexual Harassment Allegations," *Times-Picayune*, October 28, 2017, [http://www.nola.com/business/index.ssf/2017/10/john\\_besh\\_response\\_new\\_orleans.html](http://www.nola.com/business/index.ssf/2017/10/john_besh_response_new_orleans.html).

<sup>143</sup> Agg, "A Harvey Weinstein Moment for the Restaurant Industry?" <https://www.newyorker.com/culture/annals-of-gastronomy/a-harvey-weinstein-moment-for-the-restaurant-industry>.

Jon McNeill, the president of global sales and service at Tesla, said, “As a father of a daughter, I do not want to be a part of an organization or create a culture that would limit her. I can’t help that I’m a white dude, but I can help the culture that gets created.”<sup>144</sup>

In the media, Mark Halperin, the well-known journalist and coauthor of a book on Barack Obama, was suspended by MSNBC over sexual harassment claims brought by five women. Halperin apologized for his behavior and said he would step back from his work to deal with his issue.<sup>145</sup>

Bill O’Reilly, host of the highest-rated political commentary show on cable, *The O’Reilly Factor*, was forced to resign from Fox News after it came to light that he had paid six women nearly \$50 million to settle sexual harassment suits. The network was aware of the accusations made against O’Reilly, and “Rupert Murdoch and his two sons, Lachlan and James, as top executives of 21st Century Fox, decided ... to retain O’Reilly despite being made aware of the fresh complaints. The next month, the company gave O’Reilly a contract extension worth \$25m a year.” It added language to his contract saying he’d be let go if new allegations came up, which they did. When his show began to lose sponsors, O’Reilly was fired.

O’Reilly’s departure followed that of Roger Ailes, the former Fox News chairman, who was accused of sexual misconduct. Fox publicized taking steps to remake its corporate culture: “21st Century Fox has taken concerted action to transform Fox News...installing new leadership, overhauling management and on-air talent, expanding training, and increasing the channels through which employees can report harassment or discrimination.”<sup>146</sup>

Power does corrupt, and those who stand to gain economically by keeping quiet about misconduct are complicit in perpetuating the corruption. Politics, the ultimate field in which power plays, abounds with sexual harassment. One commentator says:

For my own part, I received a crash course in all this in Washington during the 1990s, where I spent five formative years. The city was shaken by a series of sexual harassment scandals that yielded two valuable lessons. One was that an atmosphere of casual sexism

<sup>144</sup> Sheelah Kolhatkar, “The Tech Industry’s Gender-Discrimination Problem,” *The New Yorker*, November 20, 2017, [https://www.newyorker.com/magazine/2017/11/20/the-tech-industrys-gender-discrimination-problem?mbid=nl\\_Daily%20111317%20Nonsubs&CNDID=10097111&spMailingID=12348564&spUserID=MTQOODYwOTkwNTgyS0&spJobID=1281239126&spReportId=MTI4MTIzOTeyNgS2](https://www.newyorker.com/magazine/2017/11/20/the-tech-industrys-gender-discrimination-problem?mbid=nl_Daily%20111317%20Nonsubs&CNDID=10097111&spMailingID=12348564&spUserID=MTQOODYwOTkwNTgyS0&spJobID=1281239126&spReportId=MTI4MTIzOTeyNgS2)

<sup>145</sup> Associated Press, “Journalist Mark Halperin Suspended by MSNBC over Sexual Harassment Claims,” *Guardian* (Manchester), October 26, 2017, <https://www.theguardian.com/world/2017/oct/26/mark-halperin-sexual-harassment-suspended-msnbc>.

<sup>146</sup> Reuters, “Bill O’Reilly Settled \$32m Sexual Harassment Claim Before Signing Fox News Deal—Report,” *Guardian* (Manchester), October 21, 2017, <https://www.theguardian.com/media/2017/oct/21/bill-oreilly-32m-harassment-claim-fox-news-deal>.

might constitute a “hostile working environment” even when it did not involve a specific word or gesture directed at a specific woman. Another was that “consent” loses much of its meaning when one person holds power over another.<sup>147</sup>

A majority of people interviewed who worked in Congress said they experienced sexual harassment or knew someone there who had. Female workers in the capital, from aides to senators, must learn the unwritten rules to avoid being sexually harassed or abused. “There is also the ‘creep list’—an informal roster passed along by word-of-mouth, consisting of the male members most notorious for inappropriate behavior, ranging from making sexually suggestive comments or gestures to seeking physical relations with younger employees and interns.”<sup>148</sup>

Despite the reprisal of other powerful figures in various industries, it’s not likely that the culture in politics will change. “The power dynamics in Washington contribute to this problem.” The power hierarchy often takes the shape of one central figure at the top on whose success the rest of the network’s chances rest. Underlings are reluctant to make waves that would jeopardize their position or get the leader in trouble.<sup>149</sup> On the other hand, “sometimes, the sexual advances from members of Congress or senior aides are reciprocated in the hopes of advancing one’s career—what one political veteran bluntly referred to as a ‘sex trade on Capitol Hill.’”<sup>150</sup>

During Donald Trump’s 2016 campaign for the U.S. presidency, the most powerful position in the world, eleven women accused him of sexual misconduct. Why were those allegations brushed aside as lies and “locker-room talk,” but accusations against Harvey Weinstein, a person of relatively lower stature, snowballed into #MeToo and orchestrated the disgrace, firing, and takedown of multiple abusers across sectors of society?

It may have to do with the social standing of the accusers relative to that of the accused. “Weinstein’s sexual harassment scandal is unlike almost every other in recent memory because many of his accusers are celebrities, with status, fame, and success commensurate with his own. Sexual harassment is about power, not sex, and it has taken women of extraordinary

<sup>147</sup> Freedland, “On Sexual Harassment We Men Need to Be Clear,” <https://www.theguardian.com/commentisfree/2017/nov/03/stop-blaming-sexual-harassment-victims-confront-culprits-men-exploiting-power>.

<sup>148</sup> J. Lee, Sunlen Serfaty, Sara Ganim, and Juana Summers, “‘Nothing About It Felt Right’: More Than 50 People Describe Sexual Harassment on Capitol Hill,” CNN, November 14, 2017, <http://www.cnn.com/2017/11/14/politics/sexual-harassment-congress/index.html>.

<sup>149</sup> Sheryl Gay Stolberg, “Why Sexual Harassment Persists in Politics,” *New York Times*, November 2, 2016, <https://www.nytimes.com/2016/11/03/us/politics/why-sexual-harassment-persists-in-politics.html>.

<sup>150</sup> Lee, Serfaty, Ganim, and Summers, “‘Nothing About It Felt Right,’” <http://www.cnn.com/2017/11/14/politics/sexual-harassment-congress/index.html>.

power to overcome the disadvantage that most accusers face.”<sup>151</sup>

The three dimensions of the social hierarchy—power, status, and influence—come into play and determine whose voice will be heard. When people have power but no status, they may exercise authority or control over others. But for people who have no power, it is status that helps them to have a voice that is heard.<sup>152</sup>

Although most perpetrators are men, and there is a general pervasive myth that men have an uncontrollable biological need for sex, sexual misconduct is about power and “has more to do with how men are socialized, and how our society has constructed gender and masculinity, than biology.”<sup>153</sup> No doubt, denying, disputing, or ignoring claims of sexual misconduct worsens the trauma and shame for survivors. But when perpetrators face few consequences for their abuse, it fosters an environment that perpetuates violence, disrespect, and abuse of power.

Since the Weinstein scandal, a number of people who have been sexually harassed have come forward and named their abuser. Admitting to harassment is unusual because so much is at stake for accusers; the current tidal wave of exposures represents a significant change in public consciousness, and perhaps power dynamics.

Power disparities affect people’s—or a nation’s—behavior in relation to difference. Just as sexual harassment threatens a person’s bodily sovereignty, illegal immigration threatens the sovereignty of the United States, the argument goes. President Trump is building a wall between the United States and Mexico to stop illegal immigration because it is believed that illegal immigrants pose a security hazard; they bring crime, gangs, and drugs; they steal jobs from Americans; and they use the country’s social welfare system without contributing to it, placing an undue burden on the American people.

Sovereignty is the power of a state—or an individual—to do what is necessary to govern itself. “By not exercising ‘control’ over borders through actively blocking immigrants . . . the United States government would surrender a supposedly vital component of its national sovereignty.”<sup>154</sup> Notice a state must first have power in order to protect its sovereignty; on

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<sup>151</sup> Jane Mayer, “Anita Hill on Weinstein, Trump, and a Watershed Moment for Sexual-Harassment Accusations,” *The New Yorker*, November 1, 2017, <https://www.newyorker.com/news/news-desk/anita-hill-on-weinstein-trump-and-a-watershed-moment-for-sexual-harassment-accusations>.

<sup>152</sup> Valeria Maltoni, “The Difference between Power and Status,” Conversation Agent, <http://www.conversationagent.com/2016/02/the-difference-between-power-and-status.html>.

<sup>153</sup> “Sexual Assault Misconceptions,” Sexual Assault Prevention and Awareness Center, University of Michigan, <https://sapac.umich.edu/article/52>.

<sup>154</sup> Alex Nowrasteh, “National Sovereignty and Free Immigration Are Compatible,” Cato at Liberty (blog), CATO Institute, April 28, 2014, <https://www.cato.org/blog/national-sovereignty-free-immigration-are-compatible>.

the personal level, lack of power leads to breaches of bodily integrity in the form of sexual harassment and to the unfair treatment in the form of discrimination.

In the following quotations, substitute the name of any less-empowered group for “women,” substitute the name of any powerholding group for “men,” and see how the concept applies across all the *-isms*:

After the revelations about Weinstein and others...issues like unequal pay and lack of promotion might seem minor by comparison. They aren’t, of course, Weinstein-level problems—but they are the problems that create men like Weinstein. It’s the imbalance of pay and power that puts men in a position to harass, that gives them unchecked control over the economic lives of women and, as a result, influence over their physical lives. These subtler forms of discrimination, familiar to almost any woman who has held a job, can in fact be especially insidious, since they are easier for companies, and even victims, to dismiss.<sup>155</sup>

Men who demean, degrade or disrespect women have been able to operate with such impunity—not just in Hollywood, but in tech, venture capital, and other spaces where their influence and investment can make or break a career. The asymmetry of power is ripe for abuse.<sup>156</sup>

The cases of racism and sexism that have come to public attention seem to point to the power held by white males in our society as the problem. “The U.S. has always been and remains a culture in which white men embody the vast majority of power, through both economic and political might as well as the accumulated advantages of privilege simply from being white and male.”<sup>157</sup>

This is an observation, not a value judgment. We can see and acknowledge that there are

<sup>155</sup> Sheelah Kolhatkar, “The Tech Industry’s Gender-Discrimination Problem,” *The New Yorker*, November 20, 2017, [https://www.newyorker.com/magazine/2017/11/20/the-tech-industrys-gender-discrimination-problem?mbid=nl\\_Daily%2011317%20Nonsubs&CNDID=10097111&spMailingID=12348564&spUserID=MTQ0ODYwOTkwNTgyS0&spJobID=1281239126&spReportId=MTI4MTIzOTEyNgS2](https://www.newyorker.com/magazine/2017/11/20/the-tech-industrys-gender-discrimination-problem?mbid=nl_Daily%2011317%20Nonsubs&CNDID=10097111&spMailingID=12348564&spUserID=MTQ0ODYwOTkwNTgyS0&spJobID=1281239126&spReportId=MTI4MTIzOTEyNgS2).

<sup>156</sup> Melinda Gates, co-chair of the Bill & Melinda Gates Foundation, as quoted in Sheelah Kolhatkar, “The Tech Industry’s Gender-Discrimination Problem,” *The New Yorker*, November 20, 2017, [https://www.newyorker.com/magazine/2017/11/20/the-tech-industrys-gender-discrimination-problem?mbid=nl\\_Daily%2011317%20Nonsubs&CNDID=10097111&spMailingID=12348564&spUserID=MTQ0ODYwOTkwNTgyS0&spJobID=1281239126&spReportId=MTI4MTIzOTEyNgS2](https://www.newyorker.com/magazine/2017/11/20/the-tech-industrys-gender-discrimination-problem?mbid=nl_Daily%2011317%20Nonsubs&CNDID=10097111&spMailingID=12348564&spUserID=MTQ0ODYwOTkwNTgyS0&spJobID=1281239126&spReportId=MTI4MTIzOTEyNgS2).

<sup>157</sup> P. L. Thomas, “Power, Responsibility, and the White Men of Academia,” *Huffington Post*, May 30, 2017, [https://www.huffingtonpost.com/entry/power-responsibility-and-the-white-men-of-academia\\_us\\_592d58bce4b08861ed0ccbce](https://www.huffingtonpost.com/entry/power-responsibility-and-the-white-men-of-academia_us_592d58bce4b08861ed0ccbce).

relative differences in power, status, and influence among us<sup>158</sup> and that power differentials in human relations lead to more advantages and benefits accorded to some, and less to others. Let me reiterate: those are facts. I am not saying this is fair. I am not saying this is right or wrong. It is the way our society operates now.

What *is* wrong is when a person in a relative position of power uses that power to coerce another into an unsafe act. What *is* wrong is when a person in a relative position of power acts on a prejudice based on a stereotype to discriminate against another. What *is* wrong is when a person in a relative position of power withholds or limits another's opportunities to pursue health, welfare, and purpose in life. Whether power is earned or inherited, it demands to be used responsibly with empathy and respect.

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<sup>158</sup> Michael W. Kraus, "Status Hierarchies: Do We Need Them?" *Psychology Today*, October 2, 2012, <https://www.psychologytoday.com/blog/under-the-influence/201210/status-hierarchies-do-we-need-them>.



## Part II: The Diversity Gap in Law Firms: What Firms Say and What They Do

My interest in human groups underlies my fascination with why some attorneys get the best jobs and others don't. In legal recruiting, I determine an attorney's traits and characteristics and try to match them up with firms that will benefit from that individual's unique strengths and abilities. I believe everyone has something to contribute if given a chance.

Yet, sometimes, no matter how loudly we sing the praises of a particular candidate, firms resist hiring that person. I wanted to know why. It seems legal hiring falls back on entrenched patterns, and those patterns are based on current business realities, which in turn are shaped by societal beliefs and values, which ultimately are influenced by the powerholders in society.

A diversity gap exists in law firms. What firms say about supporting diversity differs from what they do about diversity in practice. Yet, simply making observations about the diversity gap stirs controversy and inflames people on all sides. There are specific reasons people get so upset when we try to talk about racism, sexism, and other perceived unfair employment practices just as there are reasons why firms resist diversity efforts. I believe there is a way to reconcile the current realities of the legal business climate with diversity goals so that all attorneys can find jobs and law firms can realize the benefits of a diverse workforce.

## Chapter 4: The Arguments for Diversity

According to the *Washington Post*, diversity is good for business and good for the world: companies that emphasize diversity are worth more, earn higher returns, and have better financial outcomes; scientific research conducted by diverse teams is higher quality; and academic papers written by diverse group authors have higher impact and make greater contributions to science.<sup>159</sup>

In their 2017 Business Performance Benchmark Study, Altify—the self-proclaimed “global leader in sales transformation”—found that diversity pays off: “70 percent of respondents believe that a diversity policy has impact on the business performance of their organization, and the results suggest that they are right. Companies with a positive track record in diversity have 50 percent better customer retention and 17 percent shorter sales cycles.”<sup>160</sup>

Diversity is one of the most popular and important issues in the current legal environment. You can scarcely pick up a legal periodical without seeing numerous articles related to diversity. When I go out and meet with law firms to discuss their hiring needs, just about every firm launches into a long discussion about how interested they are in diversity and how important it is to them.

I could be sitting in west Texas with a couple of white, overweight partners wearing cowboy hats, leather suit jackets, and hypnotic, shiny belt buckles and one will tell me: “Get me some diversity in here!” and another attorney will slam his hand on the table and exclaim “Yes, siree!”

It does not matter who you talk to. The demand for diversity is the same in rural Alabama as it is in New York City. Diversity is something that law firms take seriously and want more of.

It seems like diversity and inclusion managers and committees have popped up all over the place and are now part of the infrastructure of big law firms. These people understand the diversity gap in law firms and go to work each day to combat it. They may not have solved the problem yet, but they are working hard on it.

And for good reason.

Many corporate clients survey prospective law firms asking about the type of diversity program

<sup>159</sup> Weiner, “Diversity Is Good. Why Doesn’t Everyone Agree?” [https://www.washingtonpost.com/blogs/she-the-people/wp/2014/11/26/diversity-is-good-why-doesnt-everyone-agree/?utm\\_term=.893a6c980d77](https://www.washingtonpost.com/blogs/she-the-people/wp/2014/11/26/diversity-is-good-why-doesnt-everyone-agree/?utm_term=.893a6c980d77).

<sup>160</sup> “Study Finds Customer Retention Is Number One Strategic Imperative for 2017, Sellers Still Struggle to Access Key Buying Influencers,” Altify, March 29, 2017, <https://www.altify.com/company/press/study-finds-customer-retention-number-one-strategic-imperative-2017-sellers-still-struggle-access-key-buying-influencers/>.

the firms have in place. These large companies, which are usually represented by in-house counsel, want to know how many women and minorities work in a firm that would represent them. If a company believes a law firm is diverse, the firm stands a better chance of getting hired. If the law firm is not diverse, it might not only lose out on a new client but also lose some of its existing clients.

Diversity in the law firm setting typically means differences in race, ethnicity, gender, and sexual orientation. It is often measured at the associate and partner levels. Diversity in this context does not refer to age differences or diversity within the staff ranks—people only seem concerned with diversity when it comes to attorneys.

There are two classes of arguments for diversity:

- The social arguments for diversity focus on the fairness of diversity and that having more diversity can promote fairness and redress past discrimination. These arguments also focus on the fact that the employee population in businesses should reflect the composition of the overall population.<sup>161</sup>
- The business arguments for diversity focus on the business sense of diversity and the idea that having more diversity increases the amount of business firms are qualified for, assists with recruiting, increases the amount of business that law firms get, and assists law firms in reaching better business decisions.<sup>162</sup>

## The Social Arguments for Diversity

Diversity is the right thing to do. Many tenets of moral behavior support this assertion.

*Diversity is beneficial from a moral perspective.* Originally, in the U.S. Constitution, “we the people” did not refer to Native Americans, white women, and certainly not African Americans. Many people believe the negative aspects and legacies of American history need to be redressed. Although white males in power have extended equality to women, black people, LGBTQ people, and other people of color, vestiges of past wrongs linger. Many proponents of diversity believe we should be leveling the playing field to redress past acts of discrimination.<sup>163</sup> For hundreds of years, many groups were denied employment in corporations, law firms, and

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<sup>161</sup> Given the United States’ legacy of past discrimination, affirmative action proponents believe the past wrongs can be addressed through diversity initiatives. See Rose Mary Wentling, “Diversity Initiatives in the Workplace,” University of Illinois, 1997, <http://ncrve.berkeley.edu/cw82/deversity.html>.

<sup>162</sup> See Douglas E. Brayley and Eric S. Nguyen, “Good Business: A Market-Based Argument for Law Firm Diversity,” *Journal of the Legal Profession* 34, no. 1 (2009): 1–25.

<sup>163</sup> See Wentling, “Diversity Initiatives in the Workplace,” <http://ncrve.berkeley.edu/cw82/deversity.html>.

other establishments.<sup>164</sup> The United States has a legacy of racial, economic, political, and social division.

During what is called the “golden age” of law firms, in the 1950s and 1960s, the top law firms screened applicants on the basis of their race, religion, gender, and socioeconomic background. One 1964 book, *Wall Street Lawyer*, noted, “They want lawyers who are Nordic, have pleasing personalities and ‘clean-cut’ appearances, are graduates of the ‘right’ schools, have the ‘right’ social background and experience in the affairs of the world, and are endowed with tremendous stamina.”<sup>165</sup>

There is little doubt that law firms were formerly institutions that excluded women and minorities. The moral argument for including them now is that law firms should make up for past wrongs.<sup>166</sup>

*Diversity improves the morale of staff and attorneys in a firm.* If an attorney looks around and sees a lot of diversity in the firm, that attorney can believe that the firm represents the public at large, and this improves how the attorney feels.<sup>167</sup> Attorneys who are diverse want to see other diverse attorneys in their firms. Having a highly diverse staff working with diverse attorneys also is likely to improve morale because the cultural divide between attorneys and staff is diminished.<sup>168</sup>

High morale leads to employee job satisfaction, which in turn motivates employees to put in more effort, become creative, take initiative, be “committed to the organization,” and focus “on achieving organizational goals rather than personal goals.”<sup>169</sup> According to one journal:

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<sup>164</sup> However, with the ratification of the Fourteenth Amendment and particularly the equal protection clause, the Civil Rights Act was made applicable to states. Regardless, diversity efforts of corporations, law firms, and other employers were limited if not nonexistent. John E. Higgins, “Grutter and Gratz Decisions Underscore Pro-Diversity Trends in Schools and Businesses,” Nixon-Peabody, 2004, <https://www.nixonpeabody.com/en/ideas/articles/2004/02/06/grutter-and-gratz-decisions-underscore-pro-diversity-trends-in-schools-and-businesses>.

<sup>165</sup> See Erwin O. Smigel, *The Wall Street Lawyer* (New York: Free Press of Glencoe, 1964), 37.

<sup>166</sup> See J. Cunyon Gordon, “Painting by Numbers: ‘And, Um, Let’s Have a Black Lawyer Sit at Our Table,’” *Fordham Law Review* 71, no. 4 (2003): 1257, 1291–1292. “The successful moral arguments for integration, the transformative kind that results in redistribution of power, and which endured changes in demography, fortunes and fashions had both intellectual cogency and emotional power to change beliefs because the entrepreneurs made their own lives the example.”

<sup>167</sup> See, generally, Pedro A. Noguera and Susan K. Springborg, “Increasing Diversity in Law Firm,” *Legal Management* 13, no. 5 (1994): 60. “Poor morale and reduced productivity are often the result of a firm culture which tolerates or even promotes [discriminatory] behavior.”

<sup>168</sup> Associates have been found to be more satisfied with their work when they are surrounded by a more heterogeneous group of coworkers that challenge their notions or understanding. See Brayley and Nguyen, “Good Business: A Market-Based Argument for Law Firm Diversity,” 28.

<sup>169</sup> See Usmani Sania, Kumari Kalpina, and Hussain Javed, “Diversity, Employee Morale and Customer Satisfaction: The Three Musketeers,” *Journal of Economics, Business and Management* 3, no. 1 (January 2015): 11–18.

The argument is that the overall morale of the organization will increase and improve the more diversity that there is. Increased morale will make an employee happier and more productive, and higher productivity will lead to higher performance and increased customer satisfaction. Customer satisfaction is important because it enhances customer retention and ultimately leads to profitability in a company.<sup>170</sup>

Additionally, on the wish list of many associates is the opportunity to “identify with the compassionate values of the firm as demonstrated by pro bono commitments, training programs, employee diversity, reasonable billable hours, and part time and family leave policies.”<sup>171</sup> Thus, a law firm with employee diversity fulfills one of the wishes that increases associate satisfaction and thus improves morale.

*Diversity promotes proportional representation of diverse attorneys.* According to the U.S. Census Bureau, as of July 1, 2016, approximately 24 percent of Americans were people of color, and by 2044, it is projected that the majority of the U.S. population will be people of color.<sup>172</sup> However, despite these numbers, only 15.3 percent of associates are attorneys of color, and only 8.8 percent of partners are attorneys of color inside major law firms.<sup>173</sup> Many argue that law firms should include the same percentage of minority attorneys as there are minority attorneys in the population.

Major law firms have largely utilized the same basic business model for over fifty years, which initially explicitly discriminated against certain demographic groups (including attorneys of color) in favor of white attorneys. This overt practice began to wane in the 1970s.<sup>174</sup> By 1980, 3.6 percent of associates were of a minority group, and by 1990, 6.5 percent of associates were of a minority group.<sup>175</sup> In a 2016 report, the National Association for Law Placement (NALP)

<sup>170</sup> Ibid.

<sup>171</sup> Harrison Barnes, “Top Ways for Law Firms to Increase Associate Satisfaction and Increase Associate Retention: What Law Firm Associates Really Want from Their Jobs,” BCG Attorney Search, 2015, <http://www.bcgsearch.com/article/900044267/Top-Ways-for-Law-Firms-to-Increase-Associate-Satisfaction-and-Increase-Associate-Retention-What-Law-Firm-Associates-Really-Want-from-Their-Jobs/>.

<sup>172</sup> See William H. Frey, “New Projections Point to a Majority Minority Nation in 2044,” Brookings Institution, December 12, 2014, <http://www.brookings.edu/blogs/the-avenue/posts/2014/12/12-majority-minority-nation-2044-frey>; Progress 2050, “Demographic Growth of People of Color,” Center for American Progress, August 2015, <https://cdn.americanprogress.org/wp-content/uploads/2015/08/05075256/PeopleOfColor-Democracy-FS.pdf>.

<sup>173</sup> See Debra Cassens Weiss, “Law Firms Employ Fewer Black Lawyers Than Other Minorities, Survey Reports,” *ABA Journal*, August 23, 2017, [http://www.abajournal.com/news/article/law\\_firms\\_employ\\_fewer\\_black\\_lawyers\\_than\\_other\\_minorities\\_which\\_firms\\_are/](http://www.abajournal.com/news/article/law_firms_employ_fewer_black_lawyers_than_other_minorities_which_firms_are/).

<sup>174</sup> Veronica Root, “Retaining Color,” *Michigan Journal of Law Reform* 47 (2014): 575, 578.

<sup>175</sup> See Elizabeth Chambliss, “Organizational Determinants of Law Firm Integration,” *American University Law Review* 46 (1997): 669, 696.

stated that minorities made up 22 percent of associates at law firms.<sup>176</sup> However, despite the appearance of a sharp increase, because the percentage of Americans who are not white is 39.7 percent,<sup>177</sup> a large discrepancy in representation in law firms as compared to in society continues.

The attorney labor pool is becoming far more diverse than it was when many partners graduated from law school.<sup>178</sup> The percentage of diverse attorneys graduating from law schools is increasing. The number of minority students attending law school has more than tripled since the 1970s; however, at many top schools, such as Harvard and Columbia, the percentage of minority students is still below 9 percent.<sup>179</sup> Given this, it makes sense that individuals who seek law firm services would rather see a firm-wide representation similar to what they see in their town or city as a whole. People want to see a variety of races and genders representative of their own lives.

Law firms do not yet approach the demographic outlook of the country.<sup>180</sup> “A diverse law firm is a better reflection of the general population, which in turn helps make the firm more relatable to the public as an agent of the client. Working with relatable attorneys and staff could be the difference between winning and losing a case.”<sup>181</sup> Diversification of staff may lead to greater capability in areas of outreach, networking, and client retention.

*Diversity helps rectify imbalances resulting from admissions policies in law schools.* Countless barriers make it more difficult for people of color to succeed in the legal field. One is gaining admission to top law schools.<sup>182</sup> Yet the selectivity of top-tier law schools does not preclude the

<sup>176</sup> “NALP Diversity Infographic: Minorities,” National Association for Law Placement, 2016, [http://www.nalp.org/nalpdiversityinfographic\\_minorities](http://www.nalp.org/nalpdiversityinfographic_minorities).

<sup>177</sup> “QuickFacts,” U.S. Census Bureau, 2016, <https://www.census.gov/quickfacts/fact/table/US/PST045216>.

<sup>178</sup> Smith-Barrow, “Minorities Interested in Law May Find a Home at Schools That Value Diversity,” <https://www.Usnews.Com/education/best-graduate-schools/top-law-schools/articles/2015/02/02/pursue-law-schools-that-value-diversity>.

<sup>179</sup> Ibid.

<sup>180</sup> See Nicole Harrison, “Why You Should Seek Diversity in Your Law Firm,” Defense Litigation Insider, April 15, 2015, <http://www.defenselitigationinsider.com/2015/04/15/why-you-should-seek-diversity-in-your-law-firm/>.

<sup>181</sup> Ibid.

<sup>182</sup> See Elizabeth Slattery, “Supreme Court Upholds Race-Based Discrimination in College Admissions,” *Daily Signal*, June 23, 2016, <http://dailysignal.com/2016/06/23/supreme-court-upholds-race-based-discrimination-in-college-admissions/>; Adolfo Guzman-Lopez, “Study Calls for End to Ban on Race-Based Admission to California Universities,” KPCC, May 29, 2015, <http://www.scpr.org/news/2015/05/29/52045/study-calls-for-end-to-ban-on-race-based-admission/>; Adam Liptak, “Court Backs Michigan on Affirmative Action,” *New York Times*, April 22, 2014, <https://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html>.

fact that attorneys who attended lower-ranked law schools can and will succeed in the legal profession. Law firms can help remedy imbalances in law school admissions by hiring more diverse attorneys from lesser-ranked law schools. “If law firms care too much about recruiting at only the top 20 schools, they miss some highly qualified and exceptional candidates at the other 160 American Bar Association–accredited law schools.”<sup>183</sup>

*Diversity alleviates institutional problems related to retention of women and minorities.* Many argue that institutional problems make it difficult for women and minorities to succeed once they are hired at law firms. These problems stem mostly from preconceptions and negative stereotypes about diverse attorneys and their ability and loyalty. Acting on these preconceptions results in treatment of diverse attorneys that decreases their chances of staying long term, which reinforces the negative stereotypes about them and perpetuates an environment that seems unwelcoming to diverse attorneys. Hiring more diverse attorneys provides firms the opportunity to remove institutional barriers to their success.

## The Business Arguments for Diversity

Many factors add up to the fact that diversity helps law firms improve their bottom line.

### Large Clients Demand Diversity

Numerous large clients have made it a point to require the firms they work with diversify their staff.<sup>184</sup> The last thing a law firm needs is to appear biased to large corporate clients that strive for equal company representation among their employees or wealthy individuals for whom diversity holds overwhelming social implications.

The “Diversity in the Workplace Statement of Principle,” BellSouth-led project to encourage and support diversity in the workplace developed in the fall of 1998, established an expectation that law firms that represent large companies will promote diversity in-house. The Statement of Principle articulates the following: “We expect the law firms which represent our companies to work actively to promote diversity within their work-place. In making our respective decisions concerning selection of outside counsel, we will give significant weight to a firm’s commitment and progress in the area.”<sup>185</sup>

In 2016, the chief legal officers at twenty-four *Fortune* 1000 companies emailed a letter to their in-

<sup>183</sup> Kara M. Robinson and Melanie L. Levs, “Debunking the Mystique of Top 20 Law Schools,” Carter-White & Shaw, LLC, <http://www.diverseattorney.org/pdf/Debunking%20the%20Mystique%20of%20Top%2020%20Law%20Schools.pdf> (last visited September 1, 2017).

<sup>184</sup> Brayley and Nguyen, “Good Business: A Market-Based Argument for Law Firm Diversity,” 25.

<sup>185</sup> See Root, “Retaining Color,” 598.



house colleagues at other *Fortune* 1000 companies asking them to support ABA Resolution 113,<sup>186</sup> which “urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys and urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.”<sup>187</sup>

According to Diversity Lab, which creates and experiments with innovative ways to close the gender gap and boost diversity in law firms, some of the nation’s top law firm clients such as Facebook, AT&T, Bank of America, and NBC Universal have made diversity requirements mandatory for any and all outside vendors these companies deal business with, including law firms.<sup>188</sup>

Facebook, for instance, requires that any outside counsel have no less than 33 percent women and ethnic minorities on staff.<sup>189</sup> Bristol-Myers Squibb established a year-long mentoring program between legal department lawyers and diverse lawyers from four of the company’s outside law firms. When a firm attorney completes the mentorship, that attorney is provided with executive coaching and guaranteed work on at least one Bristol-Myers Squibb legal issue during the year.<sup>190</sup>

Other large American companies have demanded their outside counsel become more diverse:

*Coca-Cola:* Beginning in 2007, the Coca-Cola Legal Division has bestowed the Living the Values Award on the law firm that best demonstrates its commitment to diversity with creative and innovative solutions that advance company goals. Solutions may include strides in hiring, retention, and promotion of diverse lawyers, initiatives that add value to internal efforts, creative partnering arrangements with minority- and women-owned firms, and pipeline/ community outreach initiatives.

<sup>186</sup> See Kristen Rasmussen, “GCs Back ABA Push for Law Firm Diversity Data,” *Corporate Counsel*, 2016, <https://advance.lexis.com/search?crd=95a80db8-f869-4d46-bee2-deb26cf5e2aa&pdsearchterms=LNSDUID-ALM-CORPCM-1202767162775&pdbyasscitordocs=False&pdmfid=1000516&pdisurlapi=true> (last visited August 25, 2017).

<sup>187</sup> “113 Adopted,” American Bar Association, 2016, [https://www.americanbar.org/news/reporter\\_resources/annual-meeting-2016/house-of-delegates-resolutions/113.html](https://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/113.html).

<sup>188</sup> See “Clients Push for Diversity,” Diversity Lab, <http://www.diversitylab.com/knowledge-sharing/clients-push-for-diversity/> (last visited September 20, 2017).

<sup>189</sup> See Stephanie Russell-Kraft, “Companies Use Diversity Data to Hold Law Firms Accountable,” *Bloomberg Law*, April 3, 2017, <https://bol.bna.com/companies-use-diversity-data-to-hold-law-firms-accountable/>; “Diversity in the Legal World—the Big Picture,” BCG Attorney Search, 2017, <http://www.bcgsearch.com/article/900048695/Diversity-in-the-Legal-World-The-Big-Picture/>.

<sup>190</sup> See “Diversity in the Legal World—the Big Picture,” <http://www.bcgsearch.com/article/900048695/Diversity-in-the-Legal-World-The-Big-Picture/>.



*Engage Excellence:* The legal departments of DuPont, General Mills, Verizon, and Walmart cofounded this program in 2014 in which a portion of their legal spending is afforded to hire ethnically diverse or LGBT lawyers to serve as lead counsel on select matters. Those companies also require that diverse teams work on their outside legal matters and that “the law firms...certify that the diverse lead lawyer hired receives financial credit as originator of the matter.”

*GE Capital Americas (GECA):* Every two years, GECA general counsels recommend diverse outside counsel, mostly diverse non-equity partners and associates from GECA-approved firms, participate in their Project HOLA program. Chosen outside lawyers are paired with in-house lawyers who volunteer to participate. The outside counsel have the opportunity to gain an insider view of GE’s businesses and its legal team.

*Home Depot:* In an annual RFP to outside firms, the company requests diversity information, including explanation of how firms put diversity first. It evaluates whether firms look at diverse slates when filling positions, whether firms ensure that Home Depot is introduced to diverse attorneys when deciding how to staff company matters, whether firms expose the company to the full range of their talent, whether firms promote diverse lawyers, and whether firms generally support the company’s efforts to work with diverse suppliers. To the extent outside firms use local counsel, court reporters, and other vendors, Home Depot expects firms to be mindful of the need to look broadly to bring in the best talent.

*HP Inc.:* In February 2017, Kim Rivera, HP’s chief legal officer and general counsel, articulated the company’s decision to withhold legal fees from law firms that do not meet diversity staffing requirements. HP requires its outside law firms to retain at least one diverse relationship partner or at least one woman and one racially diverse attorney who each perform at least 10 percent of the billable hours worked on HP matters.

*Macy’s:* The department store sets diversity objectives for each outside firm and reduces bonuses and opportunity for future work for failure to meet diversity goals.

*Mansfield Rule:* The Mansfield Rule, named after the first woman admitted to a U.S. Bar, “asks law firms to consider women and minority lawyers for at least 30% of their candidate pool for leadership and governance roles, equity partner promotions, and lateral hiring.” The rule is supported by more than fifty legal departments.

*MetLife:* Outside counsel must “make sure that the junior diverse talent has sponsorship among the senior lawyers and that they get the best coaching and nurturing they can provide.” MetLife also requires at least one lawyer on each of the company’s outside legal teams is a minority or female lawyer. In support of these efforts, MetLife requires outside law firms to create formal plans for promoting and retaining diverse lawyers.

*Microsoft:* Microsoft offers 2 percent bonuses on the prior year's fees to its premier provider firms if they meet diversity goals. Additional bonuses are on the table for firms that hit other benchmarks, such as partner and management committee diversity, diversity of relationship partners, and diversity of partners who billed for Microsoft matters as reflected in the number of hours. Over the seven years since rolling out this program, Microsoft has increased the diversity of its outside counsel teams by more than 15 percent.

*Morgan Stanley:* Annually, Morgan Stanley bestows a leadership award for diversity and inclusion on one of its outside law firms to promote continuous growth in that area. In an April 2017 New York Times article, the company's chief legal officer, Eric Grossman, stated, "We put a lot of weight not just on the diverse and female attorneys who work on Morgan Stanley matters, but also on how many diverse lawyers they have in the firm and the depth of their sponsorship programs they have to promote overall diversity."<sup>191</sup>

*Walmart:* In 2015, Walmart developed and launched Walmart Ready, an onboarding program designed to educate women and diverse outside counsel about Walmart's business, legal operations, and corporate culture, while affording them an opportunity to connect and network with in-house lawyers. Within a few months of its launch, more than 25 percent of the firms that participated had received a legal assignment. The company held the second Walmart Ready event in September 2016.

*Xcel Energy:* In 2017, the company began scoring and ranking its outside firms on factors such as demonstrated commitment to diversity and inclusion. Xcel Energy also assesses whether diverse lawyers at its firms have access to meaningful opportunities and allows the firms it employs or may employ access to these statistics. The company believes that being ranked against their peers motivates firms' lawyers to take the steps needed to progress toward diversity goals.

## Diversity Is Monitored by External Publications and Observers

Publications such as the *American Lawyer* and *Vault* routinely publish lists of the most diverse firms.<sup>192</sup> Being featured negatively in these rankings can hurt law firms' perception in the market. For example, an Above the Law article in 2011 pointed out specific law firms in various large cities that still "have work to do" regarding diversity.<sup>193</sup>

<sup>191</sup> Ellen Rosen, "Facebook Pushes Outside Law Firms to Become More Diverse," *New York Times*, April 2, 2017, <https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html>.

<sup>192</sup> See McKenna Moore, "The 2017 A-List," *American Lawyer*, <http://www.americanlawyer.com/id=1202793476168/The-2017-AList> (last visited September 18, 2017); Matt Moody, "2018 Best Law Firms for Diversity," *Vault*, <http://www.vault.com/company-rankings/law/best-law-firms-for-diversity/?sRankID=36&rYear=2018> (last visited September 18, 2017).

<sup>193</sup> David Lat, "New Data on Law Firm Diversity," Above the Law, March 20, 2011, , <http://abovethelaw.com/2011/05/new-data-on-law-firm-diversity/?rf=1>.

Manhattan's least diverse office was Pryor Cashman (which also has offices in Los Angeles) and it had no black, Latino, or openly gay lawyers. Boston got called out as the worst market in the country for diverse lawyers: half of Boston BigLaw firms have zero black or Latino partners, 20 percent have no black associates, and 30 percent have no Latino associates. Quinn Emanuel Urquhart & Sullivan, a law firm featured on the Vault 100 list of most prestigious law firms, had one black partner in its Los Angeles office (the most diverse market for lawyers), whereas its New York offices had no black or Latino partners.<sup>194</sup>

Also, countless articles in various news publications (legal and nonlegal) chronicle law firms' efforts to become more diverse and to retain minority attorneys:

- *New York Times*: "Women and Minorities Make Slow Progress in Filling Ranks at Law Firms"<sup>195</sup>
- *Above the Law*: "Diversity in the Legal Profession: The More Things Change, the More They Stay the Same—Until They Don't"<sup>196</sup>
- *Law360*: "How 5 Firms Are Building More Diverse Ranks"<sup>197</sup>
- *Washington Post*: "Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That"<sup>198</sup>
- *New York Times*: "Facebook Pushes Outside Law Firms to Become More Diverse"<sup>199</sup>

There also have been numerous high-profile lawsuits against law firms for discriminating against women, LGBTQ people, and people of color.

- In 2012, Greenberg Traurig was hit with a \$200 million class action lawsuit claiming "women at the firm's Philadelphia office are compensated less than their male counterparts, are given less business-generating opportunities, and assigned lower titles." But the disparities were "neither coincidental nor limited to its Philadelphia office," according to the suit. The suit was

<sup>194</sup> Ibid.

<sup>195</sup> Elizabeth Olson, "Women and Minorities Make Slow Progress in Filling Ranks at Law Firms," *New York Times*, January 4, 2017, <https://www.nytimes.com/2017/01/04/business/dealbook/law-firm-diversity-women-minorities.html?mcubz=3>.

<sup>196</sup> David Perla and Sanjay Kamlani, "Diversity in the Legal Profession: The More Things Change, the More They Stay the Same—Until They Don't," *Above the Law*, March 16, 2017, <http://abovethelaw.com/2017/05/diversity-in-the-legal-profession-the-more-things-change-the-more-they-stay-the-same-until-they-dont/>.

<sup>197</sup> Erin Coe, "How 5 Firms Are Building More Diverse Ranks," *Law360*, August 20, 2017, <https://www.law360.com/articles/954902/how-5-firms-are-building-more-diverse-ranks>.

<sup>198</sup> See Deborah L. Rhode, "Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That," *Washington Post*, May 27, 2015, [https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm\\_term=.9d0fc7ef133b](https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.9d0fc7ef133b).

<sup>199</sup> See Rosen, "Facebook Pushes Outside Law Firms to Become More Diverse."

filed by a former female partner who claimed she was fired for complaining to the CEO about the rampant gender discrimination going on within the firm.<sup>200</sup>

- In 2015, law firm Kaye Scholer was sued for, among other things, discrimination based on sexual orientation. According to the complaint, the plaintiff claimed that she had set up a meeting between one of the co-chairs of the firm’s real estate department and the general counsel of a potential client. The general counsel self-identified as gay and asked the plaintiff whether a qualified LGBT attorney could attend the meeting as well. When the plaintiff asked the co-chair, he responded by yelling that if the general counsel cared about having an LGBT attorney present, he did not want him as a client.<sup>201</sup>
- In 2017, BigLaw firm Quinn Emanuel Urquhart & Sullivan was hit with a racial discrimination suit by a former secretary, who alleged he was called a “n\*\*\*\*r” by his supervisor during a staff dinner.<sup>202</sup>

Suffice it is to say, law firms are under massive pressure to show the public they are diverse. If a law firm fails to become sufficiently diverse, it will be called out for this in the media, and this will hurt its brand among clients and potential recruits and cost it money.

## Diversity Gives a Firm a Competitive Advantage in the Marketplace

Firms with greater racial and gender diversity are significantly outperforming their homogeneous counterparts. In a 2009 article in the *American Sociological Review*, the most diverse companies bring in nearly fifteen times more revenue than less diverse companies.<sup>203</sup> More diverse companies attain more diverse clients and generate more profit in general.<sup>204</sup> Another study found that “a firm ranked in the top quarter in the diversity rankings will generate more than \$100,000 of additional profit per partner than a peer firm of the same size in the same city, with the same hours and leverage but a diversity ranking in the bottom quarter of firms.”<sup>205</sup>

<sup>200</sup> See Staci Zaretsky, “This \$200 Million Class Action Case Claims Women Are Being Elbowed Out by the Greenberg Traurig ‘Boys Club,’” *Above the Law*, December 3, 2012, <http://abovethelaw.com/2012/12/this-200m-class-action-case-claims-women-are-being-elbowed-out-by-the-greenberg-traurig-boys-club/?rf=1>.

<sup>201</sup> See Complaint at 11-12, *Zahn v. Kaye Scholer LLP* (dismissed Oct. 16, 2015).

<sup>202</sup> Kathryn Rubino, “Quinn Emanuel Hit with Racial Discrimination Lawsuit,” *Above the Law*, January 20, 2017, <http://abovethelaw.com/2017/07/quinn-emanuel-hit-with-racial-discrimination-lawsuit/>.

<sup>203</sup> See Cedric Herring, “Does Diversity Pay?: Race, Gender, and the Business Case for Diversity,” *American Sociological Review*, April 1, 2009; see also Sheryl L. Axelrod, “Banking on Diversity: Diversity and Inclusion as Profit Drivers—the Business Case for Diversity,” *American Bar Association*, June 12, 2014, [https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news\\_analysis/articles\\_2014/diversity-inclusion-profit-drivers.html](https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2014/diversity-inclusion-profit-drivers.html).

<sup>204</sup> *Ibid.*

<sup>205</sup> See Brayley, and Nguyen, “Good Business: A Market-Based Argument for Law Firm Diversity,” 1–25.

Because the number of diverse candidates in the workforce is increasing, many believe that law firms will gain a competitive advantage if they hire and retain a greater percentage of diverse attorneys.

- Clients hiring law firms are more likely to be diverse, so law firms have a better chance getting business if they are more diverse.<sup>206</sup> The most diverse firms bring in nearly fifteen times more revenue than the least diverse. This seems to point to the conclusion that diverse clients are an untapped market when there are not enough diverse attorneys to build relationships with them.<sup>207</sup>
- Diverse law firms increase their marketability by having diverse attorneys who can more closely identify with diverse clients. Given the increasingly global nature of society, potential clients expect to see diverse attorneys in the law firms they consider hiring. “If a law firm is demographically representative of the general population, more people will feel comfortable with that firm, and the firm will attract a wider range of clientele.”<sup>208</sup>
- Diverse law firms create a good impression in the legal market that they value diversity. A positive impression enables firms to attract top talent. “Having a diverse work force shows talented candidates that your business values different perspectives and chooses the best talent” regardless of gender, race, sexual orientation, etcetera. In turn, diverse attorneys tend to be more satisfied at work given the room allowed for different perspectives and experiences.<sup>209</sup> Overall, three arguments arise in favor of diverse leadership: firms with diverse leadership (1) have a better chance of solving complex problems; (2) function with increased innovation; and (3) enjoy greater financial growth.<sup>210</sup>
- Diverse law firms are better situated to understand the needs of clients, who may also be diverse. Larger firms serve corporations and government, which serve diverse populations.<sup>211</sup> As such, those clients want their vendors to reflect their clientele. Law firms that refuse to diversify are not just losing the race but failing to get their foot in the door of new business. Further, clients look to their attorneys and law firms for more than just legal advice. At times, clients seek referrals in other fields or jurisdictions; thus, law firms that hire lawyers from

<sup>206</sup> See Herring, “Does Diversity Pay?: Race, Gender, and the Business Case for Diversity.”

<sup>207</sup> Ibid.

<sup>208</sup> See Edward T. Kang, “Diversity and its Impact on the Legal Profession,” *Law Practice Today*, September 14, 2016, <http://www.lawpracticetoday.org/article/diversity-impact-legal-profession/>.

<sup>209</sup> Ibid.

<sup>210</sup> See Paola Cecchi-Dimeglio, “Nudges to Increase Diversity: A Competitive Advantage to Attract and Recruit More Women at Your Firm,” Harvard Law School, January 2017, <https://thepractice.law.harvard.edu/article/nudging-to-increase-diversity/>.

<sup>211</sup> See Edward N. Druck and Michael J. Hernandez, “Law Firm Diversity: The New Standard of Workplace Excellence,” *Diversity Matters*, June 2014, <https://www.isba.org/committees/diversityleadershipcouncil/newsletter/2014/06/lawfirmdiversitythenewstandardofw>.

diverse backgrounds are more likely to have larger networks to reach out to.<sup>212</sup>

There are concrete reasons why law firms should strive to be diverse, including (1) client requirements, (2) improved recruitment, and (3) perception in the legal community. Becoming more diverse assists law firms in generating business, recruiting attorneys, and improving their brand. Various studies and observations suggest that businesses become more competitive when they are more diverse.<sup>213</sup>

- A study by Dow Jones of more than twenty thousand venture-backed companies over a five-year period found that those companies with at least one woman executive were more likely to succeed than those with only men in leadership positions.<sup>214</sup>
- “According to research from the Center for Talent Innovation, employees at organizations with 2-D diversity [two dimensions of diversity, covering inherent (gender, ethnicity, and sexual orientation) and acquired (skills and education)] traits are 45% likelier to report a growth in market share over the previous year and 70% likelier to report that the firm captured a new market.”<sup>215</sup>
- A Credit Suisse study found that companies with higher female representation at the board level or in top management exhibited higher returns on equity, higher valuations, and higher payout ratios.<sup>216</sup>
- Firms “that invest in diversity and understand the changing landscape” will derive competitive advantage, says Tom Sager, former general counsel at DuPont Co. and partner at Ballard Spahr LLP. “The demographics are so obvious to all now, and to be successful, over time you’re going to have to be a leader in this space, particularly as corporations wise up

<sup>212</sup> See Harrison, “Why You Should Seek Diversity in Your Law Firm,” <http://www.defenselitigationinsider.com/2015/04/15/why-you-should-seek-diversity-in-your-law-firm/>.

<sup>213</sup> See, generally, Brayley and Nguyen, “Good Business: A Market-Based Argument for Law Firm Diversity,” 25, which found that diversity in the law firm setting increases the amount of business the firm has access to, given that diversity of its associates and partners diversifies its clientele); see also Axelrod, “Banking on Diversity: Diversity and Inclusion as Profit Drivers—the Business Case for Diversity,” [https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news\\_analysis/articles\\_2014/diversity-inclusion-profit-drivers.html](https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2014/diversity-inclusion-profit-drivers.html), which determined that firms with greater racial and gender diversity are significantly outperforming their homogeneous counterparts.

<sup>214</sup> See Deborah Gage, “Women Executives Make Venture-Backed Companies More Successful: Study,” *Wall Street Journal*, October 4, 2012, <https://blogs.wsj.com/venturecapital/2012/10/04/women-executives-make-venture-backed-companies-more-successful-study/>.

<sup>215</sup> Sylvia A. Hewlett, Melinda Marshall, and Laura Sherbin, “How Diversity Can Drive Innovation,” *Harvard Business Review*, December 2013, <https://hbr.org/2013/12/how-diversity-can-drive-innovation>.

<sup>216</sup> See Mark Misercola, “Higher Returns with Women in Decision-Making Positions,” Credit Suisse, October 3, 2016, <https://www.credit-suisse.com/corporate/en/articles/news-and-expertise/higher-returns-with-women-in-decision-making-positions-201610.html>.

and understand that a lot of the work they do with the external world is done through their law firms.”<sup>217</sup>

- Quantopian “pitted the performance of *Fortune* 1000 companies that had women CEOs between 2002 and 2014 against the S&P 500’s performance during that same period. The comparison showed that the 80 women CEOs during those 12 years produced equity returns 226% better than the S&P 500.”<sup>218</sup>

Although these studies were conducted in businesses other than law firms, they make it clear that diversity offers competitive advantages to those who embrace it.

Law firm diversity can have much greater consequences even beyond clients. It opens doors in business that would otherwise remain closed. For example, a study published in the *Journal of Economics and Strategy* on professional-services firms found that “shifting from an all-male or all-female staff to one split evenly along gender lines could increase revenue by [up to] 41 percent.”<sup>219</sup> Additionally, a 2014 Glass Door survey found that two-thirds of people consider diversity an important factor in deciding where to work.<sup>220</sup>

Diverse law firms open themselves to greater opportunities. A law firm that makes diversity one of its building blocks is available to a more diverse group of clients. For example, being able to communicate in multiple languages opens a firm to a larger client base that would be impossible to reach otherwise. Diversity also establishes more and different networking circles and activities in which potential business can be found.<sup>221</sup>

## Diversity Reduces the Cost of Doing Business

Inadequately managed diversity is costly to law firms in terms of increased turnover—attorneys do not stay in firms where they are unhappy and feel excluded. Attorney attrition has been attributed to “lack of adequate training and mentoring opportunities,” “poor hiring practices,”

<sup>217</sup> Tom Sager, quoted in Melissa Maleske, “The High Cost of BigLaw’s Lack of Diversity,” *Law360*, May 17, 2016, <https://www.law360.com/articles/795768/the-high-cost-of-biglaw-s-lack-of-diversity>.

<sup>218</sup> Pat Wechsler, “Women-Led Companies Perform Three Times Better Than the S&P 500,” *Fortune*, March 3, 2015, <http://fortune.com/2015/03/03/women-led-companies-perform-three-times-better-than-the-sp-500/>.

<sup>219</sup> Sara F. Ellison and Wallace P. Mullin, “Diversity, Social Goods Provision, and Performance in the Firm,” *Journal of Economics and Management Strategy* 23, no. 2 (2014): 465–481.

<sup>220</sup> See “Two-Thirds of People Consider Diversity Important When Deciding Where to Work,” *Glassdoor*, November 17, 2014, <https://www.glassdoor.com/press/twothirds-people-diversity-important-deciding-work-glassdoor-survey-2/>.

<sup>221</sup> “Diversity Primer,” *Diversity Best Practices* 149 (September 29, 2009), [https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/import/embedded/anchors/files/diversity\\_primer\\_chapter\\_10.pdf](https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/import/embedded/anchors/files/diversity_primer_chapter_10.pdf).



and “poor management practices” often experienced by diverse attorneys.<sup>222</sup>

In a 2006 NALP Foundation study, 78 percent of new associates left their firms by the end of their fifth year. Turnover imposes substantial direct and indirect costs on law firms.<sup>223</sup> The higher the rate of turnover among diverse attorneys, the more homogeneous law firms become over time, thus increasing the likelihood of lateral transfers and more turnover.<sup>224</sup>

Unhappy attorneys typically do not bill as many hours as well-adjusted attorneys, and they are absent more often. Attorneys who feel isolated or not part of the team communicate less with coworkers, which makes their work take longer to complete and can decrease the quality of their service, and are less engaged with their work.<sup>225</sup>

According to one researcher, in the absence of gender diversity in firms absences increase, psychological commitment decreases, intent to leave increases, and social relations decrease among gender-diverse attorneys. In the absence of racial diversity, racially diverse attorneys experience those same outcomes. In the absence of age diversity, age-diverse attorneys’ intent to leave increases. Increased turnover follows other aspects that make attorneys feel excluded.<sup>226</sup> The argument is that law firms that adequately manage diversity will avoid these costs and be more profitable.

Law firms that are more diverse therefore have a competitive advantage, while law firms that hold women and minorities back from their full potential expose themselves to liability, prevent growth of their client base, and lose out on the “synergistic financial competitive advantage that diversity and inclusion represent.”<sup>227</sup>

<sup>222</sup> Smith-Barrow, “Minorities Interested in Law May Find a Home at Schools That Value Diversity,” <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2015/02/02/pursue-law-schools-that-value-diversity>.

<sup>223</sup> See “Attorney Retention Strategy Seminars,” JD Bliss, [http://www.jdblissblog.com/attorney\\_retention.html](http://www.jdblissblog.com/attorney_retention.html) (last visited on September 18, 2017).

<sup>224</sup> See Lee Simons, “Why Are Law Firms Failing on Diversity?” *Stanford Business Journal*, September 15, 2016, <https://www.gsb.stanford.edu/insights/why-are-law-firms-failing-diversity>.

<sup>225</sup> See Simons, “Why Are Law Firms Failing on Diversity?” <https://www.gsb.stanford.edu/insights/why-are-law-firms-failing-diversity>; Jonathan S. Leonard and David I. Levine, *The Effect of Diversity on Turnover: A Large Case Study* (Berkeley: University of California, 2006), 13, <http://faculty.haas.berkeley.edu/levine/Papers/Leonard%20&%20Levine%20Diversity%20&%20Turnover%20WP.pdf13>; and Axelrod, “Banking on Diversity: Diversity and Inclusion as Profit Drivers—the Business Case for Diversity,” [https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news\\_analysis/articles\\_2014/diversity-inclusion-profit-drivers.html](https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2014/diversity-inclusion-profit-drivers.html).

<sup>226</sup> See A. S. Tsui and B. A. Gutek, *Demographic Differences in Organizations* (Lanham, MD: Lexington, 1999).

<sup>227</sup> See Axelrod, “Banking on Diversity: Diversity and Inclusion as Profit Drivers—the Business Case for Diversity,” [https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news\\_analysis/articles\\_2014/diversity-inclusion-profit-drivers.html](https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2014/diversity-inclusion-profit-drivers.html).



Associates and partners working in heterogeneous settings are more productive given the diversity of thought, educational backgrounds, experience levels, and identities of their colleagues. “The diverse team’s collective intelligence . . . is generally significantly greater than a team whose individual members are uniformly ‘smart.’” This is largely attributable to the firm’s ability to avoid “groupthink” suffered by nondiverse firms that approach problems from the same angle.<sup>228</sup>

## Diversity Cuts Down on Litigation

Diverse law firms avoid discrimination lawsuits. Law firms get fired or sued for discrimination all the time:

- In 2006, Walmart stores fired two separate law firms owing to the firms’ lack of diversity.<sup>229</sup> General counsel for Walmart Thomas Mars stated, “Both of those firms were performing well, exceeding expectations, in the category of performance and in the category of cost”; however, diversity was a factor the company was not willing to compromise on.<sup>230</sup> Mars later stated that corporate legal departments need to be willing to drop law firms that refuse to aim for the diversity goal clients lay out in order to force the growth of diversity programs.
- In 2012, a \$200 million class action case was filed against Greenberg Taurig Hogs, alleging that females were compensated less than their male counterparts, were given less business-generating opportunities, and were assigned lower titles.<sup>231</sup>
- In 2012, a large firm headquartered in New York, Kelley Dyre & Warren, settled an age discrimination lawsuit brought by a former partner who stated that the firm’s policy of de-equitizing partners after the age of seventy constituted age discrimination.<sup>232</sup>
- In 2016, a lawsuit was filed against white-shoe law firm Chadbourne & Parke alleging that it paid female partners “lower salaries and bonuses than their male counterparts,” and that the plaintiff was fired after complaining about these allegations.<sup>233</sup>

<sup>228</sup> Ibid.

<sup>229</sup> See Karen Donovan, “Pushed by Clients, Law Firms Step Up Diversity Efforts,” *New York Times*, July 21, 2006, <http://www.nytimes.com/2006/07/21/business/21legal.html>.

<sup>230</sup> Ibid.

<sup>231</sup> See Debra Cassens Weiss, “\$200M Class Action Claims ‘Boys Club’ at Greenberg Taurig Hogs Work and Origination Credit,” *ABA Journal*, December 3, 2012, [http://www.abajournal.com/news/article/class\\_action\\_claims\\_boys\\_club\\_at\\_greenberg\\_taurig\\_hogs\\_work\\_and\\_origination/](http://www.abajournal.com/news/article/class_action_claims_boys_club_at_greenberg_taurig_hogs_work_and_origination/).

<sup>232</sup> See Catherine Ho, “Law Firms Hit with Workplace Discrimination Suits,” *Washington Post*, July 1, 2012, [https://www.washingtonpost.com/business/capitalbusiness/law-firms-hit-with-workplace-discrimination-suits/2012/06/29/gJQADOVjGW\\_story.html?utm\\_term=.de865c32191d](https://www.washingtonpost.com/business/capitalbusiness/law-firms-hit-with-workplace-discrimination-suits/2012/06/29/gJQADOVjGW_story.html?utm_term=.de865c32191d).

<sup>233</sup> Victoria Bekiempis, “Law firm Fired Lawyer After She Mentioned Pay Discrimination,” *New York Daily News*, August 31, 2016, <http://www.nydailynews.com/new-york/manhattan/law-firm-fired-lawyer-mentioned-pay-discrimination-article-1.2773468>.

- In 2017, BigLaw firm Steptoe & Johnson got hit with a class action gender discrimination lawsuit alleging unequal pay for women working for the law firm.<sup>234</sup>

According to Cyrus Mehri, the founder of Mehri & Skalet, a large Washington, D.C.–based class action law firm, the following “toolbox,” often used in employment discrimination case settlements, can help firms increase hiring and retention of minority lawyers:<sup>235</sup>

(1) Enhancing the company’s internal and external reporting mechanisms; (2) use of an independent diversity monitor; (3) use of an independent ombudsperson, who reports to the management, to address internal complaints; (4) use of a highly qualified industrial psychologist to revise and revamp certain company policies; (5) requiring hiring managers to conduct in-person interviews with a diverse slate of candidates for all open positions; (6) structured interviews; (7) creation of company sponsored affinity groups for minority lawyers; (8) use of an external task force; (9) mentoring programs and (10) linking management compensation to the recruitment, retention, and development of diverse employees.<sup>236</sup>

When law firms take steps such as those denoted above, discrimination will likely decrease as will ensuing litigation. Note that an objective human resources department can function as the neutral party employees can report to; it must prove itself trustworthy to employees so they can be assured they will not be retaliated against by the company if they speak up about harassment or discrimination complaints.

## Diversity Is Necessary for Effective Recruiting

Diverse firms are in a better position to recruit top talented diverse attorneys. When shopping for a firm to work in, diverse attorneys are more interested in joining diverse firms. Even nondiverse attorneys expect there to be a certain amount of diversity in law firms they join.

If a law firm is not diverse, it may have a difficult time recruiting at law schools, where students value diversity. Law students are increasingly concerned and interested in diversity. For example, at Harvard Law School, “Students interviewed [in response to a report on diversity] . . . said that they want more classroom discussion of social, racial and economic justice,

<sup>234</sup> See Kathryn Rubino, “Another Biglaw Firm Gets Hit with a Class-Action Gender Discrimination Lawsuit,” Above the Law, June 28, 2017, <http://abovethelaw.com/2017/06/another-biglaw-firm-gets-hit-with-a-class-action-gender-discrimination-lawsuit/>.

<sup>235</sup> See Cyrus Mehri and Danielle E. Davis, “A Few Thoughts on Tackling the Issue of Diversity and Inclusiveness in Law Firms,” Mehri & Skalet, PLLC, May 2011, <https://findjustice.com/blog/wp-content/uploads/2017/04/A-Few-Thoughts-on-Tackling-the-Issue-of-Diversity-and-Inclusiveness-in-L....pdf>.

<sup>236</sup> Ibid.

though the report points to the school's extensive course offerings and faculty-led reading groups covering those topics."<sup>237</sup> At Chapman Law School, over 250 law students supported a proposed law journal that was tentatively titled the "Chapman Law School Diversity and Practice Journal" but that was eventually named the "Law Journal of Social Justice."<sup>238</sup>

According to a Forbes study that surveyed three hundred senior executives of companies around the globe worth at least \$500 million, a diverse workforce attracts top talent.<sup>239</sup> "If you want to attract the best talent, you need to be reflective of the talent in that market," said Eileen Taylor, Deutsche Bank's global head of diversity.<sup>240</sup>

Diversity, particularly with the Millennial workforce, tends to attract young, highly skilled individuals. The same is said of law firms that make diversity a priority in their practice areas. As wealth now transcends nearly every ethnicity and nationality, the need for a diverse group of lawyers is critical to serving these clients. Young wealth—that is, the pioneers in tech, gaming, and other multimedia sectors—tends to feel easier about someone their age handling their legal affairs as opposed to someone older who has no concept of what these young, wealthy individuals have accomplished culturally.

## Diversity Provides Creative Problem Solving

Per Clio, a law practice management software company, one of the simple ways firms retain clients is by delivering excellent substantive work product.<sup>241</sup> To deliver that excellent substantive work product, there must be sharp decision making. Better decision making results in better satisfied clients, which refer additional clients, giving the firm additional business.

Some suggest that when a law firm is diverse, attorneys have insights and access to perspectives that they normally would not have.<sup>242</sup> Diverse attorneys have diverse viewpoints,

<sup>237</sup> Karen Sloan, "Law Students Say Harvard's Diversity Study Falls Short," Law.com, July 17, 2017, <http://www.law.com/sites/almstaff/2017/07/17/law-students-say-harvards-diversity-study-falls-short/>.

<sup>238</sup> See Joe Patrice, "Conservative Law School Freaks Out When Students Want to Talk About Diversity," Above the Law, March 3, 2016, <http://abovethelaw.com/2016/03/conservative-law-school-freaks-out-when-students-want-to-talk-about-diversity/>.

<sup>239</sup> "Global Diversity and Inclusion: Fostering Innovation through a Diverse Workforce," Forbes, 2011, [https://images.forbes.com/forbesinsights/StudyPDFs/Innovation\\_Through\\_Diversity.pdf](https://images.forbes.com/forbesinsights/StudyPDFs/Innovation_Through_Diversity.pdf).

<sup>240</sup> Ibid.

<sup>241</sup> See Jarred Correia, "4 Simple Client Retention Strategies for Law Firms," Clio, May 4, 2017, [https://www.clio.com/blog/client-retention-strategies-law-firms/?utm\\_campaign=Clio\\_Content&utm\\_medium=pr&utm\\_source=lexology&utm\\_content=4\\_simple\\_client\\_retention&utm\\_term=may\\_4\\_2017](https://www.clio.com/blog/client-retention-strategies-law-firms/?utm_campaign=Clio_Content&utm_medium=pr&utm_source=lexology&utm_content=4_simple_client_retention&utm_term=may_4_2017).

<sup>242</sup> Associates have been found to be more satisfied with their work when they were surrounded by a more heterogeneous group of coworkers that challenge their notions or understanding. See Brayley, and Nguyen, "Good Business: A Market-Based Argument for Law Firm Diversity," 28.

and a different perspective can sometimes help groups reach better decisions that benefit clients.<sup>243</sup> When a law firm is diverse, different perspectives are honored and everyone feels like he or she has a right to contribute to the health of the law firm.<sup>244</sup>

Others suggest that diverse team members live in two cultures simultaneously and therefore tend to be more creative thinkers.<sup>245</sup> Studies have found that heterogeneous groups, ones that include minority views and a diversity of persons, are more creative and devise more possible solutions to problems than homogeneous groups.<sup>246</sup>

The age we live in has repeatedly proven that creativity leads to success. “Numerous commentators have argued that enhancing the creative performance of employees is a necessary step if organizations are able to achieve competitive advantage.”<sup>247</sup>

We can think of diversity in law practice in much the same way. Law firm diversity can be compared to a box with 120 colors of crayons in it. From that big box of crayons, something creative is bound to emerge. Diversity fosters an environment open to innovation. According to a study by Roy Y. J. Chua of Harvard Business School, “The more your network includes individuals from different cultural backgrounds, the more you will be creatively stimulated by different ideas and perspectives.”<sup>248</sup> Presenting an idea to a diverse group of people typically results in more discussion than presenting the same idea to a homogeneous group.<sup>249</sup> Different backgrounds can produce different opinions and ideas.

<sup>243</sup> See Taylor H. Cox and Stacy Blake, “Managing Cultural Diversity: Implications for Organizational Competitiveness,” *Executive* 5, no. 3 (1991): 45–56.

<sup>244</sup> A study done by Berkeley’s law school found that associates preferred to have access to minority mentors or colleagues in order to delineate unique challenges. See Tiffani N. Darden, “The Law Firm Caste System: Constructing a Bridge between Workplace Equity Theory and the Institutional Analyses of Bias in Corporate Law Firms,” *Berkeley Journal of Employment and Labor Law* 30 (2009): 132. Those relationships allowed associates to “establish a mechanism to voice concerns.”

<sup>245</sup> See Darden, “The Law Firm Caste System,” 95.

<sup>246</sup> See C. J. Nemeth, “Minority Dissent as a Stimulant to Group Performance,” in *Group Process and Productivity*, edited by S. Worchel, W. Wood, and J. A. Simpson, 95–111 (Newbury Park, CA: Sage, 1992); Louise Jones, “Homogeneous vs. Heterogeneous Teams,” BizFluent, September 26, 2017, <https://bizfluent.com/info-8357494-homogeneous-vs-heterogeneous-teams.html>.

<sup>247</sup> Tony Proctor, *Creative Problem Solving for Managers: Developing Skills for Decision Making and Innovation* (New York: Routledge, 2014), 7.

<sup>248</sup> Roy Y. J. Chua, “Innovating at the World’s Crossroads: How Multicultural Networks Promote Creativity” (Working Paper 11-085, Harvard Business School, 2011), [http://www.interculturalservices.com/mt-content/uploads/2016/07/chua\\_hbs\\_2011.pdf](http://www.interculturalservices.com/mt-content/uploads/2016/07/chua_hbs_2011.pdf).

<sup>249</sup> When associates and partners work in a heterogeneous setting, firms are more productive given the diversity of thought, different educational backgrounds, experience levels, and diverse identities of the attorneys who work there. See Axelrod, “Banking on Diversity: Diversity and Inclusion as Profit Drivers—the Business Case for Diversity,” [https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news\\_analysis/articles\\_2014/diversity-inclusion-profit-drivers.html](https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2014/diversity-inclusion-profit-drivers.html).

Of course, opinions can result in disagreements, but disagreements provide opportunities for even more innovative thought and problem solving. Disagreements and discussions eventually lead to advancements. Lawyers who do not face conflict, strong discussions, and diverse opinions become comfortable and their firms cease to progress.

## Diversity Is a Reality

It really is a small world after all. We know this simply by how easy it is to connect to nearly anyone on the planet. And with the neighborhoods of our cities and towns becoming more diverse, many accept diversity as today's model of humanity. We are used to seeing others from different regions, cultures, and walks of life every day on television, social media, and the internet. We are now accustomed to what was once regarded as foreign and exotic.

As such, it makes sense that individuals who seek law firm services would rather see a firm-wide representation similar to what they see in their neighborhoods.<sup>250</sup> People want to see a variety of races and genders representative of their own lives.

A wide range of people of various ethnicities, genders, and backgrounds seek legal help. In the United States, more than fifteen million civil suits are filed annually.<sup>251</sup> In the United Kingdom, the Civil and Social Justice survey from 2006–2009 found that “36% of the adult population experience a civil and social justice problem over a three-year period. Of these, 9% take no action and 49% seek advice. Only 29% seek advice from traditional forms of legal adviser. Further only 13.3% sought advice from solicitors.”<sup>252</sup> People from all walks of life require legal help in some capacity. Simply put, when dealing with matters serious enough to warrant counsel, potential clients want someone with whom they feel comfortable and who they can relate to.

Demographically diverse law firms tend to put a large cross section of society at ease. Clients “often believe that their race will factor into how they will be treated throughout the process of

<sup>250</sup> In 1993, only 38.99 percent of associates were women and 8.36 percent of associates were minorities. In 2011, the associate makeup had grown to be composed of 43.35 percent women and 19.9 percent minorities. As for partners, in 1993, women accounted for 12.27 percent of partners while minorities only accounted for 2.55 percent of partners. In 2011, women accounted for 19.54 percent of partners, and minorities had grown to account for 6.56 percent of partners. Aviva Cuyler, “Diversity in the Practice of Law: How Far Have We Come?” American Bar Association, October 2012, [https://www.americanbar.org/publications/gp\\_solo/2012/september\\_october/diversity\\_practice\\_law\\_how\\_far\\_have\\_we\\_come.html](https://www.americanbar.org/publications/gp_solo/2012/september_october/diversity_practice_law_how_far_have_we_come.html).

<sup>251</sup> See “Infographic: Lawsuits in America,” Common Good, 2012, <http://www.commongood.org/blog/entry/infographic-lawsuits-in-america>.

<sup>252</sup> See “Individual Consumer Needs,” Legal Services Board, <https://research.legalservicesboard.org.uk/analysis/demand/individual-consumer-needs/> (last visited September 18, 2017).

obtaining relief and will factor into what relief may be available to them.”<sup>253</sup>

For example, “blacks would likely want their case in the hands of someone who sees the world as they do, someone who can personally identify with their historical and current struggle in this country as black Americans, and someone who may be less likely to judge them because they are black.”<sup>254</sup> “Same-race legal representation can . . . reinforce an undeniable bond—a historic, common struggle against racial discrimination and oppression.”<sup>255</sup> The African American general counsel may be happy to see an African American attorney representing the company. Locating a decent attorney is no easy feat for clients, particularly when the practice of law is done from a cultural point of view that they are unfamiliar with or uncomfortable with.

Old-school law firms are pretty much doomed once their old-school clients die off. The practice of law shifts to accommodate the changes in demographics. Those who represent the law must shift as well.

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<sup>253</sup> Shani M. King, “Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys,” *Cornell Journal of Law and Public Policy* 18, no. 1 (2008): 15.

<sup>254</sup> *Ibid.*

<sup>255</sup> Julie D. Lawton, “Am I My Client? Revisited: The Role of Race in Intra-Race Legal Representation,” *Michigan Journal of Race and Law* 22 (2016): 13, 22.

## Chapter 5: Law Firm Business Structure

Why do law firms keep hiring nondiverse people over diverse people, despite their diversity policies and best intentions? One reason may be that law firms have been “burned” in previous diversity efforts when they hired diverse people who turned around and accused them of not being diverse enough or tolerant enough or who continually dredged for problems regarding diversity. There are the self-reinforcing feedback loops, too.

Law firms seek to maintain low profiles and avoid people who seem “too diverse.” In addition to fearing they will hire someone who ends up making problems, law firms also worry they will hire someone who is too independent-minded and who cannot be controlled in the way that law firms are accustomed to controlling their workers.<sup>256</sup>

Law firms are thus fine hiring an attorney who is a mother, but not if she expects to be treated differently. Law firms want to hire African Americans and other minorities, as long as they do not make an issue out of their diversity. Diversity is generally sought after and valued, but not when it is “in your face.”

Years of enthusiastically representing attorneys of all sorts has led me to become a devil’s advocate. Take it from the law firm’s perspective: law firms are businesses, and they are driven by the needs and wants of their partners and their partners’ clients.<sup>257</sup> This means that to get a job in BigLaw attorneys need to be the sort of lawyer and person that partners and clients want. That is a fact.

So how does an attorney who wants a reduced-hour schedule or time off to raise kids fit into this reality? Not so well—and not because there is anything inherently wrong with raising kids but because this attorney does not fit into the model of a client- and economics-driven law firm that demands loyalty to the firm above all else.<sup>258</sup> Additionally, a law firm cannot control this attorney, cannot call him or her whenever it wants to. It believes the attorney will not be as motivated to work because of family obligations. The firm will simply hire an attorney without this “baggage” because then the law firm can be confident it will not have to deal with control issues. Baggage is anything that makes an attorney too different and not of the “mold” that law firms require.

<sup>256</sup> See, generally, Amanda Griffin, “10 Reasons Attorneys Are Ruining Their Futures in Law Firms,” *JD Journal*, May 12, 2017, <https://www.jdjournal.com/2017/05/12/10-reasons-attorneys-are-ruining-their-futures-in-law-firms/>, which finds that “superiors want to feel that their job is secure” and encourages associates not to undermine authority or shake things up.

<sup>257</sup> See Brian Farkas, “Understanding How Different-Sized Law Offices Do Business,” *Lawyers.com*, <http://research.lawyers.com/understanding-how-law-offices-do-business.html>.

<sup>258</sup> Aiden Franklin, “The 2016 Working Mother & Flex-Time Lawyers 50 Best Law Firms for Women,” *Working Mother*, July 11, 2016, <http://www.workingmother.com/2016-working-mother-flex-time-lawyers-50-best-law-firms-women#page-4>.



It does not matter what city the attorney is in. It could be San Francisco, Los Angeles, New York, or Charleston. Law firms only accept and embrace diversity when it does not come with baggage that impedes their ability to please partners and clients.<sup>259</sup> Law firm business structure has a lot to do with how they go about ensuring they cater to partners and clients.

## The Law Firm Business Model

Law firms have always mirrored the companies that employ them. Throughout the 1950s and during the post–World War II period, American business boomed. Law firms were eager to respond to this new business and began growing to accommodate these interests. Before the 1950s, law firms rarely were larger than twenty attorneys. As law firms grew to accommodate major American corporations, significant changes in their organization occurred.<sup>260</sup>

Today, the largest law firms service the largest clients and have the most institutional clients. Because law firms do not have predictable sources of recurring revenue, like their large corporate clients do, they must devote time and effort to securing new or continuing business, and they do that by doing good work that makes clients happy. Except for some very large law firms with longstanding institutional relationships (which provide virtual annuities of money), most law firms are made up of individual partners, each of whom has a book of business.

Modern law firms are groups of attorneys who operate under one roof to service clients. A law firm can be made up of as many businesses as there are partners.<sup>261</sup> In the past, law firms serviced clients who belonged to the law firm, but this changed over the past several decades. Today, most individual partners within a firm hold the clients, and the law firm pays partners a percentage of the business those clients generate.

Partners allocate a portion of a client’s work to other partners and associates in the firm and in turn receive a percentage of the revenue from work done for the client, including the work the partner completes as well as the work the partner allocates to others. The law firm, then, has an interest in pleasing these partners and doing what they want.<sup>262</sup>

<sup>259</sup> See Susan Letterman White, “Law Firm Models: Improving Diversity and Performance,” *Law Practice Today*, July 5, 2014, <http://www.lawpracticetoday.org/article/law-firm-models-improving-diversity-performance/>.

<sup>260</sup> Harrison Barnes, “The Industrialization of the American Law Firm,” *LawCrossing*, <http://www.lawcrossing.com/article/296/The-Industrialization-of-the-American-Law-Firm/> (last visited September 15, 2017).

<sup>261</sup> See, generally, Anders Spile, “Partnership Structures & Innovation in Midsize Law Firms,” *Legal Executive Institute*, 2017, <http://legalexecutiveinstitute.com/partnership-structures/>, calling law firms “an agglomerate of several smaller businesses all operating under one roof”.

<sup>262</sup> See, generally, Joel A. Rose, “Partner Compensation Plans,” *New York State Bar Journal* 78 (2006): 42, 43, which explains basic plans of compensation for partners at law firms; “Overview of Law Partner Compensation,” *The Lion Group*, <http://liongrouprecruiting.com/law-partner-compensation-overview/>; “New Data on Law Firm Partner Compensation,” *Above the Law*, September 19, 2012, <https://abovethelaw.com/2012/09/new-data-on-law-firm-partner-compensation/>.



According to an Aderant study from 2015, the main compensation system used by North American law firms is a subjective system in which partner “compensation is determined based on the subjective decisions made by a person or committee, although inputs to the decision may include statistical information.”<sup>263</sup> The law firm provides a brand for partners to operate under, hires associates and staff, and manages the business logistics for partners. In exchange, partners typically turn over anywhere from 50 to 90 percent of the revenue that they bring in, most commonly 70 percent. That money is then split into thirds among the partner who originated the business, the other partners, and the firm for operating expenses.<sup>264</sup>

What this means is that partners generate the business that sustains modern-day law firms. For law firms to survive and flourish in today’s business climate, they need to hire associates who please the partners by helping the partners please clients. What this also means is that concerns such as diversity are not paramount to law firms, but satisfying partners who generate business is.<sup>265</sup>

The issue is not that firms or people in firms are uninterested in diversity. Rather, the issue is that firms and people in firms are more interested in the economic bottom line and getting work done. Sometimes that concern dovetails nicely with diversity efforts, and other times it does not. The average client of the average large law firm is not a huge publicly held company like General Electric or Apple but instead is likely to be a closely held, midsize private company. These companies care about results and what their law firm can do for them. They hire the best law firms they can afford because they believe that is the way to ensure the best possible results. If diversity satisfies this type of client, diversity then becomes important to the partners that service that client and to the firm.

Once a law firm reaches a certain size and starts relying on major institutional clients for work, it can and must take diversity seriously. As discussed previously, diversity is critical to large corporations such as General Motors, General Electric, and Walmart. Clients like this can have a big impact on law firm diversity because they offer large chunks of business and are thus in a position to influence the leaders and agendas of their law firms.

Major corporate clients can require their law firms to be more diverse. Even when they are not required, law firms can strive to reflect the values and norms of their important clients—so if a client is diverse and takes inclusion efforts seriously, then the law firm that services that

<sup>263</sup> “Your Partner Compensation System Can Be Better: Here’s How,” Aderant, 2015, [http://www.aderant.com/wp-content/uploads/2015/10/Partner\\_Compensation.pdf](http://www.aderant.com/wp-content/uploads/2015/10/Partner_Compensation.pdf).

<sup>264</sup> See, generally, Rose, “Partner Compensation Plans,” 42, 43, which explains basic plans of compensation for partners at law firms.

<sup>265</sup> See Rhode, “Law Is the Least Diverse Profession in the Nation,” [https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm\\_term=.9d0fc7ef133b](https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.9d0fc7ef133b).

client will do the same. The law firms that tend to reflect the attitudes and culture of corporate America are the large, household-name firms that rely on large corporations for a great deal of business.

In some of the largest law firms, making partner may require an attorney to bring in a huge multinational client or several smaller clients with a lot of money to spend to prove the attorney's business-generating capability.<sup>266</sup> The most valuable clients are the ones that throw off tens of millions of dollars a year in business to law firms. Law firms are businesses and think with their pockets; if a client generates tens of millions in business, its law firm will take that client's needs extremely seriously.

## What Partners Want

Aside from the limited circumstances in which a law firm's economic interests and cultural values intersect with that of a major client, law firms often face difficulties making diversity a part of their hiring calculus. Because of the way they operate, firms seek a certain type of hire who may or may not be diverse.

To hold on to partners, law firms must recruit attorneys (associates) who are the most highly qualified and with whom partners feel comfortable. These objectives are sometimes compatible with diversity goals, but not always.

## Qualifications

An attorney's pedigree is extremely important to partners in law firms. The majority of law firms hire from the best law schools they can, and they hire the best students from those schools. Many law firms have grade cutoffs and base their reputation on the quality of their attorneys' academics (and minds)—which is essentially what they are selling for hundreds of dollars an hour.

When hiring lateral attorneys, law firms look very closely at the firm an attorney comes from and the training the attorney may have received there.<sup>267</sup> Law firms hire laterally based on the quality of the attorney's experience. They want attorneys who have been trained in the best firms and who show the most potential. The fact that a major law firm hired a candidate in the past is considered an indication that the attorney passed that firm's screening methods and was deemed capable and qualified.

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<sup>266</sup> Harrison Barnes, "The Only Seven Reasons a Law Firm Will Ever Make You a Partner," BCG Attorney Search, January 12, 2016, <http://www.bcgsearch.com/article/900046337/The-Only-Seven-Reasons-a-Law-Firm-Will-Ever-Make-You-a-Partner/>.

<sup>267</sup> Harrison Barnes, "Top 30 Factors Large Law Firms Consider When Hiring Lateral Attorneys," BCG Attorney Search, September 20, 2016, <http://www.bcgsearch.com/article/900047422/30-Ways-to-Tell-How-Employable-You-Are-by-a-Major-American-Law-Firm/>.

Firms look at the perceived “minds,” that is, the intelligence and intellectual capabilities, of prospective hires. These qualifications are important to law firms because they contribute to satisfying partners, who please clients, who generate business. It has always been this way.

The challenge is that when a law firm hires based only on academic qualifications—the prestige of a candidate’s law school and the ranking of the student within the graduating class—diversity figures into this calculation in a counterintuitive way.

Affirmative action programs and admissions diversity programs, which are designed to benefit diverse attorneys, sometimes ironically have the opposite effect. This can be the case when an affirmative action program advances a diverse individual through college and law school and into a law firm when that individual does not have the requisite skills (true abilities even though the “qualifications” look good on paper) to succeed without such support, and then fails in the work environment, making partners wary of hiring diverse attorneys in the future. This is also the case when an extremely capable and qualified diverse attorney is perceived as being less than qualified because he or she is diverse and *might* have been the beneficiary of affirmative action; once burned, partners tend to be shy.

I have spoken with several partners about the challenges they face with diversity issues. When a law firm and its partners pitch a potential client, they typically showcase the team they have put together to work on the matter. They like to present a team of attorneys that looks as good as possible on paper. This means the attorneys went to the best law schools, did well there, and received various honors and other accolades (Order of the Coif, Law Review, clerkships, and so forth). When clients are being charged high hourly rates, they expect their attorneys to have these sorts of backgrounds and want nothing but the best.

The partners and diversity coordinators I spoke with expressed concerns about how to integrate diversity into pitch sessions. Because of affirmative action–based programs and admissions diversity policies, at least a few partners said that they trust the qualifications of diverse graduates from only a few law schools, such as Harvard Law School, to be “up to par.”<sup>268</sup> Otherwise, they worried when hiring diverse candidates that the new hires might have earned their way into college and law school based on their diversity, not on their academic merit and abilities:

Every law school ends up with a cohort of black students with LSAT scores significantly lower on average than its nonblack students. The most selective law schools, employing racial preferences, take care to admit something like 5 to 10 percent of black applicants, in an attempt to approximate in their student body the black proportion of the population

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<sup>268</sup> See Barnes, “The Industrialization of the American Law Firm,” <http://www.lawcrossing.com/article/296/The-Industrialization-of-the-American-Law-Firm/>.

(which is 12 percent). That means that most black law students at that school come in with significantly lower LSAT scores than nonblack students.<sup>269</sup>

At least a few people mentioned they believed that for admission to Harvard Law School black applicants must have LSAT scores of 168 and above, which puts them in the 95th percentile for that test.<sup>270</sup> The Harvard Law School website states that admissions decisions are based on the Admission Committee’s considered judgment, and not standardized test scores alone.<sup>271</sup> The class of 2020 is listed as comprising 175 students in the 75th percentile of the LSAT, 173 students in the 50th percentile, and 170 students in the 25th percentile (out of the 562 students enrolled, LSAT statistics are provided for 519).<sup>272</sup> We cannot know whether this hidden admission requirement for black students is true, but a few partners confirmed they hire African Americans only from Harvard Law School because they believe it to be true.

Further conversations turned up the perception that state law schools accepted students who were not academically qualified to attend and who subsequently did not succeed in law firms. This includes schools such as the University of California, Los Angeles, the University of California, Berkeley, the University of Virginia, and the University of Minnesota. The partners I spoke with stated that black attorneys graduating from these schools did not seem to do well in law firms because their work was not of the same caliber as that of black attorneys

<sup>269</sup> See, generally, Michael Barone, “Blacks and Law School Discrimination,” *U.S. News & World Report*, August 29, 2007, <https://www.usnews.com/opinion/blogs/barone/2007/08/29/blacks-and-law-school-discrimination>, which cites a report by the U.S. Commission on Civil Rights. According to the Law School Admission Council, “Average LSAT scores were highest for Caucasian and Asian/Pacific Islander test takers. African American and Puerto Rican test takers had the lowest mean LSAT scores” for the 2003–2008 and 2013–2014 testing years (Susan P. Dalessandro, Lisa C. Anthony, and Lynda M. Reese, *LSAT Technical Report Series*, Technical Report 14-02 [Newtown, PA: Law School Admission Council, October 2014], [https://www.lsac.org/docs/default-source/research-\(lsac-resources\)/tr-14-02.pdf](https://www.lsac.org/docs/default-source/research-(lsac-resources)/tr-14-02.pdf)). And, after admitting that the racial scoring gap is widening on standardized tests for admission to graduate schools, the *Journal of Blacks in Higher Education* notes: “blacks admitted to our graduate and professional schools under affirmative action programs tend nevertheless to be qualified students entirely capable of handling the rigorous curriculum at these institutions. JBHE surveys of the graduation rates at our leading business, law, and medical schools show that black students — many, if not most, of whom were admitted under affirmative action guidelines — graduate at very high rates. In many cases their graduation rates approach 100 percent, and in almost all cases the black student graduation rate at these graduate and professional schools is very close to the graduation rate for white students” (“The Widening Racial Scoring Gap on Standardized Tests for Admission to Graduate School,” *News & Views, Journal of Blacks in Higher Education*, n.d., [http://www.jbhe.com/news\\_views/51\\_graduate\\_admissions\\_test.html](http://www.jbhe.com/news_views/51_graduate_admissions_test.html)).

<sup>270</sup> See “LSAT Score Conversion,” <https://www.alphascore.com/resources/lSAT-score-conversion/>.

<sup>271</sup> “Admissions FAQ: What Are the Eligibility Requirements for Applying to the Harvard Law School J.D. Program?” Harvard Law School, <http://hls.harvard.edu/dept/jdadmissions/apply-to-harvard-law-school/the-application-process/admissions-faq/#faq-1-3>

<sup>272</sup> “HLS Profile and Facts,” Harvard Law School, <http://hls.harvard.edu/dept/jdadmissions/apply-to-harvard-law-school/hls-profile-and-facts> (last visited November 15, 2017).

who graduated from Harvard Law School. (But see the later section “Preconceptions About African American Attorneys” on bias in evaluating the work product of diverse attorneys.) Some partners believed state schools admitted students who were not as intellectually capable as students admitted to better schools.

As a result of this doubt and assumption, several diverse attorneys confided that they felt as if they needed to work harder than white attorneys at their firms because of the “negative perception” that affirmative action cast on them. In many respects, affirmative action may have the unintended impact of marginalizing diverse attorneys because these programs cause firms and clients to perceive diverse attorneys as unqualified for the positions they apply for.

## Comfort Level

A partner’s comfort level with an associate may or may not coincide with a firm’s diversity agenda. The problem with attorneys hiring people they are most comfortable with is that these new hires are often people who are alike and share a background with the hiring attorneys. This perpetuates a certain diversity or lack thereof.

Many older attorneys have been representing clients for forty years or longer. Forty years ago, large law firms were almost the exclusive domain of white Protestant men. As discussed earlier, because of homophily, people tend to hire people who are similar to them. Thus, the white Protestant men tended to hire people like them, advanced people like them, and handed down business to people like them.

Although the makeup of law firms has changed dramatically since the 1970s, it has been slow in changing. The progression is something like the following: in the 1950s and 1960s, only white Protestant males worked in large law firms. Next, these white Protestant males hired other attorneys like them and gave them their business when they retired, continuing a power structure in law firms that is dominated by white Protestant males. Then, this cycle repeated. People hire those like them and with whom they feel most comfortable. White Protestant males thus stay in power in law firms, holding the majority positions, numbers, and business.

If a firm includes more diverse attorneys, it will likely promote more diverse attorneys to partners, who will likely hire more diverse attorneys.

## The Three Essential Criteria Firms Use for Hiring Attorneys

Aside from qualifications and comfort level, almost all law firms and individual partners consider three essential criteria in hiring decisions:

1. Can the attorney do the job?

2. Can the attorney be managed?
3. Will the attorney do the job long term?

When law firms hire any attorney—diverse or not—they ask these three questions that get to the core of how law firms operate as businesses in a competitive and profitable manner. One of the best ways law firms can further their diversity goals is by filtering diversity efforts through these three questions.

Similarly, attorney candidates must consider hiring partners to be their customers: to get hired, candidates must give partners what they want, which, mainly, means being able to answer yes to each of these three questions.

## Can the Attorney Do the Job?

Law firms ask, “Can this attorney do the job?” as soon as they receive a résumé. Most attorneys can do the job, but there are exceptions.

Law firms typically base hiring decisions on qualifications—the law school attended, grades received, and first jobs attained—which presumably signal an attorney’s ability as well as forecast future potential. Yet, hiring decisions based on such qualifications penalize some attorneys because these qualifications do not necessarily represent their ability to do the job or translate into future success.

For example, in a Harvard Law School study of four different graduating classes across four different decades, researchers found that “grades are not predictive of partnership for women or men.”<sup>273</sup> Additionally, a 2010 study by Richard Sander and Jane Yakowitz argues that law school prestige has lost much of its credibility as a predictor of attorney career success.<sup>274</sup> Instead, characteristics such as commitment, the ability to overcome adversity, the ability to generate business,<sup>275</sup> and other measures better predict success in the career trajectory of an attorney.

Law firms always take a risk when hiring an attorney at the entry level. The only information

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<sup>273</sup> David B. Wilkins, Bryon Fong, and Ronit Dinovitzer, “The Women and Men of Harvard Law School: Preliminary Results from the HLS Career Study,” Harvard Law School Center on the Legal Profession, 2015, <https://clp.law.harvard.edu/assets/HLS-Career-Study-FINAL.pdf>.

<sup>274</sup> Richard Sander and Jane Bambauer, “The Secret of My Success: How Status, Eliteness, and School Performance Shape Legal Careers,” *Journal of Empirical Legal Studies* 9 (2012): 893–930.

<sup>275</sup> See Mark Beese, “Four Necessary Leadership Skills for Lawyers,” *Law Practice Magazine*, September 2015, <http://leadershipforlawyers.com/wp-content/uploads/2013/11/Four-Leadership-Skills-for-Todays-Lawyer.pdf>.

they have to go on is the attorney's grades in law school and the attorney's interview ability. To protect against mistakes, law firms offer summer associate programs to test whether people are more likely to swim than sink. Because the ability to do the job is so important, if an attorney has not undergone the summer associate vetting process, a law firm will be reluctant to take a chance on that attorney. This is true even for graduates of major law schools.

Yet, even when firms have an attorney's previous work experience to judge that attorney's ability to do the job, they still perceive they are taking a risk hiring diverse attorneys. Because NALP and other groups use entry-level hires to measure firms' diversity, law firms are under tremendous pressure to hire diverse classes of first-year associates. They compete for diverse candidates, specifically black attorneys. Because of this practice, many diverse attorneys who are lateralling from their first position are presumed—often wrongly—to have less ability to do the work because they were hired initially to fill diversity spots. This unfortunate perception results in many diverse attorneys having to work harder than others to prove themselves once they get into a law firm.

And the academic qualifications of black attorneys continue to be misperceived when they lateral into new firms. When white attorneys who received less-than-stellar grades in law school lateral from their first major law firm to another firm, most prospective law firms disregard the lackluster grades. The new firm reasons that because the attorney was hired initially by a major law firm, he or she can do the work and get along.

On the other hand, the taint of affirmative action follows black attorneys when they attempt to lateral from their first job to another. It comes down to this: many prospective law firms believe that black candidates were admitted to certain prestigious law schools and were offered their first job at a major law firm because of their diversity, not their ability. This is clearly an unfair and very problematic judgment on the part of hiring firms. But I make this observation because I have seen it in action. Many black attorneys I have worked with have had difficulty transitioning out of their first legal position because their ability to do the job is questioned.

It is important to note that “doing the job” pertains not only to being able to accomplish the work on the basis of intellectual ability but also to growing in the position and becoming part of a team. Each law firm has its own ways of doing things, and an attorney must be able to adapt to the unique culture of the law firm in order to be able to do the job.

## **Can the Attorney Be Managed?**

Law firms want to be sure that any attorney they hire can be managed. Many attorneys are not manageable. In fact, a great many attorneys end up leaving the practice of law in law firms



precisely because they cannot be managed.<sup>276</sup>

“Being manageable” means an attorney follows instructions, works to the best of his or her ability, cares what others think, and tries to his or her best ability to do good work and to continually improve. It also means that an attorney will not try to find fault with the organization or the people in it, that the attorney will not cause trouble for the firm, and that the attorney is willing to submit to the needs of the firm in exchange for employment and the benefits that accrue from that.

Being controllable and manageable apply not only to associate hiring but also to partner hiring. Partners also must be managed by the law firms that hire them. Just like associates, partners must submit to the law firm’s control and not make issues. These personality traits are important to law firms, and not every person fits the definition of being manageable.

In general, law firms are conservative institutions. They exist to serve others, and the needs of their employees, including attorneys, are supposed to be subordinated to those of their clients. The majority of attorneys in law firms, including partners and counsel, are expected to work silently in the background and to follow orders while others do the more exciting and glamorous work in the firm.<sup>277</sup>

Associate attorneys are expected to be tools of the organization. They are to bill hours, follow orders, and not draw unnecessary attention to themselves or the firm.<sup>278</sup> Law firms want worker bees. In associates, they are not looking for business generators or activists. When law firms hire attorneys, they want to make sure their attorneys will not sue them, will not air firm dirty laundry, will be controllable, and will rely on them and be dependent on them.

It’s crucial that attorneys depend on their law firm—for their self-image, income, lifestyle, and more. This is one reason why attorneys from wealthy backgrounds typically do not do well in law firms: they do not see the value of contributing so much hard work when they need not depend on a firm to supply income, status, or lifestyle. To succeed in law firms, attorneys must desire the income and the (presumed) social prestige that comes from being an attorney. In short, the attorney needs to have desires that the law firm can fulfill, which gives the firm leverage for managing that employee.

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<sup>276</sup> See Barnes, “The Only Six Factors Prestigious Law Firms Care About When Hiring Lateral Attorneys,” <http://www.bcgsearch.com/article/900047665/The-Only-Six-Factors-Prestigious-Law-Firms-Care-about-When-Hiring-Lateral-Attorneys/>.

<sup>277</sup> Ibid.

<sup>278</sup> Anna Jaffe, Grace Chediak, Erika Douglas, Mackenzie Tudor, Robert W. Gordon, Lucy Ricca, and Susan Robinson, *Retaining and Advancing Women in National Law Firms* (white paper, Stanford University, May 2016), <https://law.stanford.edu/wp-content/uploads/2016/05/Women-in-Law-White-Paper-FINAL-May-31-2016.pdf>.

Certain types of people are notoriously unmanageable. Firms do their best to avoid hiring the campus activist, the person who seems angry all the time, the individual who does not want to fit in, and the candidate who is more concerned with his or her personal needs and desires than those of the firm. Law firms do not want trouble.

The “us against them” mentality of movements and causes scares law firms.<sup>279</sup> Law firms do not wish to be the battleground where employees fight out issues of social justice. Law firms want to serve their clients and avoid drawing negative attention to themselves in the process. This is why law firms tend to shy away from hiring employees who are involved in a cause or who might stir up problems within the firm. Whatever the societal benefits of social justice activism, law firms simply see it as trouble and cost—both to the firm and to the firm’s clients—and wish to avoid candidates who might raise these issues.

Years ago, I worked with two attorneys who were from the same law firm. They had gone to the same law school and had similar grades. They were both in the same practice area and looking for a position in the “bastion” of liberalism: San Francisco. One was white and the other was black. The black woman had a bunch of stuff on her résumé about how she had been a national leader of the Black Law Students Association and was proud to have sued her law school with other black students over an issue of diversity. I thought she was a great candidate. She did not get a single interview; the white woman got several interviews and job offers.

Law firms may find it difficult to ascertain whether diverse candidates are manageable. In today’s market, it’s likely that the person hiring candidates does not share a background or culture with diverse candidates and, especially because of cultural misconceptions or misunderstandings, will have no way to judge whether a candidate is the type of worker bee the firm is looking for.

## Will the Attorney Do the Job Long Term?

A large concern is whether an attorney will remain with the firm long term. Firms invest tremendous amounts in hiring attorneys, training attorneys, bringing attorneys up to speed on matters, and placing attorneys on existing client teams. Law firms want to hire people who will stay around long enough for them to recoup their investment at least. They also want to hire attorneys they believe have the potential to become partners who will grow the firm in the future.

Law firms have huge problems with retention, and in many cases retention is lowest for diverse attorneys. Most often, the problem is systemic in a law firm and not the fault of the diverse attorney. Inside law firms, diverse attorneys experience many issues that can decrease their

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<sup>279</sup> Progressive social justice movements are forms of collective action that emerge in response to situations of inequality, oppression, and/or unmet social, political, economic, or cultural demands.

ability to do the job long term, such as feeling left out of the social group of the law firm, having their work criticized more than that of peers, lacking role models for their diverse group, having trouble getting sponsors and mentors, having no access to inside information about the firm and feeling uncertain about the future, and feeling like token representatives of diversity who are really not given substantive work to do.

Law firms want to hire attorneys with long-term potential. Yet many factors can make diverse attorneys not want to do the job long term or to be perceived as attorneys who cannot do the job long term. Without a solid support network, they often do not feel welcome in the law firm environment and end up leaving, which reinforces the perception that diverse attorneys do not stay for the long term, creating a self-perpetuating cycle.

## Class Issues in Law Firms

When the British arrived on the Fijian Islands, they had an impossible time getting the native Fijians to work.<sup>280</sup> The Fijians' lives had always been simple and did not require hard work. If they needed something to eat, they tapped a coconut or speared a fish. Then it was time for a nap.

Fed up with the differences in work culture, the British brought over Indians from India to work.<sup>281</sup> The Indians quickly set up shops and worked hard, showing they had the work ethic and drive to get things done. Many hardworking people of Indian descent still call the South Pacific home, and they are resented by native Fijians because they are now in positions of power and comprise the majority of professionals, business owners, and middle class in large parts of the country.<sup>282</sup>

What is interesting about this, of course, is that the British (who in this scenario might be termed "the upper class") certainly did not want to do the work. They wanted to live off the fruits of others' work. Simultaneously, the native Fijians (who might be termed the "lower class") did not want to do the work either. They wanted to live off the fruits of nature's work instead. So, the British went searching for people who wanted to be the middle class and do the work. Societies have always struggled to find people to do the work. Today, for example, countries

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<sup>280</sup> See, generally, "Fiji History," Fiji Guide, <http://fijiguide.com/page/history-1> (last visited September 18, 2017). "Sir Arthur Gordon, the colony's first governor. . . was dead set against using natives to work the fields. . . . He [took] steps immediately to protect Fijians from being exploited as a labor force . . . [and] set up a taxation system requiring Fijians to work their own land rather than that of a planter."

<sup>281</sup> Ibid. "Large-scale plantations seemed the obvious answer to the new rulers, but labor was scarce. . . . Gordon [Fiji's governor] had a plan. Having previously worked in Mauritius and Trinidad, he had seen indentured Indian labor. He convinced the planters to bring over Indians as the answer to their needs."

<sup>282</sup> See Mitchell Landsberg, "Race, Resentment Fuel Attacks on Indians in Fiji, Forcing Many to Flee," *Los Angeles Times*, June 22, 2000, <http://articles.latimes.com/2000/jun/22/news/mn-43757>.

like the United Arab Emirates and Saudi Arabia largely import people to work in lower- and middle-class positions. “Source countries include [but are not limited to] Afghanistan, Bangladesh, China, India, Indonesia, Nepal, Pakistan, The Philippines, Sri Lanka, Thailand, and Vietnam.”<sup>283</sup> Doctors, lawyers, engineers, accountants, and others come from the United States, Europe, and other developed, wealthy countries with lots of middle-class workers.<sup>284</sup>

Around the world, hotels are run and managed by Europeans and Americans and their rooms are cleaned by people from the Philippines, Thailand, and other poor countries; cruise ships that plow the seas are captained, owned, and managed by Americans and Europeans, and the kitchens are staffed and rooms cleaned by people from the Philippines. Work is done largely by the lower and middle classes in countries like the United Arab Emirates. The upper classes are those born into wealth (and oil), and thus are serviced by and control those below them on the social hierarchy. This sort of arrangement—in one form or another—is how class, money, and status have interacted in various societies for centuries.

Law firms have a fundamental problem with treating certain people inside as upper-class citizens and others as lower-class citizens. As in society, it is often the upper classes who are the least diverse and yet the most powerful, who have the power to perpetuate the system or change it. In this class-based system, the “important” people are often less diverse than the people who service them because of differences in status and power. This creates a negative self-reinforcing cycle of classism.

The issue of class is neither new nor unique to law firms. For example, Karl Marx observed in *The Communist Manifesto* that “the history of all hitherto existing society is the history of class struggle.” Class is an explosive issue in American society—nobody wants to talk about it because nobody wants to be categorized or feel that they are less than another.

But class factors into the diversity equation and must be addressed. I have experienced the kinds of disadvantages associated with growing up in a poor working-class environment and have felt first-hand the problems caused by that kind of background when I tried to get ahead in the middle-class field of law.

The surroundings I grew up in are a form of diversity—in single-parent homes, in public schools, in working-class neighborhoods, in conservative prep schools where I did not excel because I did not fit in. I learned to live with being different. I learned to live with

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<sup>283</sup> See Sara Hamza, “Migrant Labor in the Arabian Gulf: A Case Study of Dubai, UAE,” *Pursuit: The Journal of Undergraduate Research at the University of Tennessee* 6 (2015): 81, 111.

<sup>284</sup> See, generally, Françoise De Bel-Air, “Demography, Migration, and the Labour Market in the UAE,” *Gulf Labor Markets and Migration* 1 (2015): 11, which states that “Western nationalities are overwhelmingly in the upper echelons of occupations” in the United Arab Emirates.

disenfranchisement. I learned what it meant to be treated like you were high class and what it meant to be treated like you were low class. I learned what it meant to be part of a community and family and what it meant to be isolated and marginalized. I knew what it meant to be included and what it meant to be ignored.

I believe *diversity* means more than just your race or sex, social class, or religion. Diversity has a lot to do with where you came from and what you have overcome. There is a cost to growing up as I did. I am not black or a minority, but I learned what it is like to be in an environment that pushes you down.

## Comparative Analysis of Class Values and Success

Being an attorney is the most middle-class job you can have and requires middle-class values of hard work, consistency, predictability, education (and educational accomplishment), and working for the rich (or, in some cases, the poor). One of the greatest problems in the legal profession comes when people from lower-class or upper-class backgrounds try to enter the legal profession—especially prestigious law firms.

Something I learned long ago is that the upper and lower classes are more like each other than either is like the middle class.

- The upper and lower classes are less likely than the middle class to work (and if they do, the jobs do not require much thought).<sup>285</sup>
- Frustrated and not part of the “mainstream” workforce, the upper and lower classes often experience various social and other problems to a greater degree than the middle class.<sup>286</sup>

<sup>285</sup> See, generally, Ali Meyer, “Report: Low-Income Entitlements Make Recipients Less Likely to Work,” *Washington Free Beacon*, September 2, 2015, <http://freebeacon.com/issues/report-low-income-entitlements-make-recipients-less-likely-to-work>. “According to the [Government Accountability Office], an increase in income could result in a loss of Medicaid benefits for an individual and thus cause them to be less likely to pursue employment” and “found the same result when looking at the housing assistance program”; and Anthony W. Orlando, “The Rich Aren’t Rich Because They Work Harder. They Work Harder Because They’re Rich!” *Huffington Post*, February 14, 2014, [http://www.huffingtonpost.com/anthony-w-orlando/the-rich-arent-rich-becau\\_b\\_4791626.html](http://www.huffingtonpost.com/anthony-w-orlando/the-rich-arent-rich-becau_b_4791626.html). The article points out that the rich work more because they have the option to do so; by this same logic, the rich also have the option to not work at all because they are already rich. The middle class does not have a choice because they cannot rely on entitlements and are also not rich enough to have the option to not work.

<sup>286</sup> See, generally, Khouloud Essoussi, “Problems Facing Working Poor in the US” (slideshow), January 1, 2014, [https://prezi.com/\\_pzsquvhy2mk/problems-facing-working-poor-in-the-us/](https://prezi.com/_pzsquvhy2mk/problems-facing-working-poor-in-the-us/); Marlene Kim, “Problems Facing the Working Poor,” Economic Policy Institute symposium, 1999. The problems the working poor face are listed as: holding the lowest-paying and unstable jobs, lacking full-year employment, lacking higher education, having “poor health constraints,” being less likely to be in two-parent families, less access to healthcare, and not participating in welfare programs despite qualifying for them. See also Orlando, “The Rich Aren’t Rich Because They Work Harder,” [http://www.huffingtonpost.com/anthony-w-orlando/the-rich-arent-rich-becau\\_b\\_4791626.html](http://www.huffingtonpost.com/anthony-w-orlando/the-rich-arent-rich-becau_b_4791626.html).

- Hard drug use generally starts with the upper class and goes straight to the lower class, bypassing the middle class (the middle class is working!).<sup>287</sup>
- The middle class cares what others think of them, and the lower and upper classes often could care less!<sup>288</sup>
- The middle class tries to fit in—the lower class does not care and neither does the upper class.<sup>289</sup>

The problem is that people from the lower classes and upper classes often were not raised with the same work ethic demanded of the middle class and thus demanded by modern-day law firms. This is not to say that people from these two classes do not work hard or value hard work in certain contexts. Nobody would argue, for example, that an individual of the lower class who works three jobs to put food on the table does not have an exceptional work ethic! But that kind of work ethic is different from the kind of “put your head down and bill hours” work ethic that is typically associated with middle-class professionals and that is necessary for success in a law firm environment.

With lower- to working-class attorneys, I see a recurring problem—they view their jobs as them exchanging a certain amount of time for a certain amount of money. If two thousand hours per year is required, that is what they are going to try to give. If they need to work occasionally on the weekend, then that is what they will do. It is an attitude of “I am selling my labor for this amount of money.” Whereas the middle-class mentality of an attorney is to put in as much time as it takes to solve the case or make the client happy.

When I see attorneys failing, dropping out, not making partner, and having issues with the practice of law, it is mostly because they do not understand the value of hard work and constant improvement. Regardless of an attorney’s diversity—and social class is a form of diversity—success as an attorney follows, in large part, their ability to understand the value of

<sup>287</sup> See, generally, Jeffrey M. Jones, “Drinking Highest among Educated, Upper-Income Americans,” Gallup, 2015, <http://www.gallup.com/poll/184358/drinking-highest-among-educated-upper-income-americans.aspx>. A 2015 Gallup Poll “indicated higher alcohol use among the upper class, while abuse of prescription opioids is prevalent among the lower economic class”; Megan E. Patrick et al., “Socioeconomic Status and Substance Use Among Young Adults: A Comparison Across Constructs and Drugs,” *Journal of Studies on Alcohol and Drugs* 73 (2012): 722, 772. Alcohol use and marijuana use in young adulthood were associated with higher childhood family socioeconomic status.

<sup>288</sup> Ibid. Trying to fit in as middle class ties into caring what others think about you.

<sup>289</sup> See, generally, Emmie Martin, “70% of Americans Consider Themselves Middle Class—but Only 50% Are,” CNBC, June 30, 2017, <https://www.cnbc.com/2017/06/30/70-percent-of-americans-consider-themselves-middle-class-but-only-50-percent-are.html>. A Northwestern Mutual survey that found that 70 percent of Americans consider themselves middle class, while only 50 percent are actually a part of it. This indicates that people who consider themselves middle class care that others think they are middle class.

constant, never-ending commitment and unwavering discipline to improve and be the best they can be. They get ahead by proving their merit.

It is a profound problem when the upper and lower classes are advanced on something other than merit. They develop expectations that they should be making large salaries, that they should be surrounded by other attorneys who also went to great schools, that they should be doing work on behalf of major corporations, and that they should have a shot at being a partner in a major American law firm.

But this rarely works out. Unless they have learned the sorts of middle-class values that are necessary to succeed in the law firm atmosphere, they usually do not perform at the level required to advance. Not to say they cannot learn this work ethic; in fact, they *must* learn it if they are going to succeed in BigLaw.

Generally, middle-class people are raised with the attitude and learn the skills to provide service to those who have the money to pay for it. From a young age, they are schooled, pushed, and taught these skills and the importance of pleasing superiors. They also watch their parents do it, and they go to schools that push this and show them how to do this. They are told they should be doctors, lawyers, accountants, and other middle-class professions, and the necessity of stability and having a career is drilled into them. This is why middle-class people do so well as attorneys.

In contrast, upper-class people are raised watching their parents hire and fire lawyers. (These are overgeneralizations—stereotypes, if you will—of these classes of people.) They learn that lawyers are people who serve them and that attorneys will grovel, if necessary, to get their business. Lower-class people may not even be exposed to attorneys at all. Further, the parents of lower-class people are unlikely to set an example of the middle-class work ethic. “Lower class families have lower parental literacy levels . . . less stable housing . . . and less security that comes from stable employment,” among other things.<sup>290</sup>

Working-class people are more likely to view the employer as the “enemy,” someone who is exploiting them and not paying them enough per hour and someone to unionize against. Because lower- to working-class people see work as a “job,” they don’t see what they do as important or as a mission. Because it is not a mission, they approach everything as a trade-off: this much work for this much money.

This attitude misses a hugely important point:

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<sup>290</sup> See Richard Rothstein, “Does ‘Poverty’ Cause Low Achievement?” Economic Policy Institute, October 8, 2013, <http://www.epi.org/blog/poverty-achievement/>.



- It is the quality of the labor that counts.
- It is the passion behind the labor that counts.
- It is being a client's advocate and not a seller of labor that counts.
- It is seeing yourself as essential to the client's happiness and not just a pawn that counts.

Being an attorney involves billing hours, but that is not the same as punching a time-clock. Law is a profession an attorney grows into, develops a reputation in, becomes more and more skilled at, and spends a lifetime doing. Attorneys do not sell their labor or their time. They sell something more significant: relationships, peace of mind, a sense of security for clients in the necessary transactions in life.<sup>291</sup>

Attorneys experience class-based issues in law firms when they do not understand what is expected of them (middle-class mentality) and when they do not have the drive to do what it takes (middle-class work ethic). Socioeconomic level might not be a category of diversity we usually think of, but it can mean that certain diverse attorneys face additional hurdles to achieving success in law firms.

- *Associates are judged by hours billed and their chances of making partner.* The hours of every associate in a law firm are measured and reported. Hours are needed to get bonuses and stay employed. The chances of making partner are related to an attorney's hours billed, strength of background, business development potential, and quality of work.
- *Partners are judged by the amount of business they bring in, collections, and hours billed.* Partners are under a lot of pressure to generate business. The most powerful partners inside of any law firm are those with the most business—the ones who can give work to other associates and partners.
- *Both partners and associates are judged on the quality of their education and accomplishments.* Their accomplishments include such factors as trials won, deals done, clients brought in, presentations made, titles attained in the community, social standing achieved in the community and in the firm, among other things. Each law firm has a system of values and requirements that it uses to judge its attorneys and by which the attorneys inside of the firm judge each other.

## The Great Chain of Being in BigLaw

Remember Aristotle's Great Chain of Being? The social structure of large American law firms

<sup>291</sup> Jordan Furlong, "What Do Lawyers Sell?" Law Twenty-21, June 26, 2013, <https://www.law21.ca/2013/06/what-do-lawyers-sell/>; "What Do Lawyers Sell?" EJ Legal, <http://www.ejlegal.co.uk/what-do-lawyers-sell/>; Philip Ware, "What Do Lawyers Sell? Hint: It's Not Law!" LinkedIn Pulse, September 1, 2016, <https://www.linkedin.com/pulse/what-do-lawyers-sell-hint-its-law-philip-ware/>.

is more consistent with the Great Chain of Being in the Middle Ages than other American businesses are. In the same way that Medieval society was organized under a strict hierarchy, so too is the modern large law firm:

- *The large law firm operates with the managing partner (or law firm CEO) at the top—the king.* This is the person who is the face of the kingdom and who is held out as being in charge.
- *Beneath the managing partner are nobles, who are the other partners and have “land” (i.e., own a percentage of the firm).* The land that nobles control is equivalent to the percentage of a law firm equity partners control. Very few people are made equity partner in large law firms; equity partner is a rarified position.
- *Next are the knights: the salaried associates, income partners, and counsel attorneys.* The salaried attorneys in the firm are respected for the work they do. The very best knights and the ones who make the largest sacrifice for the nobles, over the longest period, can become nobles, but that is rare.
- *Next are the guilds: accounting, Human Resources and their junior helpers and assistants, staff attorneys, paralegals, and other business services professionals in the firm.* The largest kingdoms have a proliferation of guilds.
- *Next come the serfs: the para-professional staff in the firm.* The serfs were bound to the land in Medieval society and were like slaves. In law firms, serfs might be the people without professional skills, such as break room help and people in the copy room, filing assistants, and receptionists who are employed full-time.
- *Next come the peasants: independent contractors.* Peasants were free and sometimes had skills, but often did not. The peasants inside of a law firm are contractors who maintain the building and people brought in for short-term assignments, such as contract attorneys, contract secretaries, and contract paralegals. They are the lowest status because they have no attachment or ongoing permanent relationship with the firm.

As was true in Medieval society, there is very little movement between classes in a major law firm. The serfs and peasants are unlikely to ever become guild members, guild members are unlikely to become knights, knights are unlikely to become nobles (equity partners), and nobles are unlikely to become kings. The law firm is a Medieval sort of institution, and the larger a law firm becomes, the more Medieval it is.

The nobles own the firm and set the rules that make a noble-rewarding system self-perpetuating. Nobles do not want their land carved up and doled out to more land owners. They want to keep things the way they are so that they stay in power and can continue to get as large a share of the profits as possible. The knights try to keep each other down and undermine each other.

Though it may be controversial to say, based on my observations, diversity and inclusion in the law firm *decreases* the higher up the chain you go:

- *The king—the managing partner*—is more likely to be a white male than a woman or person of color or gay.
- *The nobles—the equity partners*—are much more likely to be white males than women, people of color, or gay.
- *The knights—the salaried associates, counsel, and income partners*—are much more likely to be white than diverse.
- *The guild professions—the accounting staff, Human Resources staff, and other professionals*—are more likely to be white than diverse.
- *The serfs—the janitors, receptionists, and break room staff*—are more likely to be diverse than white.
- *The peasants—the contract secretaries, paralegals, and attorneys*—are more likely to be diverse than white.

One of the major sources of debate inside of law firms is the diversity that exists among the knights, nobles, and kings. Among these three groups of the lawyer class, the knights (salaried associates, counsel, and income partners) tend to have the most diversity. The diversity among the knights is most evident and prevalent among those who are hired directly out of law school.

The reason that law firms can better make more diverse and inclusive hires at the entry level is because they know that most of their entry-level hires will never become nobles. They can even make non-equity partners out of some of these knights—but they still are not nobles and own no land. The law firm can look “diverse” to the outside world when it is not. Report after report has noted that the place where diversity lacks the most is at the noble (equity partner) level.

Interestingly, law firms may even elevate the occasional diverse noble to a king. In fact, the few diverse knights who become nobles often have a better-than-average chance of being elected to king by their firms to show the outside world that they are, in fact, diverse when they really may not be.

But neither hiring more diverse entry-level knights nor making the occasional diverse noble a king actually changes the fundamental, institutionalized class-based and unequal nature of the large American law firm.

## Class Issues with Staff

One aspect of the class hierarchy in law firms that is even more rarely discussed than the divisions between classes of attorneys relates to divisions and inequality between attorneys and staff, which greatly affect diversity efforts as well as the success of law firms.

It's a laudable goal to increase diversity among their attorney ranks, but at the same time firms often operate under a two-tiered social structure, where attorneys are at the top and staff are at the bottom. Moreover, the people at the top (the attorney class) are generally less diverse than the people at the bottom (the non-attorney class). As you will see, most of this division is based on perceptions of people's relative value to the firm.

When I was an attorney in a major law firm, I saw that attorneys sometimes took the staff for granted, did not treat them well, and let them believe that they were “fungible,” in many respects, and could be replaced. Attorneys were extremely impressed with the backgrounds of other attorneys but nowhere near as impressed with the backgrounds of staff members. In fact, very few people talked about the staff at all. Everyone seemed more interested in the lives of attorneys, and the staff operated in a universe where jobs were less secure, where they were thought of less, where most made drastically less money than attorneys, and where they were taken for granted. I am not saying I agree with any of this—I do not—but this is what I witnessed.

These are some of the perceptions that attorneys have of staff members. These serve to reinforce the status of staff as “second-class citizens.”

- *Most attorneys believe legal staff will not become practicing attorneys.* Very few legal staff will go to law school. Therefore, they will always do only nonbillable work. Unlike a major corporation—where someone can start out in the mailroom and eventually work up to become the chief executive officer—a legal staff person without a law degree does not have any possibility of such upward mobility. Almost all of the serious upward mobility and rewards inside law firms is reserved for the attorneys.
- *Most attorneys believe legal staff will never make anywhere near as much money as attorneys.* Attorneys in large law firms make a lot of money. Legal staff do not earn as much, and because of this, they tend to feel less financially valued in law firms as compared to attorneys.
- *Most attorneys believe legal staff are not as intelligent as attorneys.* Attorneys often believe that legal staff are not as intelligent as they are simply because they do not have the same educational and other qualifications that attorneys have. This is not true, of course, because intelligence is not dependent on education. Nevertheless, this misperception (stereotype) controls how legal staff are treated.

- *Most attorneys believe legal staff do not work as hard.* Very few professionals work as hard as attorneys, especially those in the largest law firms. Legal staff are in positions where they are not judged by how many hours they bill but by other criteria. Secretaries, paralegals, and other legal staff often work overtime and put in long hours, the majority of legal staff members can work regular nine-to-five-type jobs, whereas most attorneys can put in untold hours.
- *Most attorneys believe legal staff do not have comparable educational qualifications.* Most legal staff are not attorneys, did not attend the top schools that attorneys did, and did not perform as well in school as many attorneys did. Even if a legal staff member has excellent educational qualifications—including having gone to a prestigious law school—most attorneys do not take nonpracticing lawyers as seriously as they take associates, partners, and counsel.

Far more than just attorneys work in law firms. Firms are massive institutions with a myriad of people working there. At their most basic level as economic institutions, large law firms are composed of people providing professional services (legal work) and people providing business services (adjuncts to legal work, such as document production, recruiting, and marketing).

As law firms become more diverse and inclusive of diverse attorneys, they should also pay attention to the class and other distinctions that exist between attorneys and staff. These distinctions end up marginalizing people who perform vital business services that support the work of attorneys to ensure the profitability of the firm.

What most people think of when they think of the practice of law is a group of attorneys doing legal work—not a group of nonlegal professionals doing everything else necessary to make the legal work possible in a complex and competitive international marketplace. Because of the emphasis on “lawyering” as the skill law firms sell, many believe that the work done by staff is less important than the work done by attorneys.

Staff report that some attorneys act like staff are “beneath them” and not doing work that is as important as the work attorneys do. This feeling of class division runs through the staff-attorney relationship in many law firms. In American law firms in large cities, the most diversity is at the bottom of the social hierarchy—among the entry-level associates and staff attorneys and clerks. The further up the hierarchy you go (equity partners and heads of important departments, like the chief financial officer), the less diversity you’ll find. Diversity follows the class lines.

Law firms are further divided into subhierarchies within the lawyer and staff classes. For example, within a law firm’s professional services class are attorneys of different ranks and statuses, with equity partners at the top, associates in the middle, and contract attorneys at the

bottom. Similar hierarchies exist in the business services class. A firm's chief financial officer is likely to be at the top, for example, whereas the copy room clerk is going to be at the bottom.

With limited exceptions, most nonlawyers inside of law firms do nonbillable work. Because their work does not lead directly to profit—one hour of work does not translate into one hour of fees—attorneys may not always appreciate and understand the importance of staff and the work they do. The work staff do is critically important to the profitability and success of the firm because it enables attorneys to specialize in law work, function efficiently, earn more money, and service clients more effectively.

Owing to the peculiar way in which attorneys judge themselves and each other, it is hardly surprising that attorneys view people who do not directly generate fees as less valuable and accord them lower status in the social hierarchy of firms. Even partners without business are made to feel like second-class citizens.

Law firms that scale up typically realize the importance of the work that staff do and consistently develop new staff positions to enable their staff to work more effectively servicing attorneys, who in turn service partners, who in turn generate business by making clients happy. Many of the largest law firms even have nonlawyer staff who earn as much as (or more than) non-equity partners in the firm.

Another problem that contributes to the reduced status of staff is, because they are cost centers (i.e., they do not directly generate fees through billable hours), their jobs are more vulnerable to being reduced or eliminated than are the jobs of attorneys, who can bill hours. When a law firm is considering laying off people to save money, often the first to go are staff. Lawyers are typically closer to “their own kind” and are most interested in saving each other's jobs. Also, a law firm's reputation can suffer greatly when it lays off attorneys, yet staff layoffs rarely merit mention.

## Resentment between Classes

As a result of competition between the various classes of the social hierarchy in law firms—as in society—resentments and divisions emerge:

- Partners resent those trying to become partners.
- Associates resent partners.
- Contract attorneys resent associates, counsel, and partners.
- Staff resent attorneys.
- Attorneys resent staff.

- Associates resent other associates aspiring to become partners.
- Partners resent other partners competing for larger shares of the profits.

The average law firm is a combustible mix of class warfare, resentment, and diversity issues that eat up people in the profession. Nowhere is this stress more prevalent than in American BigLaw. If you have any doubt about any of this, just read the headlines in any legal tabloid, lawyer blog, or staff blog. Resentment is everywhere you turn.

Law firms are incredibly complex institutions, and every member has a distinct and crucial role in the functioning and profitability of the enterprise. Without the clerk to file the brief on time, the most brilliant bet-the-company lawsuit would be lost. Without the paralegal to proof the prospectus, the most sophisticated securities deal would go bust. Without the business development professional to alert the clients to changes in the law, the most important client would be left hanging in the wind. True diversity and inclusion begins with understanding, appreciation, and respect—of both staff and attorneys.

Attorneys may not be in control of every single factor that affects their career, but knowing how law firms operate, and why, enables them to improve their chances of getting hired by presenting themselves as candidates who can do the work, be managed, and stay long term.

What law firms say about diversity and what they do about it are two different things. Whereas Justice is blind, law firm hiring practices cannot be. Firms have good intentions to increase hiring and retention of diverse attorneys because their clients demand diversity, it can increase their innovation and market position, and it's the right thing to do.

But law firms are businesses, and they must contend with the realities of the legal marketplace. They stay in business and are profitable by attracting valuable partners and providing them with attorneys who do good work that satisfies clients. What pleases partners—the subjective part of hiring decisions, which rests on some unfounded beliefs about diverse candidates and some hiring traditions—influences why some candidates get hired and others don't.



## Chapter 6: Hiring Practices in Tension with Diversity Efforts

We can generalize that most law firms operate under a conservative ethic that preserves tradition, respects authority, and is built on hierarchy. Introducing diversity to the mix asks firms to step away from their past conditioning in predicting which kinds of attorneys help them succeed. No longer can partners or recruiting coordinators rely only on extrinsic characteristics to forecast whether a person has the ability and fortitude to succeed in the legal profession. Instead, who attorneys are on the inside—where they come from and what they had to overcome, their creativity, their resilience, their commitment and focus—is what counts.

Yet even the most progressive firms exhibit trends in hiring related to diversity. Law firms' hiring of diverse attorneys follows patterns according to whether the new hire is an entry-level attorney, a lateral associate, or a lateral partner. On the whole, as mentioned above, firms do better in meeting diversity objectives with entry-level hires, who are lower on the social hierarchy in firms, than with any type of lateral hire.

### Entry-Level Hiring

Comparatively, it is easier for diverse attorneys to get hired at the entry level than at the lateral level.<sup>292</sup> In my experience, law firms hiring at the lateral level, and especially at the partner level, are little concerned about diversity. There are various reasons why firms are more likely to hire diverse candidates at the entry level.

There are more people involved in entry-level hiring. Entry-level attorneys typically are hired to work in the firm generally, not to work for one specific partner or attorney. Later, when attorneys become established in a firm, then they are tracked toward specific senior attorneys.

Entry-level attorneys are interviewed by a mix of associates, partners, and others—all of whom weigh in on whether to hire the person, so homophily comes into play to a much lower degree in the interviewing process. It is less about one person liking the attorney and more about the firm deciding whether the attorney is qualified. Also, the law firm's hiring and management committees can consider the importance of diversity and other factors that affect the firm's reputation in the legal community when making hiring decisions.

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<sup>292</sup> See "Entry-Level and Lateral Hiring," National Association for Law Placement, <http://www.nalp.org/entry-levelhiring> (last visited September 8, 2017).

	Partners			Associates			Total Lawyers			Summer Associates		
	% Women	% Minority	% Minority Women	% Women	% Minority	% Minority Women	% Women	% Minority	% Minority Women	% Women	% Minority	% Minority Women
2009	19.21	6.05	1.88	45.66	19.67	11.02	32.97	12.59	6.33	46.62	24.04	12.90
2010	19.43	6.16	1.95	45.41	19.53	10.90	32.69	12.40	6.20	47.35	26.99	14.92
2011	19.54	6.56	2.04	45.35	19.90	10.96	32.61	12.70	6.23	47.71	27.11	15.19
2012	19.91	6.71	2.16	45.05	20.32	11.08	32.67	12.91	6.32	46.26	29.55	16.26
2013	20.22	7.10	2.26	44.79	20.93	11.29	32.78	13.36	6.49	45.32	29.51	15.78
2014	21.05	7.33	2.45	44.94	21.63	11.51	33.48	13.83	6.74	46.33	30.27	16.63
2015	21.46	7.52	2.55	44.68	22.00	11.78	33.38	13.97	6.81	47.78	31.16	16.99
2016	22.13	8.05	2.76	45.00	22.72	12.42	33.89	14.62	7.23	48.71	32.33	18.05

**Table 6.1** Women and Minorities at Law Firms, 2009–2016. **Source:** The NALP Directory of Legal Employers

A close watch is kept on law firm hiring. The National Association for Law Placement (NALP), law schools, attorneys, and potential summer associates, among others, closely watch law firm hiring practices at the entry level. NALP, an influential professional association that advises legal professionals, from law students and attorneys to law firms and law schools, champions diversity and inclusion. It operates under the beliefs that “all law students and lawyers should benefit from a fair and ethical hiring process . . . [and] a diverse and inclusive legal profession best serves clients and our communities.” It serves its members by collecting and publishing legal employment data.<sup>293</sup> (See Table 6.1.)

Firms are under pressure to appear diverse by hiring a diverse class of summer associates. Law firms that do not put together a diverse class of summer associates can come off as being discriminatory in their hiring practices, whether that is true or not. Law firms seek to hire diverse attorneys at the entry level because they know NALP is tracking these hires and they want to present the best possible face to the public.

Even though entry-level hires are unproven commodities, a firm’s investment in them is comparatively minimal. If the attorney does not do good work, the law firm can write off many of his or her hours. The firm can also give the attorney busywork to do until the attorney leaves. Major national law firms often have large institutional clients with ongoing unsophisticated work (document reviews, due diligence, discovery) that low-skilled entry-level attorneys can do without too much risk to the law firm.

<sup>293</sup> “What Is NALP?” National Association for Law Placement, <https://www.nalp.org/whatisnalp>.

The law firm can send a message—directly or indirectly—to an entry-level attorney who is not a good fit that it makes sense for the attorney to move on, and the attorney often is able to find a new job quickly.

Clients may give law firms marching orders to assemble diverse teams to work on their matters. Partners consider hiring diverse teams when they have a large case or matter to be staffed, and diversity requirements can be met with diverse entry-level attorneys, who are relatively low-risk hires. Placing entry-level attorneys on low-risk matters is not likely to hurt a firm’s business substantially.<sup>294</sup> However, the most powerful partners representing the largest companies may not be willing to change their hiring criteria to be more inclusive of diverse employees despite their marching orders for diversity.

## Lateral Hiring

At the lateral level, more than at the entry level, law firms operate like meritocracies, where talented people are chosen to move ahead based on their ability. Law firms are open to including diverse attorneys at the lateral level, but they do not change their hiring qualifications out of diversity concerns:

- At the lateral *associate* level, almost all law firms hire based on the attorney’s qualifications: education (the quality of the attorney’s academics and law school); strength of current employer (the quality of the law firm the attorney is coming from); practice area (the type of work the attorney is doing and the law firm’s need for that specialization); presumed commitment to the type of work the attorney is interviewing for (whether the law firm believes the attorney will stick around); presumed fit with the culture of the firm; and diversity of the attorney.
- At the lateral *partner* level, most law firms hire based on the amount of business an attorney brings. I have seen only a few rare instances when law firms have hired a partner for diversity reasons—law firms simply do not hire partners who do not have substantial business (unless the partner’s business is in a very niche practice area that the firm cannot service on its own).<sup>295</sup>

As in society, the further up the social hierarchy you go, the less diversity you find, partly as a result of higher-status partners perpetuating a system of hiring that started out not including diverse attorneys.

<sup>294</sup> See Lateral Link, “How In-House Counsel Are Raising the Bar for Law Firm Diversity,” Above the Law, March 11, 2016, <http://abovethelaw.com/2016/03/how-in-house-counsel-are-raising-the-bar-for-law-firm-diversity/>.

<sup>295</sup> See, generally, Brian Farkas, “Understanding How Different-Sized Law Offices Do Business,” Lawyers.com, <http://research.lawyers.com/understanding-how-law-offices-do-business.html> (last visited September 11, 2017).

Most large law firms know that their hires are likely to stay only for the short term. Associates are short-term “investments” because they are likely to leave (or be asked to leave); very few stick around to become partners. Partners are guilty of “short termism,” too, because they stay with a law firm only as long as they are paid what they want, are happy, and the firm recruits the best talent for them to work on their matters.

Usually, law firms hire lateral associates to work with a specific attorney in the law firm. This attorney (generally, a partner) simply hires the person with the best qualifications and with whom the partner is most comfortable. The law firm cannot influence the hiring attorney to hire one candidate over another on the basis of diversity because the law firm’s role is to provide a service to the hiring attorney, who needs work done. Unless the hiring attorney is being pressured by clients to hire for diversity, it is unlikely diversity will factor much into the hiring decision—other than where diversity intersects with homophily and hierarchy, which usually results in a hiring process that overlooks or dismisses diverse candidates on the basis of various misperceptions. (See “Preconceptions about Diverse Attorneys” later in this book.)

Large law firms are often made up of hundreds of small businesses, with each partner’s business contributing to the whole. Partners can get up and go anywhere at any time. A fluid lateral market means that law firms must hold on to their business generators and the attorneys who bring in business.<sup>296</sup> Firms are not interested in undertaking initiatives that can potentially dilute profits or displease partners and make them go away. Likewise, business generators have no incentive to build for the future of the firm because they are motivated by their individual needs rather than by societal concerns about increasing diversity.<sup>297</sup> This is not to say that law firms and partners do not share the interest in diversity of their clients and society but that they are more motivated by their business interests (money) than by the common good.<sup>298</sup>

Because of the short-term-thinking, dog-eat-dog world of the law firm, calculations about diversity often do not factor into lateral hiring decisions. Whereas Human Resources can ensure a steady inflow of diverse attorneys at the entry level, it is much more difficult at the lateral level, where individual partners do so much hiring and have so many preconceptions about what they want and do not want.<sup>299</sup>

<sup>296</sup> Ibid.

<sup>297</sup> “Partner Compensation: Proven Pay Incentives to Motivate Partners to Achieve Firm Objectives,” C4CM, 2017, <https://c4cm.com/product/partner-compensation-proven-pay-incentives-to-motivate-partners-to-achieve-firm-objectives/>.

<sup>298</sup> “What Is a Social Good,” Investopedia, [https://www.investopedia.com/terms/s/social\\_good.asp#ixzz4xrNMaw7v](https://www.investopedia.com/terms/s/social_good.asp#ixzz4xrNMaw7v). A social good or the common good is “a good or service that benefits the largest number of people in the largest possible way.” Diversity might be termed a social good.

<sup>299</sup> See, generally, Steven J. Harper, “The Real Story of the New York Primary,” *Belly of the Beast*, April 20, 2016, <https://thelawyerbubble.com/tag/lateral-hiring-in-big-law/>, which discusses difficulties with lateral hires.

The following subsections discuss why law firms are less likely to hire diverse candidates as the lateral level.

## Attrition

A substantial portion of attorneys enter law firms and find that law firm life is not for them.<sup>300</sup> Attrition is a major issue with all attorneys—regardless of diversity—but retention issues are exacerbated for diverse attorneys, and thus law firms assume a greater risk hiring them at the lateral level.

Work in a law firm can be extremely difficult. According to one attorney:

I lasted five years, and once my student loans were paid off, I got the hell out. It was demoralizing, working like a dog doing mundane work and my vitality was slipping day by day. The hours and stress were killing me.

I got into the office at 8:00 am and left at 10:00 pm every day, plus I would also work one day on the weekends. I would work about 70–80 hours a week. The stress was unbelievable, especially coming from senior associates and partners in the firm. Everyone was biting each other heads off to get ahead. The senior associates viewed you as competition to become a partner and they would treat new associates like slave labor.

[Before I joined] my law firm showed us brochures with smiling associates, promised us interesting work, and the infamous “work life balance” bullshit. It was shocking because you are their slave and then they send you back to your old law school to recruit new people.<sup>301</sup>

## Potential for Dead Weight

Law firms are afraid of hiring unproductive or untalented associates who may not work out. At the entry level, associates are put on assignments that are less consequential, and the law firm can write off the hours of entry-level associates who do not do good work. If they are asked to leave a firm, entry-level associates typically have other job options.

After a year or two, attorneys are expected to be more efficient. At this point, law firms are exposed to serious risks if the attorney does not do good work. The firm can lose the money, time, and resources it expended to train the new hire, can face a lawsuit, or can expend further

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<sup>300</sup> See Adam Vaccaro, “Why Employees Quit Jobs Right After They’ve Started,” *Inc.*, April 17, 2014, <https://www.inc.com/adam-vaccaro/voluntary-turnover-six-months.html>.

<sup>301</sup> Poor Paralegal, “How Big Law Firms Treat Employees,” Poor Paralegal (blog), February 19, 2011, <http://thepoorparalegal.blogspot.com/2011/02/how-big-law-firms-treat-employees.html>.

resources if the attorney stays longer than the firm wants.

Law firms are most interested in attorneys with fewer than five years of experience who have not switched firms more than a few times during that period. Once an attorney has more than five years of experience or has switched firms more than a few times, it becomes very, very difficult for that attorney to find a new position.<sup>302</sup> When a law firm lets a lateral attorney go, it gives the impression there is a problem with the attorney's performance, and it becomes difficult for the lateral attorney to find another job. If a lateral attorney is let go, the law firm also knows there is a risk the attorney may bring a lawsuit against the firm. Hiring a lateral attorney involves much more risk than hiring an entry-level attorney.

Law firms seem to have different standards for letting go of diverse and nondiverse attorneys. In my opinion, law firms are more inclined to fire nondiverse attorneys than diverse attorneys. I have encountered diverse attorneys who were told to start looking for a new job over a year earlier but who were still with their law firms. In contrast, when nondiverse attorneys are fired, they are usually let go immediately or given three to six months to find a new job.

Although these may be isolated examples, they point to a tendency in law firms to carry the extra baggage of fired diverse attorneys longer and at greater expense than that of nondiverse attorneys they have fired, which can make them wary of hiring diverse attorneys in the first place.

## Concerns with Work Product

Law firms are skeptical about diverse attorneys' work product. This is often completely unfounded, of course. But law firms do question the level of training attorneys received at their previous jobs, whether attorneys were initially hired because of their diversity as opposed to their talent, and whether some attorneys will need more supervision than other attorneys. Many law firms expressed concern to me that diverse lateral attorneys may not have any substantive experience because previous law firms did not put them on important assignments, for example. Black attorneys, in particular, suffer from the misconception that they will need more supervision, even at the lateral level, and it works against them in hiring consideration.

## Concerns of Individual Partners

Partners decide whom they hire. Regardless of their own diversity, partners want to hire people they believe will work out the best with their particular clients and who will work the hardest

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<sup>302</sup> Amanda Griffin, "23 Types of Attorneys That Law Firms Don't Want," JD Journal, July 20, 2017, <https://www.jdjournal.com/2017/07/20/23-types-of-attorneys-that-law-firms-dont-want/>.

and help them produce the most revenue.<sup>303</sup> Because law firms cannot control the diversity of who individual partners hire, a self-reinforcing loop may occur.

Some of the issues regarding partners' failure to hire black or diverse attorneys at the lateral level may be the result of aversive racism.<sup>304</sup> As opposed to overt racism (and sexism), which is characterized by demonstrated hatred and discrimination, aversive racism is more subtle, characterized by ambivalence toward members of another group that is often expressed through avoiding interaction with the other group members and appealing to stereotypes to explain the avoidance.<sup>305</sup>

People who exhibit the behaviors of aversive racism “sympathize with victims of past injustice, support the principle of racial equality, and regard themselves as non-prejudiced, but at the same time possess negative feelings and beliefs (which may be unconscious) about” members of other groups.<sup>306</sup> People tend to view those of their class and ethnic group more positively than they view others who are not. “People respond systematically more favorably to others whom they perceive to belong to their group than to different groups.”<sup>307</sup> A white attorney may unconsciously believe that a black attorney does not deserve the same employment opportunities, training, and mentorship as white attorneys do.

In my recruiting practice, I have found it more difficult to place black attorneys. I have worked with many black attorneys who were coming from major American law firms, who were graduates of third- and fourth-tier law schools, and who had next-to-impossible times getting even a single interview. These attorneys were penalized even more than typical white attorneys who had not attended top-tier law schools. When I work with attorneys from similar backgrounds, I have noticed that the black attorney is almost always more difficult to place than the white attorney. I am not sure why this is. Black attorneys tend to get fewer interviews and get placed less often than white attorneys. The lack of success is almost palpable.

Recently, I worked with several black women who were unemployed even though they had

<sup>303</sup> See “The Question You Should Ask All Lateral Hires,” Law360, January 26, 2015, [http://www.milesstockbridge.com/files/4214/2239/0127/The\\_Question\\_You\\_Should\\_Ask\\_All\\_Lateral\\_Hires.pdf](http://www.milesstockbridge.com/files/4214/2239/0127/The_Question_You_Should_Ask_All_Lateral_Hires.pdf).

<sup>304</sup> See, generally, Rebecca M. Blank, Marilyn Dabady, and Constance F. Citro, eds., *Measuring Racial Discrimination*, Consensus Study Report of National Academies of Sciences, Engineering, and Medicine (Washington, D.C.: National Academies Press, 2004), which found that “appearing racist has become aversive to many white Americans.”

<sup>305</sup> “Aversive Racism,” Wikipedia, edited October 14, 2017, [https://en.wikipedia.org/wiki/Aversive\\_racism](https://en.wikipedia.org/wiki/Aversive_racism).

<sup>306</sup> John F. Dovidio and Samuel L. Gaertner, “New Directions in Aversive Racism Research: Persistence and Pervasiveness,” *Nebraska Symposium on Motivation, Motivational Aspects of Prejudice and Racism* 53 (2008): 44.

<sup>307</sup> *Ibid.*



excellent qualifications in all respects. They had attended eminent law schools like Harvard and Michigan and had worked in major law firms in major markets like New York City. They were in practice areas like corporate, and corporate has been in high demand. I could place none of the attorneys.

One attorney called me and apologized after bombing several interviews. She said she was worried she might have harmed my reputation. “I’m sure law firms did not appreciate you sending a fat black woman out to interview,” she said.

I was astonished. Several times she said she should just give up—and she did. Despite what she viewed as her limitations, for the life of me, I could not understand what prevented her from being hired but I wondered if aversive racism or sexism might have contributed.

Partners generate the business that sustains law firms; therefore, it behooves law firms to hire attorneys who please partners. Partners want to work with qualified attorneys with whom they’re comfortable and with whom they identify culturally, in other words, attorneys who share the same social markers, hobbies, experiences, and tastes.

Hiring partners also want to hire attorneys who can do the job, who can be managed, and who will stay with a firm for the long term. Yet their methods of judging and forecasting an attorney’s ability to do the job are wrapped up in a perspective that effectively results in hiring practices that disfavor diverse attorneys. Moreover, the business culture in law firms perpetuates an environment that challenges diverse attorneys’ ability to persist over the long term.

Attorneys who might be inclined to resist a divisive culture are not hired in the first place because they are perceived to be unmanageable types. Therefore, there used to be no one inside firms who would agitate for change (now diversity coordinators and committees are working to change traditional hiring practices). Law firms likely will not embrace true diversity until the benefits of diversity can somehow be realized alongside what partners want and the business realities of law firms.

If diversity is important, firms can assume the responsibility of nurturing diverse attorneys early in their careers and countering the negative impact of the factors discussed here. Law firm diversity efforts work better when they align with what partners and law firms want.

## **Contributors to the Diversity Gap in Law Firms**

Law firms are continuously held up as examples of institutions that are not meeting diversity goals:

- The *Washington Post* slams lawyers for “not doing enough” to change the fact the legal profession is the least diverse.<sup>308</sup>
- The *New York Times* paints “a bleak picture for women trying to rise at law firms.”<sup>309</sup>
- Stanford Graduate School of Business published an article explaining why law firms are “failing” at diversity.<sup>310</sup>
- An article from Above the Law laments that “despite two decades of extensive efforts, gender and other diversity at the partner and [general counsel] level is essentially unchanged.”<sup>311</sup>
- The 2017 Law360 Glass Ceiling Report found that “women [saw] another year of slow gains at law firms.”<sup>312</sup> (See Table 6.2.)

	Partners				Associates				
	Total #	% Women	% Minority	% Minority Women	Total #	% Women	% Minority	% Minority Women	# of Offices
<b>Total</b>	50,909	22.13%	8.05%	2.76%	45,398	45.00%	22.72%	12.42%	1,082
<b>By # of Lawyers Firm-wide:</b>									
100 or fewer	3,471	22.01%	6.68%	2.42%	1,818	42.08%	17.05%	8.80%	114
101-250	9,516	22.04	6.20	2.04	5,446	44.45	16.43	9.02	145
251-500	11,162	22.22	7.40	2.65	7,672	44.59	21.64	11.78	214
501-700	6,283	21.82	8.21	2.75	5,657	44.46	22.22	11.51	121
701+	20,477	22.23	9.44	3.22	24,805	45.59	24.96	13.84	488

<sup>308</sup> See Rhode, “Law Is the Least Diverse Profession in the Nation,” [https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm\\_term=.9d0fc7ef133b](https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.9d0fc7ef133b).

<sup>309</sup> See Elizabeth Olson, “A Bleak Picture’ for Women Trying to Rise at Law Firms,” *New York Times*, July 24, 2017, <https://www.nytimes.com/2017/07/24/business/dealbook/women-law-firm-partners.html?mcubz=3>.

<sup>310</sup> See Lee Simmons, “Why Are Law Firms Failing on Diversity?” Stanford Graduate School of Business, September 15, 2016, <https://www.gsb.stanford.edu/insights/why-are-law-firms-failing-diversity>.

<sup>311</sup> See Perla and Kamlani, “Diversity in the Legal Profession: The More Things Change, the More They Stay the Same,” <http://abovethelaw.com/2017/05/diversity-in-the-legal-profession-the-more-things-change-the-more-they-stay-the-same-until-they-dont/?rf=1>.

<sup>312</sup> See Jacqueline Bell, “The 2017 Law360 Glass Ceiling Report,” Law360, July 23, 2017, <https://www.law360.com/articles/946586>.

	Partners				Associates				
	Total #	% Women	% Minority	% Minority Women	Total #	% Women	% Minority	% Minority Women	# of Offices
Offices in:									
Atlanta	1,149	20.45	8.01	2.35	852	47.07	19.48	10.92	24
Austin	331	24.17	11.48	4.83	219	42.01	21.92	10.96	18
Boston area	1,610	22.61	4.53	1.68	1,814	46.69	16.76	10.53	33
Charlotte	455	16.26	6.15	1.54	302	37.75	13.91	4.97	14
Chicago	3,413	21.95	7.00	2.34	2,533	44.69	20.37	11.21	55
Cincinnati	336	22.62	3.27	1.19	147	34.69	16.33	7.48	9
Cleveland	496	19.96	3.83	0.81	322	37.89	6.83	4.04	8
Columbus	419	21.24	5.97	1.67	229	44.54	12.66	6.11	12
Dallas	1,024	20.12	8.30	2.83	957	36.47	21.00	7.94	32
Denver	638	27.27	5.49	1.88	468	46.37	13.89	7.91	24
Detroit area	553	25.14	5.79	2.35	230	44.78	16.96	8.70	9
Ft. Lauderdale/W. Palm Beach	186	23.12	4.84	2.69	109	44.95	15.60	9.17	9
Grand Rapids	263	19.77	2.28	0.76	74	37.84	12.16	6.76	6
Houston	1,040	18.46	10.87	3.46	1,110	40.54	21.53	10.99	39
Indianapolis	343	23.03	2.92	1.17	140	48.57	10.00	5.00	7
Kansas City, MO	439	23.46	4.10	1.14	244	42.21	17.21	9.43	6
Los Angeles area	2,042	23.46	15.18	5.53	2,282	46.41	31.33	17.57	77
Miami	576	25.69	31.08	9.03	342	45.32	44.15	23.10	17
Milwaukee	632	24.05	3.48	1.58	313	43.77	8.95	4.47	7
Minneapolis	1,132	27.39	3.53	1.59	566	42.93	12.37	6.18	19
New York City	6,340	18.86	8.45	2.73	11,387	45.20	26.74	15.19	102
Northern NJ/Newark area	505	18.61	4.75	1.78	410	42.93	18.29	10.00	10
Northern Virginia	193	11.40	8.29	1.55	187	35.29	25.13	9.09	9

	Partners				Associates				
	Total #	% Women	% Minority	% Minority Women	Total #	% Women	% Minority	% Minority Women	# of Offices
Orange Co., CA	524	17.18	13.74	4.39	520	40.38	28.85	12.88	20
Philadelphia	722	20.36	3.88	1.66	646	46.59	12.85	6.19	12
Phoenix	560	23.04	6.25	1.61	255	38.04	14.12	6.27	13
Pittsburgh	564	20.74	3.72	1.60	369	45.26	14.09	7.86	7
Salt Lake City	180	12.78	5.00	1.11	123	29.27	8.13	3.25	8
San Diego	272	20.59	12.50	2.94	321	43.93	26.79	13.08	16
San Francisco	1,362	26.58	13.44	4.63	1,531	51.86	30.57	17.18	51
San Jose area	792	20.33	17.30	5.56	1,388	44.09	40.63	20.46	40
Seattle area	895	27.37	9.27	3.35	511	45.60	22.11	12.72	23
St. Louis	766	23.11	4.31	1.57	400	43.25	12.25	6.00	11
Washington, D.C.	4,809	21.94	9.07	3.39	5,006	45.61	22.31	12.37	100
Wilmington	263	22.81	4.18	1.52	257	42.02	12.06	6.23	12
<b>States</b>									
Other areas in California	238	28.57	11.76	5.04	148	47.30	20.27	8.78	9
Other areas in Connecticut	357	24.93	2.80	2.24	199	50.75	17.09	11.56	8
Other areas in Florida	699	23.18	8.87	3.58	309	42.39	14.89	6.47	22
Kentucky	358	24.86	2.23	0.56	130	46.15	12.31	6.92	6
Other areas in New Jersey	221	20.81	7.69	2.71	120	41.67	17.50	7.50	7
Other areas in New York State	744	21.64	3.63	0.67	420	44.52	11.19	5.48	10
Other areas in Texas	152	15.79	9.21	1.32	137	45.26	13.87	5.11	7

**Table 6.2**

Regarding diversity in law firms, backers of the following groups believe they need preferential treatment in hiring and advancement:

- *Women attorneys.* According to the 2017 Law360 Glass Ceiling Report, women are 50.3 percent of current law school graduates but make up just under 35 percent of lawyers at law

firms. Additionally, women made up 20 percent of equity partnerships, which is where the highest pay and most prestigious leadership positions are located.<sup>313</sup>

- *Gay attorneys.* A Gallup poll published in January 2017 by Gary J. Gates of the Williams Institute at UCLA Law found that 4.1 percent of U.S. adults identify as lesbian, gay, bisexual, or transgender. Among Millennials—those born between 1980 and 1998—7.3 percent identify as LGBT.<sup>314</sup> However, the 2016 NALP report on diversity in law firms found that, at respondent law firms, only 2.5 percent of lawyers identified as LGBT.<sup>315</sup>
- *Black attorneys.* A 2016 NALP report showed that only 1.81 percent of partners at reporting law firms were black partners, while 4.11 percent of associates at the reporting law firms were black. In 2016, black women made up 0.64 percent of law firm partners and 2.32 percent of law firm associates. At the associate level, the number of black women lawyers at law firms peaked in 2008, just before the financial crisis, at 2.97 percent.<sup>316</sup> According to Paula T. Edgar, president of the Metropolitan Black Bar Association in New York City, a lot of black women leave BigLaw firms because “the firm culture is not conducive to success for people of color or people of color who are women.”<sup>317</sup> Additionally, according to a survey conducted by the Minority Corporate Counsel Association, black lawyers leave firms at a higher rate than members of other minority groups, with black women leaving even more frequently than black men, by a margin of 17 percent to 15 percent, respectively.<sup>318</sup>
- *Latino attorneys.* In 2016, Latino associates made up 4.42 percent of the attorneys at law firms reporting to the NALP, while 2.31 percent of partners were Latino.<sup>319</sup> The Vault/MCCA survey showed that “for the first time since 2008 . . . new attorney hires included more Hispanic women than men and nearly half of the Hispanic lawyers who made partner in 2015 were women.” Latinos made up 3.6 percent of respondents in the survey. Although not as high as attrition for black men and women, 10 percent of Latino attorneys and 13 percent of Latina attorneys left their law firms.

<sup>313</sup> Ibid.

<sup>314</sup> See Gary J. Yates, “In US, More Adults Identifying as LGBT,” Gallup, January 11, 2017, <http://www.gallup.com/poll/201731/lgbt-identification-rises.aspx>.

<sup>315</sup> See *2016 Report on Diversity in U.S. Law Firms* (Washington, D.C.: National Association for Law Placement, January 2017), 7, <https://www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf>.

<sup>316</sup> Ibid.

<sup>317</sup> See Stephanie Russell-Kraft, “Law Firms Struggle to Hire and Keep Black Women,” *Bloomberg Law*, January 6, 2017, <https://bol.bna.com/law-firms-struggle-to-hire-and-keep-black-women/>.

<sup>318</sup> See *Vault/MCCA Law Firm Diversity Survey Report* (Vault and Minority Corporate Counsel Association, December 2016), [http://archive.mcca.com/\\_data/global/downloads/research/reports/VaultMCCA\\_Survey-2016-v01.pdf](http://archive.mcca.com/_data/global/downloads/research/reports/VaultMCCA_Survey-2016-v01.pdf).

<sup>319</sup> Ibid.

However, Latina attorneys seemingly face a more difficult law experience than men in the “forms of gender bias and discrimination that work together to create inhospitable workplaces and limit opportunities for their career success and advancement.” Some examples of these experiences are being subjected to sexism by male attorneys (including Latinos), stereotypes regarding “roles and qualifications of women in the workplace, especially regarding their appropriateness for leadership positions.” Also, “the dual role of being a mother and lawyer adds an additional gender-related barrier to Latinas in their legal careers,” which is “consistent with research that suggests having significant child care responsibilities is one of the more critical barriers to career advancement facing women in the profession.” For Latina attorneys, this is made even more difficult by cultural expectations that their role is as mothers with the primary goal of taking care of the family, which leads to their careers being viewed as secondary to those of men.<sup>320</sup>

The following groups are often left out of diversity discussions:

- *Asians (including Indians)*. According to NALP, in 2016, Asian associates represented more than 11 percent of minority associates in major firms. However, NALP finds that Asian Pacific Americans represent 3.13 percent of all partners in big firms.<sup>321</sup> Compared with other ethnicities, Jean Lee, head of the Minority Corporate Counsel Association, states, “Asians are leaving [firms] at the highest numbers.”<sup>322</sup> No data could be found separately on Indians, who may or may not be included in the numbers with other Asian attorneys.
- *Native Americans*. Whereas Native Americans are accounted for in the overall minority percentages of the 2016 NALP report, they were not reported separately.<sup>323</sup> However, 2015 research conducted by the National Native American Bar Association found that there are only 2,640 Native American attorneys in the United States. That is approximately 0.2 percent of the 1.2 million attorneys in the nation. The study also found that approximately 40 percent of Native American respondents “reported experiencing demeaning comments or other types of harassment based on their race, ethnicity, and/or tribal affiliation.” Similarly, about 34 percent reported experiencing discrimination, and 30 percent “reported that they felt that they had been treated differently from their peers” because of their Native American

<sup>320</sup> See Jill L. Cruz and Melinda S. Molina, “Few and Far Between: The Reality of Latina Lawyers,” Hispanic National Bar Association, September 2009, <http://hnba.com/wp-content/uploads/2015/06/few-far-between.pdf>.

<sup>321</sup> “Women and Minorities at Law Firms by Race and Ethnicity—New Findings for 2016,” *NALP Bulletin*, February 2017, <https://www.nalp.org/0217research?s=Asian%20Associates>.

<sup>322</sup> See Vivia Chen, “Where Are the Asian-American Partners,” *American Lawyer*, March 14, 2017, <http://www.americanlawyer.com/id=1202779428743/Where-Are-the-Asian-American-Partners>.

<sup>323</sup> Perla and Kamlani, “Diversity in the Legal Profession: The More Things Change, the More They Stay the Same,” <http://abovethelaw.com/2017/05/diversity-in-the-legal-profession-the-more-things-change-the-more-they-stay-the-same-until-they-dont/?rf=1>.

associations.<sup>324</sup>

- *Middle Easterners (males—but not females).* NALP reports diversity statistics for “minorities,” which it defines as “those whose race or ethnicity is Black, Hispanic, American Indian/Alaskan Native, Asian, Native Hawaiian or other Pacific Islander, and those of multi-racial heritage.” Thus, it is unknown whether Middle Easterners are included in these numbers.
- *People with disabilities.* The 2016 NALP report on diversity stated that 0.33 percent of partners self-reported as having a disability, while the same percentage of associates self-reported the same.<sup>325</sup> However, the number of lawyers with disabilities is hard to determine because there is little reporting on them. Some attorneys with disabilities report that status, whereas others do not consider it relevant to their work experience.<sup>326</sup>
- *White attorneys from lower-class backgrounds.* There is minimal discussion regarding class backgrounds of attorneys, especially those of white attorneys. Because they are white, these attorneys are grouped with the majority—other white attorneys. Associations like NALP consider race/ethnicity exclusively when calculating diversity at law firms.
- *White immigrant attorneys of European descent.* There seems to be no distinction, as far as diversity is concerned or calculated, between white immigrant attorneys of European descent and white attorneys.

All of these groups (except white attorneys) may be reported to various organizations and clients as being part of a firm’s diversity, but most discussions about diversity inside of law firms do not center on these groups. I am not sure why; however, during my discussions with law firms, they did not come up. For whatever reason, the current push toward diversity brings certain groups under the umbrella of diversity and takes certain groups out from under it.

One group that experiences a massive amount of discrimination, in my opinion, is Middle Eastern males. If a Middle Eastern male has an ethnic-sounding last name and is seeking a job in New York, for example, he will have an extraordinarily difficult time finding a position. I have seen this time and time again. Similarly, people who are blind, deaf, wheelchair bound, or otherwise disabled have a very difficult time. Perhaps the group most discriminated against in the legal profession is older attorneys without business. If an attorney has more than five or six

<sup>324</sup> Arin Reeves, “The Pursuit of Inclusion: An In-Depth Exploration of the Experiences and Perspectives of Native American Attorneys in the Legal Profession,” National Native American Bar Association, 2015, [http://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA\\_report\\_pp6.pdf](http://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA_report_pp6.pdf).

<sup>325</sup> Perla and Kamlani, “Diversity in the Legal Profession: The More Things Change, the More They Stay the Same,” <http://abovethelaw.com/2017/05/diversity-in-the-legal-profession-the-more-things-change-the-more-they-stay-the-same-until-they-dont/?rf=1>.

<sup>326</sup> See Terry Carter, “The Biggest Hurdle for Lawyers with Disabilities: Preconceptions,” *ABA Journal*, June 2015, [http://www.abajournal.com/magazine/article/the\\_biggest\\_hurdle\\_for\\_lawyers\\_with\\_disabilities\\_preconceptions](http://www.abajournal.com/magazine/article/the_biggest_hurdle_for_lawyers_with_disabilities_preconceptions).



years of experience and no business, a law firm becomes a very unwelcoming place for that attorney.

Other groups that are not technically “diverse” but that face difficulties getting hired (by law firms or other employers) include these:

- *Short men.* A 2004 study published in the *Journal of Applied Psychology* showed that height is strongly related to success for men, and that as a man’s height increases, it corresponds to an increase in income.<sup>327</sup>
- *Unattractive people.* An article in *New York Magazine* cites a book by Daniel S. Hamermesh that explains that attractive people make \$230,000 more than unattractive people over the course of a lifetime. It goes on to explain that “unattractive women earn 3 percent less than average-looking women, while unattractive men’s take-home is reduced a whopping 22 percent.”<sup>328</sup>
- *Overweight people.* The National Association to Advance Fat Acceptance (NAAFA), a nonprofit civil rights organization dedicated to ending size discrimination in all of its forms, states in a fact sheet that size discrimination is as prevalent as racial discrimination. It cites various examples, including: “fat people can be terminated or suspended because of their weight, despite good job performance”; “fatter people suffer up to 6 percent less earnings than thin people in comparable positions”; and “1 of 3 children has experienced weight bias from a teacher,” while “2 of every 3 children has experienced it from a classmate.”<sup>329</sup>
- *People with disabilities.* Employment for disabled people fell from about 50 percent in 1990 to about 41 percent in 2010. Disabled workers also “earn about \$9,000 less a year than a non-disabled workers, according to Census data on median earnings.”<sup>330</sup>
- *People from lower-class backgrounds.* A 2012 study published in the journal *Psychological Science* found that stress caused by social class discrimination was potentially an important factor in negative consequences on health.<sup>331</sup> Additionally, a 2016 study published in the

<sup>327</sup> See Timothy A. Judge and Daniel M. Cable, “The Effect of Physical Height on Workplace Success and Income: Preliminary Test of a Theoretical Model,” *Journal of Applied Psychology* 89 (2004): 428–441.

<sup>328</sup> See Molly Young, “The Ugliness Penalty,” *New York Magazine*, July 29, 2011, <http://nymag.com/news/intelligencer/the-ugliness-penalty-2011-8/>.

<sup>329</sup> See “Facts on Size Discrimination,” National Association to Advance Fat Acceptance, [https://www.naafaonline.com/dev2/assets/documents/naafa\\_FactSheet\\_v17\\_screen.pdf](https://www.naafaonline.com/dev2/assets/documents/naafa_FactSheet_v17_screen.pdf) (last visited September 15, 2017).

<sup>330</sup> Ananya Bhattacharya and Heather Long, “America Still Leaves the Disabled Behind,” *CNN Money*, July 26, 2015, <http://money.cnn.com/2015/07/26/news/economy/americans-with-disabilities-act-problems-remain/index.html>.

<sup>331</sup> See Thomas E. Fuller-Rowell, Gary W. Evans, and Anthony D. Ong, “Poverty and Health,” *Psychological Science* 23 (2012): 734–739.

journal *American Sociological Review* found that “biases related to social class and gender skew employment opportunities toward men from privileged backgrounds.”<sup>332</sup>

At the same time that certain groups appear to be largely ignored in diversity discussions, other groups appear to merit special attention, especially in the law firm context. There are numerous examples of law firms and other groups creating initiatives dedicated to assisting these groups in hiring and retention:

- *Female black attorneys.* Both Los Angeles and New York (the two largest markets for lawyers) have associations dedicated specifically to black female attorneys: the Black Women Lawyers Association of Los Angeles and Association of Black Women Attorneys (ABWA) in New York. The ABWA advertises that its “members are successful women in the New York Metro area, practicing in a variety of areas at law firms, in solo practice, at city, state and federal government agencies, in finance, teaching and the judiciary.”<sup>333</sup> Cahill, Gordon, & Reindel, a large international law firm, has provided pro bono and/or financial support to the Association of Black Women Attorneys.<sup>334</sup>
- *Male black attorneys.* Though no association or group directly targets black male attorneys, some focus on the black attorney community as a whole. For example, the mission of the California Association of Black Lawyers (CABL) is “to promote reform in the laws and the administration of justice as [they] continue [their] quest for equality and empowerment.”<sup>335</sup> Some firms have initiatives designed to assist black attorneys. For example, Weil, Gotshal, & Manges, the tenth-ranked firm in the Vault Law 100, has a Black Attorney Affinity Group that “embodies the talents and strengths of black attorneys across the Firm, focusing on mentorship and networking, recruitment and retention, pro bono initiatives, business development and client outreach.”<sup>336</sup>
- *Latino and Latina attorneys.* Winston & Strawn, a global law firm with offices across five continents, has a Latina/Latino Lawyer Alliance set up as one of its Affinity Groups, which

<sup>332</sup> Lauren Rivera and Andr s Tilcsik, “Research: How Subtle Class Cues Can Backfire on Your Resume,” *Harvard Business Review*, April 4, 2017, <https://hbr.org/2016/12/research-how-subtle-class-cues-can-backfire-on-your-resume>; Lauren A. Rivera and Andr s Tilcsik, “Class Advantage, Commitment Penalty,” *American Sociological Review* 81 (2016): 1097–1131.

<sup>333</sup> “About Us,” Association of Black Women Attorneys, <https://abwanewyork.org/about-us/> (last visited September 15, 2017).

<sup>334</sup> See “Diversity and Inclusion—Women’s Initiatives Committee,” Cahill, Gordon, & Reindel LLP, <https://www.cahill.com/diversity/womens-initiative> (last visited September 15, 2017).

<sup>335</sup> “Membership,” California Association of Black Lawyers, <http://www.calblacklawyers.org/about-cabl/membership/> (last visited September 15, 2017).

<sup>336</sup> “The Black Attorney Affinity Group,” Weil, Gotshal & Manges LLP, <https://www.weil.com/about-weil/diversity-and-inclusion/the-black-attorney-affinity-group> (last visited September 15, 2017).

“play a critical role in the hiring, advancement, retention, and promotion of . . . minorities.”<sup>337</sup>

- *LGBTQ attorneys.* Kirkland & Ellis, the eighth-ranked firm in the country, according to the Vault Law 100, has initiatives targeting members of the LGBT community. According to the firm’s website, to be able to recruit and retain the most talented attorneys, “part of this commitment includes fostering an environment in which all lesbian, gay, bisexual and transgender (LGBT) attorneys have the greatest opportunities to thrive.”<sup>338</sup>
- *Women attorneys.* The American Bar Association has a Directory for Women Lawyers that provides “listings of national, state, local, international, and multicultural organizations for women attorneys. The directory also includes information on gender bias task forces and committees, where available.”<sup>339</sup> The most prestigious law firm in the country (according to the Vault Law 100), Cravath, Swaine, & Moore, even has a women’s initiative that “helps . . . women lawyers develop professional relationships and foster conversations about topics of particular interest to women attorneys.”<sup>340</sup>

There can be no doubt that law firms lacked a great deal of diversity in the past—just as most professions in the United States did. But I am not sure what is going on when society and law firms single out certain groups as being more in need of inclusion than others, but this is the way it is currently working. A real struggle for power is happening.

The pressure to hire people other than white males is something that law firms are experiencing from many quarters. But law firms do not reward diversity the way schools and many businesses can because they are made up of hundreds of individual partners who are each accountable to clients—and not society at large. These partners are more likely to care about their self-interest in the short term, and this means they want the best attorneys they can find who can provide what they and their clients need. Moreover, law firms are accountable to their partners because, if their partners are not generating significant revenue, the law firm will not survive.

Law firms are run by what makes good business sense. The law firm is a business and is operated like a business, which means the needs of clients are put first. It also operates in a competitive marketplace, and to succeed among such fierce competition, a law firm does what its clients demand and are willing to pay for. To work in the law firm context, diversity efforts must align with the underlying business realities and needs of law firms.

<sup>337</sup> “Diversity & Inclusion,” Winston & Strawn LLP, <http://www.winston.com/en/who-we-are/firm-profile/diversity.html> (last visited September 15, 2017).

<sup>338</sup> “LGBT Diversity,” Kirkland & Ellis LLP, <https://www.kirkland.com/sitecontent.cfm?contentID=218&itemid=777> (last visited September 15, 2017).

<sup>339</sup> “Directory of Associations for Women Lawyers,” American Bar Association, [https://www.americanbar.org/groups/women/resources/directory\\_of\\_associations\\_of\\_women\\_lawyers.html](https://www.americanbar.org/groups/women/resources/directory_of_associations_of_women_lawyers.html) (last visited September 15, 2017).

<sup>340</sup> “Women’s Initiative,” Cravath, Swaine, & Moore LLP, <https://www.cravath.com/womensinitiative/> (last visited September 15, 2017).

## Part III: Solutions

The average law firm seems to take diversity very seriously. Law firms devote entire sections of their websites to diversity, a topic often given equal prominence as the directory of attorneys. (See Figure III.1.) Front and center is a section that talks about the law firm’s commitment to diversity. “The typical law firm website and brochure may include a diversity commitment statement and a list of accolades awarded for alleged strides in diversity, but is often silent regarding whether they actually have a diverse team of lawyers.”<sup>341</sup>



Figure III.1. Cravath’s Diversity Statement

Almost every large law firm has a diversity committee. In 2005, DRI issued the *Law Firm Diversity Retention Manual* that included recommendations for developing a successful diversity program, one of which was establishing and managing a diversity committee. When developing a diversity committee, DRI recommends and firms typically consider the following.<sup>342</sup>

<sup>341</sup> Michael J. Plata and Michelle A. Ferrer, “Marketing Diversity as a Competitive Advantage,” *New Jersey Lawyer*, April 2012, 33–36.

<sup>342</sup> Alan S. Gutterman, “§ 4:44. Article: Law Firm Organization of Diversity Activities,” *Business Transactions Solutions*, 2017.

- *The size of the committee:* Committees with between five and nine members typically are most successful. Larger committees require subcommittees that focus on specific aspects of the diversity program.
- *Diversity within the committee:* The committee itself should be a blend of genders, racial backgrounds, sexual orientations, and, moreover, associates and partners.
- *Interaction within the firm:* Staff and lawyers of the firm should have opportunities to interact with committee members. It is important for the committee to circulate articles and information relevant to external and internal diversity issues.
- *Development of a diversity plan:* Committees are responsible for developing and implementing both short-term and long-term strategic diversity plans.
- *Involvement with law schools:* Firms that support law school minority organizations as well as minority bar associations will largely have access to a greater recruiting pool.

For reference, firms such as Morrison & Foerster, a global law firm headquartered in San Francisco, have been praised for implementing multipronged approaches to creating diversity committees.<sup>343</sup>

In addition, a significant percentage of large law firms also have diversity managers. Often, they are hired from outside the firm to supplement the duties of diversity committees.<sup>344</sup> A survey of law firm diversity programs found that at least 90 percent of firms assigned the following duties to their diversity manager:<sup>345</sup>

- Develop and promote diversity goals and strategies
- Implement long-term and short-term strategies
- Monitor objectives and strategies
- Promote awareness of diversity issues in management, operations, and governance
- Develop programs that foster an environment of inclusiveness and support for all lawyers so as to encourage retention
- Ensure firm support of law school minority organizations and national minority bar associations
- Manage external outreach programs
- Collaborate with corporate clients regarding diversity initiatives
- Work with the recruiting committee

<sup>343</sup> Ibid.

<sup>344</sup> Darden, “The Law Firm Caste System,” 85, 114.

<sup>345</sup> Ibid., 115.

Law firms are spending a lot of money on diversity managers and diversity programs. The average annual salary for a diversity manager is more than \$200,000, with firms allocating more than \$500,000 to the diversity manager's office.<sup>346</sup> These expenditures are geared toward making sure that both women and ethnic minorities are hired by the firm and are well integrated after being hired. Scholars like Bill Henderson and Marc Galanter articulate that these expenditures are not made by large firms simply out of a moral obligation but rather for profit maximizing.<sup>347</sup>

Law firms tend to do what other law firms do, and because there is so much competition to be diverse, a law firm cannot afford not to be diverse. But despite this overt commitment to diversity, diverse candidates still have hoops to jump through to attain employment in a law firm.

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<sup>346</sup> See Brayley and Nguyen, "Good Business: A Market-Based Argument for Law Firm Diversity," 5.

<sup>347</sup> Ibid., 9.

## Chapter 7: Breaking In to the Legal Profession

While I was growing up, Detroit was home to lots of families that were not well off financially—lower-middle-class and working-class neighborhoods made up the bulk of the city. But I lived with my mother in a small house on a quiet street in Grosse Pointe, the waterside town adjacent to Detroit. Grosse Pointe was nearly 100 percent white and Catholic and Protestant. There were no black people in Grosse Pointe that I knew of, and no Jewish people either. It was a very conservative area, where a lot of wealthy families lived.

We were not one of them. My mother was a single working woman with an alcohol problem. She kept a roof over our heads, but I felt alone and lost when she was drinking and I could not communicate with her. I felt isolated from our community because my mom was a single parent in a conservative neighborhood, and we didn't socialize with the other "regular" families. The kids on my street were not allowed to come over to my house to play. Because I was mostly unsupervised for much of my childhood, I got into more trouble than I should have. With what I was experiencing at home, I often felt depressed and hopeless.

In an attempt to provide a better environment for me, my parents decided to send me to a private school called the University of Liggett for eighth grade. My parents were divorced, and despite her issues, my mother elected not to take child support so that I could attend this prestigious school, which my father paid for.

Primarily, the children of successful businessmen, old Grosse Pointe families, and doctors and lawyers who practiced in Detroit attended the school. The student body was dominantly white, and the school's dress code required boys to wear a coat, tie, dress shirt, and dress pants and girls to wear skirts and blouses.

During the first several months at Liggett, I did not fit in at all. I had gone to public schools until then, and public school kids talked, dressed, and acted differently from how those private school kids did. I was the child of a single mother, never had dry-cleaned clothes before, and did not know how to behave in an environment that could be described as conservative and Republican. After some time, however, I learned what made me friends—being rebellious—and started acting out to gain the approval of my classmates. The other students found this quite humorous, and I quickly became popular.

I was living with my mother and experiencing her constant drama while I attended Liggett. I got surprisingly bad grades, even when I studied. I had done well enough in public school, but this private school was a whole different can of worms. The other students studied hard at night and were motivated to get good grades, whereas I was being raised in the lower-middle-class part of the city, and making the most of education was not part of our culture.

Instead of kicking me out, Liggett simply did not invite me to pick classes for the following year or to tour the high school. I wondered why, so I tracked down the headmaster, and when she finally met with me, she told me that I needed to do well on my final exams if I wanted to return, and she recommended that I study hard. This was upsetting news. My grades did not improve even when I made a supreme effort to study. I wanted very badly to advance to the high school and felt like I was not being allowed to because my distracting home life and lower-class background were not factored in to my situation. Instead of confronting the issues contributing to my poor performance, the school ignored them. I did not return to Liggett for ninth grade.

After I failed in that environment, my parents decided the next best thing was for me to live with my father on the other side of town in Bloomfield Hills. He had recently moved in with the woman he planned to marry. Lots of different kinds of people lived in Bloomfield Hills, and the private prep school I attended there, Cranbrook, emphasized diversity. I liked this a great deal and found the learning environment much more open.

Cranbrook had no particular dress code, and no major importance was placed on following the rules. The school was open to different ideas, encouraged debate, and seemed to treat everyone the same. Large numbers of not only white Christians but Jews, Indians, Asians, and others attended. The atmosphere was much more liberal than that of Liggett.

I thrived at Cranbrook. The quality of the education and teachers made a huge difference for me. Despite the school's emphasis on diversity, however, I noticed that the kids from different backgrounds associated mainly with other kids who were like them. The Jewish kids hung out with other Jewish kids, and the black students did the same.

Cranbrook was a place where I fit in and succeeded. However, my home life was a different story. My father's second marriage lasted only a few tumultuous years. While his relationship was disintegrating, my living environment was very divisive. For a time, my father lived in the basement of the house, and I stayed upstairs with his wife and her daughter. It was a strange experience. They cooked their meals separately, did not speak to me, and would not even let me use their cooking utensils. Making matters worse, my father often traveled overseas on business, and I would not see him for weeks at a time. I was isolated and grew to feel that I could rely only on myself.

But I was lucky. If I had stayed with my mother and never moved in with my father—which gave me the opportunity to absorb some of his values, such as an emphasis on education, middle-class work ethic, and prestige as a motivation—I likely would have attended a community college somewhere in Detroit, and my life would have turned out much different.

Following in my mother's footsteps would have led me down a whole other path. She had grown up in a small town in Michigan, had attended public schools, and went to Michigan State



for college. When I lived with her in Grosse Pointe, I was around her drama all the time. Her struggles simply to survive daily life left no room for her to teach me to prepare for the future or plan for a better life.

When I got to college, I was elated to be attending such an intellectually rigorous institution as the University of Chicago. I gravitated to classes dealing with human groups, such as sociology and anthropology, where we discussed race and ethnicity and how different groups fared in society. I found these subjects fascinating because their effects were playing out everywhere around me.

In my sophomore year of college, I dated and fell in love with a conservative Jewish girl from Texas. All of her friends were Jewish, and after our relationship became more serious, she came under increasing pressure from her family to end it with me and find someone Jewish to date. Her family believed Jewish people were preferred and superior in many ways to non-Jewish people. We eventually broke up because her family would not accept me.

As I studied other cultures, I became intrigued with all the different ways groups got along, or didn't. It surprised me each time my girlfriend moved to break up with me after she spoke with her family. I did not understand why Detroit was all black and the suburbs were all white. The economic differences around me did not make a lot of sense either.

All of this acted as the perfect storm and I got hooked on the concept of helping others who also felt marginalized by society. As someone who needed to support himself during college, I felt a great affinity toward the working people of Detroit. I wanted to demonstrate that, by applying themselves, they could better themselves no matter what their background.

The summer before my senior year at the University of Chicago, I worked seven days a week and just about every waking hour in an asphalt sealing business I had started during high school. The business was based in Detroit, and I lived on Jefferson Avenue in an apartment in a "dangerous" neighborhood. I hired most of my workers from a nearby drug rehabilitation center. All of my workers were black men. The guys tended not to have had much experience being employed, and I took great pride in giving them honest work to do to help them develop confidence and self-respect.

Detroit, at the time, was impoverished and as yet "undiscovered," with a high degree of poverty, rundown buildings, and other economic issues. My crew and I began each morning by driving our work trucks out to the much wealthier suburbs to seal asphalt. We did most of our work in Grosse Pointe. It was gritty, exhilarating, and rewarding. I loved the outdoors, the smell of tar, the heat, the bantering back and forth with my employees, and pretty much everything about the job.

A few nights a week, I got dressed up in a nice shirt and pants and went around door to door selling asphalt. I loved going out to sell because I would meet wealthy homeowners and see

how they were living. I talked to them about their careers and learned about them and what it had taken for them to be successful.

When I was working a job, I was typically covered in tar, wore work boots and work pants, and was always sweaty. I was unrecognizable from the person I was when I was selling. I loved this contrast, too. Traveling around with my workers, we certainly looked far from respectable. People treated me a lot differently from how they treated me when I was all dressed up and selling. But I enjoyed being with the guys and never felt so alive as when we were toiling together.

Though I never really made much profit in this business, back then I convinced myself I was doing very well financially. What was really happening was that I had become absorbed in helping others and felt best each day when I picked up and dropped off my workers at the rehabilitation center. So, I rationalized the business was a worthwhile endeavor by believing it was financially successful, as my more conservative values demanded a business be.

My interest in helping black men largely stemmed from my upbringing. My mother worked for the Michigan Department of Civil Rights, and I grew up a witness to how enthusiastic she was in her efforts to help primarily black people who had been discriminated against. Though she lost a lot of that enthusiasm later in her career, I saw her motivation when I was younger, and it moved us both.

I grew the asphalt business into a rather decent-sized business, and by the end of the summer, it was generating thousands of dollars in an average week. Many times, I worked alone overnight on commercial parking lots that needed to be ready for business by the next day. I smoked cigarettes, drank a lot of beer, went home covered from head to toe in tar, ordered take-out, and had a very unhealthy lifestyle in all respects.

When I returned to college the autumn of my senior year, I was so tired I did not have any energy. I dropped all of my classes except one and spent the better part of the fall semester sleeping in the fraternity house. Even though I was the president of the fraternity, I was so tired I didn't participate in many activities. I grew my hair long because I was too tired to get it cut. I had worked so hard over the summer in my asphalt sealing business that I thought I had simply exhausted myself. Later I found out I had mononucleosis.

I had not yet come up with a plan for my career but believed that the best idea was to go to law school, and I was excited about this possibility. Despite my lethargy, I was doing well in college and felt like I could get into a good law school if I did well on the LSAT. But being completely exhausted and unable to stay awake made studying for this test impossible, and I was unable to complete the exam the first two times I took it. Nevertheless, I managed to get into my first-choice law school—the University of Virginia. I had chosen this school largely because the smartest person my college girlfriend knew had gone there, and she had told me I would never

get in because I was not smart enough. I was very happy when I did.

The atmosphere at Virginia was so different from the University of Chicago's. Chicago was sort of dark, somewhat depressing, and rather ethnic. In contrast, people at the University of Virginia were primarily white, looked healthy, seemed upbeat, and—for reasons that made little sense to me—pretended not to work that hard. They played lots of softball, kept busy at the gym, and then told everyone they were not studying very much. I found this humorous because I knew my fellow students stayed up late each night hitting the books hard.

The people in law school were very smart but were not necessarily all that intellectual. Both the professors and students seemed to cut through the nonsense and get to the truth of matters very quickly. This is what might be called “lawyering,” but it was also cultural. Law school introduced me to the culture of the legal profession.

To succeed in the legal world, from a very young age aspiring attorneys need to have certain kinds of information conveyed to them, and certain values and priorities emphasized. In many cases, if an aspiring attorney does not obtain the right information at the right time and adopt the right values and priorities early on—before he or she even fully appreciates the significance of them—that attorney's opportunity to excel is diminished, sometimes irrecoverably.

Three factors make it possible for an aspiring attorney to get a position with a large, prestigious law firm, first as a summer associate and then later as a permanent employee: (1) the quality of the attorney's law school, (2) the attorney's grades, and (3) how well the aspiring attorney interviews. If an attorney does not compete well in these three areas, he or she will have issues getting a position with a major law firm.

## The Right Schooling

When I went to the private school Cranbrook, I lived with my father, a businessman, in a diverse neighborhood. My father had also gone to Cranbrook, and he believed that a good education was vital to my future. Going to that school changed my life. Had I not attended, I probably never would have considered going to college someplace like the University of Chicago. From there, I might never have aspired to attend law school, let alone at the University of Virginia.

Many hurdles stand in an aspiring attorney's career path. How effectively the future attorney overcomes them determines that attorney's success in the practice of law. Unless aspiring attorneys are prepared for these challenges and understand the “rules of the game,” their income and future in the legal field can be uncertain.<sup>348</sup>

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<sup>348</sup> See “Applying to Law School,” Law School Admissions Counsel, <https://www.lsac.org/jd/applying-to-law-school/whom-to-admit> (last visited September 22, 2017).

Here is what I wish I knew about becoming an attorney. I am not commenting on whether these barriers to entry are morally right or correct but simply observing the way the legal field operates right now.

## Getting Top Grades in College

The first hurdle is getting top grades in college. To get into the best law schools, future attorneys need to know the importance of high grades early in their academic careers. In a mandatory meeting with my guidance counselor after my first semester of college at the University of Chicago, I mentioned I might be interested in going to law school. I probably had a 3.3 grade point average—which was very good at the University of Chicago at the time.

“If you want to go to a top law school you need at least a 3.6 grade point average,” she said.

I was shocked. A 3.6 would have put me in the top 5 percent of my class, not an easy achievement at Chicago. Yet, from that point on, I studied and worked as hard as I could. I made sure I did not take classes I couldn’t excel in. I’m grateful I was given this information early in college so that I had the chance to focus on high grades practically from the start; otherwise, I wouldn’t have made it to law school. This guidance was crucial to my success.

Unless students come from a background that values education and believes a good education is the key to future success—or they are pointed in the right direction academically early on—their odds of going to the best law schools are sorely diminished.

Chicago was an academically competitive environment, which brought out the best in me. I was surrounded by other students trying their hardest. They were concerned about their grades and future professional advancement. Most of my friends, primarily white kids, had attended top prep schools to facilitate their entry to the university. Their values of hard work and academic preparation wore off on me.

## Getting in to a Top Law School

The second hurdle is getting into a top-quality law school. Law schools are extremely competitive. Most are one-dimensional in how they admit people: they consider students’ grade point average, LSAT scores, quality of undergraduate school, and (for most of them) race and ethnicity (this is called “race-conscious admissions policies” as discussed earlier).

As a legal recruiter, I have noticed that when an attorney has attended a top-ten law school such as Harvard, Stanford, Michigan, or Virginia, his or her odds of securing a position with a large law firm are very good. The odds of getting a job at a large law firm for attorneys who

attended smaller or less-prestigious law schools decrease in proportion to the ranking of their law school. Typically, getting a position with a major law firm requires attorneys to have attended a top-ten or top-twenty law school, as tiered by *U.S. News & World Report*, which ranks law schools on the basis of a weighted average of twelve quality measures. Had I not gone to the University of Chicago, where I was surrounded by other high-achieving students, I never would have applied to the School of Law at University of Virginia. I would not have cared. Living in an academically competitive environment where the significance of education to future success was stressed led me to adopt these values and motivated me to high achievement.

## Getting Top Grades in Law School

The third hurdle is getting top grades in the first year of law school. In my experience as a legal recruiter, I've noticed that for attorneys to get into the best law firms, they need to get high grades their first year of law school. Law firms, like law schools, vary in their level of prestige. The very best major law firms typically require attorneys to have achieved the best grades. The further down the list in law school ranking, the more important future attorneys' grades become. Attorneys who attended a local law school that is not very prestigious may need to be one of the top-five students in the class to even have a shot of working at a major law firm.

Attorneys with poor grades—even those who attended the very best law schools—may not get an offer to join a prestigious law firm as a summer associate. Subsequently, when summer associates do not get an offer to join a law firm at the end of the summer, their résumé is permanently tainted. The message this sends is the following: the attorney could not get a position with a prestigious law firm as a summer associate; therefore, the academic achievement that would enable the attorney to get a summer associate position with a prestigious law firm was not important to that student.

This predicament can be fatal to an attorney's career and can foreclose the possibility of that attorney ever working in a major law firm.

My first-semester grades in law school were less than stellar. During the second semester, however, I realized that my future was on the line, so I worked like crazy—probably the hardest I have ever worked—and received high marks. I did not want to fail. Getting good grades after my first semester seemed like a life-and-death prospect: if I failed, I would be failing at something major for the first time in my career. I was resilient, not afraid to work hard, and had every intention of succeeding. This sort of motivation came from inside me, and no one needed to encourage me to do well at that point. I was used to succeeding because of the solid study habits I had formed in college, and I had so much on the line; failure was not an option.

Even though I was up against so many competitive kids, I did not feel out-punched regarding

intelligence or intellectual abilities. I was capable of competing, understanding the material, and getting good grades. I was not at a disadvantage.

But what if I had been at a disadvantage? What if I was incapable of getting good grades? What if I had somehow been accepted into a law school when I was unable to compete to the appropriate level with the rest of the students? I am 100 percent certain that I would not have gotten a position with a prestigious law firm my second summer, with all the collateral damage that ensues from there.

Grades are one way a student's intelligence and drive within the educational system are represented. Without the intelligence, achievement becomes extremely difficult. Without the drive, staying competitive becomes impossible. Getting good grades in law school is also a product of who you are competing with and their level of aptitude and intelligence.

## Getting a Summer Associate Position with a Top Firm

The fourth hurdle is getting a prestigious position for the summer after the second year of law school. I have found that the quality of the law firm where a law student works as a summer associate sets the tone for the rest of that attorney's legal career. If the summer position is not at a prestigious firm, future potential employers perceive the aspiring attorney as flawed in some way—there must have been significant reasons the attorney did not get a position with a good firm. It cannot be overemphasized: if a law student does not get a summer position with a large, prestigious law firm, the odds are that the attorney may never get a position with a large, prestigious law firm.

Law firms typically hire law students as summer associates to work in the firm the summer after their second year of law school. Every law student covets a summer associate position, and for good reason. Back when I was a 1L (had the first year of law school under my belt), weekly pay for summer associates was about \$1,200; today these jobs pay several times that. In addition, the quality of the firm where a summer associate works can determine the trajectory of that attorney's career in law.

To fill these positions, firms interview students the autumn of their second year of law school—meaning future attorneys are screened after only one complete year of law school. Summer associates almost always receive offers to join the firm after graduation. If a law student does not get a summer position with a large law firm after his or her first or second year of law school, that student will have a very difficult time ever getting a position with a large law firm. Summer associate positions are that important.

Most law students do unpaid internships the summer after their first year of law school to “beef up” their résumés for when they start interviewing for the all-important summer associate

jobs the autumn of their second year. During the summer after my first year of law school, I worked for the Environmental Defense branch of the Department of Justice in Washington, DC. The DOJ is made up of countless divisions, but this particular branch was unusual because it defended the government when the government was accused of spilling waste or otherwise damaging the environment. I quickly realized that working as a government attorney was not for me.

Each day on the way into work, I saw well-dressed, polished people hurrying on the sidewalks. I assumed they were attorneys who worked for private law firms. They appeared engaged, enthusiastic about their jobs and life in comparison to the bland people at the DOJ. On the basis of these observations, I decided to target working for a private firm during my second summer.

I received a summer position at Reid & Priest, an old, midsized law firm in New York. I had spent the autumn visiting numerous law firms in Chicago, New York, and Washington, D.C., that had called me back for interviews—but the firm I clicked with was Reid & Priest. I could tell the people at Reid & Priest liked me and that I would do well there. It was a serious firm, but the people were approachable and easy to speak with. I also clicked with the hiring partner, which compensated for my lack of interviewing skills.

## Getting an Offer from a Top Firm

The fifth hurdle is getting an offer after the second-year summer job. To make working at a large, prestigious firm a realistic option for the future, law students must receive an offer of employment after their second-summer job. Otherwise, I have found that future employers believe there is something seriously wrong with an attorney.

The ten-week summer associate job is a testing ground for firms to see whether the future attorney has what it takes to fit in and perform. Absent serious economic issues at the firm, it is very rare for law firms not to offer promising summer associates employment—unless there is something wrong with the associates. Issues with summer associates include attitudes of entitlement, sloppy work product, negativity, inability to follow directions, and other red flags. If a summer associate has these sorts of issues, most law firms will not be interested in hiring that person.

Reid & Priest was one of the oldest law firms in New York and represented power companies for its bread-and-butter work. I enjoyed my summer there and had a good experience. At the end of the summer, out of the twelve people in my class, the only student who received an offer was a black woman from my class at the University of Virginia. The firm stated that it was not in a position to make multiple offers because it was having financial issues. Luckily, I had already set myself up to do a clerkship after graduation; Reid & Priest told me to call about working at the firm in the future after my clerkship ended.

Though I did not realize it at the time, events in the larger economy were already affecting my career. Attorneys are dependent on the economy for their jobs. Firms merge with each other; firms go out of business. When I entered law school, I believed you could join a firm and stay there for the remainder of your career if you worked hard and did well. That was not the truth anymore. To compete, firms were transitioning into a new business model. (See “The Law Firm Business Model” earlier.)

## The Right Grades

Consider that, beyond raw talent and fortitude, the ability of aspiring attorneys to acquire the skills that enable them get good grades, get into good colleges and prestigious law schools, and play the part of the worker bee and then the entrepreneur who gathers a book of business are rooted very deeply in their background and diversity: racial background, gender, and socioeconomics.

Education is a system that operates on certain premises: that grades and tests can measure students’ intelligence, knowledge, and ability. Sometimes these premises coincide and sometimes they do not coincide with certain societal groups’ values and beliefs, with which aspiring attorneys from those groups have been inculcated.

For example, some say grades are a measure of how good students are at getting good grades—they measure effort, not intelligence, knowledge, or how much students have learned.<sup>349</sup> (Yes, willingness of an aspiring attorney to put forth effort is a good item for law firms to evaluate, but don’t let that get mixed up with the idea that grades are measuring intelligence, another quality law firms sell.) The ability to get good grades may depend more on a student’s motivation to get good grades for some intrinsic or extrinsic reward, and, depending on their background, children may or may not be made aware of the potential rewards of education. Like I said earlier, I was lucky to be exposed to my father’s esteem for a good education, and this motivated me to excel in my opportunities at the prestigious schools I attended.

Similarly, the quality of the college and law school an aspiring attorney attends depends, for one, on SAT and LSAT scores. The SAT and LSAT are standardized tests; it is still debated whether standardized tests are biased and advantage certain groups over others.<sup>350</sup>

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<sup>349</sup> Terry McGlynn, “What Do Our Grades Measure? Academic Savvy or Actual Learning?” Small Pond Science (blog), <https://smallpondscience.com/2014/02/19/what-do-our-grades-measure-academic-savvy-or-actual-learning/>.

<sup>350</sup> Noliwe M. Rooks, “Why It’s Time to Get Rid of Standardized Tests,” *Time*, October 11, 2012, <http://ideas.time.com/2012/10/11/why-its-time-to-get-rid-of-standardized-tests/>; Ronnie Reese, “Minority Testing Bias Persists,” *Huffington Post*, April 23, 2013, [https://www.huffingtonpost.com/ronnie-reese/test-bias-minorities\\_b\\_2734149.html](https://www.huffingtonpost.com/ronnie-reese/test-bias-minorities_b_2734149.html).



It is common to measure the performance of children in school by achievement tests. Although achievement tests indirectly measure personality traits as an amalgam, our analysis indicates that personality and cognitive traits should be separated more clearly and controlled for in order to understand test score gaps. . . .

Understanding what constitutes the test scores and grades used to explain the Black-White achievement gap . . . the male-female wage gap . . . and the PISA score and No Child Left Behind test score gaps *by social class* directs attention to what factors give rise to the gaps and how they might be remediated. (emphasis added)<sup>351</sup>

Depending on their background, children may or may not be taught the skills they need to win at the education game the way it is set up, which affects their future opportunities.

## Resources Providing Early Support for Aspiring Attorneys

The following resources recruit diverse lawyers long before these students even enter law school. How is that done? They simply attract kids—yes, kids—who, as early as high school, have established an interest in law practice. They track their young people through college and law school and, upon graduation, place them in law firms throughout the country, if not the world.

With diversity in the legal sector tantamount to their cause, they work willingly with any law firm that contacts them regarding diversity. They also work with and represent any group member who has graduated successfully, in most cases passed the bar exam, and established an ability to practice at a high level within an area of interest. In other cases, they recruit young lawyers just out of law school with the hope of placing them in firms where they flourish and their talents are allowed to blossom.

- **Council on Legal Education Opportunity:** Founded in 1968, the Council on Legal Education Opportunity (CLEO) is a national organization that has expanded the opportunity for more than ten thousand minority and low-income students to attend law school and join the legal profession.
- **Hispanic National Bar Association:** The Hispanic National Bar Association (HNBA) is an organization representing Hispanics in the legal profession. Founded on March 20, 1972, as La Raza National Lawyers Association, HNBA's members include attorneys, judges, law professors, legal assistants and paralegals, and law students in the United States and its territories.

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<sup>351</sup> Lex Borghans, Bart H. H. Golsteyn, James J. Heckman, and John Eric Humphries, *What Do Grades and Achievement Tests Measure?* (Human Capital and Economic Opportunity Global Working Group, December 30, 2015), 13, [https://hceconomics.uchicago.edu/sites/default/files/3\\_BGHH-Grades-Achievement-Measure-Paper\\_2015-12-30a\\_sjs.pdf](https://hceconomics.uchicago.edu/sites/default/files/3_BGHH-Grades-Achievement-Measure-Paper_2015-12-30a_sjs.pdf).

- **Institute for Inclusion in the Legal Profession:** The Institute for Inclusion in the Legal Profession (IILP) retains a core philosophy that fewer walls lead to more open doors. IILP reaches out to high schools, colleges, and law schools, providing programs that supplement the students' education, while also preparing them for the competitive aspects and nature of the legal world.
- **Minority Corporate Counsel Association:** The Minority Corporate Counsel Association (MCCA) is one of the premier sources of learning, knowledge and future-oriented research on diversity and inclusion within the legal profession. Established in 1997, the MCCA provides resources, education, ideas, and networking to enhance the power and performance of the legal community. MCCA members are committed to diversity and inclusion.
- **National Association of Women Lawyers:** The National Association of Women Lawyers have sought to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law since 1899.
- **National Bar Association:** Established in 1925, the National Bar Association (NBA) is currently the nation's oldest and largest national network of predominantly African American attorneys and judges. First called the "Negro Bar Association," the NBA's formation was in direct response to black legal pioneers of the early twentieth century who were denied membership to the American Bar Association.
- **National LGBT Bar Association:** The National LGBT Bar Association comprises a national collection of lawyers, judges, and other legal professionals who help promote justice in and through the legal profession for the LGBT community. The LGBT Bar offers national lecture series, corporate counsel institutes, and the annual Lavender Law Conference & Career Fair.

## The Way to Interview

Students' ability to interview well depends on their personality and their determination to extend beyond any natural disinclinations (if, say, they are introverted) to connect with interviewers, which is facilitated by sharing a background in common. Aspiring attorneys' ability to connect with interviewers, who are essentially making subjective judgments about candidates (based on homophily and stereotyping), is influenced by racial background, gender, and socioeconomic background.

As mentioned earlier, entry-level attorneys are unknown quantities—the only information law firms have to go on is their grades in law school and their interview ability. The people who hire attorneys must identify with the candidates on some level. They need to feel some commonality with the people they hire. They need to believe that the people they hire are like them in some way. People identify with others from similar backgrounds. As mentioned, homophily is the tendency for people to associate with other people who are like them.

Law firms are different from typical corporate settings in many respects, not the least of which is the sheer amount of time employees (attorneys) are required to spend in close quarters with each other. This requirement for close interaction can inadvertently impede diversity efforts because, to get the work done, law firms want to form teams that work effectively together.

Kellogg School of Management professor Lauren Rivera found that hiring managers want recruits who have the potential to be friends with each other. Rivera writes, “Hiring is more than just the process of skill sorting. . . . It is also a process of cultural matching between candidates, evaluators, and firms. Employers sought candidates who were not only competent but culturally similar to themselves.”<sup>352</sup>

This does not necessarily mean that hiring is discriminatory—but often, subtly, it is. A law firm might be “diverse,” for example, but often the diversity is only skin deep, as they say, and not based on class, culture, or background. Smooth-working law firms consist of people who may be different colors (though mainly white and male) who grew up in similar types of neighborhoods, who attended similar top schools, and who share the same values and lifestyle. People want to be around people like them.

In Rivera’s paper, a law firm hiring partner said: “We have a weekend getaway for our new summer associates their first week here. When one of our summers got back the next week, he said to me, ‘We’re all so different in our different way, but you can tell we were all recruited to come to [FIRM] because we all have the same personalities. It’s clear like we are all the same kind of people.’”<sup>353</sup>

Given this, successful interviewing has a lot to do with the background of the attorney. An attorney from a family of attorneys has a lot more to talk about and has more experiences in common with his or her interviewer than does one from a lower-middle-class or working-class background. Interviewers also can identify more closely with attorneys who share their ethnicity or social class. These factors make a difference in the ability of law students to get summer positions and attorneys to get jobs.

When I was interviewing in law school, I’m sure the legal recruiters probably thought it was strange that I had a bunch of stuff on my résumé about my extensive experience in the asphalt industry—calling myself the president of my asphalt company and more. I loved it when law firms asked me about the asphalt work. I’d find myself talking enthusiastically about it. To this day, thinking about my asphalt business makes me yearn for that time in my life.

But talking about my pride and enthusiasm for doing dirty blue-collar work was probably not

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<sup>352</sup> Lauren A. Rivera, “Hiring as Cultural Matching,” *American Sociological Review* 77 (2012): 999.

<sup>353</sup> *Ibid.*, 1009.

appropriate in law firm interviews. Also, it was probably not appropriate to discuss my interest in inner-city Detroit and class divisions. But I did discuss these things because I did not know not to. All of this perfectly positioned me as someone who probably should not have gotten an offer from any firm. I was coming at the whole legal world from the wrong perspective and with the wrong sort of values. I had the ability to do good work and get good grades, but I did not come from a background large law firms were accustomed to. I did not know how to act the part of a large law firm attorney yet. That certainly came across every time my calloused palms shook the soft hands of white-shoe attorneys. I felt that I did not belong, but that made me want it more.

In this respect, individuals from working-class backgrounds are often at a disadvantage in the competition for legal jobs through no fault of their own. They might not have worked in an office environment before, might not know anyone who has worked in an office environment, and might lack the work habits needed to succeed in an office environment. People from middle-class environments are correspondingly advantaged in the long haul to become attorneys because they likely grew up watching one or both parents and other relatives go to work in a business environment, and thus they know what it takes to succeed.

Looking back, I understand how I skirted these issues that normally waved red flags in front of law firms: inadvertently, I had built rapport and established commonality with the people who interviewed me despite the differences of my background.

For example, during the autumn of my second year of law school, I interviewed with more than thirty law firms in short, twenty-minute sessions at a campus job fair. Then I went to a host of callback interviews. The mother of one of my high school friends taught at the University of Detroit, a Jesuit school, and one of the perks of her position was that my friend could attend various Jesuit schools tuition-free. He chose to go to Fordham.

An attorney named Robert Reger from Reid & Priest, an old, midsized New York firm, interviewed me at the campus job fair. In the course of conversation, he mentioned that he had gone to Fordham, and I said, "That's a great Jesuit school." He liked that comment a great deal. After our conversation, I knew I would be hired, and I was. In retrospect, I think that Reger probably thought I was Catholic (I am not). My intent during the interview was not to play on religion but simply to make conversation and create rapport, but I believe that common point of interest was why Reger warmed up to me and I got the job.

Later, during my second year of law school, one afternoon my friend and I noticed commotion in one of the lecture halls. We popped in to see what it was all about. The Law and Graduate Republicans had gathered, and they were very seriously giving speeches and voting for officers. At the time, I was not a member of any political party and had very little understanding of politics other than what I sensed was an overwhelming interest in Republican politics in Virginia and Democratic politics in Chicago and Detroit.

Sometime during the meeting, someone called out for nominations for secretary/treasurer and, as a joke, my friend nominated me. I decided to plow through with it, and got up and gave a short speech. To my great surprise, I ended up winning the position. As we walked out of the meeting, my friend joked: “Now we need to find a Democrat meeting and take you over there to run for something.”

With my summer position at Reid & Price already arranged, I had begun to think about doing a clerkship with a judge after my last year of law school before going to work in a law firm. I had no idea what a clerkship was, but I was told that if I wanted to be a litigator, I should apply for a federal district court clerkship (trial court), and if I wanted to be an appellate attorney, I needed to apply for an appellate clerkship (appellate court). I imagined myself pounding tables and marching around to the beat of my own arguments inside courtrooms, so I applied for district court clerkships in my home state of Michigan.

Within a few days of sending out applications, I received a call from the secretary of a federal judge in Michigan. The judge wanted to meet with me. He was a Republican judge and he had attended my high school, Cranbrook. I met with him in Detroit a week or so later, and he offered me a position as a clerk.

I spent maybe thirty minutes with the judge. I am pretty sure that when he hired me he thought I was a Republican, another characteristic beside our high school that we had in common. I bet having the information on my résumé about my position as secretary/treasurer for the Law and Graduate Republicans had something to do with that. I don’t think he would have interviewed me or hired me if I was not a Republican because I have since learned employers tend to hire employees they believe are like them and can help them.

A lot needs to come together for a law student to get a summer associate position with a major law firm—a lot of pieces must fall into place correctly: if the student manages to get into a good law school, the student needs to get good grades. If the student gets good grades, he or she still needs to interview well.

Then, there are further hurdles to clear to get a permanent job in a large law firm. Again, aspiring attorneys, especially diverse attorneys, are challenged by factors out of their control, such as the business-based hiring practices of law firms and the preconceptions they harbor about certain types of people.

## Chapter 8: Challenges Facing Diverse Attorneys

One of the criticisms leveled against law firms is that they have preconceptions about the work product of different types of attorneys. The diverse attorneys who are subject to some of the most negative stereotypes include (1) black attorneys, (2) women attorneys, and (3) gay attorneys.

Biases make people unconsciously form expectations of those they have categorized or stereotyped a certain way. The expectations are based on the category, not the unique individuals, and arise from prior experiences but also are shaped by the culture: stories, movies, books, the media. Biases are reduced or eradicated when they are exposed to examples that directly contradict those beliefs.<sup>354</sup>

To close the diversity gap, law firms need to be sensitive to these preconceptions, which are the result of historical biases, lingering prejudices, and misinformation. When diverse candidates can help law firms see past preconceptions, firms are more likely to hire and retain diverse attorneys and benefit from the many advantages of having a diverse workplace.

### Preconceptions About African American Attorneys

One group that suffers significantly when it comes to getting ahead in law firms is African American attorneys.<sup>355</sup> Law firms and diversity leaders in law firms mentioned this group most frequently as having difficulties. These preconceptions are so often incorrect that they have become misconceptions entirely.

It is unfair and the product of racism, but the reality is that the work of black attorneys is criticized more than that of white attorneys.<sup>356</sup> There is a shocking but well-known study by the leadership consulting firm Nexion, which wrote a memo and distributed the memo to sixty partners in twenty-two law firms. Half of the partners were told the memo's writer was a black man named Thomas Meyer, and the other half were told the writer was a white man named Thomas Meyer. A total of fifty-three partners finished the task of reviewing the memo. Twenty-four partners reviewed the memo written by the white man, and the other twenty-nine reviewed

<sup>354</sup> Facing History and Ourselves, *The Holocaust and Human Behavior*, 35.

<sup>355</sup> See Debra Cassens Weiss, "Only 3 Percent of Lawyers in BigLaw Are Black, and Numbers Are Falling," *ABA Journal*, May 30, 2014, [http://www.abajournal.com/news/article/only\\_3\\_percent\\_of\\_lawyers\\_in\\_biglaw\\_are\\_black\\_which\\_firms\\_were\\_most\\_diverse](http://www.abajournal.com/news/article/only_3_percent_of_lawyers_in_biglaw_are_black_which_firms_were_most_diverse).

<sup>356</sup> See Cynthia Thomas, "The Changing Role of Legal Support Staff," American Bar Association, [https://www.americanbar.org/publications/law\\_practice\\_magazine/2014/january-february/the-changing-role-of-legal-support-staff.html](https://www.americanbar.org/publications/law_practice_magazine/2014/january-february/the-changing-role-of-legal-support-staff.html).

the memo written by the black man.<sup>357</sup>

The attorneys from Nexion had inserted a total of twenty-two errors in the memo: (1) four errors of factual analysis, (2) six serious technical writing errors, (3) five factual errors, and (4) seven minor grammatical and spelling errors.

Here were the major findings of the study.<sup>358</sup>

- More technical and factual errors were found in the black Thomas Meyer’s memo than in the white Thomas Meyer’s.
- The partners found an average of 5.8 of the 7 spelling and grammar errors in the black Thomas Meyer’s memo; the others found an average of 2.9 of the 7 spelling and grammar errors in the white Thomas Meyer’s memo.
- The partners gave the memo written by the black man a rating of 3.2 out of 5.0; the partners gave the memo written by the white man a rating of 4.1 out of 5.0.
- The black Thomas Meyer was criticized for being “at best” average and needing lots of improvement; the white Thomas Meyer was praised and told he had good analytic skills.

Here are some of the comments made:

#### White Thomas Meyer

“generally good writer but needs to work on...”

“has potential”

“good analytical skills”

#### Black Thomas Meyer

“needs lots of work”

“can’t believe he went to NYU”

“average at best”

This study has been removed from Nexion’s website, but it is often cited as something that shows the bias in how law firms review the work of attorneys from different backgrounds.

These preconceptions about the work quality of African American attorneys make it difficult for African American attorneys to thrive inside law firms. Many black attorneys report needing to work harder to get the best work and to get ahead.<sup>359</sup> Howard University tells its students that to get ahead they need to work harder than other attorneys to make up for this disparity.

<sup>357</sup> See Debra Cassens Weiss, “Partners in Study Gave Legal Memo a Lower Rating When Told Author Wasn’t White,” *ABA Journal*, April 21, 2014, [http://www.abajournal.com/news/article/hypothetical\\_legal\\_memo\\_demonstrates\\_unconscious\\_biases](http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases).

<sup>358</sup> Ibid.

<sup>359</sup> See Cuyler, “Diversity in the Practice of Law: How Far Have We Come?” [https://www.americanbar.org/publications/gp\\_solo/2012/september\\_october/diversity\\_practice\\_law\\_how\\_far\\_have\\_we\\_come.html](https://www.americanbar.org/publications/gp_solo/2012/september_october/diversity_practice_law_how_far_have_we_come.html).

## Preconceptions About Women Attorneys

Women are considered differently from how men are considered in the workplace, and this can make it difficult for women to succeed in law firms because of difficulty with generating business, finding mentors, sexual harassment, time commitments, the lack of realistic part-time options, and stereotyping about females. Although more women than men graduate from law school, fewer women make it into the upper realms of big law firm practice.

As is the case with black attorneys, dangerous preconceptions exist in law firms about women attorneys. These preconceptions are unfair and the product of sexism.

## Unconscious Beliefs About Who Is in Power

In television, films, and popular culture, the people shown in powerful and professional positions—doctors, lawyers, engineers, politicians, CEOs, and judges—are more often than not white men (although this is changing).<sup>360</sup> Very few shows have women in powerful positions in the lead. When most people think about these sorts of professions, men often come to mind first. For example, most congressional representatives, CEOs of *Fortune* 500 companies, college presidents, and others in power are men.<sup>361</sup> When a woman holds a position or office traditionally considered in the male domain, the qualifier “woman” or “female” is usually appended to descriptions of her: a “lady doctor,” a “woman attorney,” a “female engineer.”

The same goes for law firm partners and attorneys portrayed in the media. This creates unconscious bias about the sorts of people who should be and are in power—men. It is not easy for women to overcome this bias, and they often believe that they need to work harder than others to prove their worth and gain status.

## Women Will Have Kids and Make Family a Priority over Their Careers

Women are perceived as at risk for leaving because of family priorities. Law firms assume women will either get pregnant and leave the firm or substantially “dial it back” when they have

<sup>360</sup> See Eric Brown, Yurii Horton, and Raagen Price, “Portrayal of Minorities in the Film, Media and Entertainment Industries,” *EDGE*, 1999, [https://web.stanford.edu/class/e297c/poverty\\_prejudice/mediarace/portrayal.htm](https://web.stanford.edu/class/e297c/poverty_prejudice/mediarace/portrayal.htm); “Diversity in Movies Largely Unchanged Despite Increased Awareness, Study Finds,” *Hollywood Reporter*, July 31, 2017, <https://www.hollywoodreporter.com/news/usc-study-diversity-movies-largely-unchanged-increased-awareness-1025336>; Larry Buhl, “How Does Hollywood See Your Career?” *Monster.com*, <https://www.monster.com/career-advice/article/how-does-hollywood-see-your-career-hot-jobs>.

<sup>361</sup> See “Women in Leadership,” Pew Research Center, January 14, 2015, <http://www.pewsocialtrends.org/2015/01/14/chapter-1-women-in-leadership/>.



kids, decreasing their contributions to the firm.<sup>362</sup> This belief, which is gradually dissipating but which is still present, often penalizes women who are competing with men for advancement in the firm. The idea is: Why should we advance her, give her the best work—and so forth—if she is going to leave or substantially cut back on work at some point soon?

These preconceptions are biases that are not always expressed but that influence the decisions of both male and female partners in law firms. The idea that women are going to leave or place family as a priority makes it more difficult for them to succeed because law firms do not trust them to do the work long term.<sup>363</sup> Brande Stellings, vice president of corporate board services at Catalyst, a nonprofit focused on workplace opportunities for women, recalled conversations with partners who admitted reluctance in mentoring young women associates because they thought these lawyers were going to leave.<sup>364</sup>

## If Women Have Kids, They Are Not Loyal

Women are sometimes perceived as being disloyal to their law firms when they have children. In contrast, if a man has children, he often receives a raise. Law firms often do not value women having children because they believe it will lessen their commitment and take them away from work. “The prevailing view of the partners is that lawyers should be available to their clients 24 hours a day,” and simply put, “the structure of the workday and the attitudes of those managing the firm are incompatible with family life.”<sup>365</sup>

Once a woman has children, it is expected that her priority will be her family and not the law firm. This makes it more difficult for her to get the best assignments, be put on important matters, and more.<sup>366</sup> Though men also have children, there is a massive double standard that penalizes women when they have children.

## If Women Are Successful, They Are Cold and Untrustworthy

Women who succeed in the practice of law are often believed to be cold and untrustworthy.

<sup>362</sup> See, generally, Anne-Marie Slaughter, “Why Women Still Can’t Have It All,” *The Atlantic*, July 2012, <https://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>, which articulates the discrepancies between men and women in top positions and notes that, although every male Supreme Court justice has a family, two of the three female justices are single with no children.

<sup>363</sup> Ibid.

<sup>364</sup> See, generally, Melissa Maleske, “Law Firm Biases Continue to Thwart Women,” *Law360*, April 19, 2015, <https://www.law360.com/articles/644634/law-firm-biases-continue-to-thwart-women>.

<sup>365</sup> Jennifer Reed, “The Expansion of the Legal Profession to Include Women with Children,” *Arizona Attorney*, 1997, 44–45.

<sup>366</sup> Ibid., 45.

Halley Bock, CEO of leadership and development training company Fierce, noted that the ruthless “ice queen” stereotype is rampant and that “a woman who shows emotion in the workplace is often cast as too fragile or unstable to lead.”<sup>367</sup> Instead of being nurturing, being team players, and having all the other characteristics women are believed to have, they are considered to be the exact opposite. The idea is that if a woman succeeds, she needs to be more male-like and less female-like, yet that makes her untrustworthy.

## Women Are Supposed to Be Team Players and Not Go against the Grain

Law firms expect men to have certain characteristics—to be self-confident, take-charge, and aggressive. In contrast, law firms expect women to be team players.<sup>368</sup> Women may be told that if they take a strong position on a legal matter with their superiors they “have a personality problem,” whereas men will be thought of as having self-confidence and being aggressive. If a woman tries to act self-confident in the way that men do, she may be told that she is “uppity” and “too aggressive” and be penalized for it. In contrast, in their reviews men are often told that they need to be more aggressive.

Some women attorneys told me that men are expected to be the trial lawyers and go to court, while women are more often the brief writers. (The brief writers, incidentally, are the ones who most often win the cases because most cases are won or lost on the strength of briefs.)

## Women Will Sue the Firm for Sexual Harassment

Women also are perceived as being potentially problematic because they might sue their firms for sexual harassment.

## Preconceptions About LGBT Attorneys

Preconceptions about LGBT attorneys exist, and these also are unfair and the product of prejudice. Female gay attorneys are often considered to be “butch,” unfeminine, and devoid of the characteristics female attorneys are expected to have. “The term butch tends to denote a degree of masculinity displayed by a female individual beyond what would be considered typical of a tomboy.”<sup>369</sup> The overriding characteristic of the female gay attorneys is that they have a masculine presentation.

<sup>367</sup> Jenna Goudreau, “The 10 Worst Stereotypes About Powerful Women,” *Forbes*, October 24, 2011, <https://www.forbes.com/sites/jennagoudreau/2011/10/24/worst-stereotypes-powerful-women-christine-lagarde-hillary-clinton/#578acd9c61ca>.

<sup>368</sup> See, generally, Elizabeth Olson, “Female Lawyer’s Gender-Bias Suit Challenges Law Firm Pay Practices,” *New York Times*, August 31, 2016, <https://www.nytimes.com/2016/09/01/business/dealbook/female-lawyers-gender-bias-suit-challenges-law-firm-pay-practices.html>, which discusses an example of a female partner being fired for what she claimed were baseless reasons.

<sup>369</sup> “Butch and Femme,” Wikipedia, edited November 25, 2017, [https://en.wikipedia.org/wiki/Butch\\_and\\_femme](https://en.wikipedia.org/wiki/Butch_and_femme)

Male gay attorneys, on the other hand, are often considered to be effeminate and as having characteristics more akin to those of women or as hypermasculine.<sup>370</sup> The way they talk, dress, and comport themselves is stereotyped.<sup>371</sup>

These preconceptions about gay attorneys make it difficult for them to fit in at law firms because they are labeled and penalized for how they are assumed to behave.

Many gay attorneys I spoke with indicated they were more comfortable in larger cities such as New York, San Francisco, and Portland than in other cities (especially Midwestern cities). In many smaller markets, away from the coasts, gay attorneys were less likely to be understood and to fit in with law firm culture.

Regardless of the market, gay attorneys noted that they felt pressured not to be too flamboyant, not to sexualize themselves, and to “blend in” to increase their chances of getting a job or advancing in a law firm.

I have observed male gay attorneys have a difficult time getting hired. I recently represented a young white male gay attorney with a few years of experience in a hot practice area. Nothing on his résumé indicated he was gay. When I spoke with him, however, he had a style of speech that fit the stereotype for gays. He spoke about his husband frequently and named hobbies that were not traditionally masculine ones. All of this is of course fine for a person to do. But that he was so obviously gay is something that law firms would pick up quickly and probably reject.

This attorney went on over twenty interviews and did not receive a single callback. He was a graduate of a top law school and working at a major American law firm. There was no reason for him not to get at least a callback because the work that he did was very in demand. He had good experience and there was nothing wrong about his ability. Had this attorney been white, boring, and obviously masculine, I am pretty sure he would have gotten callbacks and several offers. But I’m guessing that when the law firms met him in person, they were immediately uncomfortable.

In another case, I worked with a white gay partner in a prestigious small law firm. He had a good amount of business—approaching \$1,000,000—and was eager to leave his law firm. He got in the door with numerous law firms and also got callbacks from these law firms. But after interviewing at more than fifteen firms, this attorney gave up all hope and ended up staying

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<sup>370</sup> See Ron Suresha, *Bears on Bears: Interviews & Discussions* (Bear Bones Books, 2009), 83.

<sup>371</sup> *Ibid.*; see also Murray Lipp, “Myths and Stereotypes That Dehumanize Gay Men Must Be Challenged: Start with These 10!” *Huffington Post*, June 19, 2013, [http://www.huffingtonpost.com/murray-lipp/gay-men-myths-stereotypes\\_b\\_3463172.html](http://www.huffingtonpost.com/murray-lipp/gay-men-myths-stereotypes_b_3463172.html).

at his firm. He was not overtly gay, but my guess about what happened was that, when he got to the stage when law firms asked for information about his clients and billings, they quickly discovered not only that he was gay but also that he represented many gay organizations, some of which had a habit of suing big corporations and were in the public limelight in a way that makes some audiences uncomfortable.

I believe the law firms were (1) not uncomfortable with him personally because his diversity was not too overt but (2) were uncomfortable with his representing gay organizations that were potentially threatening to the sort of clients the firms represented. I do believe he would have been hired by at least ten of the fifteen firms had he not been representing the gay clients—any other attorney in his market would have been.

In contrast to gay male attorneys who are overt about their sexuality and clients and have difficulty getting law firm jobs, I have seen the exact opposite with gay female attorneys. They have not had difficulty getting offers and jobs. They did not have the “client” issue the gay partner had, but they were upfront about being lesbians. No one seemed to care.

The only thing that I can conclude—and I may be wrong about this—is that possibly the market values the “masculine” attributes of gay women and devalues the feminine attributes of gay men. Just as firms are biased against women in many cases, they are even more biased when they believe a male exhibits female-like characteristics.

## Preconceptions About Men with Middle Eastern–Sounding Names

Another group that suffers under unfair preconceptions and prejudice are men with Middle Eastern–sounding names.<sup>372</sup> They often have a difficult time getting hired. I have seen this over and over again, and it is very prevalent in large legal markets. The only market where I have not seen it be much of an issue has been in the Bay Area in California.

This is not a problem for women attorneys with Middle Eastern–sounding names, for some reason. A woman with a Muslim last name and traditional headscarf does not experience the same sort of pushback as a similarly situated Muslim man. In contrast, it is often exceedingly difficult for Muslim men to get hired.

In some markets, like New York City, an attorney with a Middle Eastern name often gets no interviews whatsoever, whereas an attorney with similar qualifications gets numerous interviews. This may have something to do with stereotypes about male Middle Easterners.

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<sup>372</sup> See Ruchika Tulshyan, “Have a Foreign-Sounding Name? Change It to Get a Job,” *Forbes*, June 13, 2014, <https://www.forbes.com/sites/ruchikatulshyan/2014/06/13/have-a-foreign-sounding-name-change-it-to-get-a-job/#572695d35316>.

Here are some examples I have run across recently:

One Middle Eastern attorney in a hot practice area was coming from a major, prestigious law firm in New York City. He had a few years of experience and was otherwise very marketable. He did not receive interviews from a single firm in New York. Had this attorney not had a Middle Eastern last name, I believe that he would have received several interviews.

I represented a Middle Eastern attorney in Texas. This attorney had a stellar background in all respects. He went to a very prestigious law school and was at a well-regarded law firm. At the same time I represented this attorney, I also represented a white attorney in the same practice area from a large law firm who had recently lost his position and was unemployed—he was fired because he was not coming into work enough and had low hours. Incredibly, the white attorney received at least five offers in Texas and the attorney with the Middle Eastern-sounding last name did not receive a single interview. I was shocked. The attorney with the Middle Eastern-sounding last name had much better qualifications, was in the same practice area, and was employed.

## The Sorts of Attorneys Law Firms Avoid Hiring

My father impressed upon me that the most important thing in life was to find an employer and dedicate yourself to that employer for the rest of your career. His way of thinking assumed that if you dedicated yourself to a job, your employer would support you and you could rely on that employer until you retired. There was a time when law firms operated that way: an attorney would join the firm after graduating from law school, and if the attorney excelled, the attorney could expect to become a partner in the law firm and be supported by the firm through retirement.

When I was entering the legal profession as an attorney, this was becoming less and less the norm. Law firms were changing. Attorneys were more like soldiers of fortune who brought their ability to work or their business to a given law firm and chose to work in the firms that paid them the most and provided the best support to accomplish their business. Because law firms want to attract and retain the most valuable partners, who bring a lot of business, they are relentless in hiring only attorneys who are the safest bets, the ones who will please and serve partners the best.

The best law firms are demanding business environments. To avoid the risk of displeasing partners, law firms avoid hiring the following types of candidates, regardless of their diversity. Because of misperceptions, prejudices, or what's proved true in the past, law firms perceive these types of candidates as unable to satisfy one of the three essential criteria: ability to do the job, ability to be managed, ability to stay long term.

## Lateral Attorneys with No Law Firm Experience

The odds are that the training and ways of approaching problems lateral attorneys with no law firm experience have may not work in the law firm environment. At the entry associate level, law firms generally hire based on the attorney's qualifications and diversity.<sup>373</sup> But most attorneys with otherwise acceptable qualifications but without law firm experience do not do well inside of law firms when law firms try them out.<sup>374</sup> I am not sure why this is.

It could be that attorneys motivated to work in government, public interest, and other practice environments typically do not do as well in law firms because their initial career decisions did not involve working in the commercial environment of the law firm. I see this regularly. Recently, I worked with a graduate of Harvard Law School who never worked as a summer associate in a law firm and who had zero law firm experience. He had spent the first three years after law school in legal positions in government and public interest. Despite what I knew would be huge resistance from law firms, I took him on and got him an offer from a prestigious national law firm.

But before he accepted the position, he started questioning whether the firm was prestigious enough for a graduate of Harvard Law School. He wondered whether enough Harvard Law School graduates worked in the law firm and was concerned about whether he would get the right experience and more. He asked if he could expect to lateral from that firm to an even more prestigious law firm after a year or two. I told him that it was a miracle he had received an offer in the first place because he had no private sector or law firm experience at all. He was not a fit for the law firm environment.

Ultimately, this attorney let deadlines for accepting the job offer come and go and was not hired. He wasn't interested in working in a law firm. This attorney also—incredibly—did not receive any offers from law firms while he was at Harvard Law School. Law firms perceived something wrong with him, his personality, and his commitment to the practice of law firm law.

Attorneys without law firm experience most often do not have law firm experience because they did not get positions in law firms in law school or were not motivated enough to get these positions early in their careers.<sup>375</sup> Law firms take this as a bad sign and a sign that these attorneys will not do the work long term.

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<sup>373</sup> See “When You’re Sat Across the Table from Someone at an Interview, What Are They Analyzing? What Gets You There in the First Place?” Chambers Associate, <http://www.chambers-associate.com/where-to-start/what-recruiters-are-looking-for> (last visited September 8, 2017).

<sup>374</sup> See Adam S. Weiss, “Why Lateral Candidacies Fail,” Law360, June 19, 2015, <https://www.law360.com/articles/668706/why-lateral-candidacies-fail>.

<sup>375</sup> Ibid.

## Attorneys Not Motivated by Money

The attorney not motivated by money is likely not a best fit for a law firm. To work the hours and put up with the sort of internal competition that is common in law firms, attorneys need to be interested in money—there is no other way. Law firms use money as a carrot to motivate long hours and high performance. Law firms love it, for example, when attorneys get married, purchase homes and cars, and develop expensive tastes because this means that the attorneys will depend more and more on the firm for money.

Law firms are businesses and function based on attorneys' ability to generate money.<sup>376</sup> If a law firm hopes to have long-term control over an attorney, the attorney must at least have some motivation to make money and more and more of it. The more the attorney desires money, the harder the attorney will work, the more business the attorney will generate, and the more likely the attorney will succeed inside the law firm.

The best attorneys for a law firm environment are motivated by money and often come from a background in which their families did not have a lot of money, and they wanted to be like people who did have a lot of money. These attorneys want to be something their parents were not. This is just the way it is.

There are exceptions to this, of course, and I have known excellent attorneys who were not motivated by money at all. As a general rule, though, the biggest and best law firms are demanding environments. A law firm loses control over attorneys if they are not interested in working long hours and exposing themselves to the sort of stress they experience inside law firms for money.

I recently heard about an attorney who practiced law with another attorney in downtown Los Angeles. He won a large verdict and received tens of millions of dollars in the recovery. When he received the fee, and the money had cleared, the first thing he did was quit the law firm. He was only doing the work for the money.

If money does not motivate an attorney, the attorney might be happier teaching law, working for the government, or going in-house or to an environment that is less taxing. Law firms often keep attorneys working and enthusiastic about their firms with the prospect of more and more money. The attorney who is not interested in this is an attorney who is not a good fit for a law firm.

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<sup>376</sup> See Rose, "Partner Compensation Plans," 42, 43; Russ Alan Prince and Bruce Rogers, "How Lawyers Can Dramatically Boost Their Incomes," *Forbes*, September 14, 2012, <https://www.forbes.com/sites/russprince/2012/09/14/how-lawyers-can-dramatically-boost-their-incomes/#e25a8714ed74>, which discusses how attorneys retain and build business portfolios.

## Attorneys Not Motivated by Prestige and What Others Think of Them

Most law firm attorneys—or at least the “lifers,” the ones who last—are motivated by prestige. Their prestige level, the prestige level of their current firm, the prestige level of their clients, the prestige level of their peers, and even the prestige level of the city they live in motivate them. Either attorneys buy in to this prestige business, or they do not.

- *Their own prestige motivates the best law firm attorneys.* Attorneys are very aware of their qualifications: where they went to college, how they did in college, where they went to law school, how they did in law school, what honors they received in law school, where they have worked, and what titles they have had.<sup>377</sup> All of these factors are important to most attorneys, and most law firm attorneys believe they are a “brand,” of sorts, and need to protect their prestige by interviewing only with certain firms, working with only certain types of attorneys, and being around only certain types of attorneys.

When I speak with attorneys who have been practicing for a significant time—even those in their eighties—they often start the conversation by volunteering all of their accomplishments, awards, and other attributes that increase their prestige. Just look at the biographies they post on their websites. Prestige is crucial to attorneys—they are motivated by what others think of them. If they get a significant compliment from someone well known, they tend to remember it and talk about it.

If prestige does not motivate an attorney, that attorney is likely not the best hire for a law firm.<sup>378</sup> The reason is simple: law firms use money and the carrot of prestige to get attorneys to work harder and harder. Attorneys uninterested in the prestige of their job, accomplishments, and so forth are not likely to thrive in a law firm environment, where people are trying to accumulate honors constantly.

- *Attorneys are motivated by the prestige level of their current law firm.* The best law firm attorneys take their prestige very seriously—and nowhere does it come into play more than with the prestige level of the law firm they work at. This is one reason law firms can extract so much work from them. The largest law firms use their prestige to confer prestige on attorneys, and this serves to motivate the attorneys working there.

When I meet lawyers who work at very prestigious law firms, they are very proud of this fact. They know joining one of these firms is highly competitive and they form a lot of their professional identity around it.

With limited exceptions, if I call almost any partner or associate at a major law firm and tell

<sup>377</sup> See Vivia Chen, “Best Law Schools for Jobs and Prestige,” *American Lawyer*, March 17, 2016, <http://www.americanlawyer.com/id=1202752467164/Best-Law-Schools-for-Jobs-and-Prestige>.

<sup>378</sup> Joel A. Rose, “Maintaining Motivation for Attorneys in a Law Firm,” Joel A. Rose & Associates, [http://www.joelarose.com/articles/maintaining\\_motivation.html](http://www.joelarose.com/articles/maintaining_motivation.html) (last visited September 8, 2017).



them that a law firm more prestigious than their own is interested in them, they almost always agree to speak with that firm. The opposite occurs if the law firm is less prestigious.

Law firms use their prestige to both attract and retain attorneys. Attorneys who do not buy in to the idea of prestige likely will not do well in major law firms because their prestige keeps many attorneys going.

- *Attorneys are motivated by the prestige of their firm's clients.* Most attorneys are impressed when their firms represent large clients and famous people. Most attorneys gain a sense of importance from working at a firm that represents significant companies, groups, and people.

Most humans are tribal animals, and lawyers are no different—but some are more tribal than others. As such, the best law firm attorneys are cognizant of who their firm represents and use this information to garner prestige.<sup>379</sup>

- *Attorneys are motivated by the prestige of the matters they work on.*<sup>380</sup> In addition to being motivated by the prestige level of the firm's clients, attorneys are also motivated by the prestige level of the matters they are personally working on. You can tell how motivated attorneys are based on the level of enthusiasm they show when talking about the matters they are working on. I have had conversations with attorney candidates I knew were excellent fits for law firms in which they spoke about matters with so much interest and enthusiasm it was contagious.

I recently interviewed an attorney for a legal recruiting position who was working for Gibson Dunn. He spoke with so much enthusiasm about the legal work he had been doing that I knew he would never be a good fit for legal recruiting.

- *Attorneys are motivated by the prestige of their peers.*<sup>381</sup> Attorneys are motivated by the prestige of their peers—where their peers went to law school, where they have worked in the past, and so forth. This motivation is very strong. Before they interview with any law firm, attorneys typically look up the attorneys they would be working with to get the low-down on their qualifications. Attorneys take great pride in working with groups of highly qualified attorneys because they believe this adds to their own prestige.
- *Attorneys are motivated by the prestige of the city they work and live in.*<sup>382</sup> Attorneys take the prestige of the city where they work and live very seriously. Many attorneys working in New York City, for example, would never consider working somewhere else. Attorneys typically work much harder in cities like New York than they do in other major American cities. Law firms can get so much work out of these attorneys because the prestige of the place motivates them.

<sup>379</sup> See, generally, Marilyn Odendahl, "Corporate Clients Are Reshaping Big Law Firms," *Indiana Lawyer*, May 20, 2015, <http://www.theindianalawyer.com/articles/37215>, which discusses how and why corporate clients demand diversity from outside counsel.

<sup>380</sup> See Rose, "Partner Compensation Plans," 42, 43.

<sup>381</sup> *Ibid.*

<sup>382</sup> *Ibid.*

## Attorneys Who Distrust the Business-Facing Aspect of the Law Firm

Many young attorneys distrust the business-facing aspect of the law firm.<sup>383</sup> This can come from exposure to ultra-liberal values that give them the idea that business is bad and anything seeking to make money is also suspect and bad. This sort of ideology ends up hurting law firms because the attorneys who join them then begin questioning the ethics of certain assignments, the number of hours billed, and so forth. Law firms are wary of hiring attorneys with anticorporate values.

When I worked at Dewey Ballantine in my early years as an attorney, I witnessed the consequences of not putting your head down and doing the work you were assigned. A couple of weeks after I started at Dewey, a partner named Don Woods stopped by my office and then started giving me assignments. He was an older attorney, originally from New York, and had gone to Columbia Law School. He had a New York accent but a nice attitude and was pleasant to be around. Don gave me work to do almost the entire time I was at Dewey.

I learned that he had formerly given all his work to a Columbia grad who had graduated the same year I had. Apparently, this associate had questioned the necessity of some of the assignments, and as a consequence, Don stopped giving him work. Not only had Don stopped giving him work but also no one else in the firm would give him work either. At the time, you could type an attorney's name into the online billing system and see how many hours that person had billed. Incredibly, for a several-month stretch, this attorney did not bill any hours.

Every year as a recruiter, I encounter various attorneys who have lost jobs inside of major law firms because they questioned the wisdom of doing various assignments or accused other attorneys of overbilling. For example, I worked with a first-year attorney from a top-five law school who lost his position because he made a big stink out of doing an assignment that he thought was unnecessary. He then told other associates that he believed the young partner who assigned him the work was just trying to drive up the bill. This—true or not—was obviously none of his business; his job was to do the assignment and not question the business aspects of the firm.

Attorneys who suspect the business justification of law firm operations always end up losing their jobs. At the interview stage, law firms will do a good job of weeding out attorneys who might later make waves. Law firms exist and work to maximize profit. Partners are motivated by increasing their profits, holding onto clients, and making money consistently. Any attorney who threatens these goals will not be hired.

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<sup>383</sup> See Griffin, "23 Types of Attorneys That Law Firms Don't Want," <https://www.jdjjournal.com/2017/07/20/23-types-of-attorneys-that-law-firms-dont-want/>.

As touched on above, law firms hire attorneys who believe the work of the law firm is important.<sup>384</sup> An attorney not motivated by the importance of a law firm’s work is likely not a good fit.

## Attorneys with Very Poor Law School Performance

Plenty of good attorneys out there did poorly in law school.<sup>385</sup> But these attorneys typically do not get jobs in large law firms. Law school performance is an indicator of an attorney’s level of motivation and aptitude for the law. Almost all law schools practice “blind grading,” meaning professors are blind to whose exams they are grading. Although professors and others may have some bias about attorneys as people from different backgrounds, ethnicities, and persuasions, attorneys earn grades most often without professors knowing who they are.

## First-Year Associates Looking for Jobs Before Completing Their First Year of Practice

Attorneys who lose their positions during their first year of practice or who are looking for a position before completing their first year of practice are most often not the best fit for law firms over the long term.<sup>386</sup> If an attorney throws in the towel and moves on so quickly, odds are this is an indication of the attorney’s level of commitment and resilience.

Being a law firm attorney requires commitment. Most first-year associates looking for a new position have a variety of complaints about their firms—and some of these make sense. Although there are exceptions, this lack of early commitment usually means the attorney does not have the constitution to succeed in the law firm environment when the going gets tough—and the going will always get tough.

One problem with attorneys looking for positions before completing their first year of practice is that they are not trained yet and do not understand what they are doing. The young attorney must be able to take orders, be managed, and have his or her work critiqued. If attorneys cannot stand to have work criticized and are not manageable early in their career, likely they will not change later either.

## Attorneys Interested in Drastically Smaller or Less-Prestigious Law Firms

If an attorney is interested in moving to a drastically smaller or less-prestigious law firm than the current firm, that’s usually a bad sign.<sup>387</sup> It might mean the attorney is taking the first job offered

<sup>384</sup> Ibid.

<sup>385</sup> Ibid.

<sup>386</sup> Ibid.

<sup>387</sup> Ibid.

or is so unhappy with the practice of law that he or she needs to make a drastic change, both of which can compromise an attorney's ability to do the job long term.

If attorneys take the first job they can get, this means they are in a bad spot and are making a change for a reason. They might have lost their current position or may be desperate for a job offer because larger, more prestigious law firms will not hire them for some reason.

Another danger, and the most significant one, is that the attorney will leave for a larger and more prestigious law firm the second an opportunity arises. Larger law firms pay more than smaller law firms, in most cases, and there is a host of reasons most attorneys prefer them. Smaller law firms that hire attorneys from larger law firms often find that these attorneys leave—quickly.

If attorneys are unhappy with working in a large firm and wish to experiment in a smaller law firm, odds are very good that they will find that the small firm environment is not much different—but the pay is less and the legal matters smaller.

## Attorneys from Third- and Fourth-Tier Law Schools with Average or Below-Average Academic Performance

Attorneys who do not do well in average-to-poor law schools are a bad bet because law firms sell the quality of attorneys' minds in solving problems.<sup>388</sup> Problem solving requires intelligence and a high degree of motivation—both of which law school performance tests. If an attorney did not do well in an average to poorly regarded law school, the odds are that he or she will not do well in most law firms either.

## Attorneys Who Did Poorly in College

Except for science and engineering majors (where low grades and strict grading curves are often the norm), attorneys who did poorly in college are often risks for lateral hiring.<sup>389</sup> College grades (like law school grades) often show attorneys' level of motivation. The ability to do well in college is often a reflection of the future attorney's desire to achieve. I have found over and over again that the best entry-level and lateral hires are attorneys with top performance in college. College shows how hard someone is willing to work for an extended period and how likely he or she is to be passionate about a given subject, the major.

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<sup>388</sup> See Chen, "Best Law Schools for Jobs and Prestige," *American Lawyer*, March 17, 2016, <http://www.americanlawyer.com/id=1202752467164/Best-Law-Schools-for-Jobs-and-Prestige>.

<sup>389</sup> See Griffin, "23 Types of Attorneys That Law Firms Don't Want," <https://www.jdjjournal.com/2017/07/20/23-types-of-attorneys-that-law-firms-dont-want/>.

## Entry-Level Attorneys Who Did Not Summer in a Law Firm

Larger law firms typically use the summer associate programs as a testing ground for future hires.<sup>390</sup> They expect attorneys to summer in law firms because it shows a level of motivation to work in a law firm and the ability to get a legal job. If an attorney does not work for a law firm during the attorney's first or second year of law school and, instead, takes a position with a nonprofit, a public interest organization, or a type of business other than a law firm, the odds are the attorney is not interested in working in a law firm.

## Attorneys Who Have Been Involved in Lawsuits against Previous Employers

If an attorney was involved in a lawsuit against a previous employer, law firms take this as a bad sign. Law firms avoid people who raise trouble because they will find themselves on the receiving end of trouble in the future.

## Attorneys Who Have Had Too Many Jobs in the Past (or Who Switch Jobs Frequently)

Attorneys who have had too many jobs or who switch jobs frequently will likely do the same thing with new employers, compromising their ability to do the work long term. There are attorneys who settle in and make things work and those who do not. Attorneys who move frequently between firms do so because they get into trouble or realize there is no upward mobility at their current law firm. Law firms view the following reasons attorneys move between firms unfavorably.<sup>391</sup>

- *Inability to get along with peers.* Attorneys might move around because of issues with peers, and these issues surface at each firm they join.
- *Does not have the business represented.* Partners may jump between firms for years representing they have a certain amount of business they do not. Law firms quickly find out when new partners do not bring the business represented.
- *Poor supervisory abilities.* Some attorneys move between firms because they have very poor supervisory abilities.
- *Issues with work quality.* Many attorneys are pushed out of firms because they have issues with their work quality.

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<sup>390</sup> See, e.g., "Summer Associate Program," Sheppard Mullin, <https://www.sheppardmullin.com/careers-lawstudents-summer.html> (last visited September 8, 2017).

<sup>391</sup> See Lateral Link, "Top 5 Reasons Attorneys Move," Above the Law, March 6, 2014, <http://abovethelaw.com/2014/03/the-top-5-reasons-attorneys-move/?rf=1>.

- *Inability to be trusted.* Some attorneys create problems in law firms because they have issues with trust. They may not be able to be trusted about their hours or with client information, and other attorneys may not trust them.
- *Substance abuse problems.* Many attorneys lose their positions as a result of issues with substances.
- *Issues getting work from others.* Some attorneys may lose their positions because they have problems getting work from others. They might have poor work quality or personality issues, or they fail to aggressively seek out work. Law firms want attorneys who can “create work” and find work to do.
- *Consistent billing irregularities.* Attorneys who have irregularities with their billing may be let go or may not be given work. Law firms need to trust the hours attorneys bill are not overinflated or unaccounted for.
- *Inconsistent face time in the office.* Attorneys who are not seen in the office enough may lose their positions. Most law firms consider face time in the office as important and necessary. When attorneys are not available to receive assignments and take feedback from other attorneys, it creates issues.

Regardless of the reason the attorney hops between firms, law firms think that what happened in the past is likely to repeat in the future. Law firms are looking for attorneys with a stable employment history. In the world of law firm hiring, the past is the best predictor of what is likely to happen in the future.

## Attorneys Who Are Currently Unemployed

If an attorney is currently unemployed, this is a very, very bad sign. The legal profession expects attorneys—especially those working inside of law firms—to consider their career as the most important thing in the world to them. Unemployed attorneys are viewed as not committed enough to their legal career or as flawed in whatever way might have gotten them fired. Many otherwise excellent attorneys make the mistake of leaving their law firms—for valid reasons—without another job lined up. Law firms do not believe they can afford to take chances on attorneys who do this.

## Attorneys Who Do Not Seem to Take Their Careers Seriously

In job interviews, attorneys say various things, with their words and their résumés, that indicate they do not take their careers all that seriously. Law firms want to avoid attorneys who do not seem consistently motivated to practice law in the law firm environment. They will ask questions and probe the commitment level of the attorneys they interview to see how committed they seem to be. They want people who are going to stick around and succeed over the long run.

## Attorneys Who Failed to Pass the Bar Multiple Times

Although many excellent and highly skilled attorneys fail to pass the bar, when an attorney fails multiple times, this is not a good sign. Unlike the LSAT, the bar exam is not a test of intelligence—it is a test of how hard a student studied for the bar exam. If an attorney puts in the studying time it takes to pass the bar exam, this demonstrates the attorney is committed and is likely to succeed in the practice of law. Any wavering of commitment shows the attorney may not succeed in the practice of law because succeeding takes such high commitment.

## Senior Attorneys Without Business

Many law firms have institutional clients that consistently feed them work they have no issues putting their senior attorneys on. However, other law firms might not have these sorts of clients in the wings for their more senior hires, so they look for senior attorneys who can bring their own business or who have proven they can generate business. Hiring any senior attorney without business is risky because that attorney must compete for partner-level work with other partners, often becomes a cost center rather than a profit center, and is a lawsuit risk if he or she does not succeed (age discrimination and other suits are common).<sup>392</sup>

## Attorneys Who Do Not Connect with Interviewers

It is a problem when attorneys do not connect with their interviewers. Lawyers should be able to develop rapport with interviewers because this is something they need to do with other lawyers and with clients. There is nothing wrong with an attorney not being a social butterfly, but it is important that an attorney can connect with people.<sup>393</sup>

## Attorneys Who Do Not Seem Interested in the Practice of Law

The best hires are attorneys (and law students) who talk enthusiastically about the practice of law and their interest in it. If someone is going to sit down and spend ten or more hours a day doing something, that person should be interested in it. The ability of law students and attorneys to talk with a certain level of enthusiasm about the practice of law is very important to law firms.

## Attorneys Coming from In-House or the Government

Attorneys from different practice settings typically do not transition well into law firms. In

<sup>392</sup> See Fred Yager, “The Cost of Bad Hiring Decisions Run High,” Insights, <http://insights.dice.com/report/the-cost-of-bad-hiring-decisions/> (last visited September 15, 2017).

<sup>393</sup> See Griffin, “23 Types of Attorneys That Law Firms Don’t Want,” <https://www.jdjjournal.com/2017/07/20/23-types-of-attorneys-that-law-firms-dont-want/>.

fact, the more experience they have in settings other than law firms, the worse. One reason is because law firms have different expectations than other practice settings do. Law firms compete with other firms to do the best work, and this competition is not as prevalent in other practice settings. The work hours tend to be more, and the interpersonal relations of attorneys in law firms tend to be more competitive. Attorneys interested in other practice settings are not likely to stay long term in a law firm. Law firms tend to be more “up or out” than other practice settings.

## Lateral Attorneys Switching Law Firms

Attorneys relocating to their home market are better bets for law firms than attorneys switching firms in their existing market. Lateral attorneys relocating to their home markets are often very good hires because they are “coming home” and are likely to remain in the new market over the long term.<sup>394</sup> But attorneys changing firms within their existing market might have lost their position for whatever reason. They are apt to move again.

## Attorneys with a Sense of Entitlement

Attorneys with a sense of entitlement are often difficult to spot, but they do not fare well in the law firm world.<sup>395</sup> Particularly risky for law firms are graduates of the best law schools (Yale, in particular). Other risky hires are attorneys who appear to be motivated by bonuses and short-term rewards rather than what they can expect through long-term commitment in a law firm. Attorneys with a sense of entitlement may expect to be given certain types of assignments or might complain and make issues out of trivial things. Attorneys with a sense of entitlement often create low morale in their firms.<sup>396</sup>

A sense of entitlement might appear in attorneys who believe they have “made it” by having gone to a good law school or by having gotten experience in a good firm or in attorneys who believe they are special because of certain aspects of their background.<sup>397</sup> Many attorneys believe that once they have made a certain amount of money, they are entitled to make this amount (or more) in the future. (Little do they realize that in many major law firms they are “front loading” their compensation early in their careers—their early incomes are high compared to what they will make later.) Entitled attorneys might not have the background that inculcates the

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<sup>394</sup> See “What Law Firms Look for in a Lateral Resume,” Law Crossing, <http://www.lawcrossing.com/article/900007989/The-Lateral-Resume/> (last visited September 8, 2017).

<sup>395</sup> See Amanda Griffin, “Not Everyone Is Fit to Work in a Law Firm,” *JD Journal*, October 19, 2016, <https://www.jdjournal.com/2016/10/19/not-everyone-is-fit-to-work-in-a-law-firm/>.

<sup>396</sup> See “Lawyers and Narcissistic Entitlement Syndrome,” FindLaw, <http://careers.findlaw.com/law-career-management/narcissistic-entitlement-syndrome.html> (last visited September 8, 2017).

<sup>397</sup> *Ibid.*



middle-class work ethic attorneys need to succeed. They might have become accustomed to having money, honors, or other awards handed to them.

## Attorneys with a Downward Trend of Moves

Law firms tend to hire attorneys who are moving up, improving, getting better and better, and not the other way around.<sup>398</sup> If an attorney shows a series of downward moves to smaller and less-prestigious firms, this is not a good sign. An attorney who is improving and moving to better and better jobs is one who is going places. In contrast, attorneys with downward trends on their résumé likely will move to a less-prestigious law firm soon.

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<sup>398</sup> See Griffin, “23 Types of Attorneys That Law Firms Don’t Want,” <https://www.jdjjournal.com/2017/07/20/23-types-of-attorneys-that-law-firms-dont-want/>.

## Chapter 9: Other Trials Inside Law Firms

### Retention Issues

Many diverse attorneys feel like a “mark” follows them inside firms that makes it more difficult for them once they are hired: they are not trained as thoroughly, their mistakes are judged more harshly, they are given less sophisticated work, they are rarely taken to pitch meetings or allowed significant client contact, and so they move on.

Many top law firms remain suspicious that diverse attorneys were educated, gained job experience, and were hired simply to fill diversity quotas rather than on their merit. Because of this presumed inferiority, diverse attorneys are given poor assignments and have a difficult time getting mentors. The routine mistakes young attorneys make are more costly to diverse attorneys because they confirm existing prejudices in the firm. When diverse attorneys are not provided challenging work, are not mentored, and become discouraged, they tend to leave law firms where they are unhappy.<sup>399</sup>

Almost all law firms and attorneys I spoke with admitted to having serious issues with retention of diverse attorneys. Retention is difficult despite the facts that clients want to see diversity and demand it and diversity in law firms is carefully tracked.

For various reasons, some based on the limiting preconceptions firms have about them, others based on law firm culture, diverse attorneys face retention issues at law firms. These impediments to doing the work long term are interrelated, so the more firms address false preconceptions, for example, the better mentorship opportunities will be for diverse attorneys. The better their mentorship, the better the retention of diverse attorneys will be. The better their retention, the fewer false preconceptions there will be about diverse attorneys to derail diversity efforts and prevent law firms from experiencing the full benefits of a diverse workforce.

How an attorney is treated, how an attorney views life in a law firm, and how confident an attorney is about belonging in a firm significantly affect that attorney’s legal career as well as law firms’ ability to do business.

Many diverse attorneys join law firms and then end up leaving within a few years.<sup>400</sup> This often

<sup>399</sup> See, generally, Judge John Hack, “Diversity Quotas: Would They Be Legal, Would They Make a Difference?” Legal Cheek, November 4, 2014, which finds that attempts to force law firms and chambers to recruit a specified percentage of a certain type of applicant is destined to fail quickly.

<sup>400</sup> See Leonard and Levine, *The Effect of Diversity on Turnover: A Large Case Study*, 13, <http://faculty.haas.berkeley.edu/levine/Papers/Leonard%20&%20Levine%20Diversity%20&%20Turnover%20WP.pdf>.

occurs because they feel isolated,<sup>401</sup> do not see upward potential,<sup>402</sup> and do not receive the best assignments and believe their skills would be more valued elsewhere.<sup>403</sup> Diverse attorneys give various other reasons for leaving their firms:

- Feeling like they do not belong
- Feeling left out
- Lack of access to inside information
- Inability to get enough work (hours)
- Not being given substantive work
- Feeling like tokens
- Inability to get adequate sponsorship, mentoring, and training
- Inability to generate enough business
- Inability to form relationships with influential partners
- Lack of positive feedback
- Lack of role models for their diverse group
- Family considerations
- Geographic considerations
- Major market versus smaller market considerations
- Feeling uncertain about the future

## Feeling Like They Do Not Belong

Diverse associates often feel isolated when they notice that few of their colleagues or superiors share their background.<sup>404</sup> Many diverse attorneys report feeling like they do not

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<sup>401</sup> See *Creating Pathways to Diversity: A Set of Recommended Practices for Law Firms* (Minority Corporate Counsel Association, 2017), 17, <https://www.mcca.com/wp-content/uploads/2017/04/Book-2Blue.pdf>.

<sup>402</sup> See, generally, Staci Zaretsky, “The Best Biglaw Firms for Minority Attorneys Who Want to Make Partner,” *Above the Law*, August 22, 2017, <http://abovethelaw.com/2017/08/the-best-biglaw-firms-for-minority-attorneys-who-want-to-make-partner/>, which explains that “while more than 30 percent of law students are minorities, only 15 percent of lawyers and less than 9 percent of partners are attorneys of color.”

<sup>403</sup> See *Creating Pathways to Diversity*, 18–19, <https://www.mcca.com/wp-content/uploads/2017/04/Book-2Blue.pdf>.

<sup>404</sup> See Leonard and Levine, *The Effect of Diversity on Turnover*, <http://faculty.haas.berkeley.edu/levine/Papers/Leonard%20&%20Levine%20Diversity%20&%20Turnover%20WP.pdf>.

belong. They may feel like their contributions are not valued as highly as those of nondiverse attorneys and that they do not fit in with the other attorneys they are working with, either because their values and beliefs differ or are perceived to differ. Diverse attorneys may be perceived as lacking commitment to work as a result of their family obligations. They report not being invited to informal functions, not being viewed as potential leaders, and that the focus is on their gender or minority status instead of on their skill.<sup>405</sup>

## Feeling Left Out

Many attorneys from diverse backgrounds report feeling left out in law firms. They feel like they are not included in activities, they are not asked out for lunches, and they are not made part of social groups and activities that occur with firm employees outside of work. Diverse attorneys also report feeling like they exist on their own “island.” In a study conducted by the Minority Corporate Counsel Association regarding minority attorney experiences at law firms, participants discussed the “acute isolation minority attorneys can experience, such as exclusion from ‘peer camaraderie, socializing, and support that make the first few years [at a law firm] more tolerable.’”<sup>406</sup> These “forms of workplace inequity are frequently embedded in an institutional structure that preserves exclusion, even if it prohibits more deliberate exclusion.”<sup>407</sup> As lawyers attempt to implement “remedial decrees designed to eliminate the effects of systems that have deliberately subordinated workers, they find themselves dealing with issues of organizational norms, culture, and structure.”<sup>408</sup> Subsequently, “if the new associates are unable or unwilling to conform their lifestyles and values entirely to the firm’s culture conflict ensues, leading to the large-scale departure of nontraditional associates.”<sup>409</sup>

## Lack of Access to Inside Information

One of the more important ways to get ahead in law firms is by having access to inside information, such as knowing about the strengths and weaknesses of various attorneys and

<sup>405</sup> See Charlotte L. Miller, “Checklist for Improving the Workplace Environment (or Dissolving the Glass Ceiling),” *Utah Bar Journal* 9 (1996): 6–9; Government of New Brunswick, “Employer Checklist on Workplace Environment and Satisfaction,” Wage Gap Reduction Initiative, [https://www.gnb.ca/0012/Womens-Issues/wg-es/tools/pdf/employer\\_checklist-e.pdf](https://www.gnb.ca/0012/Womens-Issues/wg-es/tools/pdf/employer_checklist-e.pdf).

<sup>406</sup> See *Creating Pathways to Diversity: A Set of Recommended Practices for Law Firms* (Minority Corporate Counsel Association, 2017), <https://www.mcca.com/wp-content/uploads/2017/04/Book-2Blue.pdf>.

<sup>407</sup> Susan Sturm, “Lawyers and the Practice of Workplace Equity,” *Wisconsin Law Review* 2002 (2002): 277, 285; Tiffani N. Darden, “The Law Firm Caste System: Constructing a Bridge between Workplace Equity Theory and the Institutional Analyses of Bias in Corporate Law Firms,” *Berkeley Journal of Employment and Labor Law* 30, no. 1 (2009): 85–132.

<sup>408</sup> Sturm, “Lawyers and the Practice of Workplace Equity.”

<sup>409</sup> Richard H. Sander, “The Racial Paradox of the Corporate Law Firm,” *North Carolina Law Review* 84 (2006): 1755, 1766.

partners, client relationships, and work distribution within the firm. This sort of information can make attorneys feel like they are part of the group and enables them to make correct career decisions. Many diverse attorneys report a lack of access to this sort of information, which affects their ability to advance in the firm.

## Inability to Get Enough Work (Hours)

The most important contribution young attorneys make to law firms is their ability to work lots of hours. A major concern of all attorneys is getting enough hours to succeed. Hours are the lifeblood of attorneys—both partners and associates. Without billable hours, attorneys’ careers are often short-lived.<sup>410</sup>

In law firms, work can be distributed in a variety of ways. Some law firms use central assignment systems, where all work for associates is assigned to a central person and then distributed fairly among them. Assignments that come through central assignment systems tend to be short-term work, and central assignment does not necessarily result in attorneys getting a lot of hours consistently over a long period.

A law firm can be a very isolating place for an attorney. It can be even more isolating when an attorney does not have work to do or when the work the attorney is given is unimportant. Workflow has a great impact on an attorney’s career. When there is not a lot of work to go around, associates are at constant risk of upsetting partners. If you’re not productive, you’re not essential to the firm.

To get lots of hours, attorneys need to work on long-term assignments and form relationships with attorneys in their firms who have access to long-term work. Most tasks that lawyers do are not on huge matters. The majority of work in large law firms comes from individual lawyers giving work to each other and associates. Partners develop relationships with other attorneys they like working with and feel comfortable with. Most law firms distribute work informally in this way: partners give work to the attorneys whose work they like best, who they believe their clients like best, and who they are most comfortable with.<sup>411</sup>

The problem with partners assigning work is that it creates a self-reinforcing feedback loop of partners supporting the careers and advancement potential of associates who are like them and not assigning work to attorneys they don’t identify with.<sup>412</sup>

<sup>410</sup> See Rhode, “Law Is the Least Diverse Profession in the Nation,” [https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm\\_term=.9d0fc7ef133b](https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.9d0fc7ef133b).

<sup>411</sup> Ibid.

<sup>412</sup> “Reinforcing feedback loops, or positive feedback loops, occur when an initial change is reinvested to further that change in the future.” “Reinforcing Loop,” Systems & Us, <https://systemsandus.com/foundations/why-you-should-think-like-a-modeler/reinforcing-loops/> (last visited September 18, 2017).

Recently, I spoke with an attorney who has practiced law at the same major law firm for the past twenty years. He not only has been able to survive for two decades in one of the most competitive and demanding law firms in the country but also made partner there. He said he went to work each day and never left without “making his hourly target for the day,” and he has lived his life like this for twenty years. “As long as you are making your hours, you’ll always be okay,” he told me. “It’s only when your hours stop that there are issues.”

Many attorneys agree that tallying billable hours is one of the most harrowing aspects of practicing law in a firm. To this day—almost two decades after practicing as an attorney—I still have nightmares that weeks have gone by and I haven’t billed any hours. In my dreams I know I am committing professional suicide by not billing hours.

## Not Being Given Substantive Work

Many diverse attorneys in law firms report that they are not given substantive work. They believe that partners have lower tolerance for their mistakes than for the mistakes of nondiverse attorneys and thus will not give them important work to do. Attorneys without important work have limited prospects for advancement. Few minority associates “are classified as potential ‘stars’—young lawyers who should be cultivated as future firm leaders—in the firm, and therefore few minorities get . . . challenging assignments . . . [leaving] minority associates . . . to be stuck with routine work leading nowhere.” In addition, they are not given appropriate feedback on their assignments that enables them to improve their output; law firms end up giving them nonsubstantive work instead. “Even when internal mobility is available uniformly . . . organizational leaders may ‘track’ individual employees, informally grooming them for success (or failure) by controlling their access to choice work assignments.”<sup>413</sup> Minority attorneys report that not being given substantive work is also discouraging. It leads many to leave the firm long before they are formally passed over for partnerships.<sup>414</sup>

## Feeling Like Tokens

Many minority attorneys report they are put on important matters to make the law firm look diverse when really they are given only small, unimportant assignments. Or they are highlighted on law firm websites so the firm is perceived as diverse, but then are forgotten about later. This tokenism is problematic. Black attorneys in particular experience this.<sup>415</sup>

<sup>413</sup> See Chambliss, “Organizational Determinants of Law Firm Integration,” 688–689.

<sup>414</sup> Sander, “The Racial Paradox of the Corporate Law Firm,” 1755, 1766.

<sup>415</sup> See David B. Wilkins and G. Mitu Gulati, “Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis,” *California Law Review* 84 (1996): 493, 571; Jean E. Wallace and Fiona M. Kay, “Tokenism, Organizational Segregation, and Coworker Relations in Law Firms,” *Social Problems* 59, No. 3 (2012): 389–410.

Women and other minorities report being asked to attend functions or award ceremonies, to speak to law students of color, to pose for publications, but never to have had contact with partners in power other than at those events. Furthermore, they report meeting with clients only when race or gender diversity was an advantage to the firm, for example, when a client specifically requested a diverse legal team or when a client is a minority.<sup>416</sup>

## Inability to Get Adequate Sponsorship, Mentoring, and Training

To get ahead in most law firms, attorneys need sponsors who support them to partnership.<sup>417</sup> They also need mentors who show them the ropes along the way and train them. An attorney without a sponsor has an extremely difficult time advancing and making partner. Attorneys sponsor junior attorneys when the junior attorneys impress them and when they can identify with them. Because sponsors tend to sponsor those who are most like them, attorneys from various diverse backgrounds often have an issue getting a sponsor when there are not many attorneys like them in the law firm. A self-reinforcing feedback loop arises, where diverse attorneys fail to get sponsored and thus do not advance to a position where they can sponsor others like them.

Similarly, according to a study by David B. Wilkins and G. Mitu Gulati, white mentors tend to feel more comfortable in working relationships with other white men, in turn making it “difficult for blacks to form supportive mentoring relationships.”<sup>418</sup> Also, because of the lack of women and minorities at the senior partner level, fewer women and minorities are mentors.<sup>419</sup>

To be most effective, attorneys need lots of training from more senior lawyers. When attorneys are not trained by more senior attorneys, their work does not develop the way it must for success. This training is nearly constant, and attorneys need feedback constantly, too.

If the law firm and its partners do not believe a given attorney has potential, they will stop giving the attorney meaningful work and will leave the attorney on his or her own. Once that happens, the attorney’s advancement ceases and peers move ahead rapidly.<sup>420</sup>

<sup>416</sup> LeeAnn O’Neill, “Hitting the Legal Diversity Market Home: Minority Women Strike Out,” *Modern American*, 2007, <https://www.wcl.american.edu/modernamerican/documents/ONeillArticle.pdf>.

<sup>417</sup> See David L. Harris, “I Just Looked Around and They Were Gone: Retaining the Minority Lawyer,” *New Jersey Lawyer* 149 (1992): 25; Beth Hawkins, “Law Firms Struggle with Recruiting and Retaining Minority Lawyers,” *MinnPost*, December 2, 2011, <https://www.minnpost.com/politics-policy/2011/12/law-firms-struggle-recruiting-and-retaining-minority-lawyers>.

<sup>418</sup> See Wilkins and Gulati, “Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis,” 569.

<sup>419</sup> See *Creating Pathways to Diversity: A Set of Recommended Practices for Law Firms* (Minority Corporate Counsel Association, 2017), 18, <https://www.mcca.com/wp-content/uploads/2017/04/Book-2Blue.pdf>.

<sup>420</sup> *Ibid.*

The difficulty diverse attorneys have in finding mentors, and therefore in gaining access to the training they need, is a primary reason they leave large law firms and in the earlier stages of their careers.<sup>421</sup>

## Inability to Generate Enough Business

For an attorney to stay employed in a law firm permanently, business generation is extremely important.<sup>422</sup> Attorneys who want to become partners and have a say in the future of the law firm must develop a book of business.

One issue diverse attorneys face is that clients tend to develop business with attorneys who are similar to them. One article found that “all Michigan alumni are disproportionately likely to serve same-race clients.”<sup>423</sup> It is more difficult for attorneys to get business from others who do not share their background. Most CEOs, general counsel, and others who generate business tend to be heterosexual white males. Because diverse attorneys are most likely to attract business from attorneys of their background, they have a smaller universe of potential clients to draw from than white attorneys do.

Firms with high billing rates make it difficult for young attorneys to bring in business, too.

## Inability to Form Relationships with Influential Partners

The inability to form meaningful relationships with influential partners severely limits the careers of diverse attorneys in law firms. Partner contact and mentoring is increasingly recognized as a key process for the success of attorneys. “Disparity in social contacts with partners and mentoring experiences with partners, rather than disparities in merit and performance, can explain the ‘paradox’ of high rates of minority lawyers’ dissatisfaction and departures after being hired into large law firms.”<sup>424</sup>

One writer notes that social relationships leave “some black lawyers at a distance from their white colleagues....For the most part, they don’t go to church together on Sunday enough,

<sup>421</sup> See Root, “Retaining Color,” n.235.

<sup>422</sup> See Ed Poll, “What Associates Need to Know About Business Development,” LexisNexis, January 12, 2011, <https://www.lexisnexis.com/legalnewsroom/lexis-hub/b/career-news-and-trends/archive/2011/01/12/teaching-associates-about-business-development.aspx?Redirected=true>.

<sup>423</sup> Richard O. Lempert et al., “Michigan’s Minority Graduates in Practice: The River Runs Through Law School,” *Law and Social Inquiry* 25 (2000): 395, 401; Elizabeth Olson, “Many Black Lawyers Navigate a Rocky, Lonely Road to Partner,” *New York Times*, August 17, 2015, <https://www.nytimes.com/2015/08/18/business/dealbook/many-black-lawyers-navigate-a-rocky-lonely-road-to-partner.html>.

<sup>424</sup> Lempert et al., “Michigan’s Minority Graduates in Practice.”



they don't have dinner together enough, and they don't play enough golf together to develop sufficiently strong relationships of trust and confidence."<sup>425</sup>

## Lack of Positive Feedback

Many diverse attorneys report their work is criticized more than the work of their peers. Black associates frequently report being judged more harshly than their white contemporaries on similar mistakes. There is a perception in many law firms that the diverse attorney may not be "up to snuff." Because of the expectation that minority associates perform only average or acceptable work, any mistake they make confirms this initial perception and forms a vicious cycle. On the other hand, absent a compelling reason to think otherwise, "mistakes by whites are more likely to be dismissed as . . . 'growing pains' since these associates are presumed competent."<sup>426</sup> The severity of criticism leveled against them leads many diverse attorneys to leave law firms, which compromises their ability to do the work long term.

The lack of positive feedback diminishes diverse attorneys ability to improve, get more meaningful work, and fully participate and advance in law firms. Because their work is more harshly criticized, mainly because of the erroneous and outrageous preconceptions discussed earlier, diverse attorneys understandably long for an environment where they receive positive feedback on their work so that they know what they are doing right and can do more of that.<sup>427</sup>

A few black attorneys I worked with told me they felt more comfortable working in government legal departments than in the law firm environment. They said they received positive feedback on their work, the environment was more egalitarian, and they knew they could advance if they did good work. They commented that law firms were not as welcoming of diversity as the government was.<sup>428</sup>

## Lack of Role Models for Their Diverse Group

Young diverse associates are more likely to join a law firm when they see diverse attorneys in positions of power in the firm. Having diverse attorneys on the management committees of law

<sup>425</sup> Ibid., n241.

<sup>426</sup> See Wilkins and Gulati, "Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis," 571–572.

<sup>427</sup> See, generally, Ginene A. Lewis, "Turning the Corner on Diversity to Push Boundaries on Retention," *Legal Intelligencer*, August 10, 2017, <http://www.thelegalintelligencer.com/id=1202795225979/Turning-the-Corner-on-Diversity-to-Push-Boundaries-on-Retention?slreturn=20170813133640>, which articulates the importance of one-on-one honest feedback from diverse attorneys.

<sup>428</sup> See, generally, Wilkins and Gulati, "Why Are There So Few Black Lawyers in Corporate Law Firms?" 493, 502–505, which discusses that a far higher percentage of black lawyers are in roles as supervisors in government and very few are partners in large law firms.

firms likely improves retention of diverse attorneys. Having a role model demonstrate how it's possible to succeed in the firm increases the odds of retaining diverse attorneys.<sup>429</sup>

Minority attorneys report there is a self-reinforcing feedback loop inside large law firms, and many attorneys leave because they find no appropriate role models to look up to and follow. In large law firms, there may not be many women, gay, black, or other diverse partners. The number of black attorneys at AmLaw 100 firms, for example, generally can be counted on one hand, even though the average firm on that list has more than doubled in size in the past twenty years.<sup>430</sup> In addition, in a Law360 survey of more than three hundred firms, women made up a little less than 20 percent of equity partners.<sup>431</sup> Furthermore, a January 2017 bulletin from the National Association for Law Placement (NALP) indicated that 1.89 percent of partners overall identify as LGBT, which does not match that group's proportion in society.<sup>432</sup>

Most management committees are composed of the attorneys with the most business. For reasons discussed earlier (lack of mentorship and training, lack of substantive work, lack of meaningful relationships with senior attorneys), lower numbers of diverse attorneys have the most business in a firm. And when diverse attorneys are appointed to management committees without the necessary book of business, it is perceived as tokenism.

On the other hand, studies demonstrate that the mere presence of a diverse judge on a panel can influence the way decisions are made:

- In sexual harassment and sex discrimination cases, judicial panels “with at least one female judge decided cases for the plaintiff more than twice as often as did all-male panels.”<sup>433</sup>
- One study indicated that a panel of two white judges and one black judge was more likely to decide cases upholding affirmative action outcomes than was an all-white panel.<sup>434</sup>

The presence of a diverse person on a management committee can influence the committee's decisions, including decisions about diversity-related matters.

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<sup>429</sup> Ibid.

<sup>430</sup> See Julie Triedman, “The Diversity Crisis: Big Firms’ Continuing Failure,” *American Lawyer*, May 29, 2014, <http://www.americanlawyer.com/id=1202656372552/The-Diversity-Crisis-Big-Firms-Continuing-Failure>.

<sup>431</sup> Bell, “The 2017 Law360 Glass Ceiling Report,” <https://www.law360.com/articles/946586>.

<sup>432</sup> “LGBT Representation among Lawyers in 2016” (press release), National Association for Law Placement, January 2017, <http://www.nalp.org/0117research>.

<sup>433</sup> Jennifer L. Peresie, “Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts,” *Yale Law Journal* 114: 1759–1790, [https://www.yalelawjournal.org/pdf/211\\_35ddrdm9.pdf](https://www.yalelawjournal.org/pdf/211_35ddrdm9.pdf).

<sup>434</sup> See Jonathan P. Kastellec, “Racial Diversity and Judicial Influence on Appellate Courts,” *American Journal of Political Science* 57 (2013): 167.

## Family Considerations

Women attorneys at law firms may have family obligations that they cannot abandon. In society, women are traditionally the family caregivers, not men.<sup>435</sup> In most circumstances, women are considered responsible for children.<sup>436</sup> Women attorneys who desire a family are held back in their careers by these gender-specific expectations, which law firms perceive as incompatible with a career in a firm.<sup>437</sup>

Work in a law firm often involves assignments that are time pressured: trials in a large case, deadlines for transactions, papers that need to be filed by a certain time. These deadlines are often nonnegotiable.

Negative consequences are accorded to attorneys who are not around to make sure legal work is done properly and in a timely manner. Attorneys' family obligations sometimes compete with their ability to be constantly available to the law firm. Attorneys who cannot fully dedicate themselves to the job are often believed to be ineligible for partnership or advancement because they can't be there to meet the demands of the law firm's clients.

Flex-Time Lawyers releases an annual list called the "50 Best Law Firms for Women." Most of these firms allow attorneys who work reduced hours to be eligible for equity partner promotion. In 2014, only one lawyer at those firms received that promotion; in 2013, no one in that category was promoted to partner.<sup>438</sup> Evidently, even at these more lenient firms, attorneys find it hard to advance without fully committing to the job. "Individual partners continue to point to women's child-bearing and child-rearing responsibilities to explain the lack of women lawyers in leadership positions, despite significant literature to the contrary."<sup>439</sup>

<sup>435</sup> See Linda L. Lindsey, "Gender Roles in Marriage and the Family," in *Gender Roles: A Sociological Perspective* (New York: Pearson, 2016), 221–227.

<sup>436</sup> In households where both the mother and father work full-time, more than half of the women came home to do housework, whereas only 20 percent of the men did the same. Bryce Covert, "Why it Matters That Women Do Most of the Housework," *The Nation*, April 30, 2014, <https://www.thenation.com/article/why-it-matters-women-do-most-housework/>. Moreover, women are spending more than twice the time of their male counterparts on child care each week.

<sup>437</sup> See, generally, Slaughter, "Why Women Still Can't Have It All," <https://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>, which articulates the discrepancies between men and women in top positions and notes that, although every male Supreme Court justice has a family, two of the three female justices are single with no children.

<sup>438</sup> See Deborah L. Jacobs, "At Law Firms, Mommy Track Still Holds Women Back," *Forbes*, August 5, 2014, <https://www.forbes.com/sites/deborahljacobs/2014/08/05/at-law-firms-mommy-track-still-holds-women-back/#eb9cdb2e8576>.

<sup>439</sup> Linda B. Chanow, *Actions for Advancing Women into Law Firm Leadership: Report of the National Women's Association of Lawyers* (Washington, D.C.: American Bar Association, July 2008), [https://www.americanbar.org/content/dam/aba/marketing/women/gender\\_equity\\_task\\_force/nawl\\_advancing\\_women.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/marketing/women/gender_equity_task_force/nawl_advancing_women.authcheckdam.pdf).

Because of these preconceptions, many women attorneys face difficult choices.<sup>440</sup> They often choose to leave the practice of law (or the law firm) because they believe they will not advance at a firm that prejudices them and holds them back because of their current or future family obligations.<sup>441</sup>

- Due to family obligations, a woman attorney might ask for part-time hours. “In a survey of three thousand women in the nation’s largest law firms, sixty-seven percent of the respondents reported that part-time work results in lesser opportunities.”<sup>442</sup> Furthermore, in a 2007 study of Massachusetts lawyers at the top 100 firms, “women who [work] part-time stay in law firm positions longer than women who remain fulltime, but are less likely to make partner than the fulltime women who do remain.”<sup>443</sup>
- In that same study, women who left law firms did so because of “difficulty integrating work and family/personal life.”<sup>444</sup>
- “Programs and policies that are available only to women are susceptible to the dreaded ‘Mommy track’ label and therefore likely to be perceived as a path for second-class citizens.”<sup>445</sup>
- In a 2016 Issue of *OC Lawyer Magazine*, a survey was published in which four hundred men and women across the United States were asked why they left the law profession. Of the respondents, 84.7 percent were women, and their responses are listed in Table 9.1.<sup>446</sup>

<sup>440</sup> See Timothy L. O’Brien, “Why Do So Few Women Reach the Top of Big Law Firms?” *New York Times*, March 19, 2006, <http://www.nytimes.com/2006/03/19/business/yourmoney/why-do-so-few-women-reach-the-top-of-big-law-firms.html>.

<sup>441</sup> See Kathy Caprino, “Gender Bias at Work—Why Men Call Forceful Women ‘Hysterical’ and Try to Silence Them,” *Forbes*, June 15, 2017, <https://www.forbes.com/sites/kathycaprino/2017/06/15/gender-bias-at-work-why-men-call-forceful-women-hysterical-and-try-to-silence-them/#8672fbb3ea2a>.

<sup>442</sup> See Theresa M. Beiner, “Not All Lawyers Are Equal: Difficulties That Plague Women and Women of Color,” *Syracuse Law Review* 58 (2008): 317, 325.

<sup>443</sup> Anna Bookman, Cynthia Thomas Calvert, Holly English, Mona Harrington, and Joan C. Williams, “Advancing Women in the Profession: Action Plans for Women’s Bar Associations,” MIT 5, June 11, 2007; see Mona Harrington and Helen Hsi, *Women Lawyers and Obstacles to Leadership: A Report of MIT Workplace Center Surveys on Comparative Career Decisions and Attrition Rates of Women and Men in Massachusetts Law Firms* (Cambridge, MA: MIT Workplace Center, 2007).

<sup>444</sup> *Ibid.*; see Beiner, “Not All Lawyers Are Equal,” 321.

<sup>445</sup> Karen Hirschman, “Making the Practice of Law Work for Women,” *The Advocate* (Texas) 49 (2009): 51, 52.

<sup>446</sup> See “Survey Results: Why Are Women Really Leaving Firms?” Montage Legal Group, March 7, 2016, <https://montagelegal.com/survey-results-women-really-leaving-firms/>.

The primary reason I left my firm was...	Percent
I wanted to spend more time on other pursuits	0.7
Bias or discrimination ( e.g., due to race, gender, parental status, etc.)	1.3
Lack of opportunity, training, and/or support to develop a book of business	2.3
Lack of opportunity to advance	3.7
My compensation was too low	4.0
I felt disrespected	4.0
I had to leave due to family reason (e.g., spouse's job, military service, etc.)	4.0
Lack of opportunity to do the type of work I wanted to do	4.3
The work was not meaningful	4.7
The job was too stressful	7.3
Lack of flexibility regarding hours	9.6
The job demanded too much time	17.6
Toxic work culture	18.3
I wanted to spend more time with my family	18.3

**Table 9.1** *OC Lawyer Magazine* Survey: Why Women Respondents Say They Leave the Law Profession

The second choice many women attorneys face is whether to have a family at all. Many choose to remain single and do not have families because they fear that would limit them in the law firm. This unfortunate choice occurs far too often. “Studies suggest that women lawyers are less likely to be married or have children than their male counterparts.”<sup>447</sup>

The third choice is whether to remain at their law firm and risk asking for flex time or other arrangements to accommodate a reduced schedule. This exposes them to the risk that the law firm and partners will perceive them as uncommitted to their career and unable to do the work long term. Law firms do not like to compete with other priorities in attorneys’ lives.

Because the law firm is so demanding, women often feel that they cannot be part of the law firm environment while contemporaneously having children. To retain women partners, change is needed to ensure that they remain. Policies that allow women to have just as much power over the trajectory of their careers with alternative scheduling are important.

<sup>447</sup> See Beiner, “Not All Lawyers Are Equal,” 322.

## Geographic Considerations

In areas of the country that are not diverse, law firms have a more difficult time retaining diverse attorneys than they might have in the most cosmopolitan cities. This phenomenon often is more pervasive in the Midwest, suburbs, and towns outside of major cities.<sup>448</sup>

Several diverse attorneys indicated to me that they wanted to live and work in areas where there were other diverse attorneys and professionals with whom they could socialize. This is especially so for young attorneys who want to meet others. One attorney from Portland and one from San Francisco said they preferred living in areas like their respective cities rather than in smaller cities because they felt like their diversity was accepted and there were other people like them they could socialize with. Another diverse attorney in a small Southern town said she was having trouble breaking in to the social scene at her firm as well as in the town. She was leaving the firm to move to a larger city where there was a more active social scene for single people.

Partners in law firms in areas of the country with low diversity indicated they often have issues retaining diverse attorneys. One said that her firm in Florida had a difficult time retaining black attorneys because the area did not have a lot of African American professionals. She said that the most recent African American attorney she hired ended up leaving her firm and moving to Atlanta to be closer to more professionals similar to her.

In these instances, the geographic area influenced the legal market and prompted diverse attorneys to stay at their firm when they felt comfortable in the area or to leave because they felt out of place where they were working.

## Major Market versus Smaller Market Considerations

The largest law firms in the largest cities are the most likely to attract the most diverse attorneys, but, ironically, they have the hardest time with retention—whether or not an attorney is diverse. These law firms are much more “sink or swim.” They may expect extreme hours from attorneys and may make associates feel like commodities; mentors may be unavailable, and the amount of business needed to make partner can be exorbitant. Attorneys often need to bring in large, institutional clients. In general, these highly competitive firms can be pretty unwelcoming places for all attorneys.<sup>449</sup>

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<sup>448</sup> See Beth Hawkins, “Law Firms Struggle with Recruiting and Retaining Minority Lawyers,” *Minnesota Post*, December 2, 2011, <https://www.minnpost.com/politics-policy/2011/12/law-firms-struggle-recruiting-and-retaining-minority-lawyers>.

<sup>449</sup> See, generally, Maureen Lynch, “How to Get More Diversity with Better Job Adverts,” *Silicon Republic*, January 31, 2017, <https://www.siliconrepublic.com/advice/diversity-jobs-employers-candidates>, which discusses what attracts diverse candidates to a law firm.

Law firms in smaller to midsized markets do not have the same turnover as larger markets, and attorneys in them seem to make it work for everyone. Partners often retire later, associates who stick around make partner, and most attorneys have few options other than staying with the firm and making it work.

Attorneys, diverse or not, leave the most competitive firms in the major markets more than they do smaller firms in smaller markets. These firms make it hard for everyone—regardless of diversity—to have long-term careers in them.

Because most qualified diverse attorneys are most likely to be hired at the largest law firms in the largest cities where it is more difficult for them to make partner, the cycle may be self-reinforcing: attorneys go to firms where there are not a lot of opportunities, get discouraged, and leave.

## Feeling Uncertain About the Future

Many diverse attorneys often note that they do not feel confident about their future in a law firm, which impedes their ability to cultivate a long-term outlook for staying at a firm. It should be noted, though, that all kinds of attorneys report feeling uncertain about their future in a law firm.

The pressure to achieve high billable hours may be felt disproportionately by women associates “with competing family responsibilities and among those who anticipate such responsibilities.”

Additionally, attorneys might doubt whether advancement is achievable in their law firm when they see a dearth of diverse partners at the firm.<sup>450</sup> (In 2015, the NALP found that just 7.52 percent of partners at major law firms were minorities.)<sup>451</sup> Another reason for the uncertainty is lack of mentorship. “Minority lawyers leave before becoming senior associates because they are neither receiving meaningful training and mentoring nor believe that they have a realistic chance of becoming partners.”<sup>452</sup>

This consequently leads to dissatisfaction, uncertainty about whether advancement in the profession is achievable or even desirable, and eventually to attorneys leaving law firms.<sup>453</sup>

<sup>450</sup> See Wilkins, “Five Reasons Why Law Firms Are Not Making Progress on Diversity,” *CBA Record* 13 (1999): 23; Olson, “Many Black Lawyers Navigate a Rocky, Lonely Road to Partner,” <https://www.nytimes.com/2015/08/18/business/dealbook/many-black-lawyers-navigate-a-rocky-lonely-road-to-partner.html>; Olson, “Women and Blacks Make Little Progress at Big Law Firms,” <https://www.nytimes.com/2015/11/20/business/dealbook/women-and-blacks-make-little-progress-at-big-law-firms.html>.

<sup>451</sup> “NALP Diversity Infographic: Minorities,” National Association for Law Placement, 2016, [http://www.nalp.org/nalpdiversityinfographic\\_minorities](http://www.nalp.org/nalpdiversityinfographic_minorities) (last visited August 31, 2017).

<sup>452</sup> Wilkins, “Five Reasons Why Law Firms Are Not Making Progress on Diversity,” 20, 23.

<sup>453</sup> See Jaffe et al., *Retaining and Advancing Women in National Law Firms*, <https://law.stanford.edu/wp-content/uploads/2016/05/Women-in-Law-White-Paper-FINAL-May-31-2016.pdf>.

## Lack of Mentors

One thing that helps attorneys stick with and succeed in the practice of law is having a good mentor. Without a good mentor, many associates fail at law firms. Mentors offer associates profound career advantages. Nowhere is mentoring more important than for the diverse attorney who may feel alone in his or her organization.

A mentor helps an attorney understand the unstated rules and politics of the law firm, get the best assignments, develop marketing skills, bond with decision makers in the firm, and feel supported in the development of his or her career. A mentor is most often an attorney who is older, has had similar experiences, and is available to provide advice and counsel.

The most successful attorneys—regardless of their diversity—had the benefit of a mentor. Mentors can be from within an attorney’s firm or outside the firm; sometimes an attorney’s mentor is his or her parent who is an attorney. Attorneys with parents who are attorneys grew up watching the parent and witnessing the parent’s level of dedication. They will have a realistic understanding of what it means to be an attorney. This type of parent mentor can discuss issues and give advice to the attorney.

## Why Mentors Are So Important

Throwing new attorneys into the law firm environment with no support or guidance is unwise because it squashes the attorney’s chances of being able to do the work long term, to the detriment of both the attorney and the firm. Attorneys need to know countless things to get ahead in a law firm.<sup>454</sup> Every law firm has an unstated set of rules that people follow, and certain things are important in one firm and not another. A mentor can guide an associate in the right direction. A good mentor can help a mentee in so many ways it is difficult to overstate the importance of this relationship. Here are just a few of the ways a mentor can be an invaluable resource for an attorney—and all the more so for a diverse attorney, who may feel marginalized in a firm.

- *A mentor can help an attorney avoid certain partners.* Some partners may be on the way out; may be ungrateful or disorganized; may give cryptic instructions for difficult assignments; may not have good work; and may consistently give poor reviews to attorneys who work for them. A good mentor can help a mentee avoid these sorts of partners. Working with a toxic partner can be career suicide, a morale killer, and discouraging to young attorneys. When an attorney is told which partners to avoid, the attorney can make better decisions about where to invest effort.

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<sup>454</sup> See Kenneth O. C. Imo, “Mentors Are Good, Sponsors Are Better,” American Bar Association, [https://www.americanbar.org/publications/law\\_practice\\_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html](https://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html).



- *A mentor can help an attorney know which partners to get on the good side of.* In every law firm, there are certain partners it pays to please. They may have access to the best work, may be rainmakers with a lot of business, may be connected within the law firm, or may be on important management committees. If an associate curries favor with one of these partners, it can be beneficial to the attorney's career. A good partner can make sure an attorney always has work to do, can help the attorney advance to make partner, and can take the attorney along if they leave the firm. Some mentors protect their mentees through their entire careers. Many senior attorneys in large law firms—and even junior ones—are where they are because a mentor has protected and helped them along the way. Some attorneys can work their entire career without having to generate business because they got in good with the right partners. A mentor likely has access to information about who does and does not like the mentee and why they feel this way. Attorneys may need to impress people they are not impressing and may need to do more work with people who like them. When attorneys understand who their friends and enemies are, they are far more likely to be successful.
- *A mentor can take an attorney on business development meetings.* Good mentors take mentees on business development meetings and inform attorneys of the requirements in terms of business development. Watching the older attorney can help the mentee learn the skills necessary to succeed in business development. Mentors also introduce mentees to a network of contacts that the mentee can draw on later. Knowing how business is generated is important for attorneys and can provide them with more employment security. Attorneys who attend business development meetings with their mentors gain skills and contacts.
- *A mentor can tell an attorney what he or she is doing right.* Many attorneys may not realize what they are doing right and what they are doing better than other attorneys. The law firm environment is filled with all sorts of doubters and puts people on the defensive constantly. Attorneys tend to hear much more about what they are doing wrong than about what they are doing right. Constant negative feedback can take its toll and is one reason so many people leave the practice of law. This is especially so for diverse attorneys. Good mentors encourage attorneys by making them aware of their strengths and building on them.
- *A mentor can tell an attorney what he or she is doing wrong.* Good mentors also tell attorneys what they are doing wrong. Many times, young attorneys do not even realize what they are doing wrong, so it is important for them to get this feedback from a mentor. Mistakes can be related to their attitude toward the work, taking too long or not enough time on assignments, asking for too much direction, not socializing enough with other attorneys outside work, being careless with details, or not doing what is expected of them. Having a mentor looking out for them and pointing out mistakes enables attorneys to correct these faults before it's too late.
- *A mentor can help adjust an attorney's expectations.* Many attorneys—associates and partners alike—have inflated expectations about the quality of work they should be doing,

their compensation, advancement, and the challenges they should be given at various points in their careers. Mentors can act as sounding boards and temper high expectations. Also, an attorney needs to be aware of the hours of work that are expected. In some firms, 2,500 hours may be needed to be competitive with other associates, and in others, that number may be 1,800. A mentor can give an attorney insight into how his or her hours stack up to those of other attorneys in the firm. Lawyers can get into trouble by not billing enough hours, and they also can also get in trouble by billing too many hours.

- *A mentor can provide insight on who to emulate.* Every law firm has an unwritten behavior code. Mentors can help attorneys realize what behavior is considered admirable. When attorneys know who is doing well, they can observe that attorney's behavior and model the positive aspects of it. They can associate with attorneys who are succeeding and avoid attorneys who are on the way out.
- *A mentor can explain how the firm is doing financially.* Law firms can be risky places to work because they go through so many economic ups and downs. When the firm is doing poorly, a good mentor can help an attorney understand when it may be time to look for a job (before the attorney is laid off) and when it may be time to look extra busy and indispensable. When the law firm is doing well, a good mentor can point out the opportunities for advancement.
- *A mentor can advise an attorney on how to overcome adversity.* Mentors who share similar characteristics as the mentee can be very helpful in helping the mentee overcome difficulties related to diversity that the mentor encountered. Mentors demonstrate that it is possible to succeed in the face of challenges. Having someone to identify with is an important source of encouragement and helps attorneys pull through when things get difficult. Relating with stories is one of the best ways to teach people.
- *A mentor can guide an attorney in managing his or her personal life.* The personal lives of attorneys working in law firms can become difficult. Attorneys are argumentative with each other, which causes stress; the hours are long, which causes stress; the amount of travel required is often unreasonable, which causes stress; and deadlines pile up day after day, which causes stress. Attorneys are not home most of the time, but when they are, they usually are not "present," and this is not pleasant to be around. Many attorneys do not excel at nurturing relationships or raising children. A good mentor can show a young attorney how to find balance and succeed in the practice of law and in life outside of work. Many attorneys leave the practice of law because they cannot manage their personal lives, and many attorneys who do not manage their personal lives properly end up extremely unhappy at work.
- *A mentor can provide contacts.* Good mentors share their contacts from in-house, other law firms, government, and other places. I have known countless attorneys whose mentors assisted them in transitioning into new careers by putting the attorneys in touch with the right people. It is much easier to get a new position or to find the information they need with the help of a mentor's network.

## Why Diverse Attorneys Face Difficulties Getting Mentors

Lack of mentorship is a key reason why diverse attorneys do not do better in law firms. It's hard for diverse attorneys to find mentors in law firms for various unfair, incorrect, or prejudicial reasons.

Partners only mentor associates they believe are the smartest or the most likely to stick around. They are interested in mentoring only attorneys they believe are the best qualified and likely to do the work long term. As discussed earlier, diverse attorneys are often perceived as not being qualified or as unable to do the work long term, so partners may not choose to mentor them.

Women face difficulty getting mentors because they are perceived as lacking in long-term commitment to the firm or the practice of law. Partners often believe women will not stick around or that they will grow less committed to work because of family obligations.<sup>455</sup>

To meet their diversity goals, firms must confront preconceptions they have about diverse attorneys and create formal mentoring arrangements for them.

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<sup>455</sup> Deborah L. Rhode, *The Unfinished Agenda: Women and the Legal Profession* (Washington, DC: ABA Commission on Women in the Profession, American Bar Association, 2001), 15, <http://womenlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf>.

## Chapter 10: Levering a Way In to Law Firms

After leaving the federal judge in Bay City after I graduated from law school, I didn't want to call Reid & Priest and explain why my clerkship had ended after only one year and not two, so I decided I might as well look for a job in California before searching in New York. I could live wherever I wanted at this point in my life, and Los Angeles was warm, had great law firms, and seemed to be the opposite of New York, which was hectic and loud and filled with New Yorkers who were rushed and abrupt. I sent out letters to as many law firms as I could find around Los Angeles.

Several good law firms called me. My grades had continued to improve after my first semester, and I made Law Review during my third year of law school. That, combined with my clerkship, made me attractive to law firms.

One of the first LA firms I interviewed with was Quinn Emanuel, a firm that did trial work. The firm had tried to recruit me while I was in Bay City. I liked the firm and its people a great deal and felt that it was a perfect fit for me. The hiring partner, Bill Urquhart, had gone to Fordham, so I talked some more about Jesuits when I met him. The head of the firm, John Quinn, was a Mormon, and I had at one point considered becoming a Mormon, too. To my astonishment, one of the attorneys who interviewed me was chewing tobacco.

Back then, Quinn was a great place with a great vibe. The attorneys were interesting, hardworking, and well qualified. The firm took on important and sophisticated work, and the atmosphere was fast-paced yet far more casual than the atmosphere at Reid & Priest or in the courthouse. Quinn attorneys were concerned with the big picture and finding the best arguments. They talked through ideas and concepts with enthusiasm. I made a lot of friends at the firm quickly.

It was an egalitarian place, with attorneys and staff of all races, women partners, and lots of diverse associates. The only thing the firm seemed to care about was whether its attorneys could do the job well, not their social class, race, or gender. The partners were open to all sorts of ideas. They were nonjudgmental. There was no dress code, and people accepted you for the person you were. It was a remarkable place in all respects.

The atmosphere of a law firm can make all of the difference to an attorney's career and happiness. I felt at home at Quinn—something I had not experienced in my previous positions. Being around smart, enthusiastic people who have a lot of important work to do matters.

One day a legal recruiter called me to try to interest me in other jobs. My grandfather had attended the University of Michigan with Thomas Dewey, the founder of Dewey Ballantine, and

my father had always said I should work at that firm if I could. At the time, Dewey Ballantine and Skadden Arps were paying salaries that were half again more than any other firms in Los Angeles. They were New York-based law firms with deep pockets and huge clients. I told the recruiter that if he could get me an interview with Dewey, I would go. That was the only firm I was interested in.

When I spoke with someone from Dewey, I found it to be the exact opposite of Quinn. Quinn's offices had exposed ceilings and bright yellow walls, there was no dress code, and all sorts of motivated young partners practiced law there alongside a diverse workforce. In contrast, Dewey's offices were paneled in dark wood, the partners were older, and everyone wore suits and acted uptight—you could hear a pin drop in the halls because there was no good cheer or humor. The atmosphere reminded me of Liggett's. Yet I felt like this buttoned-down environment was something I needed to conquer to put my past behind me.

I had been so happy at Quinn, but making a much larger salary and being associated with an older, more prestigious firm with traditions and a well-known name appealed to me. I knew in my heart it was the wrong decision to leave Quinn, but something pushed me toward the establishment.

When I gave notice at Quinn, several partners told me I was making a mistake. Even John Quinn came by my office and closed the door once inside. I said I was not getting any trial experience, and he told me he would get me on a trial within six months. He did not understand if that was the reason I was leaving to go to Dewey, because he knew who was in court a lot—and it wasn't Dewey attorneys. He was very nice to me. I should have listened to him.

I took a week off between jobs. During that time, I listened to Anthony Robbins tapes; I had been reading Anthony Robbins and other self-help books throughout college and law school, and they were part of the reason I did so well. They helped me improve my grades and self-confidence and to become better at everything I did. I used a goal-setting structure learned from those tapes to set achievement goals for my time at Dewey. I believed I would need all the self-confidence I could muster to succeed in an environment that had stifled me before.

Once at Dewey, I thought I had made a good move, but then I realized that it was a strange place. For my first few weeks in the firm, there was no work to do. The partners seemed nervous, and I did not know what was going on. The associates I met were not as friendly as those at Quinn. I ate alone my first several days there and hardly spoke to anyone.

Human resources people abounded at Dewey, managing every aspect of my transition into the firm. They sent me for computer training; they gave me a name badge; they gave me forms to fill out. They put a nameplate on my door that said "Mr. Barnes"; everyone in the firm had a nameplate on their door. The firm was very organized and run like a large company, with

sterility and formality. I imagined and led myself to believe that this was what BigLaw should be like.

The rules involved in working successfully at a major law firm made themselves apparent to me. One rule is that associates should never question the work they are given. If job security is important to them, they should do the work they are given. This is not to say that other considerations are unimportant, but if they become more important than job security, an associate should consider different career options. At major firms, associates are not paid to question; they are paid to do the work they are assigned.

Partners make their living and law firms flourish by doing as much work as can be done on most matters and keeping clients happy while doing so. Don, a senior partner, for example, gave me lots of memos to write. This was not the sort of work I did at Quinn, but it was effective for Don and for Dewey. The more I researched a matter and drilled down on it, the more likely we would find a result that would help the client. Don had never lost a case. His method of writing expensive memos for clients who were willing to pay for them was something that produced results.

A few months into working at Dewey, I realized that the firm was shrinking and partners were losing their jobs because they did not generate enough work. This scared me. If I stayed at the firm, I would be investing my time into a position that could be ephemeral. It became clear to me that regardless how hard I worked, I could lose my job when I got older. Working in a law firm where there is not a lot of work to do is not a happy thing.

While we were in the doldrums, someone from Dewey's New York office flew out and announced that a huge group of attorneys from a Los Angeles law firm, Paul Hastings, was going to join Dewey. This was exciting news because we hoped this meant we would have more work. Our branch office leased an entire floor in anticipation of the arrival of these attorneys.

Instead of the forty or fifty new attorneys Dewey planned on, only ten or fifteen showed up. Paul Hastings had learned about the move ahead of time and had talked the majority of attorneys into staying there. Even when the new attorneys arrived at Dewey, it was immediately clear that they had no plans to share work with any of the existing attorneys. I tried to get work from them on a few occasions and was always politely refused. They operated as their own little economic unit and did not share hours or work with Dewey attorneys.

With the way law firms are organized, partners give work only to attorneys they trust and protect only attorneys they are close to. The Paul Hastings attorneys were a close-knit group, they were all friends outside of work, and they had no interest in sharing their work with the attorneys at Dewey.

At the same time, another interesting dynamic was developing at Dewey. When I had first interviewed with Quinn, Bill Urquhart asked me which other law firms I was interviewing with. Several of those firms were branch offices of larger firms based in different cities. Bill said something I will never forget: “Never trust branch offices.” I had no idea what he meant, but I figured it out at Dewey. Attorneys at the New York Dewey office did not trust the attorneys at its Los Angeles branch, so they gave work to other Los Angeles law firms, not their own branch office. It must have been demoralizing to the partners at our office, who were struggling for work billing out at New York rates.

The rates a law firm charges have a lot to do with the sort of work the firm can bring in. Dewey was charging rates that were at least 50 percent more than what most large LA law firms charged. Because of this, it could only bring in large clients that could afford the higher rates. For example, Don Woods represented the Sultan of Brunei, and the Sultan seemed to have unlimited funds to put toward various trivial forms of litigation. He was being sued by a Beverly Hills perfumer for not paying for a perfume line that was developed for his family. In another case, he was being sued for selling cigars at the Hotel Bel Air, which he owned, without displaying a notice that cigars cause cancer. He would have to pay a \$10,000 fine for the infraction. My guess is that I billed at least \$250,000 in time to fight this small fine.

In my downtime, I decided I would do things to be of more use to the firm. Having “law professor” on my résumé would make me look stronger to clients and potential clients. I applied at a local law school to teach a night class and managed to get the job. I enjoyed this position and found I was surprisingly good at it. I taught two ninety-minute classes per week.

Michelle, a fellow associate, and I became good friends. After several months, she told me she was looking for a job, and very quickly she found one with Wilson Sonsini. I believed she was making a mistake and that she should stay with Dewey, but she realized there was no future for her there. She was right.

After Michelle left, I started feeling increasingly isolated. Somehow I managed to bring in work from outside clients, and this gave me something to do in addition to what I did for Don Woods. The firm, though, was a very unhappy place, and I just could not see myself staying there over the long term. Associates were leaving and partners were leaving. The firm hired people to replace them, but everyone was out for themselves. Despite its good reputation, the firm was a frightening place to work.

After I had been there for approximately a year, I went home to see my family in Michigan over Christmas. While there, I got the sinking feeling that I needed to leave the law firm and do something different. I had experienced the two extremes of working in a law firm at Quinn and at Dewey—one was busy and one was slow. One was informal; one was formal. One reminded me of Cranbrook; the other reminded me of Liggett.

When I returned to work in the new year, the first thing I did was email my two-week's notice to Don Woods and the head of the office. Over the next two weeks, no one in the firm seemed to acknowledge that I had quit. It was unusual. The day before my last day, the head of the office stopped by my desk.

"You cannot leave here without a job," he said. "If you do that, you will have a very difficult time ever working in a large law firm again. The thing you should do is call a few legal recruiters and talk to them and find another job. It should not take you very much time to find something else. Why don't you stick around here for the next three months and talk to recruiters and see what you want to do?"

Reluctantly, I took him up on the offer.

## Working with Legal Recruiters

During my second year of law school, I took a class called "Technology in the Information Age" with Professor Peter Swire. He was a graduate of Yale Law School and was trying to get tenure. The class discussed how something called "the Internet" was soon to become ubiquitous, a claim that was met with suspicion by students and others at the time. I ended up with the highest grade in this class. When I went to visit Peter at office hours, we had a conversation I will never forget:

"Maybe you can do journalism, write books, or find something else besides practicing law," he said.

"What are you talking about?" I asked. I had the best grade in his class, and I could not fathom why he would say such a thing to me.

"Look at these kids you're around," he said. "They're all concerned with details, uptight, and different than you. They're concerned about things like getting a comma right and they take all of this extremely seriously. Your mind works differently. You do not want to be a lawyer."

I walked out of the meeting shocked, believing he did not know what he was talking about. Nevertheless, I remembered it years later because he was right. Being a lawyer demands a certain kind of personality and way of looking at the world. An attorney needs to be sharply focused and to care about the minutest details. That is what they are paid for.

When I left Dewey, my plan was to start my own law firm and live off the fees from my existing clients. If I did a good job, I knew I could make as much money as I was making at Dewey servicing those clients. I could also develop more business from new clients if I marketed myself. I wasn't worried about succeeding with my own practice. What I was concerned about was staying at Dewey for the next three months and continuing to be unhappy. Working inside



a large law firm did not make me happy; nevertheless, I used my remaining time to search for another in-house position as backup.

When I started calling legal recruiters, I was surprised by what I learned. Most of the time my calls went directly to voicemail. Some recruiters knew about open positions and others did not. Most of the recruiters did not research the market carefully; they did not seem 100 percent committed to the work. They called me from their cell phones (unconventional at that time), and most did not have offices. Legal recruiting seemed to be conducted in a frivolous manner.

Back then, the market was excellent for lateral attorneys. I must have gone on at least twenty interviews, and I learned a lot about the Los Angeles legal climate. Slowly, I came to realize that I was more interested in working with the law firms as a recruiter than as an attorney.

I saw the work product recruiters sent to firms on my behalf and found it lacking, riddled with typos and inaccuracies. I knew that I could do much better and felt that recruiting was a career that tapped into my strengths: I was interested in helping people make better decisions than I had made with my legal career, and I could see right away how I could improve the process of legal recruiting.

After all, how could I have worked so hard as an attorney and gone so far, and yet my career was in the hands of people who were not completely dedicated to finding me a position that was the absolute best fit, who could not send out a letter without mistakes, who did not thoroughly research the market to uncover the best opportunities for me? Moreover, recruiters were making very good livings at the time despite their lax performance. I knew I could do a better job and be happy doing it.

By the time March rolled around, I had increased the amount of work I got from existing clients. On my last day at Dewey, I figured that I had enough work to keep me busy and billing for at least the next month. Plus, I had taken out a home equity loan and had a small cushion of about \$20,000 to use to pay bills and start my business.

However, when I started work the first day after leaving Dewey, I was building a legal recruiting business, not a legal practice. After two weeks of working seven days a week, I had done no legal work but had built up my recruiting practice. After one month, I was doing nothing but recruiting and decided to give all of my legal matters away.

I was very enthusiastic about legal recruiting. This was another of the most exhilarating periods of my life. I got up at five in the morning and stayed up late working on recruiting. But after four months, I still had not made a single placement. Nevertheless, I believed in myself and continued to work with a great deal of gusto. I loved talking to new people all day. I loved talking to the law firms. I loved researching the firms and building a database.

One morning my phone rang. It was Latham & Watkins calling to make an offer to one of my candidates. The next day, Wilson Sonsini called and made an offer to another of my candidates. By the end of the week, I had four offers and all were accepted. I could not believe it. I made as much money from those placements as I would have made the entire year had I stayed at Dewey.

Within a few months, that number doubled and then tripled. By the end of the year, I had made over \$1 million in placements in my first year of legal recruiting. I started hiring people like crazy to help me manage this and moved into offices in downtown Los Angeles.

One of my early interests was helping attorneys who were having issues with their careers get into good firms. Once attorneys enter the legal profession, several major factors can influence their success or failure. I built my recruiting business, BCG Attorney Search, and subsequent companies on the basis of a few core beliefs: every attorney is unique—and thus diverse—and legal recruiting is a calling designed to bring every attorney “home” within the profession.<sup>456</sup>

The way legal recruiting works, recruiters charge law firms a percentage of an attorney-candidate’s salary when the law firm hires that attorney. For the most part, busy large law firms that bill a lot of hours are not concerned about legal recruiting fees. They simply want to hire the best possible candidates to impress their clients and to get the work done. The money a recruiter charges is minimal compared to the amount of money the law firm can make from the attorney.

However, only the very best law firms—I would say the top 10 to 20 percent of law firms—have the requisite work and are willing to hire legal recruiters. Therefore, the other 80 to 90 percent of law firms tend not to use legal recruiters. I saw that those law firms were essentially being ignored in job searches. This was fine for most of my candidates, who tended to be from top law schools and who currently worked in top law firms, but it didn’t allow me to help the other 80 to 90 percent of attorneys in the country who weren’t aiming for jobs at the top law firms.

I eventually rolled out a system that gave attorneys access to every employer in every market around the country where they wanted to work. I hired a data processing company and with it researched and built a huge database of all of the law firm employers in the United States, aggregating every available job. This is the foundation on which I built LawCrossing and BCG Attorney Search: seek to have people understood, explain their situations, give them access to all the opportunities in the market, and make sure their recruiters are working as hard as possible to find their best fit.

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<sup>456</sup> See “BCG Attorney Search Core Values 2010,” BCG Attorney Search, 2010, [http://www.bcgsearch.com/pdf/bcg\\_corevalues.pdf](http://www.bcgsearch.com/pdf/bcg_corevalues.pdf).

My personal feeling about diversity is that it should be possible for everyone who wants to be included in the legal profession to find a job. This is what I have built my career on, and I take this task very seriously. The reality is, the top law firms are very selective (for reasons explained) and will never include everyone—but only the top attorneys from the top law schools. But there is a universe of law firms out there, diverse in their unique makeup, circumstances, and approach to the profession, and there are attorneys from all walks of life with all kinds of backgrounds, skills, preferences, and talents. Anyone who wants to join the legal profession who has the ability and motivation should be able to make a living in law and at the same time enrich the legal profession with their unique perspectives and insights.

## Everyone Needs to Be Understood

When I started recruiting, I spent a lot of time understanding each person's unique circumstances and what he or she was looking for specifically. It was important to know the reasons why a person was moving and the reasons why a person was unhappy. I wanted to have as much information as I possibly could.

My motivation came from personal experience. When I was searching for a job as an attorney and talking to recruiters, I felt as though the recruiters were not interested in me or my story. They did not want the information that I thought they needed in order to help me in my legal career. How could they help me if they didn't know who I was or what I was looking for?

When I started my recruiting business, I committed to taking the time and making the effort to learn as much as possible about my candidates. I wanted to know where they grew up, what kind of families they came from, what obstacles they overcame, what they felt were their strengths and weaknesses, what they believed were the positives and negatives about their current firms, and whether they were introverts or extroverts, among many other things. I wanted to know enough about them to be able to see whether they were a good fit or a poor fit for particular law firms.

Also, I wanted to make sure recruiters in my company understood where our candidates were coming from. For that reason, almost all of my early hires were former practicing attorneys who had worked in large law firms and who understood the qualifications and personalities involved. It was crucial for the recruiters and candidates to identify with each other and understand each other.

I still believe a recruiter can convince a law firm to hire a candidate when the recruiter appreciates what makes the attorney unique and conveys this to the law firm. We've had more success with this method than with trying to place candidates on their qualifications alone.

## Everyone Needs to Have His or Her Situation Explained

I noticed that almost all the legal recruiting firms I used as a job candidate simply sent my résumé to law firms and left it at that. I, on the other hand, required my recruiters—and still do—to complete a write-up on each candidate that explains the attorney's exact situation, his or her background, and his or her reasons for investigating a new employer. All candidates are individuals and should have their experience and background explained in as much detail as possible.

This type of background information provides law firms with insight into a candidate's diversity. More than just a person's gender, race, or socioeconomic status, diversity is what makes a person unique as an individual. It is the recruiter's job to demonstrate how that uniqueness could provide a benefit to a law firm. Candidates' hobbies, interests, family backgrounds, and experiences are all relevant factors.

Also relevant are an attorney's motivation for the job and reasons for wanting to work in a law firm. At my recruiting company, our letters are ten or more pages and describe in depth each candidate's individual situation. I wanted to ensure that people were respected for who they were and that every candidate was treated as unique and understood as unique.

Many barriers to entry for diverse candidates are negative preconceptions about their qualifications and ability to do the job and do the job long term. Presenting candidates, their abilities, and their situations in such a way as to demonstrate that these misconceptions are ill-conceived and unfounded goes a long way toward breaking the self-perpetuating cycles making it difficult for diverse candidates to get jobs in law firms.

## Everyone Needs to Have Access to All of the Jobs

Keeping up with the legal market is challenging. New law firms pop up all the time, and existing law firms have openings and close openings continually. Because the legal market is so consistently active, successful recruiters must put a tremendous amount of resources into tracking these openings.

To give my candidates access to all the jobs, one of the first things I did was hire researchers to research all the jobs. For the first ten years of business, I reinvested most of the company's profits into researching jobs and building databases and other systems for finding open jobs. Because not every law firm uses recruiters to fill openings, I also started a few other businesses to help attorneys find jobs. One, called LawCrossing.com, researched every legal employer in the market and compiled all available jobs in one place.

In November 2000, the market for lateral attorneys suddenly slowed because of the “dot bomb,” the collapse of Internet companies. The effects of this implosion spread throughout the United States and caused law firms to lay off attorneys in massive numbers.

In our downtown Los Angeles office, we kept a large board that tracked interviews, and toward the end of the month, the interviews just stopped. So did the offers for our candidates. When I spoke to law firms, they told me they were very, very worried about the state of the economy and that their clients were all cutting back on work. I was concerned because I had a lot of people who needed jobs.

When the economy went south in November 2000, not even the best attorneys could get positions with the top 10 or 20 percent of law firms. As more and more people were laid off and the best attorneys were unable to get jobs with the best firms, I knew I had to do something.

I remembered when I had quit my job in Bay City and sent out applications and letters to every law firm I could find in southern California, I got interviews with lots of small law firms that I had never heard of. Most attorneys who go to prestigious law schools are interested in applying only to top, top law firms that pay the highest salaries, perhaps the top 5 percent of firms. They are not interested in the other 5 percent that makes up the rest of top law firms. What if I was able to help people apply to all the law firms in the country and to stay employed or find a new job through this economic mess?

I invited attorneys who had been laid off or who needed a new job to come in to the office. We worked together to develop a large database of smaller legal employers. We then sent letters to all the smaller firms in the cities where the attorneys wanted to work. All of these attorneys—after months of applying only to the top firms—managed to get jobs. I knew that I was onto something and that I had found a way to help more people.

I thought I could charge law students and attorneys one or two dollars per letter sent, and as part of the service we would redo résumés and write a cover letter for candidates. I called this company Legal Authority, and it grew very quickly. Soon it had to move into a larger office space to accommodate all of the employees. I had a room full of what I called Legal Employment Advocates who would speak to attorneys and law students, identify employers they could apply to, and then assist them in sending out letters. The company was highly effective and managed to get thousands of people jobs. It also helped connect firms that did not have current job openings with candidates whose résumé looked promising for future business.

I was very proud of Legal Authority. It worked. But it also provided a service that was expensive for the average law student or attorney to afford. Those who wanted the full package had to spend upward of a thousand dollars to get all the applications sent out to all the relevant

employers in the relevant markets. Candidates could spend less on smaller disseminations, but that approach was less effective. Another issue with the service was keeping up with the ever-changing market. Law firms were opening and going out of business constantly, and even with address-updating software, it was difficult to track all the changes.

After running Legal Authority for a few years, I realized that the service had limitations and could not help everyone. Many attorneys and law students worried about spending the money it took to get a job using the service. Other people who used the service but failed to land a job began to give it negative reviews online, and this prevented potential customers from enrolling. Legal Authority, in my opinion, was an incredible way for attorneys to get jobs, but it would never be able to help everyone.

At the time, there were lots of job sites in the market, such as Hot Jobs.com. The leading one was Monster.com. These sites charged employers to post jobs. Therefore, the only jobs they listed were from employers willing to pay to post on their site. Law firms and other companies were starting to post job openings on their own websites and on other job boards. What if I could ferret out all those jobs all over the internet and put them in one place? That would help a tremendous number of attorneys seeking employment. They'd be able to go to one website and find all the legal jobs available.

I used the contacts in the Legal Authority database and visited the websites of each law firm to collect the jobs available at any given time. Because this was such a monumental task, I traveled to India, where the data processing company was located, and set about developing and training a large team of people to do this work. Within about six months, we had launched a new company called LawCrossing that aggregated every available job.

LawCrossing grew rapidly, and within a few years it was the seventy-second fastest-growing company on Inc. 500. This company exists today and is doing very well. When a candidate comes to BCG Attorney Search, that person can rest assured that we use all of our resources to do whatever is possible to get him or her a job. We have more than a hundred full-time researchers who research legal jobs, which helps our candidates access the complete market. In contrast, most of our competitors are boutique organizations that do not have access to these resources.

The foundation upon which I built BCG Attorney Search was the correct one. I seek to have people understood, to explain their situations, to give them access to all the opportunities in the market, and to make sure that the recruiters working on their files are working as hard as possible. *This is diversity in action.* Diversity is about making sure everyone who can be included is included. Diversity is also about making sure that law firms hear a variety of viewpoints from different sorts of attorneys.

## The Diverse Attorneys Law Firms Can Hire

Law firms seeking to hire more diverse attorneys have numerous underutilized resources to draw on. They also can do their hiring in a way that reconciles diversity goals and business objectives. Each of the methods discussed below could work very well.

### LL.M. Programs

Law firms can hire and sponsor more of the scores of foreign graduates with Masters of Laws degrees from American law schools. Most major law schools have LL.M. programs and enroll lots of attorneys from every region of the world. Notwithstanding the high number of exceptional attorneys coming out of LL.M. programs each year, many have difficulty getting jobs.<sup>457</sup>

Thousands of attorneys of color come out of these programs annually and are potentially good fits for many law firms. In addition to having years of training and experience in international law firms, they are hungry and do not have a sense of entitlement. They are, in fact, excited to have the opportunity to work in the United States. Also, these attorneys often have few options when it comes to moving between firms, so they are willing to put down roots.

Attorneys from LL.M. programs tend to earn their degrees and, unable to find jobs in the United States, turn around and go home after taking the bar exam. Though attorneys without citizenship can work only in New York and California (the only states that allow them to take the bar exam), they can waive in to other states later after practicing for some time.<sup>458</sup>

Attorneys from LL.M. programs are good fits for firms because: <sup>459</sup>

- *They can do the work.* Law firms can choose attorneys from LL.M. programs who have substantive experience from before the LL.M. degree. They are likely highly committed to the practice of law, have already succeeded in a law firm, and desire to continue working in a law firm long term. Having proven they can do the work, they are good bets coming directly out of LL.M. programs.
- *They can be managed.* Most attorneys from LL.M. programs are grateful for the opportunity to be hired. In many cases, their salary at an American law firm is two to five times what

<sup>457</sup> See V. Wish, “Do Law Firms Value the LLM?” LLM Guide, October 22, 2010, <https://llm-guide.com/articles/do-law-firms-value-the-llm->.

<sup>458</sup> See “Where Foreign-Trained Lawyers Can Take the Bar Exam,” National Jurist, March 3, 2014,.

<sup>459</sup> See, generally, “Law Firms That Recruit and Hire LL.M. Graduates,” LL.M. Road Map, December 11, 2012, <http://www.llmroadmap.com/blog/law-firms-that-recruit-hire-llm-graduates>, which notes firms that hire LL.Ms and why.

they would be paid in a law firm in their home country.<sup>460</sup> In an American firm, they have the opportunity to make a lot of money, and they know that if they screw up, they will not have many other opportunities and may have to return home. They expect to work hard, are motivated enough to get an LL.M. in the United States (and willing to bear the expense), and might not have the opportunity to make as much money again. These attorneys also have proven they are manageable by working for law firms previously. Because the LL.M. requires sponsorship from a firm, this attorney is likely to do what's necessary to stay at a law firm.

- *They will do the job long term.* An attorney who comes to the United States to earn an LL.M. is highly motivated and wants to work and live in the United States. If the attorney can't make it in the law firm, he or she might need to return to the home country, which for many attorneys is not desirable. Attorneys with an LL.M. degree are more motivated than others to stay in their position and commit.

## Women Who Need or Have Part-Time Schedules

More than half of all law school graduates are women. Many women leave the practice of law to have children and then want to return. Other women have children and then go on part-time schedules while they raise their children. If law firms want to hold onto women and are truly committed to diversity, they should not overlook this obvious and easy source of talent.

But law firms are hesitant to hire attorneys who are not currently employed or who are on part-time schedules. This is unfortunate. Women are put in a very difficult position when they have children because, on the one hand, they cannot quit their firms and take time off to raise the kids, and on the other hand, if they manage to go on a part-time schedule, they are usually unable to find a new position when they want to leave. These attorneys may be exceptional but are penalized for having children and taking time off to raise them or for working a reduced schedule.

These are the beliefs behind why law firms avoid hiring attorneys in this position:

- They believe that once an attorney stops practicing law, that attorney's skills will rapidly deteriorate.
- They believe that attorneys who stop practicing law for any length of time are not as committed as attorneys who have children and then return to work after family leave.
- Once attorneys take a significant amount of time off from work, they are not likely to stay

<sup>460</sup> See, generally, "Infographic of the Day: Which Country Has the Highest Paid Lawyers?" Above the Law, September 20, 2012, <http://abovethelaw.com/2012/09/infographic-of-the-day-which-country-has-the-highest-paid-lawyers>, which shows that, in 2012, with the exception of four countries, the average salary of a lawyer is lower than in the United States



very long in their next position because they may have grown accustomed to a different routine and would prefer to be at home.

- Most partners want people around who are willing to drop everything and do assignments for their clients at all hours of the day and night. They believe that attorneys should be 100 percent committed to their jobs and work as hard as possible at all times. In the grander scheme it is acceptable for women to have children and return to work a reduced schedule, but partners are not interested in them because they are perceived not to be available for work 100 percent of the time.

It is very difficult placing attorneys who desire reduced schedules. In fact, even having gone to the best law schools and coming from top firms, I guess it is at least five times more difficult to place a woman seeking a position with a reduced schedule than it is to place a woman otherwise. It is even more difficult placing a woman who is currently unemployed than it is to place a woman seeking a reduced schedule.

In these cases, law firms are allowing their business methods and prejudicial evaluation of how women with children work to interfere with hiring a diverse workforce. Women who have taken time off to have children and are seeking reduced schedules represent a massive untapped source of potential talent for law firms.

- *They can do the work.* Women who have experience working in a large law firm who have taken time off or are currently working a reduced schedule clearly can do whatever legal work is given to them. Although they may have obligations at home, law firms can figure out ways to accommodate this. Most women seeking to return to the workforce or switch firms while on a reduced schedule are doing good work at their existing firms (or have done it in the past) and are perfectly capable of doing good work at another law firm.
- *They can be managed.* Women who are returning to the workforce or seeking to work reduced hours can be managed. In fact, they tend to be very efficient with their time compared to many of their counterparts in the office. When they are working, they are working and working hard. Attorneys know where they are going to be at all points during the day because they have obligations at home as well. The attorney who is working a reduced schedule is alert to deadlines and other obligations because she knows she already has a mark on her back at some firms because of her reduced schedule. The attorney returning to the workforce after an absence is someone who can be managed. The odds are that she was managed effectively for several years when she was at the last law firm, and there is no reason to suspect that she would not be manageable at a new firm.
- *They will do the job long term.* The fact that it is difficult for women seeking reduced-hour arrangements or returning to the workforce after an absence is an advantage to the law firm that hires one of these attorneys. Most attorneys I spoke with who were hired after an

absence or under reduced-hour arrangements appreciated that they got these jobs, because it is not easy for women to find law firms willing to accommodate them. Because of all this, these attorneys are unlikely to leave once they are hired and will stay at the job for a long period. This saves law firms a great deal of money related to turnover and ensures they have someone loyal to the job.

There are many creative and practical ways law firms can benefit from the pool of attorneys who offer part-time schedules. “Law firms, ever in search of the best talent to represent clients, are devoting resources to the exploration of solutions that will accommodate the needs of working mothers.”<sup>461</sup> For example:

- Arnold & Porter, a Washington, D.C., law firm, offers “at least 18 fully paid weeks of birth or adoption leave (plus \$10,000 in adoption aid).” Additionally, 12 percent of lawyers at the firm work reduced hours.
- At Crowell & Moring, “unorthodox schedules are no barrier to accomplishment . . . as attorneys who flex or reduce their hours are helped to locate allies and premium assignments by dedicated affinity groups and advisers. Sponsors assist high performers in outlining workable paths to partnership.”
- At Duane Morris, expectant mothers get sixteen fully paid weeks off.
- Gray Plant Mooty “just debuted a dependent-care resource and referral service, and offers lengthy phase-back arrangements after a birth or adoption.”<sup>462</sup>

## Diverse Attorneys with More Than Five Years of Experience Who Do Not Have Business

Most large law firms—and many smaller ones—are run on an “up or out” model. An attorney is expected to become proficient at practicing law and valuable to the firm during the first five years of practice. After five years, the attorney must show potential for developing business for the firm and giving work to other attorneys, including partners and other associates.

When an attorney does not demonstrate this ability to generate business, the law firm must have enough work to support the attorney at the higher billing rate of experienced attorneys. Many law firms do not have work for more senior attorneys, and therefore they are reluctant to hire attorneys with experience unless they have the capacity to generate future business or practice in a popular practice area.

<sup>461</sup> See Hirschman, “Making the Practice of Law Work for Women,” 51.

<sup>462</sup> See Franklin, “The 2016 Working Mother & Flex-Time Lawyers 50 Best Law Firms for Women,” <http://www.workingmother.com/2016-working-mother-flex-time-lawyers-50-best-law-firms-women#page-4>.

The law firm business model also promotes to partner only the best associates and counsel attorneys. This means that there is tremendous competition among senior attorneys to be the best they can be, to bill a lot of hours, and to produce the best quality work product because they have the opportunity to make partner. The concern with bringing in new senior attorneys is that they will enlarge this competition.

Despite the structural issues, attorneys with years of experience can increase the diversity in firms. If the work is available, firms can hire them with titles other than associate if necessary (staff attorney, special counsel), or they can be given a longer trial period to be considered for a partner so as not to undermine the competitors in the current class.

Although firms are increasingly open to hiring attorneys with five or more years of experience, they are still reluctant to do so. Most of this reluctance stems from the perception that, if the attorney was not good enough to be a partner at the last firm, then he or she is not likely to be good enough to be a partner at the new firm.

Furthermore, law firms are reluctant to take on people who may have “sour grapes” for not being made partner somewhere else. These sorts of assumptions are not always correct. For example, the previous law firm might not have had enough opportunity at the top for aspiring partners. Or the firm was experiencing financial or other problems that have nothing to do with the attorney. Finally, attorneys sometimes desire to be in a different environment for any number of reasons, some as simple as wanting a shorter commute or to be associated with a better brand name firm. Regardless, law firms should look carefully at attorneys with more than five years of experience.

Law firms are frequently criticized for not putting more senior diverse attorneys on various business and for staffing these matters with junior attorneys. Hiring a more senior lateral diverse attorney is something that is likely to go over well with clients and be very helpful in diversifying the workforce.

Having more senior diverse attorneys in the law firm also sends a message to junior diverse attorneys and potential laterals that there is room for them in the senior levels of the law firm. This is very important because the more senior diverse attorneys in the law firm, the more junior diverse attorneys the law firm can recruit.

I have seen several law firms “break the mold” over the past few years and hire senior diverse attorneys (especially African American women). These attorneys have done very well.

Here the reasons attorneys with five or more years of experience can do very well at law firms:

- *They can do the job.* Attorneys with five or more years of experience coming from

respectable firms can almost always do the job. They have done the job in the past, and there is no reason to doubt they will be able to do the job in the future. In fact, experienced attorneys already understand law practice and know how to do the work. Law firms hiring at the lateral level can be comfortable hiring attorneys from firms with reputations for doing work of a similar quality.

- *They can be managed.* If an attorney has more than five years of experience and has not jumped between too many law firms during that time, the odds are very good that the attorney can be managed. In fact, even if attorneys make career mistakes during that time, they likely still can be managed because they probably learned from their mistakes. Though law firms worry that senior attorneys may have developed habits incompatible with the firm's practices, usually this is not a major obstacle. Older attorneys know they have fewer job options in law firms compared to junior attorneys; therefore, they are much more likely to follow directions and do what is expected of them; they are likely more manageable than junior attorneys might be. The senior attorney also knows how law firms work and is much more likely to pick up on small signals that will keep them in line.
- *They will do the job long term.* Attorneys with experience know that it will be difficult for them to find another job, especially when they do not have significant business. By being a trendsetter and hiring these attorneys, law firms add attorneys to their ranks who are doubly likely to stick around and, provided there is enough work to do, who can be profitable as well. It makes a lot of sense for law firms to do what they can to bring in diverse attorneys at the lateral level.

## Diverse Attorneys from Local, Not National or Prestigious, Law Schools

Law firms can often dramatically increase their diversity by increasing the number of attorneys they hire from less-prestigious or local law schools.

Attorneys from the largest and most prestigious law schools may have a sense of entitlement that they should be doing more important things than working in a law firm. They may assume they will receive bonuses as high as attorneys at other law firms and might be more willing to move when this does not occur. And they may have a long-term goal of going in-house, going into politics, or moving into some other career choice, which means they might be less committed while working at the law firm.

In contrast, attorneys from local and less-prestigious law schools provide several advantages. Attorneys who did very well at local and not national or highly prestigious law schools are often more motivated, more appreciative of the opportunity, and more likely to succeed than many attorneys from the largest law schools.

Very often they were at the top of their class. Attorneys who finished first, second, or third in their class at a smaller school often look as good to clients as attorneys from more prestigious law schools. Students who did exceptionally well at a local law school are arguably as good as students who finished in the middle of the class at more prestigious law schools.

Attorneys go to less-prestigious law schools for a variety of reasons, and sometimes these reasons have nothing to do with their intelligence. Years ago, I was a law professor in a law school that was not considered prestigious. One of my best students had gotten a full ride to the law school based on having achieved an LSAT score in the ninety-ninth percentile. He chose to attend the smaller school because it would not cost him anything compared to the debt he'd accrue at other law schools he had gotten into. Unfortunately, graduating from this less-prestigious law school ended up hurting him and making it difficult for him to find jobs. Were law firms inclined to take a chance on him, they would have hired a smart attorney who was more than capable of doing the work.

A student may also go to a local law school to be close to family or even because the student does not understand the importance of going to a major law school—especially if the student is from a blue-collar family, where prestige of education is not emphasized. Diverse candidates out of poor backgrounds may know they want to be lawyers but do not understand the importance of having to attend a great law school to do it.

Attorneys who attended local law schools and who showed aptitude for doing well there are well qualified for work in large law firms:

- *They can do the job.* If the attorney has done well at law school, this is an indicator that the attorney has an aptitude for the practice of law and can do the job.
- *They can be managed.* Attorneys who did well in local law schools can be managed. Some may have paid their way through law school, gone to school at night, or became attorneys as a second career. Attorneys who have worked in a large law firm and are laterals have proved they can be managed, and law firm should disregard measuring them based on the prestige of their law school. Entry-level attorneys coming from local law schools often have a lot of work experience from before law school. These attorneys can be good assets because they tend to understand the importance of hard work and what it is like in a work environment. Attorneys from less-prestigious or local law schools will take the job seriously and not want to mess up, thus being manageable. They understand they are lucky to be where they are in a large law firm. Because they do not believe they can lateral to another firm easily, these attorneys are much more likely to listen carefully to directions and to become committed to the firm.
- *They will do the job long term.* Attorneys from less-prestigious law schools typically do not have the same options to lateral to other firms as do attorneys from prestigious law schools. Therefore, these attorneys are far more likely to commit to the job and stay for the long term.

because they know their law school holds them at a relative disadvantage. They may be one of only a few class members who was able to land a job at a prestigious law firm, and the last thing they want to do is show disloyalty by leaving.

I believe one of the most underutilized resources is diverse attorneys who are the top graduates at less-prestigious law schools.

## Attorneys from Smaller Cities Looking to Relocate to Larger Ones

Law firms in smaller markets often attract attorneys who do well at local law schools and who do not necessarily get jobs with large law firms. Law firms in smaller markets also attract graduates from top law schools who may have grown up in the smaller markets. Attorneys often find themselves in smaller markets for a variety of reasons, which could be as simple as needing to be close to a spouse or a parent. Regardless of the reasons, recruiting attorneys from smaller markets seeking to relocate to larger ones is a very effective way for law firms to increase their diversity.

I have witnessed several diverse attorneys from smaller markets relocating to larger ones. These attorneys had very sophisticated training in their practice area and worked for well-known national or highly regarded regional law firms. Instead of being welcomed by law firms in larger markets, they often were shut out because the large law firms do not respect or trust attorneys trained and working in smaller markets to be able to do the job.

Markets like Los Angeles, New York, Chicago, Houston, and Atlanta expect that lateral attorneys come from major law firms in major cities. But there are a great number of talented attorneys, especially diverse attorneys, in smaller markets who are interested in relocating to larger markets.

- *They can do the job.* The size of a market has little to do with the quality of work attorneys do or their training. Law firms in smaller markets may not have billable hour requirements anywhere near those of firms in large cities, but some do. Attorneys in smaller markets may be less specialized than attorneys in the largest markets, but that is not always the case. Also, there are many excellent small law firms around the country that have superb reputations and that might mentor attorneys more and train and develop their work habits more than the largest law firms do. In addition to top regional firms, the branch offices of large national law firms can be located in smaller markets. Attorneys who have done well in smaller markets have the ability to transition into firms in larger cities and do well there.
- *They can be managed.* There is no reason to believe that an attorney moving from a smaller market to a larger market cannot be managed. Attorneys from smaller markets may have had to work with fewer attorneys and be managed and micromanaged in the smaller setting.

Attorneys moving from a smaller to a larger market may be more open to new styles of management and that they need to be this way to survive.

- *They will do the job long term.* These attorneys often are highly motivated. Though there are various reasons attorneys move to larger markets, many desire more sophisticated work and are very ambitious. An ambitious attorney is an attorney who is likely to stick around and aim for partner, meaning they are likely to do the job long term. Additionally, attorneys out of smaller markets are grateful for their opportunity in a larger firm and are more likely to stick around.

## Attorneys Who Want to Switch Practice Areas

Another sort of attorney who tends to be ignored is the one who wants to switch practice areas. Although switching from a nontransactional practice area to a transactional practice area (and vice versa) is not something I recommend, attorneys can transition from one transactional practice area to another or one litigation-oriented practice area to another.

In my experience, attorneys tend to gravitate toward one type of work or another. Some people enjoy math and science, and others enjoy English and history. Attorneys who like math and science tend to do well in corporate, real estate, and similar transactional-related practice areas. Transactional practice areas rely less on writing and more on details and therefore tend to be better for people who are math and science oriented. Attorneys who like English and history tend to prefer practice areas like environmental, litigation, and labor and employment.

Attorneys often pick up on doing work in another practice area quickly. I have seen lots of attorneys successfully move into new areas within transactional-related work or within litigation-related work. But law firms are averse to this, especially when hiring at the lateral level. Firms might assume that attorneys who switch practice areas are disillusioned with the practice of law and looking to try something different before they end up leaving the practice. This indeed may be the case, but I see this most when an attorney tries switching from a litigation-related practice area to a transactional one and vice versa.

Attorneys may have good reasons for switching practice areas that the law firm should explore with the attorney. For example, the attorney's law firm may not have enough work in a particular practice area, or the attorney may have been placed in the practice area out of law school because of firm need and not necessarily because the attorney wanted to be in that practice area.

If a law firm is interested in increasing its diversity, a simple way to do this is to hire attorneys seeking to make such a transition.

- *They can do the job.* If attorneys are proficient in a transactional or litigation-related practice area, odds are they can do the job in a new practice area. An attorney's reasons for switching practice areas may not have anything to do with his or her ability to do the work. Attorneys in new areas will take some time to get up to speed, but if they were doing good work in the previous firm and practice area, the odds are they will continue to do good work.
- *They can be managed.* Attorneys who were successful at their prior firms and who showed an aptitude for law firm practice are manageable. Because the attorney is learning a new practice area, they expect to be trained, overseen, and managed by supervisors.
- *They will do the job long term.* When a law firm takes a chance on hiring a diverse attorney who wants to switch practice areas, the attorney is likely to be grateful for this opportunity. Because the attorney worked so hard to get a position in the practice area, he or she is likely to stay. In my experience, many attorneys who switch practice areas do not always stick with the new practice area, but if they are genuinely interested in the new area and switched for that reason, they usually stick with it.

## Diverse Attorneys Who Became Contract Attorneys for Reasons Outside of Their Control

One of the most disconcerting things I see as a legal recruiter is the high number of diverse attorneys who end up as contract attorneys. Even though it does not necessarily reflect the quality of their work, they are at the bottom of the pecking order of attorneys.

Contract attorneys have no home at the firm and their pay and job are unreliable. Contract attorneys, paralegals, and other temporary employees may end up in positions inside of law firms that they never believed they would have after graduation. Without any stability, they may be forced to work in a different location each week and are paid a less-than-optimal amount to survive in these positions. According to an article in the *Washington Post*:

To a lot of people in the American economy, \$25 an hour might seem like an excellent wage. When you're chipping away at a mountain of law school debt, however, it can be woefully inadequate.

That's the situation facing tens of thousands of attorneys who didn't land the cushy corporate jobs they'd been expecting after graduation or even the type of non-profit gig that might have gotten their debt forgiven. Instead, they are freelancers, working gig by gig with law firms and staffing agencies.

In recent years, their wages have sunk so low that some of those attorneys—in a world where long hours have been treated as dues to be paid on the way to a comfortable career—are asking for the same overtime protections enjoyed by retail clerks and bus drivers.



They argue that the work—combing through all the documents that emerge during the discovery phase of a lawsuit—doesn’t feel like the practice of law. It often takes place in hastily rented review rooms, with attorneys seated side by side, staring at computer screens to pick out pieces that might be relevant to the case. In the name of information security, employers often set rules about phone use, chatter with colleagues, and food consumption.

“I was told I couldn’t eat a yogurt,” says Marc Steier, a former contract attorney who now works for a labor union. “That’s what’s so disturbing—it’s the absolute disregard. The realities of being employed at most of these agencies are beyond the pale for what most people would consider professional.”<sup>463</sup>

Once an attorney works as a contract attorney, many large law firms will not consider hiring them because of the perception that the attorney is not interested in working for a large law firm or there is something wrong with the attorney that forces him or her to work as a contract attorney. These are misconceptions that are not always accurate. Far too many diverse attorneys end up as contract attorneys as a result of circumstances.

There are multiple reasons people become contract attorneys. As discussed, law firms have trouble retaining diverse attorneys, and, in many cases, diverse attorneys leave the firm owing to the structure of the firm and how well they are or are not integrated into the organizational culture. When they leave law firm employment, many diverse attorneys who need to work become contract attorneys. Once they become contract attorneys, they enter a vicious cycle where the only positions they can get are as contract attorneys.

Or they might have left the practice of law to have children and were unable to come back, so they started contracting work. Others may be too senior, with more than five years of experience, and law firms are suspicious of hiring them, so they find jobs as contract attorneys. Still others may have been downsized during recessions. I have seen people become contract attorneys because they could not find a job after leaving to take care of a sick parent. Others wanted to take time off to write a book, but after doing so were unable to come back.

Not too long ago, I worked with an attorney who had graduated from a top-ten law school and had worked in a major U.S. law firm. He took paternity leave with his first child, but when he went back to his firm, they refused to give him any work. Law firms are leery of attorneys who take time off work. Because this firm made a judgment about the propriety of this attorney taking time away from the firm, his legal career was essentially ended.

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<sup>463</sup> Lydia DePillis, “The Lawyers Who Are Fighting for the Same Rights as Janitors,” Wonkblog (blog), Washington Post, February 29, 2016, [https://www.washingtonpost.com/news/wonk/wp/2016/02/29/the-lawyers-who-are-fighting-for-the-same-rights-as-janitors/?utm\\_term=.1632fb5c462a](https://www.washingtonpost.com/news/wonk/wp/2016/02/29/the-lawyers-who-are-fighting-for-the-same-rights-as-janitors/?utm_term=.1632fb5c462a).

Yet, not all contract attorneys are the best fits for law firms. They might have become contract attorneys because they desired more autonomy or did not like being with one employer. Other attorneys become contract attorneys because they are unwilling to make the sacrifices required of associates in law firms. Also, many people become contract attorneys because they do not have the legal skills required to work in large law firms.

Far too many diverse attorneys work as contract attorneys when they could be working in law firms and garnering the benefits of steady employment and opportunities for advancement. Here are the reasons I believe contract attorneys can be good hires for law firms seeking more diversity:

- *They can do the job.* By the time many diverse attorneys become contract attorneys, they have one or more years of experience working in large law firms. During this time, they learned legal skills that could be valuable to a new law firm. Although the diverse attorney may not have had the best experience at the prior law firm, a new opportunity at a new firm can make a difference. Attorneys who work as contract attorneys get contract jobs because they can get the work done, thereby demonstrating their abilities.
- *They can be managed.* Contract attorneys with prior experience in a large law firm can be managed. Working as a contract attorney is taxing. A contract attorney may need to report to several different employers each month who ask them to do all different types of work—much of it quite tedious. Most contract attorneys are accustomed to close management and even micromanaging on somewhat mindless-type tasks often by young associates. Contract attorneys with a few months of experience working as a contract attorney have proven they can be managed by anyone. Contract attorneys hired for a permanent role take their positions quite seriously and do not want to lose their jobs, so they follow directions and do the best work they can.
- *They will do the job long term.* Most contract attorneys are aware that their odds of getting a permanent position in a large law firm are severely diminished once they become a contract attorney. They know that if they are hired by a large law firm, they are very lucky to have gotten such a position—they are even lucky when they are hired by smaller law firms. Having seen how difficult the market can be as a contract attorney, contract attorneys put more of themselves into their job and stay in jobs long term.

## Laterals from Labor and Employment Law Firms

Law firms that do labor and employment work tend to be very good sources of diverse attorneys. For example, two large labor and employment law firms made it onto the Vault 2018 “Best Law Firms for Diversity”: Constangy, Brooks, Smith & Prophete is number four, and Littler

Mendelson came in at number nine.<sup>464</sup> Because many labor and employment law firms have very strict requirements from their clients to maintain a diverse workforce, they tend to have a strong pool of diverse attorneys. Although many labor and employment attorneys (especially at labor-and-employment-only law firms) may not have the same paper qualifications as attorneys from major law firms, they are solid attorneys who can do the work and do it well.

A number of smaller law firms and specialist firms in every decent-sized city in the country do defense-related work in employment. They do a mix of small and large cases. Attorneys from these sorts of backgrounds are strong candidates for large law firms. It is not too difficult to transition labor and employment attorneys into other contentious practice areas such as litigation and environmental. Lateral attorneys with a primary background in labor and employment quickly pick up and learn new areas.

Diverse lateral labor and employment attorneys are likely to work out at law firms for the following reasons:

- *They can do the job.* Labor and employment is a practice area where attorneys prove they are competent to do the job by doing the work for some time. Attorneys in this practice area for at least a few years can do the job.
- *They can be managed.* Most labor and employment attorneys who have proven themselves can be managed. Attorneys from smaller law firms often do well in larger law firms. Labor and employment law work has routine aspects, and if attorneys prove they can do routine work for an extended period, the odds are good they can do other law work and be managed. Because they are employment attorneys, they have a good understanding of employer expectations.
- *They will do the job long term.* Labor and employment is a practice area that most attorneys stick with throughout their careers. They may transition to other practice areas or go in-house or into Human Resources inside a company, but most attorneys continue in this practice area. When larger law firms hire labor and employment attorneys, attorneys from smaller law firms are grateful for the opportunity and stick around as long as they can.

## Future Patent Attorneys from Lower-Tier Law Schools or Lateral Patent Attorneys

Patent law is a strange practice area. Because most future patent attorneys major in engineering and science-related disciplines in college, they typically do not get the high grades required by the top law schools. Accordingly, most patent attorneys do not go to top law

<sup>464</sup> Moody, “2018 Best Law Firms for Diversity,” <http://www.vault.com/company-rankings/law/best-law-firms-for-diversity/?sRankID=36&rYear=2018>.

schools, and most patent attorneys do not get jobs with the largest law firms out of law school. Also, patent attorneys who do go to top law schools often do not get the best grades because their skills tend not to lie in writing or the topics tested in law school. Most patent attorneys end up in smaller law firms after law school.

When large law firms need patent attorneys, often the only ones they can find are from small law firms and lower-quality law schools compared to other candidates. For example, attorneys with backgrounds in electrical engineering—a notoriously difficult subject area to get great grades in—often are snapped up by larger law firms because their clients need people with electrical engineering backgrounds to work on patents.

Most patent attorneys would say that a patent attorney's performance in law school does not necessarily translate into how good he or she is at being a patent attorney. A patent attorney has unique skills that are not necessarily related to law school grades.

Law firms could dramatically increase their diversity if they hired patent attorneys out of law school—even the smaller law schools—and if they hired lateral patent attorneys from small law firms. What is so ironic is that most patent attorneys practicing in large law firms started their careers at small law firms because large law firms would not hire them out of law school.

Many diverse patent attorneys work at the U.S. Patent and Trademark Office (USPTO). Because many patent attorneys cannot get jobs with large law firms—or even small ones—because of their law school grades, they go to work for the USPTO, which gives them great experience and has a lot of diversity among its ranks. I have seen many patent attorneys successfully transition from the USPTO to large law firms.

- *They can do the job.* Being a patent attorney is largely a technical skill. It is a cerebral job, done behind a desk, and requires a lot of thought and concentration. Most patent attorneys have science and mathematics backgrounds, and these skills come most into play in the patent attorney's work. A patent attorney who passes the patent bar generally can do the job. Patent attorneys' technical expertise speaks to how well they can do the work. Because the work is so technical, law firms can use various methods to evaluate a patent attorney, such as analyzing the patent attorney's past work.
- *They can be managed.* Managing a patent attorney typically is not difficult because most of the work is done in an office without a lot of input from others. Patent attorneys have been known to have disagreements among themselves, but these disagreements seem to be limited to the quality of work or how to credit client originations, compensation, and the like. Compared to other types of attorneys, patent attorneys can be fairly easily managed because they tend to be more introverted than extroverted.
- *They will do the job long term.* Patent attorneys make more money than they can make as

engineers and are very grateful for the law work. Patent attorneys who move from small law firms to larger ones are usually satisfied with the increased prestige and money at the new firm. They do have a reputation for moving around between firms, but this is usually because they had trouble fitting in at large firms owing to their introverted nature and the fact that they work around people without math or science backgrounds.

## What Diverse Attorneys Can Do to Help Ensure Success in Law Firms

Law firm diversity makes sense from both moral and business perspectives. Diversity is the wave of the future, and firms that want to succeed need to get with the program. Most of the responsibility for diversifying is on law firms—by making better hiring decisions, combating incorrect and dangerous preconceptions, and finding ways to ensure that diverse attorneys can access mentors and avoid the marginalization that leads to attrition. Law firms need to stop the feedback loops that prevent diverse attorneys from thriving in law firms. Diverse attorneys also need to play a role in closing the diversity gap. Here are some ways they can do that.

### Form Close Allegiances with Certain Partners in the Firm

Attorneys who engender the most loyalty are those who work closely with individual attorneys. Associates, regardless of their diversity, need to form allegiances with powerful partners in their firms. These allegiances can guarantee them work when things get slow, prevent them from getting laid off, and provide them with mentors and experience to ensure their work continually improves. Without these kinds of sponsors, attorneys can feel lost and unprotected and may leave the firm.

Every attorney who wants to get ahead in a law firm must do his or her best to form close relationships with partners and others who have the ability to positively influence their careers. Law firms sometimes set up mentorship programs or try to pair attorneys with senior attorneys who will help them, but ultimately it is the attorney's responsibility to pursue these relationships. One of the costliest mistakes I see attorneys making in firms is failing to associate with the right people.

A successful career in a law firm is about the quality of relationships an attorney cultivates, not just the quality of the attorney's work. The right relationships can lead to support within the firm, introductions to potential clients, and protection in times of trouble.

### Build Relationships with Many People in the Firm

Attorneys who want to succeed in law firms go out of their way to build positive relationships with all kinds of people—from partners to attorneys on various committees, secretaries and

paralegals, and operations staff. So many people can help an attorney get work done, it pays to treat them with respect and kindness.

One danger is when an attorney goes to the office and disappears behind a closed door for the entire day, week in and week out. Lawyers work in offices so they can communicate with one another, and smooth communications mean people have to be sociable to some extent even when they are introverted. For an attorney to be seen as a team player, it is important that he or she communicates with senior attorneys, staff, and others. Open lines of communication are important to positive working relationships and success in a law firm.

## Form Friendships Outside Work

Studies regarding the diversity gap in law firms show a major problem for diverse lawyers is a lack of connections to draw on. Whatever the differences among colleagues, attorneys must find common ground and ways to connect with colleagues, making networking and socializing with fellow attorneys a priority. It is important for all attorneys to form friendships and good working relationships with attorneys in the office and outside. If people in the office know an attorney and respect that person as an individual, they are more likely to want to help the attorney at work and beyond.

## Become Indispensable

One secret that helps attorneys get ahead in law firms is to make themselves indispensable to important attorneys in the firm. Forming close relationships is the first step to becoming indispensable. From there, doing impeccable work and being reliable, hardworking, and loyal help make attorneys necessary to certain partners' business. There are plenty of attorneys willing to take an attorney's job, and therefore the only way to have employment security is to be indispensable.

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Helping attorneys get jobs is all-consuming for me. Even though attorneys don't have the best reputation in society and often are seen as greedy, selfish, and all sorts of other negative things, I identify with them and understand how difficult it is to get into the field. Law is a profession that requires you to work very hard and clear a number of hurdles—to get into a good college, to get into a good law school, to get good grades, to get good positions, and to do well in those positions by working grueling hours—and many people take on a great deal of debt to make it all happen. People who do all of this to become attorneys should see some reward at the end of the line.

Yet, I have encountered many diverse people in the course of my work over the past few years who have not been hired. They all came to me after months or years of job searching. Despite their diversity and excellent qualifications, they all got fewer interviews and fewer job offers than nondiverse candidates with similar (or not as good) qualifications. After a career of seeing this pattern constantly repeated, I concluded that law firms really must not appreciate diversity that much. Or, even if firms do appreciate diversity, they do not appreciate diversity so much that it motivates them to deviate substantially from risk-averse behavior that compels them to hire nondiverse candidates over diverse candidates.

But this is changing. More and more law firms are making diversity a priority in practice. Through the immense efforts of diversity committees, inclusion managers, and other champions of diversity in and outside law firms, hiring practices are being updated to account for the strengths and abilities of diverse attorneys and entrenched attitudes and old biases in attorney hiring are beginning to recede.

Because attorneys work so hard, play by the rules, and do work they believe is honest, I believe they are entitled to as much help as possible when it comes to their careers. It took a great deal for me to become an attorney, and I want to make sure help is available for other people like me.

## Conclusion

The Sentinelese's impressions of the outside world have been formed by their limited interaction with it and, most likely, the stories they tell each other about it. They fear the unknown and have an “us-versus-them” paradigm. They see the outside world as a hostile force and for that reason refuse to engage with it.

It is the us-versus-them model of evaluating our lives and existence that should concern us all.

This us-versus-them paradigm means that we will never truly be able to understand and appreciate people who are different from us or have differing opinions. Throughout history, a constant tension has existed between differing groups of people who fought each other over these differences, and much of this history has been extremely unpleasant. Our society exists with an us-versus-them way of thinking and operating—whether it is CNN versus Fox, women versus men, black versus white, non-Muslims versus Muslims, or environmentalists versus nonenvironmentalists—the conflict exists and it seems to be getting worse.

Not understanding the Sentinelese, the world has left them alone. The Sentinelese do not have the benefits (or some might say drawbacks) of participation in the larger world. Because they are isolated, they do not have access to what civilization has to offer—a diversity of people and experience, food, health care, entertainment, mobility and transportation, education, progress, wealth, and jobs. Would they be better off if they were part of the larger world and allowed themselves to be integrated with it? How do they feel when they see the outside world—boats, airplanes, helicopters, and people with skin color that is different from their own? What do you think they think it all means?

The paradox of this is that everyone at one time or another feels like an outsider. People all over can at one point sense their isolation and exclusion from a larger or better group.

My journey to write this book came out of the necessity to understand the need for inclusion that is prevalent in the legal profession—and society as a whole. What have I learned and what is this all about?

I believe we all want to feel included and do not like it when we are not. We want to be evaluated for what we can contribute and not penalized by our sex, race, religion, sexual orientation, class, and other factors over which we may not have any control. We want to participate in the workforce and be accepted for who we are. No one wants to feel left out. The need to be included is among the most powerful drives there is.

In the past, not being included in the group meant we would not be protected from hostile



elements outside our immediate group, we'd not have food, we'd not be able to reproduce, and often we'd die. Our ancestors had strong reasons for wanting to be included. Many people came to the United States precisely because the social order of their former homelands made them feel excluded. Part of what makes America what it is is the fact that people believe they can get ahead with their qualifications and not by the circumstances into which they were born.

Today, when you are part of the “in-group” wherever you find yourself, you often have access to the sort of knowledge you need to get ahead. The biggest benefit of belonging to the right groups is the informal knowledge these groups share with you—to help you make decisions with which to advance that you would not have access to without these contacts. The right group can also protect us and make us successful. People can also get behind you and help you avoid roadblocks that would otherwise bring your career to a standstill. The right people can help you get jobs, advance, and make the right decisions with your career when you are connected with them.

The United States is incredibly diverse. Our educational institutions, companies, and law firms all value a diversity of viewpoints, sexes, races, and differences and increasingly abhor those who do not value this diversity. There has certainly been discrimination in law firms and other institutions in the past; however, now most institutions are embracing change and doing what they can to make people from all backgrounds feel included.

Not all diverse people will succeed. Everyone stills needs to do the work and learn and understand the rules to get ahead. Attorneys also need to connect with the right people to learn the rules of each individual firm. No one can succeed if they do not understand the rules and bond with the right people. They also cannot succeed if they isolate themselves and do not make efforts to be included in the larger group. Likewise, law firms will fail to achieve their diversity objectives if they do not make serious efforts to help include diverse attorneys when diverse attorneys do not always take proactive roles to include themselves.

Many young attorneys—diverse and nondiverse—come into law firms without the right tools to succeed. They do not understand how things work. Because they do not have access to the right information, they make mistakes and fail to live up to their potential. For all the talk about diversity in the legal profession, the largest barrier to true diversity is often access to information. Young attorneys cannot succeed until they understand how the system works and the sorts of people they need to become. Law firms do not always provide this information. Feeling isolated from their peers and not part of the larger social dynamic of the law firm, many diverse attorneys lack the sort of information they need to succeed.

When I was in high school, I started reading a series of self-improvement and other books because I wanted to understand what I needed to do to be successful. I read books like *Think and Grow Rich* by Napoleon Hill and *Unlimited Power* by Anthony Robbins and sought out

whatever information I could find to help me be a better person and become successful. This knowledge helped me understand many of the thinking processes that I needed to adopt to be successful. I became very interested in how people got ahead and how things worked. My career has largely been based on finding this information and transmitting this knowledge to others. The right information is essential for people to become as successful as they are capable of being. Without this information, you will be held back and may fail—there are too many mistakes you can make.

I do a lot of writing, and my writing has generally been down two paths. I write about personal advancement information that is applicable to all, and I write about personal advancement information applicable to attorneys.

- *Personal advancement information applicable to all.* I have a site (HB.org) that discusses the way people need to be to get ahead in general. I've written hundreds of articles about what people can do to succeed and become better people in their careers and lives. I've studied and thought a lot about this, and this is a large part of my passion in this life.
- *Personal advancement information applicable to attorneys.* As well, I have written hundreds of articles for attorneys to help them avoid various mistakes and "landmines" in their careers. Many attorneys do not have the knowledge to get ahead in their careers or to survive. This comes through daily when I speak with them. They lack an understanding of what to do and how to do it.

To improve, you need to have the knowledge and means to do so. You need to know the rules. If you are not part of the dominant and most important group, you may not always have access to this information and will need to find it on your own. This is one of the main challenges anyone faces in life—knowing the rules for success. Being successful is not just a matter of getting the right education; it is about so much more.

We want what the larger world offers, with its connections, access to opportunity and people, but we are also very tribal in nature and sometimes unwilling to listen to others' points of view. The Sentinelese are isolated and held back because they are afraid of integrating. The world has left them alone because they are different. Many attorneys fail because they are not interested in learning about the rules to succeed or in integrating with others. Law firms fail to become more diverse because they leave diverse attorneys alone and do not try to understand them. People are alone because others do not help them integrate and teach them the rules—but also because they do not seek to learn the rules themselves. The greatest lesson all my study of self-improvement has taught me is that you need to go after what you want and not be held back by your self-perceived limitations. You cannot be a victim. You need to create your own future.

Much of my business is built around helping people from different environments integrate into law firms. But there is much more that I could have done in the past to affirmatively recruit people from diverse backgrounds and connect with law firms seeking diversity. Law firms operate by screening for certain pieces of information (law schools, firms attorneys have worked at, number of years of experience, portable business) and do not always make the diversity of the candidate a priority in their measurement of that person—but I believe they want to.

Over the past several months, my recruiting firm created a position for a full-time diversity officer to study diversity and work with diverse candidates. We have written many articles on our site for diverse candidates and have reached out to firms to tell them that we are interested in finding diverse candidates for them. We speak with diversity officers inside law firms all over the country about the challenges diverse candidates face. We also provide special ways for diverse candidates who need help to reach out and contact us.

Deep down we all just want to be included. We want to find our place and be cared about by others. We want to succeed and not be separate. We also want to include others as well. To include others, we need to understand them and make a true effort to do so and see their point of view. Each side needs to learn each other's motivations. Diversity will only succeed when each side takes the time to understand the other.

