Chapter 1: What is Diversity and How Can It Help Law Firms?

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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.[1]

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.[2]

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.[3]
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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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.[4] In social contexts, it is defined as "inclusion of individuals representing more than one national origin, color, religion, socioeconomic stratum, sexual orientation, etc."[5]

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 diversit (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):

"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.[6]

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.[7]

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.[8]

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.

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.[9]

In-group bias, the tendency to prefer our group, whichever ones we identify with, is a powerful motivator.[10] 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.[11] 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.
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.[12]

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."[13] Status is respect and esteem earned from others; it's the social worth others ascribe to an individual[14] (a type of labeling with significant consequences). Influence, the third factor, is gained by earning respect based on contribution, not rank.[15]

*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.[16]

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-powerful groups remain divided among themselves—along myriad lines of race,[17] class, sex, ethnicity, religion, and so forth.[18]

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.[19] 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.[20]

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.[21]
"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."[22]

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.[23] 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. The summer after my last year of 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 are 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 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.”[24] 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.[25] Labeling or stereotyping of outsiders usually focuses on their negative attributes. Often we perceive outgroups as threatening to us in some way.[26]

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.[27] When a prejudice induces us to treat an individual or another group negatively, denying them benefits or advantages, discrimination occurs.[28]

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. Click Here to Reach Chapter 2: Aspirations Toward Equity and Social Justice

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[4] 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”).
[17] 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.
[27] Facing History and Ourselves, Holocaust and Human Behavior, 32.
[28] Ibid.