

# IILP Review 2012: The State of Diversity and Inclusion in the Legal Profession



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# IILP Review 2012: The State of Diversity and Inclusion in the Legal Profession



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Whether it is developing the next generation of lawyers, providing leadership in organizations that promote diversity, or working on legal matters with far-reaching impact, we strive to build diversity and inclusion in the legal profession, the community and our firm.

We salute the Institute for Inclusion in the Legal Profession for its real-world, common-sense approach to addressing diversity in today's legal profession.

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December, 2012

Dear Colleagues,

Last year, the Institute for Inclusion in the Legal Profession (IILP) published its inaugural review of the state of diversity in the legal profession. The 2011 *IILP Review* brought together essays on key aspects of diversity, from many different perspectives. The response was quite encouraging, with many people saying that they found the *IILP Review* to contain many useful insights in pursuing our shared goal of a more diverse and inclusive profession.

On behalf of the IILP, I am delighted that we are able to present the second edition of the *IILP Review*. The 2012 *IILP Review* combines insightful personal reflections with hard data; in my view, it is the type of report that is valuable in pursuing our shared goals. My sincerest thanks and compliments go to the authors and editors whose hard work made this year's *IILP Review* possible. Indeed, IILP's determination to contribute through thought, word and deed to real change in the state of diversity depends on the collaboration and dedication that the *IILP Review* reflects.

I hope that you find the 2012 *IILP Review* interesting, informative and, perhaps, provocative.

Finally, as IILP enters its fourth year, I want to thank all of those individuals and organizations who are supporting the Institute's efforts. We are indeed making progress and, with your help, we will help ensure that the legal profession becomes a model for diversity and inclusion.

With best wishes.



Marc S. Firestone  
Chair  
Institute for Inclusion in the Legal Profession

December, 2012

Dear Readers,

The Institute for Inclusion in the Legal Profession (IILP) is proud to present the 2012 edition of the *IILP Review: The State of Diversity and Inclusion in the Legal Profession*. The *IILP Review* brings together a statistical summary of recent demographic data, thought pieces exploring diversity issues in a wide range of professional contexts, and a round-up of initiatives by law firms, corporations, law schools, bar associations, and government—all in an accessible, readable format. Our goal is make it easier for busy lawyers, judges, law professors, students, employers and diversity professionals to keep abreast of thinking and research related to diversity and inclusion in the profession and to provide momentum—and a regular venue—for addressing the continuing challenges that we face.

Thanks to your efforts, this year's *IILP Review* is expanded significantly from our inaugural issue in 2011, and includes contributions from 26 people at the forefront of thinking and practice in the field. We are delighted to present such a comprehensive sampling of this important work and welcome the continued development of both the content and format of the review. In particular, we hope to stimulate both large-scale and small-scale data collection and reporting by employers, diversity professionals, bar associations, and research institutions, so that we might better assess our progress toward greater integration and inclusion within the profession.

We hope that you find the 2012 *IILP Review* useful and informative; and that you will consider contributing to a future issue of the *IILP Review*.

A handwritten signature in black ink, appearing to read 'Elizabeth Chambliss', is positioned above the printed name.

Elizabeth Chambliss  
Editor-in-Chief



# THE CLARO GROUP

CLARITY • VALUE • INTEGRITY®

September 21, 2012

Dear Participant:

Now in our second year of sponsorship, The Claro Group (Claro) is proud to maintain its support for today's event, so thank you for taking the time to participate and to share.

We believe that the IILP's goals, actions and philosophy are in close alignment with Claro's aspirations, and indeed help drive us forward as an organization. It is heartening then to see from the continued enthusiasm from the legal community that these objectives are resonating so clearly.

While the discourse on diversity and inclusion is not always new, fresh trends and themes continue to emerge. As clients are expanding the diversity of their workforce, or indeed building their geographic and cultural footprint, it is natural that many want to work with and incentivize law firms and all professional service firms who embrace and practice the same principles. The law firms and other professional service firms that best respond to this challenge are the firms with the inside track.

Diversity initiatives are not going unrecognized: the IILP's own CEO, Sandra Yamate, was recently named as the recipient of the Tort Trial and Insurance Practice Section of the American Bar Association's 2012 Liberty Achievement Award. This prestigious accolade recognizes career commitment to and achievement in diversity efforts in the legal profession. It is a clear testament to impact of the work she has led in this area.

Sandra's leadership shows what we can achieve with consistent focus, energy and action. We look forward to continuing to collaborate, learn and grow with you to drive forward inclusion in the legal industry and make our organizations stronger.

Very truly yours,

Mark Hargis  
Managing Director

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# About IILP

The Institute for Inclusion in the Legal Profession (IILP) is a 501 (c) (3) organization that believes that the legal profession must be diverse and inclusive. Through its programs, projects, research, and collaborations, it seeks real change, now, and offers a new model of inclusion to achieve it. IILP asks the hard questions, gets the data, talks about what is really on people's minds, no matter how sensitive, and invents and tests methodologies that will lead to change. For more information about IILP, visit [www.theIILP.com](http://www.theIILP.com).

## About the IILP Review: The State of Diversity and Inclusion in the Legal Profession

The *IILP Review* features the most current data about the state of diversity in the legal profession, compelling essays that explore subtle issues of diversity and inclusion for lawyers, and current research from academic experts. As such, the *IILP Review* brings together general insights on programs and strategies to improve diversity and inclusion, as well as targeted articles about the different challenges faced by those seeking to survive and thrive as law students, lawyers, judges, and leaders.

The depth and breadth of diversity and inclusion efforts makes it hard to keep abreast of the most current information about our progress or lack thereof. Furthermore, as notions of diversity and inclusion have expanded and evolved, it's even more difficult to stay current with the latest thinking. The *IILP Review* addresses that challenge by making information about diversity and inclusion more readily and easily accessible.

If you are interested in submitting an article for a future edition of the *IILP Review* please visit [www.TheIILP.com](http://www.TheIILP.com) for more information and to download the Call for Papers.

# IILP Review 2012:

## The State of Diversity and Inclusion in the Legal Profession



# Demographic Summary

**Elizabeth Chambliss**

**Professor of Law, New York Law School**

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*In this executive summary, Professor Elizabeth Chambliss, author of the ABA report, *Miles to Go: Progress of Minorities In the Profession*, explains the most current demographic data on the legal profession*

The Institute for Inclusion in the Legal Profession (IILP) was created in 2009 to promote demographic and cultural diversity and inclusion in the U.S. legal profession. As part of this effort, the *IILP Review* publishes an annual statistical summary regarding the status of traditionally underrepresented groups within the profession. Such data are critical for assessing the profession's progress toward greater diversity and inclusion.

This summary takes stock of the profession's progress as of August, 2012. Its goal is to provide a current, comprehensive picture of the demographics of the profession and to use this information to help the profession set an agenda for effective future action.

The summary is based on a review of academic, government, professional, and popular data sources. Most sources focus primarily on providing racial and ethnic data, or data about gender and minority<sup>1</sup> representation, and these emphases are reflected below. Where available, however, the summary also includes data about the representation of lesbian, gay, bisexual and transgender (LGBT) lawyers, lawyers with disabilities, and other demographic categories relevant to diversity and inclusion, broadly defined. One goal of the *IILP Review* is to promote the systematic collection of a wide range of demographic data.

The main findings of the 2012 demographic summary are as follows:

- Aggregate “minority” representation among U.S. lawyers increased from 9.7 percent in 2000 to 13.1 percent in 2010, according to data from the Census Bureau (see Table 1).
- This aggregate figure is roughly consistent with figures provided by the Department of Labor in 2009 and 2011 (see Table 2). However, figures for specific groups vary. The Census Bureau reports lower levels of African American and Asian American representation, and slightly higher levels of Hispanic representation, than the Department of Labor (compare 2010 figures with 2009 and 2011 figures in Table 2). Both sources show minority representation among lawyers to be increasing, however, in the aggregate and for each group. According to Department of Labor figures, minority representation among lawyers increased from 11.6 percent in 2009 to 12.7 percent in 2011, with significant increases in the representation of African American and Hispanic lawyers (see Table 2).

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1. The term “minority” typically is used to refer to aggregated data about African Americans, Asian Americans, Hispanics and Native Americans, although there are variations from source to source. Unless otherwise noted, we follow the categories used in the original source and provide definitions in the footnotes.



This summary takes stock of the profession's progress as of August, 2012. Its goal is to provide a current, comprehensive picture of the demographics of the profession and to use this information to help the profession set an agenda for effective future action.

- Minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs. According to the Department of Labor, minority representation among lawyers was 12.7 percent in 2011, compared to 26.4 percent among accountants and auditors, 36.5 percent among software developers, 28.0 percent among physicians and surgeons, and 22.0 percent within the management and professional labor force as a whole (see Table 4).
- Women's representation among lawyers increased from 28.7 percent in 2000 to 31.5 percent in 2010, according to Census Bureau data (see Table 1). This figure is roughly consistent with the Department of Labor figure for 2011, but represents a slight decline from the 2009 figure of 32.4 percent (see Table 3).
- Women's representation among lawyers is higher than women's representation in some other professions, including software developers (19.0 percent), architects (20.7 percent), civil engineers (13.1), and clergy (17.1 percent) (see Table 4). Women's representation among lawyers is significantly lower than their representation among accountants and auditors (61.3 percent), physical and social scientists (47.3 percent), and postsecondary teachers (46.2 percent), however; and significantly lower than their representation within the management and professional workforce as a whole (51.4 percent).
- Women continue to be underrepresented in top-level jobs within the legal profession, such as law firm partner (19.5 percent in 2011, see Table 13) and law school dean (20.6 percent in 2008-09, see Table 21). Women's representation among law partners tends to be lowest in Southern cities, such as Atlanta (18.1 percent), Charlotte (14.5 percent), Dallas (17.6 percent), and Houston (16.2 percent), and smaller markets such as Columbus (16.6 percent), Northern Virginia (14.3 percent), and Orange County, CA (14.9 percent) (see Table 16). Women's representation among New York City partners (17.3 percent) is also below the national average (possibly due to a higher percentage of foreign lawyers in New York City firms).
- Minority women, especially, are underrepresented among law firm partners. In 2011, minority women comprised only 2.0 percent of law partners nationally (see Table 16), and even this figure is skewed upward by a few stand-out cities—Austin (3.1 percent), Los Angeles (3.7 percent), Miami (7.7 percent), Orange County (3.2 percent), San Francisco (4.0 percent), and San Jose (4.0 percent). In many cities, minority women's representation among partners hovers closer to 1.0 percent.



- Nationally, African Americans are the best represented minority group among lawyers, according to Census Bureau data (4.3 percent in 2010) with Hispanics and Asian Americans each comprising 3.4 percent (see Table 1). According to Department of Labor figures, Asian Americans (4.2 percent) are better represented among lawyers than Hispanics (3.2 percent) (see Table 2). This represents a change since 2000, when Hispanics were the second largest minority group among lawyers (see Table 1).
- The pace of African American entry into the profession has slowed in recent years. In 2011-12, African Americans made up 7.1 percent of law students, compared to around 7.5 percent in the mid- to late-1990s (see Table 7). Asian American representation among law students also has dropped after decades of steady gains. Hispanic representation among law students has increased, from 5.8 percent in 2000-01 to 7.5 percent in 2011-12. Total minority representation among law graduates rose to 24.2 percent in 2011-12, representing an all-time high (see Table 6).
- Women's representation among law students has declined from a high of 49.0 percent in the early 2000s to 46.7 percent in 2011-12 (see Table 5). Women's representation among law graduates also has declined from a high of 49.5 percent in 2003-04 to 47.3 percent in 2011-12 (see Table 6).
- Initial employment patterns for white and minority law graduates have converged since the late 1990s, except for judicial clerkship rates, where divergence has increased (see Table 8). This overall convergence masks significant differences between racial and ethnic groups, however. For instance, African Americans and Native Americans continue to be significantly less likely than other groups to enter private practice, whereas Hispanics and Asian Americans are more likely than other groups, including whites, to do so (see Table 9). African Americans are the most likely of all groups to enter government and public interest jobs. Hispanic employment patterns resemble whites' in most job categories, except that Hispanic graduates are less likely to hold judicial clerkships, and more likely to start off in public interest jobs.
- Women's initial employment continues to differ from men's among both white and minority law graduates (see Table 8). Women are less likely than men to enter private practice and business, and more likely to begin their careers in public interest jobs. Women also are more likely than men to have judicial clerkships and academic jobs. These patterns have remained relatively consistent since the late-1990s.
- The initial employment of law graduates with disabilities differs somewhat from that of other groups. Graduates with disabilities are less likely than most other groups to enter private practice and more likely to enter business. In 2010, 16.1 percent of law graduates with disabilities entered business (see Table 10), about the same rate as Asian Americans, compared to 15.5 percent of African American graduates, 12.2 percent of Hispanic graduates, and 13.1 percent of white graduates (see Table 9). Figures for lawyers with disabilities vary significantly between the two years, however, due in part to small sample sizes. In 2010, there were 416 graduates with disabilities in the sample.
- There are no recent national data on the employment of practicing lawyers by race/ethnicity beyond initial employment. In 2005, 75.0 percent of all lawyers were employed in private practice, and 8.0 percent were in business; thus, 83.0 percent of all lawyers were employed in the for-profit sector (see Table 11). Women were slightly less likely than men to be in private practice and more likely to be in business, government, or public interest jobs (see Table 12). Unfortunately, the lack of data prevents a more detailed assessment.



The summary is based on a review of academic, government, professional, and popular data sources. Most sources focus primarily on providing racial and ethnic data, or data about gender and minority representation, and these emphases are reflected below.

- There also are no national data on the employment of lawyers with disabilities or LGBT lawyers, beyond initial employment. National Association for Law Placement (NALP) data show that the percentage of lawyers with disabilities in law firms is miniscule at both the associate and partner levels, although it has increased slightly over the seven-year period for which data are available. In 2011, lawyers with disabilities made up 0.23 percent of law partners, compared to 0.16 percent in 2004 (see Table 14). The percentage of openly LGBT lawyers in law firms likewise is extremely small, but increasing. In 2011, openly LGBT lawyers made up 1.44 percent of law partners and 2.43 percent of associates (see Table 15). More data are needed to place these figures in perspective, including data from other employment settings, occupations, and regions.
- Based on the data that are available, women's representation is highest among law firm associates (45.4 percent in 2011, see Table 13), corporate counsel (41.0 percent in 2011, see Table 17), Department of Justice attorneys (39.0 percent in 2010, see Table 19) and entry-level law faculty (53.4 percent in 2008-09, see Table 21), and lowest among law partners (19.5 percent in 2011, see Table 13) and law school deans (20.6 percent in 2008-09, see Table 21).
- Minority representation is highest among entry-level law faculty (25.1 percent in 2008-09, see Table 21), law firm associates (19.9 percent in 2011, see Table 13), Department of Justice attorneys (16.0 percent in 2010, see Table 19), and corporate counsel (15.0 in 2011, see Table 17), and lowest among law partners (6.6 percent in 2011, see Table 13). According to figures provided by the Association of Corporate Counsel, minority representation among corporate counsel increased from 11.0 percent in 2006 to 15.0 percent in 2011 (see Table 17).
- The profession would benefit greatly from better data on the demographics of practicing lawyers in different employment settings. Outside of law firms, the profession lacks even basic gender and ethnic breakdowns by employment category, not to mention more detailed breakdowns by title, seniority and region; or more inclusive efforts covering sexual orientation and disability status. The profession also lacks demographic data on lawyer compensation, satisfaction, and public service. Gathering such data requires a sustained commitment by the entire profession, including bar associations, employers, law schools, and public service groups. Contributing to this effort is a chief goal of the *IILP Review*.

# Table 1 - Minority Representation in the U.S. Legal Profession<sup>1</sup>

1990	Lawyers (%)	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Total	747,077 (100.0)	25,670 (3.4)	18,612 (2.5)	10,720 (1.4)	1,502 (0.2)	56,397 (7.6)
M	564,332 (75.5)	14,360 (1.9)	12,330 (1.7)	6,744 (0.9)	1,029 (0.1)	34,463 (4.6)
F	182,745 (24.5)	11,310 (1.5)	6,282 (0.8)	3,897 (0.5)	445 (0.1)	21,934 (2.9)
	Judges (%)	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Total	32,394 (100.0)	2,278 (7.0)	1,098 (3.4)	342 (1.1)	191 (0.6)	3,909 (12.1)
M	24,994 (77.2)	1,407 (4.3)	800 (2.5)	216 (0.7)	117 (0.4)	2,540 (7.8)
F	7,400 (22.8)	871 (2.7)	298 (0.9)	126 (0.4)	74 (0.2)	1,369 (4.2)
2000	Lawyers (%)	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Total	871,115 (100.0)	33,865 (3.9)	28,630 (3.3)	20,160 (2.3)	1,730 (0.2)	84,385 (9.7)
M	621,315 (71.3)	17,450 (2.0)	17,835 (2.0)	11,020 (1.3)	975 (0.1)	47,280 (5.4)
F	249,805 (28.7)	16,415 (1.9)	10,795 (1.2)	9,140 (1.0)	755 (0.1)	37,105 (4.3)
	Judges (%)	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Total	58,355 (100.0)	5,155 (8.8)	2,650 (4.5)	1,000 (1.7)	465 (0.8)	9,270 (15.9)
M	36,565 (62.7)	2,285 (3.9)	1,440 (2.5)	605 (1.0)	260 (0.4)	4,590 (7.9)
F	21,795 (37.3)	2,870 (4.9)	1,210 (2.1)	395 (0.7)	205 (0.4)	4,680 (8.0)
2010	Lawyers (%)	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Total	1,040,000 (100.0)	44,720 (4.3)	35,360 (3.4)	35,360 (3.4)	n/a	136,240 (13.1)
M	712,400 (68.5)					
F	327,600 (31.5)					
	Judges (%)	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Total	71,000 (100.0)	8,875 (12.5)	5,538 (7.8)	2,769 (3.9)	n/a	17,182 (24.2)
M	45,156 (63.6)					
F	25,844 (36.4)					
	Legal Support (%)	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Total	604,000 (100.0)	57,296 (9.5)	53,063 (8.9)	19,676 (3.3)		130,035 (21.5)
M	120,196 (19.9)					
F	484,044 (80.1)					

1. Source: U.S. Census Bureau, Census 2000 EEO Data Tool, <http://www.census.gov/eo2000/index.html> (for 1990 and 2000 data); U.S. Census Bureau, Statistical Abstract of the United States, Table 616, Employed Civilians by Occupation, Sex, Race and Hispanic Origin 2010, <http://www.census.gov/compendia/statab/2012/tables/12s0616.pdf> (for 2010 data). Numeric breakdowns are derived from percentages. Figures for African Americans include Blacks and African Americans. Figures for Hispanics include Hispanics and Latinos. Figures for Asian Americans include Native Hawaiians and Pacific Islanders. Figures for minorities are derived from aggregating the minority categories listed. 2010 data for Native Americans are not available. 2010 data for judges includes "judges, magistrates, and other judicial workers." 2010 data for legal support includes paralegals, legal assistants, and "miscellaneous legal support workers." *Id.*



According to Department of Labor figures, minority representation among lawyers increased from 11.6 percent in 2009 to 12.7 percent in 2011, with significant increases in the representation of African American and Hispanic lawyers.

**Table 2 - Minority Representation Among U.S. Lawyers (2009-2011)<sup>2</sup>**

	Lawyers	Af Am. (%)	Hisp. (%)	As Am. (%)	Minority (%)
2009	1,043,000	49,021 (4.7)	29,204 (2.8)	42,763 (4.1)	120,988 (11.6)
2010	1,040,000	44,720 (4.3)	35,360 (3.4)	35,360 (3.4)	136,240 (13.1)
2011	1,085,000	57,505 (5.3)	34,720 (3.2)	45,570 (4.2)	137,795 (12.7)

2. Source: U.S. Department of Labor, Bureau of Labor Statistics, Table 11, Employed Persons by Detailed Occupation and Sex, 2009 Annual Averages, <http://www.bls.gov/cps/wlftable11-2010.htm> (for 2009 data); U.S. Census Bureau, Statistical Abstract of the United States, Table 616, Employed Civilians by Occupation, Sex, Race and Hispanic Origin 2010, <http://www.census.gov/compendia/statab/2012/tables/12s0616.pdf> (for 2010 data); U.S. Department of Labor, Bureau of Labor Statistics, Table 11, Employed Persons by Detailed Occupation, Sex, Race and Hispanic or Latino Ethnicity 2011 <http://www.bls.gov/cps/cpsaat11.pdf> (for 2011 data).

**Table 3 - Women's Representation Among U.S. Lawyers (2009-2011)<sup>3</sup>**

	Lawyers	Female (%)
2009	1,043,000	337,932 (32.4)
2010	1,040,000	327,600 (31.5)
2011	1,085,000	346,115 (31.9)

3. Source: U.S. Department of Labor, Bureau of Labor Statistics, Table 11, Employed Persons by Detailed Occupation and Sex, 2009 Annual Averages, <http://www.bls.gov/cps/wlftable11-2010.htm> (for 2009 data); U.S. Census Bureau, Statistical Abstract of the United States, Table 616, Employed Civilians by Occupation, Sex, Race and Hispanic Origin 2010, <http://www.census.gov/compendia/statab/2012/tables/12s0616.pdf> (for 2010 data); U.S. Department of Labor, Bureau of Labor Statistics, Table 11, Employed Persons by Detailed Occupation, Sex, Race and Hispanic or Latino Ethnicity 2011 <http://www.bls.gov/cps/cpsaat11.pdf> (for 2011 data). Numeric breakdowns are derived from percentages.



Minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs.

**Table 4 - Female and Minority Representation in Selected U.S. Professions<sup>4</sup>**

	Female	Af Am.	Hisp.	As Am.	Minority
Civilian Labor Force	46.9%	10.8	14.5	4.9	30.2
Mgmt/Professional	51.4	8.4	7.5	6.1	22.0
Mgmt/Occupations	38.1	6.3	7.7	4.6	18.6
Chief Executives	24.2	2.7	4.1	3.0	9.8
Financial Managers	54.2	6.5	8.7	5.8	21.0
Accountants/Auditors	61.3	8.5	7.6	10.3	26.4
Professional Occupations	57.1	9.1	7.4	6.8	23.3
Computer/Mathematical	25.0	6.9	5.7	16.6	29.2
Software Developers	19.0	4.8	4.6	27.1	36.5
Architecture/Engineering	13.6	5.2	6.4	8.8	20.4
Architects	20.7	1.6	4.1	5.5	11.2
Civil Engineers	13.1	4.3	4.7	7.8	16.8
Physical/Social Sciences	47.3	7.3	5.9	9.8	23.0
Psychologists	71.2	5.1	5.9	2.9	13.9
Social Services	64.5	18.1	10.7	2.8	31.6
Clergy	17.1	11.3	6.8	4.1	22.2
Legal Occupations	49.8	7.3	5.4	3.9	16.6
Lawyers	31.9	5.3	3.2	4.2	12.7
Education/Training	73.6	9.7	8.3	3.5	21.5
Postsecondary Teachers	46.2	7.3	4.8	10.1	22.2
Healthcare/Technical	74.4	10.0	6.7	7.8	24.5
Physicians/Surgeons	33.8	5.3	6.6	16.1	28.0
Registered Nurses	91.1	10.4	5.1	7.3	22.8

4. Source: U.S. Department of Labor, Bureau of Labor Statistics, Table 11, Employed Persons by Detailed Occupation, Sex, Race and Hispanic or Latino Ethnicity 2011 <http://www.bls.gov/cps/cpsaat11.pdf>. Figures for minorities are derived by aggregating the minority categories listed.

**Table 5 - Law School Enrollment by Gender and Minority Status<sup>5</sup>**

	Total	Female (%)	Minority (%)
1976-77	112,401	29,343 (26.1)	9,589 (8.5)
1977-78	113,080	31,650 (28.0)	9,580 (8.5)
1978-79	116,150	35,775 (30.8)	9,952 (8.6)
1979-80	117,297	37,534 (32.0)	10,013 (8.5)
1980-81	119,501	40,834 (34.2)	10,575 (8.8)
1981-82	120,879	43,245 (35.8)	11,134 (9.2)
1982-83	121,791	45,539 (37.4)	11,611 (9.5)
1983-84	121,201	46,361 (38.2)	11,866 (9.8)
1984-85	119,847	46,897 (39.1)	11,917 (9.9)
1985-86	118,700	47,486 (40.0)	12,357 (10.4)
1986-87	117,813	47,920 (40.7)	12,550 (10.7)
1987-88	117,997	48,920 (41.5)	13,250 (11.2)
1988-89	120,694	50,932 (42.2)	14,295 (11.8)
1989-90	124,471	53,113 (42.7)	15,720 (12.6)
1990-91	127,261	54,097 (42.5)	17,330 (13.6)
1991-92	129,580	55,110 (42.5)	19,410 (15.0)
1992-93	128,212	54,644 (42.6)	21,266 (16.6)
1993-94	127,802	55,134 (43.1)	22,799 (17.8)
1994-95	128,989	55,808 (43.3)	24,611 (19.1)
1995-96	129,397	56,961 (44.0)	25,554 (19.7)
1996-97	128,623	57,123 (44.4)	25,279 (19.7)
1997-98	125,886	56,915 (45.2)	24,685 (19.6)
1998-99	125,627	57,952 (46.1)	25,266 (20.1)
1999-00	125,184	59,362 (47.4)	25,253 (20.2)
2000-01	125,173	60,633 (48.4)	25,753 (20.6)
2001-02	127,610	62,476 (49.0)	26,257 (20.6)
2002-03	132,885	65,179 (49.0)	27,175 (20.5)
2003-04	137,676	67,027 (48.7)	28,325 (20.6)
2004-05	140,376	67,438 (48.0)	29,489 (21.0)
2005-06	140,298	66,613 (47.5)	29,768 (21.2)
2006-07	141,031	66,085 (46.9)	30,557 (21.6)
2007-08	141,719	66,196 (46.7)	30,657 (21.6)
2008-09	142,922	66,968 (46.9)	31,368 (21.9)
2009-10	145,239	68,502 (47.2)	32,505 (22.3)
2010-11	147,525	69,009 (46.8)	35,045 (23.8)
2011-12	146,288	68,262 (46.7)	35,859 (24.7)

5. Source: ABA Section of Legal Education, Legal Education Statistics from ABA-Approved Law Schools, <http://www.abanet.org/legaled/statistics/stats.html>. Some figures differ slightly from those previously reported by the ABA.



Women's representation among law students  
has declined since the early 2000s.  
Women also make up a slightly lower  
percentage of law graduates.

**Table 6 - JDs Awarded by Gender and Minority Status<sup>6</sup>**

	Total	Female (%)	Minority (%)
1983-84	36,687	13,586 (37.0)	3,169 (8.6)
1984-85	36,829	14,119 (38.3)	3,150 (8.6)
1985-86	36,121	13,980 (38.7)	3,348 (9.3)
1986-87	35,478	14,206 (40.0)	3,450 (9.7)
1987-88	35,701	14,595 (40.9)	3,516 (9.8)
1988-89	35,520	14,553 (41.0)	3,809 (10.7)
1989-90	36,385	15,345 (42.2)	4,128 (11.3)
1990-91	38,800	16,580 (42.7)	4,585 (11.8)
1991-92	39,425	16,680 (42.3)	4,976 (12.6)
1992-93	40,213	16,972 (42.2)	5,653 (14.1)
1993-94	39,710	16,997 (42.8)	6,099 (15.4)
1994-95	39,191	16,790 (42.8)	6,802 (17.4)
1995-96	39,920	17,366 (43.5)	7,152 (17.9)
1996-97	40,114	17,552 (43.8)	7,611 (19.0)
1997-98	39,455	17,662 (44.8)	7,754 (19.7)
1998-99	39,071	17,516 (44.8)	7,532 (19.3)
1999-00	38,157	17,713 (46.4)	7,391 (19.4)
2000-01	37,909	18,006 (47.5)	7,443 (19.6)
2001-02	38,576	18,644 (48.3)	7,780 (20.2)
2002-03	38,863	19,133 (49.2)	8,233 (21.2)
2003-04	40,018	19,818 (49.5)	8,367 (20.9)
2004-05	42,673	20,804 (48.8)	9,568 (22.4)
2005-06	43,883	21,074 (48.0)	9,564 (21.8)
2006-07	43,518	20,669 (47.5)	9,820 (22.5)
2007-08	43,588	20,537 (47.1)	9,631 (22.0)
2008-09	44,004	20,191 (45.9)	9,725 (22.1)
2009-10	44,258	20,852 (47.1)	10,121 (22.9)
2010-11	44,495	21,043 (47.3)	10,748 (24.2)

6. Source: ABA Section of Legal Education, Legal Education Statistics from ABA-Approved Law Schools, <http://www.abanet.org/legaled/statistics/stats.html>. Some figures differ slightly from those previously reported by the ABA.



**Table 7 - Law School Enrollment by Race/Ethnicity<sup>7</sup>**

	Total	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)
1976-77	112,401	5,303 (4.7)	2,461 (2.2)	1,324 (1.2)	301 (0.3)
1977-78	113,080	5,304 (4.7)	2,531 (2.2)	1,382 (1.2)	363 (0.3)
1978-79	116,150	5,350 (4.6)	2,788 (2.4)	1,424 (1.2)	390 (0.3)
1979-80	117,297	5,257 (4.5)	2,816 (2.4)	1,547 (1.3)	392 (0.3)
1980-81	119,501	5,505 (4.6)	3,014 (2.5)	1,641 (1.4)	415 (0.3)
1981-82	120,879	5,789 (4.8)	3,189 (2.6)	1,755 (1.5)	402 (0.3)
1982-83	121,791	5,852 (4.8)	3,349 (2.6)	1,947 (1.6)	406 (0.3)
1983-84	121,201	5,455 (4.5)	3,496 (2.9)	1,962 (1.6)	441 (0.4)
1984-85	119,847	5,476 (4.6)	3,507 (2.9)	2,026 (1.7)	429 (0.4)
1985-86	118,700	5,669 (4.8)	3,679 (3.1)	2,153 (1.8)	463 (0.4)
1986-87	117,813	5,894 (5.0)	3,865 (3.3)	2,303 (2.0)	488 (0.4)
1987-88	117,997	6,028 (5.1)	4,074 (3.5)	2,656 (2.3)	492 (0.4)
1988-89	120,694	6,321 (5.2)	4,342 (3.6)	3,133 (2.6)	499 (0.4)
1989-90	124,471	6,791 (5.5)	4,733 (3.8)	3,676 (3.0)	527 (0.4)
1990-91	127,261	7,432 (5.8)	5,038 (4.0)	4,306 (3.4)	554 (0.4)
1991-92	129,580	8,149 (6.3)	5,541 (4.3)	5,028 (3.9)	692 (0.5)
1992-93	128,212	8,638 (6.7)	5,969 (4.7)	5,823 (4.5)	776 (0.6)
1993-94	127,802	9,156(7.2)	6,312 (4.9)	6,458 (5.1)	873 (0.7)
1994-95	128,989	9,681 (7.5)	6,772 (5.3)	7,196 (5.6)	962 (0.7)
1995-96	129,397	9,779 (7.6)	6,970 (5.4)	7,719 (6.0)	1,085 (0.8)
1996-97	128,623	9,542 (7.4)	6,915 (5.4)	7,706 (6.0)	1,116 (0.9)
1997-98	125,886	9,132 (7.3)	6,869 (5.5)	7,599 (6.0)	1,085 (0.9)
1998-99	125,627	9,271 (7.4)	7,054 (5.6)	7,877 (6.3)	1,064 (0.8)
1999-00	125,184	9,272 (7.4)	7,120 (5.7)	7,883 (6.3)	978 (0.8)
2000-01	125,173	9,354 (7.5)	7,274 (5.8)	8,173 (6.5)	952 (0.8)
2001-02	127,610	9,412 (7.4)	7,434 (5.8)	8,421 (6.6)	990 (0.8)
2002-03	132,885	9,436 (7.1)	7,539 (5.7)	9,179 (6.9)	1,021 (0.8)
2003-04	137,676	9,437 (6.9)	7,814 (5.7)	10,042 (7.3)	1,048 (0.8)
2004-05	140,376	9,488 (6.8)	8,068 (5.7)	10,856 (7.6)	1,106 (0.8)
2005-06	140,298	9,126 (6.5)	8,248 (5.9)	11,252 (8.0)	1,142 (0.8)
2006-07	141,031	9,529 (6.8)	8,564 (6.1)	11,306 (8.0)	1,158 (0.8)
2007-08	141,719	9,483 (6.7)	8,782 (6.2)	11,176 (7.9)	1,216 (0.9)
2008-09	141,922	9,822 (6.9)	8,834 (6.2)	11,244 (7.9)	1,198 (0.8)
2009-10	145,239	10,173 (7.0)	9,732 (6.7)	11,327 (7.8)	1,273 (0.9)
2010-11	147,525	10,352 (7.0)	10,454 (7.1)	10,215 (6.9)	1,208 (0.8)
2011-12	146,288	10,452 (7.1)	11,027 (7.5)	10,415 (7.1)	1,165 (0.8)

7. Source: ABA Section of Legal Education, Legal Education Statistics from ABA-Approved Law Schools, <http://www.abanet.org/legaled/statistics/stats.html>. Figures include all JD candidates enrolled at ABA-approved law schools, excluding Puerto Rican law schools. Figures for Hispanics represent the combined total for Mexican Americans, Puerto Ricans, and Other Hispanics.



# Table 8 - Initial Employment by Minority Status and Gender<sup>8</sup>

1998	White			Minority		
	Male	Female	Total	Male	Female	Total
Private Practice	59.4%	53.9	57.1	52.8	46.5	49.5
Business/Industry	13.5	12.0	12.9	16.0	14.5	15.2
Government	12.6	13.4	13.0	16.4	17.7	17.1
Judicial Clerkships	10.7	14.8	12.4	8.7	11.5	10.2
Public Interest	1.3	3.5	2.2	2.5	5.9	4.3
Academic	0.9	1.0	1.0	1.4	2.0	1.7
Unknown	1.7	1.4	1.5	2.1	1.9	2.0
2003	White			Minority		
	Male	Female	Total	Male	Female	Total
Private Practice	62.1	58.8	60.5	53.0	53.9	53.5
Business/Industry	10.6	8.8	9.7	15.3	11.1	12.9
Government	12.7	12.4	12.6	15.6	15.2	15.3
Judicial Clerkships	10.7	14.1	12.3	8.1	10.4	9.4
Public Interest	1.5	3.5	2.5	3.3	5.7	4.8
Academic	1.0	1.3	1.1	2.1	2.1	2.1
Unknown	1.4	1.1	1.3	2.6	1.5	2.0
2009	White			Minority		
	Male	Female	Total	Male	Female	Total
Private Practice	61.5	57.7	59.8	59.2	56.2	57.5
Business/Industry	12.4	10.5	11.6	14.8	10.4	12.4
Government	11.5	11.2	11.4	12.6	13.4	13.0
Judicial Clerkships	9.4	11.9	10.5	5.4	8.8	7.3
Public Interest	3.3	6.4	4.6	5.4	7.8	6.8
Academic	1.4	1.8	1.6	1.7	2.7	2.2
Unknown	0.5	0.4	0.5	0.9	0.7	0.8
2010	White			Minority		
	Male	Female	Total	Male	Female	Total
Private Practice	55.8	53.1	54.6	53.4	48.8	50.8
Business/Industry	14.2	11.7	13.1	15.8	13.7	14.6
Government	13.2	13.1	13.2	14.6	15.0	14.9
Judicial Clerkships	10.6	12.3	11.4	7.4	8.6	8.1
Public Interest	3.9	7.1	5.3	5.4	9.5	7.7
Academic	1.6	2.0	1.6	2.4	3.1	2.8
Unknown	0.6	0.7	0.6	1.0	1.3	1.1

8. Source: NALP, JOBS AND JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 1998 48 (1999) (for 1998 figures); NALP, JOBS AND JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2003 52 (2004) (for 2003 figures); NALP, JOBS AND JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2009 (2010) (for 2009 figures); NALP, JOBS AND JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2010 52 (2011) (for 2010 figures). The category "business/industry" includes non-legal as well as legal jobs. 2009 and 2010 figures include only full-time jobs.

**Table 9 - Initial Employment by Race/Ethnicity<sup>9</sup>**

1998	White	Af Am.	Hisp.	As Am.	Na Am.	
Private Practice	57.1%	40.1	55.2	55.8	46.6	
Business/Industry	12.9	16.7	11.6	15.9	19.4	
Government	13.0	21.5	17.7	11.9	16.2	
Judicial Clerkships	12.4	11.1	7.5	11.4	8.9	
Public Interest	2.2	5.1	5.1	2.6	6.3	
Academic	1.0	2.6	1.6	1.0	0.5	
Unknown	1.5	2.8	1.4	1.6	2.1	
2003	White	Af Am.	Hisp.	As Am.	Na Am.	Latino
Private Practice	60.5	46.3	55.8	59.4	46.4	54.3
Business/Industry	9.7	14.6	12.2	12.5	10.2	11.8
Government	12.6	19.1	14.7	10.7	21.7	17.2
Judicial Clerkships	12.3	10.3	6.5	10.3	10.8	7.1
Public Interest	2.5	4.1	6.9	4.1	6.0	6.2
Academic	1.1	3.4	0.9	1.3	2.4	2.2
Unknown	1.3	2.2	3.0	1.7	2.4	1.2
2009	White	Af Am.	Hisp.	As Am.	Na Am.	Multi-racial
Private Practice	59.8	50.1	59.9	62.3	47.1	58.6
Business/Industry	11.6	13.6	10.3	13.6	12.2	7.9
Government	11.4	16.1	12.8	9.5	26.2	15.0
Judicial Clerkships	10.5	8.4	6.6	6.7	4.6	9.7
Public Interest	4.6	8.1	7.5	5.2	5.2	7.3
Academic	1.6	2.7	2.3	1.9	3.5	1.2
Unknown	0.5	1.0	0.6	0.8	1.2	0.3
2010	White	Af Am.	Hisp.	As Am.	Na Am.	Multi-racial
Private Practice	54.6	41.3	55.7	55.6	47.1	46.9
Business/Industry	13.1	15.5	12.2	16.3	11.8	13.0
Government	13.2	19.7	14.0	10.6	19.4	18.4
Judicial Clerkships	11.4	8.8	6.6	8.1	5.9	11.1
Public Interest	5.3	8.8	8.6	6.2	8.2	7.9
Academic	1.8	3.8	2.4	2.4	4.1	1.7
Unknown	0.6	2.1	0.6	0.7	2.9	1.0

9. Source: NALP, JOBS AND JDS: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 1998 49 (1999) (for 1998 figures); NALP, JOBS AND JDS: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2003 53 (2004) (for 2003 figures); NALP, JOBS AND JDS: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2009 53 (2010) (for 2009 figures); NALP, JOBS AND JDS: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2010 53 (2011) (for 2010 figures). The category "business/industry" includes non-legal as well as legal jobs. 2009 and 2010 figures include only full-time jobs. 2003 figures for Hispanics do not include Latinos. NALP defines "Latino" as Mexican, Puerto Rican or Cuban.

**Table 10 - Initial Employment of Graduates with Disabilities<sup>10</sup>**

	2009	2010
Private Practice	55.0%	48.1
Business/Industry	11.6	16.1
Government	12.9	12.3
Judicial Clerkships	9.8	10.8
Public Interest	8.0	8.9
Academic	2.3	2.4

10. Source: NALP, JOBS AND JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2009 54 (2010) (for 2009 figures); NALP, JOBS AND JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2010 54 (2011) (for 2010 figures). The category "business/industry" includes both non-legal and legal jobs. Figures are for full-time jobs only.

**Table 11 - Distribution of U.S. Lawyers by Type of Employment<sup>11</sup>**

	1980	1991	2000	2005
Private Practice	68.0%	73.0	74.0	75.0
Private Industry	10.0	9.0	8.0	8.0
Private Association	1.0	1.0	1.0	1.0
Federal Judiciary	0.5	0.4	0.3	0.3
State/Local Judiciary	3.0	2.0	2.0	2.0
Federal Government	4.0	4.0	3.0	3.0
State/Local Government	6.0	5.0	4.0	5.0
Legal Aid/Public Defender	2.0	1.0	1.0	1.0
Education	1.0	1.0	1.0	1.0
Retired or Inactive	5.0	5.0	5.0	4.0

11. Source: CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005 5 (2012).

**Table 12 - Distribution of U.S. Lawyers by Type of Employment and Gender<sup>12</sup>**

	1980		1991		2000		2005	
	Male	Female	Male	Female	Male	Female	Male	Female
Private Practice	73.3%	58.9	77.6	71.9	75.0	71.0	76.3	71.6
Business	10.7	9.7	9.5	8.5	8.0	9.0	8.2	9.9
Government	9.1	18.2	7.7	8.5	7.0	10.0	6.4	10.2
Judiciary	3.8	4.0	2.8	2.8	3.0	3.0	2.5	2.4
PubInt/Education	3.2	9.2	2.4	4.9	2.0	4.0	1.7	3.0
Retired/Inactive					6.0	3.0	5.0	2.7

12. Source: Lewis A. Kornhauser & Richard Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender and Educational Debt*, 70 N.Y.U.L. Rev. 829, 850 (1995) (for 1980 data); CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 9 (2004) (for 1991 and 2000 data); CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005 6 (2012) (for 2005 data) (some categories were combined for consistency with prior years).



Women are slightly less likely than men to be in private practice and more likely to be in business, government, or public interest jobs.

**Table 13 - Representation of Female and Minority Lawyers in Law Firms<sup>13</sup>**

2003	Female		Minority		Minority Female	
	Partners	Associates	Partners	Associates	Partners	Associates
Nationwide	16.8%	43.0	4.0	14.6		
100 or fewer lawyer firms	16.2	40.8	3.9	10.8		
101-250 lawyer firms	16.4	43.1	3.3	11.7		
251-500 lawyer firms	17.3	43.5	3.7	13.6		
501+ lawyer firms	17.2	43.2	5.0	17.2		
2010	Female		Minority		Minority Female	
	Partners	Associates	Partners	Associates	Partners	Associates
Nationwide	19.4	45.4	6.2	19.5	2.0	10.9
100 or fewer lawyer firms	19.7	42.8	5.9	15.0	2.1	8.7
101-250 lawyer firms	19.2	45.0	4.2	15.0	1.2	8.2
251-500 lawyer firms	19.6	45.1	6.0	17.7	2.0	9.5
501+ lawyer firms	19.9	45.4	6.5	19.3	1.9	10.8
701+ lawyer firms	19.3	46.1	7.7	22.7	2.4	12.8
2011	Female		Minority		Minority Female	
	Partners	Associates	Partners	Associates	Partners	Associates
Nationwide	19.5	45.4	6.6	19.9	2.0	11.0
100 or fewer lawyer firms	20.0	42.4	6.5	15.4	2.3	8.3
101-250 lawyer firms	19.5	45.0	4.7	15.1	1.3	8.0
251-500 lawyer firms	19.9	45.7	6.3	18.2	2.1	9.8
501-700 lawyer firms	19.2	44.7	7.4	19.1	1.9	10.7
701 + lawyer firms	19.4	46.0	7.8	23.0	2.5	12.8

13. Source: NALP Summary Chart, <http://www.nalp.org/nalpresearch/mw03sum.htm>, and NALP Bulletin, *Women and Attorneys of Color Continue to Make Small Gains at Large Law Firms*, Nov. 2003, <http://www.nalp.org/2003womenandattorneysofcolor> (for 2003 figures); NALP Bulletin, *Law Firm Diversity Among Associates Erodes in 2010*, Nov. 2010, <http://www.nalp.org/2010lawfirmdiversity> (for 2010 figures); NALP Press Release, *Law Firm Diversity Wobbles: Minority Numbers Bounce Back While Women Associates Extend Two-Year Decline*, Table 2, Nov. 3, 2011 [http://www.nalp.org/2011\\_law\\_firm\\_diversity](http://www.nalp.org/2011_law_firm_diversity) (for 2011 figures). Figures are based on statistics provided by firms in the NALP DIRECTORY OF LEGAL EMPLOYERS. Figures for firms with foreign offices may include foreign lawyers, which may inflate the percentage of minority lawyers.

**Table 14 - Representation of Lawyers with Disabilities in Law Firms<sup>14</sup>**

2004	Partners	Associates
Nationwide	0.16%	0.10
100 or fewer lawyer firms	0.16	0.11
101-250 lawyer firms	0.19	0.09
251-500 lawyer firms	0.21	0.09
501+ lawyer firms	0.10	0.11
2007	Partners	Associates
Nationwide	0.19	0.14
100 or fewer lawyer firms	0.16	0.13
101-250 lawyer firms	0.21	0.15
251-500 lawyer firms	0.18	0.06
501+ lawyer firms	0.30	0.25
701+ lawyer firms	0.13	0.13
2009	Partners	Associates
Nationwide	0.25	0.17
100 or fewer lawyer firms	0.20	0.04
101-250 lawyer firms	0.25	0.11
251-500 lawyer firms	0.27	0.24
501-700 lawyer firms	0.33	0.12
701+ lawyer firms	0.26	0.20
2010	Partners	Associates
Nationwide	0.24	0.20
100 or fewer lawyer firms	0.16	0.08
101-250 lawyer firms	0.23	0.13
251-500 lawyer firms	0.28	0.23
501-700 lawyer firms	0.36	0.14
701+ lawyer firms	0.23	0.27
2011	Partners	Associates
Nationwide	0.23	0.17
250 or fewer lawyer firms	0.19	0.10
251-500 lawyer firms	0.22	0.27
501-700 lawyer firms	0.36	0.13
701+ lawyer firms	0.24	0.17

14. Source: NALP Bulletin, *Few Openly Gay or Disabled Lawyers Reported in NALP Directory of Legal Employers*, Jun. 2005, <http://www.nalp.org/2005junfewopenlyglbtdisabled> (for 2004 data); NALP Bulletin, *Although Most Firms Collect GLBT Lawyer Information, Overall Numbers Remain Low*, Dec. 2007, <http://www.nalp.org/2007decglbtlawyerinformation> (for 2007 data); NALP Bulletin, *Reported Number of Lawyers with Disabilities Remains Small*, Dec. 2009, <http://nalp.org/dec09disabled> (for 2009 data); NALP Press Release, *Law Firm Diversity Among Associates Erodes in 2010*, Nov. 4, 2011, <http://www.nalp.org/2010lawfirmdiversity?s=disabilities> (for 2010 data); NALP Press Release, *Law Firm Diversity Wobbles: Minority Numbers Bounce Back While Women Associates Extend Two-Year Decline*, Nov. 3, 2011, [http://www.nalp.org/2011\\_law\\_firm\\_diversity?s=disabilities](http://www.nalp.org/2011_law_firm_diversity?s=disabilities) (for 2011 data).

**Table 15 – Representation of Openly LGBT Lawyers in Law Firms<sup>15</sup>**

2004	Partners	Associates
Nationwide	0.79%	1.33
100 or fewer lawyers firms	0.60	0.71
101-250 lawyer firms	0.65	0.90
251-500 lawyer firms	0.77	1.19
501-700 lawyer firms	1.02	1.67
2007	Partners	Associates
Nationwide	1.19	1.89
100 or fewer lawyers firms	0.88	1.07
101-250 lawyer firms	0.91	1.24
251-500 lawyer firms	1.04	1.56
501-700 lawyer firms	1.37	2.95
701+ lawyer firms	1.67	2.16
2009	Partners	Associates
Nationwide	1.36	2.29
100 or fewer lawyers firms	0.63	1.44
101-250 lawyer firms	1.05	1.54
251-500 lawyer firms	1.30	1.91
501-700 lawyer firms	1.11	2.28
701+ lawyer firms	1.82	2.78
2010	Partners	Associates
Nationwide	1.47	2.35
100 or fewer lawyers firms	1.17	1.42
101-250 lawyer firms	0.99	1.63
251-500 lawyer firms	1.42	2.10
501-700 lawyer firms	1.18	2.50
701+ lawyer firms	2.02	2.78
2011	Partners	Associates
Nationwide	1.44	2.43
250 or fewer lawyer firms	1.13	1.26
101-250 lawyer firms	0.98	1.85
251-500 lawyer firms	1.21	2.02
501-700 lawyer firms	1.36	2.47
701+ lawyer firms	2.05	2.90

15. Source: NALP Bulletin, *Few Openly Gay or Disabled Lawyers Reported in NALP Directory of Legal Employers*, Jun. 2005, <http://www.nalp.org/2005junfewopenlyglbtldisabled> (for 2004 data); NALP Bulletin, *Although Most Firms Collect GLBT Lawyer Information, Overall Numbers Remain Low*, Dec. 2007, <http://www.nalp.org/2007decglbtlawyerinformation> (for 2007 data); NALP Bulletin, *Although Most Firms Collect GLBT Lawyer Information, Overall Numbers Remain Low*, Dec. 2009, <http://www.nalp.org/dec09glbt> (for 2009 data); NALP Bulletin, *Most Firms Collect GLBT Lawyer Information – LGBT Representation Up Slightly*, Dec. 2010, <http://nalp.org/dec10lgbt> (for 2010 data); NALP Bulletin, *Most Firms Collect GLBT Lawyer Information, LGBT Representation Steady*, Dec. 2011, [http://www.nalp.org/lgbt\\_lawyers\\_dec2011](http://www.nalp.org/lgbt_lawyers_dec2011) (for 2011 data).

**Table 16 – Law Firm Diversity by City (2011)<sup>16</sup>**

	Partners				Associates			
	Total	Fem (%)	Min (%)	Min Fem (%)	Total	Fem (%)	Min (%)	Min Fem (%)
Nationwide	56,599	19.5	6.6	2.0	52,786	45.4	19.9	11.0
<100 lawyer firms	6,305	20.0	6.5	2.3	3,648	42.4	15.4	8.3
101-250 lawyer firms	13,340	19.5	4.7	1.3	7,968	45.0	15.1	8.0
251-500 lawyer firms	11,213	19.9	6.3	2.1	8,863	45.7	18.2	9.8
501-700 lawyer firms	7,928	19.2	7.4	1.9	7,631	44.7	19.1	10.7
701+ lawyer firms	17,813	19.4	7.8	2.5	24,676	46.0	23.0	12.8
Atlanta	1,401	18.1	6.6	1.9	1,213	47.6	17.3	10.4
Austin	354	22.3	7.9	3.1	294	42.2	19.1	7.1
Boston	1,775	20.5	3.2	1.0	2,003	47.1	15.0	8.8
Charlotte	524	14.5	4.4	1.2	397	39.0	12.3	7.8
Chicago	3,891	19.6	5.9	1.9	3,115	44.3	17.0	9.5
Cleveland	574	19.7	3.1	1.1	376	46.3	7.2	3.2
Columbus	537	16.6	4.8	0.4	276	45.3	12.7	6.2
Dallas	1,326	17.6	6.3	1.5	1,299	39.9	16.2	7.9
Denver	730	25.0	5.9	1.9	548	45.4	13.0	6.8
Detroit	828	21.5	4.8	1.6	375	41.6	10.7	5.6
Houston	1,267	16.2	7.7	2.1	1,263	39.4	19.8	8.8
Indianapolis	744	20.0	3.1	0.9	324	42.9	13.9	6.8
Kansas City	649	18.2	2.8	0.6	390	42.1	11.5	5.6
Los Angeles	2,256	19.3	12.2	3.7	2,667	48.4	28.9	15.9
Miami	640	24.2	23.9	7.7	424	47.4	37.0	19.6
Milwaukee	662	19.9	3.9	1.4	380	42.4	9.5	5.0
Minneapolis	1,276	22.3	5.0	1.2	732	49.7	13.3	6.7
New York City	7,152	17.3	6.7	2.3	13,177	44.7	24.0	13.4
Newark	1,078	17.5	4.6	1.4	955	46.5	14.9	8.3
Northern Virginia	293	14.3	6.5	1.7	264	35.2	16.7	8.0
Orange County	598	14.9	11.2	3.2	674	36.1	24.0	10.2
Philadelphia	1,021	19.2	3.8	1.2	1,002	47.1	13.4	8.3
Phoenix	694	22.3	5.6	1.7	427	40.1	15.9	7.5
Pittsburgh	534	19.5	1.7	0.4	374	46.3	8.8	6.4
Portland, OR	518	20.3	3.7	1.7	260	47.3	15.4	10.0
San Diego	393	20.4	8.9	1.8	437	44.4	18.5	8.2
San Francisco	1,493	24.7	11.8	4.0	1,689	50.9	26.8	15.8
San Jose	890	19.6	14.6	4.0	1,429	44.0	36.3	17.6
Seattle	968	22.5	8.5	2.9	567	49.6	21.2	11.5
St. Louis	835	21.6	3.6	1.2	467	42.8	11.1	5.4
Washington DC	5,396	20.3	8.1	2.5	5,862	46.4	21.1	12.1

16. Source: NALP Press Release, *Law Firm Diversity Wobbles: Minority Numbers Bounce Back While Women Associates Extend Two-Year Decline*, Nov. 3, 2011, [http://www.nalp.org/2011\\_law\\_firm\\_diversity?s=disabilities](http://www.nalp.org/2011_law_firm_diversity?s=disabilities).



**Table 17 – Female and Minority Representation Among Corporate Counsel<sup>17</sup>**

	Female	Af Am.	Hisp.	As Am.	Na Am.	Other	Minority
2001	31.5%						12.5
2004	37.0	2.0	3.0	3.0	0.0	2.0	10.0
2006	39.0	3.0	3.0	3.0	0.0	2.0	11.0
2011	41.0	4.0	3.0	5.0	<1.0	3.0	15.0

17. *Source.* ASSOCIATION OF CORPORATE COUNSEL, CENSUS OF U.S. IN-HOUSE COUNSEL (2011), <http://www.acca.com/Surveys/census01> (for 2001 figures); ASSOCIATION OF CORPORATE COUNSEL, 2011 CENSUS REPORT 72 (2012), <http://www.acc.com/legalresources/resource.cfm?show=1306363> (for 2004, 2006, and 2011 figures). 2001 figures are based on a survey of 12,674 in-house lawyers, with 929 (7.3 percent) responding. 2006 figures are based on a survey of 49,259 in-house lawyers, with 3,426 (7.0 percent) responding. *See* ASSOCIATION OF CORPORATE COUNSEL, PROFILE OF IN-HOUSE COUNSEL (2006), <http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=16297>. 2011 figures are based on responses from roughly 5,000 in-house counsel. *See* Association of Corporate Counsel, ACC's 2011 Census Report, Mar., 2012, <http://www.acc.com/legalresources/resource.cfm?show=1306363>.



Minority representation among corporate counsel increased from 11.0 percent in 2006 to 15.0 percent in 2011.

**Table 18 - Federal Government Lawyers by Race/Ethnicity and Gender<sup>18</sup>**

2002	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Law Clerks	26 (9.4)	21 (7.6)	28 (10.1)	2 (0.7)	77 (27.9)
Male	12 (4.3)	6 (2.2)	9 (3.3)	1 (0.4)	28 (10.1)
Female	14 (5.1)	15 (5.4)	19 (6.9)	1 (0.4)	49 (17.8)
General Attorneys	2,461 (8.7)	1,141 (4.0)	1,013 (3.6)	144 (0.5)	4,759 (16.9)
Male	977 (3.5)	593 (2.1)	443 (1.6)	74 (0.3)	2,087 (7.4)
Female	1,484 (5.3)	548 (1.9)	570 (2.0)	70 (0.2)	2,672 (9.5)
Admin. Law Judges	54 (4.1)	51 (3.8)	11 (0.8)	16 (1.2)	132 (9.9)
Male	39 (2.9)	45 (3.4)	8 (0.6)	12 (0.9)	104 (7.8)
Female	15 (1.1)	6 (0.5)	3 (0.2)	4 (0.3)	28 (2.1)
Patent Attorneys	11 (4.7)	1 (0.4)	8 (3.4)	1 (0.4)	21 (8.9)
Male	9 (3.8)	1 (0.4)	7 (3.0)	1 (0.4)	18 (7.7)
Female	2 (0.9)	0 (0.0)	1 (0.4)	0 (0.0)	3 (1.3)
2006	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Law Clerks	29 (9.4)	11 (3.6)	24 (7.8)	4 (1.3)	69 (22.5)
Male	7 (2.3)	8 (2.6)	10 (2.3)	2 (0.7)	28 (9.1)
Female	22 (7.2)	3 (1.0)	14 (4.6)	2 (0.7)	41 (13.4)
General Attorneys	2,570 (8.7)	1,218 (4.1)	1,292 (4.4)	145 (0.5)	5,237 (17.6)
Male	935 (3.2)	624 (2.1)	548 (1.8)	66 (0.2)	2,179 (7.3)
Female	1,635 (5.5)	594 (2.0)	743 (2.5)	79 (0.3)	3,058 (10.3)
Admin. Law Judges	67 (4.8)	54 (3.9)	8 (0.6)	17 (1.2)	147 (10.5)
Male	44 (3.1)	49 (3.5)	6 (0.4)	11 (0.8)	111 (7.9)
Female	23 (1.6)	5 (0.4)	2 (0.1)	6 (0.4)	36 (2.6)
Patent Attorneys	14 (5.9)	5 (2.1)	14 (5.9)	0 (0.0)	33 (13.9)
Male	11 (4.6)	4 (1.7)	10 (4.2)	0 (0.0)	25 (10.5)
Female	3 (1.3)	1 (0.4)	4 (1.7)	0 (0.0)	8 (3.4)

18. Source. U.S. OFFICE OF PERSONNEL MGMT., DEMOGRAPHIC PROFILE OF THE FEDERAL WORKFORCE (2002), <http://www.opm.gov/feddata/demograp/02demo.pdf> (for 2002 figures); U.S. OFFICE OF PERSONNEL MGMT., DEMOGRAPHIC PROFILE OF THE FEDERAL WORKFORCE (2006), <http://www.opm.gov/feddata/demograp/table3mw.pdf> (for 2006 figures).



Minority and women's representation is relatively high among Department of Justice attorneys.

**Table 19 - Demographics of Department of Justice Attorneys (2010)<sup>19</sup>**

Component	Total	Female	Minority	Employees With Disabilities
ATF	66	53.0%	9.0	0.0
ATR	342	39.0	11.0	1.0
CIV	828	42.0	11.0	2.0
CRM	413	38.0	15.0	2.0
CRT	303	56.0	28.0	5.0
DEA	77	42.0	9.0	4.0
ENRD	372	35.0	8.0	1.0
EOIR	417	46.0	24.0	5.0
FBI	177	45.0	16.0	5.0
BOP	139	47.0	27.0	2.0
JMD	30	50.0	20.0	0.0
NDIC	1	0.0	0.0	0.0
OBD	335	44.0	13.0	2.0
OIG	17	35.0	6.0	6.0
OJP	29	59.0	24.0	0.0
EOUSA	5,264	36.0	17.0	2.0
TAX	328	34.0	7.0	2.0
USMS	15	33.0	7.0	7.0
USTP	270	44.0	15.0	6.0
DOJ TOTAL	9,422	39.0	16.0	3.0

19. U.S. DEPARTMENT OF JUSTICE, WORKFORCE PLAN FY 2010-2013 59 (2010) ("Attorney Demographic Profile"), <http://www.justice.gov/jmd/ps/docs/hr-workforce-plan.pdf>.

**Table 20 - Federal Judicial Appointments by Race/Ethnicity and Gender<sup>20</sup>**

	Total	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Min. (%)	Fem. (%)
Nixon (1969-74)	227	6 (2.6)	2 (0.9)	1 (0.4)	0 (0.0)	10 (4.4)	
Ford (1974-76)	65	3 (4.6)	1 (1.5)	2 (3.1)	0 (0.0)	6 (9.2)	
Carter (1977-80)	259	37 (14.3)	16 (6.2)	3 (1.2)	1 (0.4)	57 (22.0)	40 (15.4)
Reagan (1981-88)	376	7 (1.9)	14 (3.7)	2 (0.5)	0 (0.0)	23 (10.9)	31 (8.2)
Bush I (1989-92)	192	13 (6.8)	8 (4.2)	0 (0.0)	0 (0.0)	21 (10.9)	36 (18.8)
Clinton (1993-00)	372	61 (16.4)	25 (6.7)	5 (1.3)	1 (0.3)	92 (24.7)	109 (29.3)
Bush II (2001-08)	322	23 (7.1)	29 (9.0)	4 (1.2)	0 (0.0)	56 (17.4)	71 (22.0)
Obama (2009-12)	145	25 (17.2)	18 (12.4)	11 (7.5)	0 (0.0)	54 (37.2)	67 (46.2)
Obama (Pending)	31	6 (19.3)	3 (9.6)	1 (3.2)	0 (0.0)	10 (32.3)	9 (29.0)

20. Source: ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT 2001-02 BIENNIAL REPORT 7, 10-11 (2003), [http://www.allianceforjustice.org/judicial/research\\_publications/index.html](http://www.allianceforjustice.org/judicial/research_publications/index.html) (for 1969-1976 data); ALLIANCE FOR JUSTICE, THE STATE OF THE JUDICIARY: JUDICIAL SELECTION DURING THE REMAINDER OF OBAMA'S FIRST TERM 10 (2012) (for 1977-2012 data). Figures for female judicial appointments were not available prior to 1977. Figures for Obama (2009-12) include all judges confirmed. Judge Cathy Bissoon (Western District of Pennsylvania) identifies as both Hispanic and Asian American. She is included in both ethnic categories but only once in the total of confirmed judges. *Id.*



The pace of federal judicial appointments  
under President Obama has been slow.

**Table 21 - Minority and Female Representation Among Law Faculty<sup>21</sup>**

	Deans (%)	Full Prof. (%)	Assoc Prof. (%)	Asst Prof. (%)
<b>1990-91</b>				
Minority	12 (6.8)	212 (6.2)	193 (18.8)	123 (19.3)
Female	15 (8.5)	481 (13.1)	375 (34.9)	313 (46.3)
<b>1995-96</b>				
Minority	17 (9.5)	336 (8.6)	282 (24.5)	186 (28.7)
Female	15 (8.4)	749 (18.1)	501 (41.8)	351 (52.8)
<b>2000-01</b>				
Minority	15 (8.5)	492 (11.5)	271 (24.2)	152 (27.6)
Female	23 (12.5)	955 (22.0)	437 (43.4)	201 (44.6)
<b>2005-06</b>				
Minority	21 (11.5)	608 (14.0)	302 (28.8)	180 (29.6)
Female	36 (18.8)	1,185 (25.9)	491 (43.8)	319 (45.1)
<b>2008-09</b>				
Minority	27 (13.6)	772 (13.5)	367 (23.4)	261 (25.1)
Female	41 (20.6)	1,706 (29.9)	734 (46.8)	554 (53.4)

21. Source: ASSOCIATION OF AMERICAN LAW SCHOOLS, STATISTICAL REPORT ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS (2001-02), Table 2B, <http://www.aals.org/statistics/2002statspage2.htm> (for 1990-91, 1995-96, and 2000-01 data); ASSOCIATION OF AMERICAN LAW SCHOOLS, STATISTICAL REPORT ON LAW SCHOOL FACULTY (2005-06), Tables 2A and 2B, [http://www.aals.org/statistics/0506/0506\\_T2A\\_tit4\\_8yr.html](http://www.aals.org/statistics/0506/0506_T2A_tit4_8yr.html) (for 2005-06 data); ASSOCIATION OF AMERICAN LAW SCHOOLS, STATISTICAL REPORT ON LAW FACULTY (2008-09), <http://www.aals.org/statistics/2009dlt/titles.html> (for 2008-09 data). Figures are based on all full-time faculty listed in the AALS Directory of Law Teachers for whom race/ethnicity is known. These are the most recent figures available from the AALS. See [http://www.aals.org/resources\\_statistical.php](http://www.aals.org/resources_statistical.php).



Minority and female representation among entry-level law faculty is relatively high compared to other employment settings. Women's representation among law school deans, however, is relatively low.

# IILP Review 2012:

## Diversity and Inclusion in the Legal Profession in General

# “What would you say?”: Giving Teeth to Diversity Programming

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*At the best of times, candid and honest communication about diversity issues with people with whom we work isn't easy. And in a law firm or corporate law department or government agency or any other group of lawyers, it can be fraught with political, professional and personal landmines. Here, Lee discusses the types of diversity programming most likely to effectively elicit positive and meaningful diversity conversations and communications for lawyers.*

Imagine you learn that your affinity group is the only one at your firm that did not receive the same funding this year. Or, that a “minority” event has been planned for all attorneys of color except your racial/ethnic group. Or, you feel that your assignments have been leaner or less well received than that of your majority peers in the department. Or, you have witnessed differential treatment on your team, and you would like to do something about it. What would you do? More importantly, what would you say?

If you were like most people, you would do nothing. Trying to address diversity issues in the workplace, particularly in legal settings, is not something most people relish. There are many reasons not to raise the issue: you may feel your good intentions will be misinterpreted; you fear negative repercussions; or perhaps quite simply, you are not sure how to begin such a conversation.

If you decide to raise the issue, you may default into attack mode, either actively or passively. After all, you are sure you know why the other person acted the way they did—you are still smarting from the impact of their (in)actions or words. Needless to say, this approach is typically not well received, and, as a result, things tend to remain the same on an institutional level.

For change to truly take root at an institutional level, it needs to happen one conversation at a time. Diversity programming with this goal in mind may help nurture long-term results—but how?

In my experiences as a consultant and facilitator for conflict management, diversity, and communications courses in a variety of sectors, interactive programs that engage participants in the issues have a real impact on mindset, and, therefore, the most promise of impacting behavior. Specifically, three attributes of interactive, case-based learning can be an effective means for exploring diversity in the legal setting: (1) an emphasis on role plays relevant to the group; (2) a focus on genuine “inquiry” or curiosity to learn and understand; and (3) use of the facilitation method of teaching.

## I. RELEVANT ROLE-PLAYS

Using customized role-plays to engage each attorney participant in thinking about and responding to situations involving diversity issues is one way to help attorneys with their fear of finding the right words to broach and conduct these types of conversations. Some diversity programs use “vignettes” or hypotheticals that present challenging situations involving diversity and ask how people might approach them. I take this approach two steps further. First, the scenario used in the



Finally, and most importantly, a role-play approach provides people with an opportunity to verbalize, experiment, and receive feedback on what they might say in such a situation.

program should be based on collective information or themes that emerge from several (confidential) pre-program diagnostic calls with participants. This enables the scenario to be truly relevant to the group. Second, the scenario should be presented as a role-play where each participant acts out a given a role. For example, a scenario could be written as a one-on-one conversation between a senior, white, male associate and a junior, minority, female associate. Half of the group would be assigned the role of the junior associate, the other half, the role of the senior associate. Everyone would receive background information for their role and the group would be divided into pairs to conduct the next conversation with the goal of having a productive conversation.

This approach has particular benefits. First, it literally forces participants to be engaged in the program. While it is easy for someone to check email in a room full of participants listening to a lecture-style course, most find it more uncomfortable to do so when another attorney is awaiting their participation in a group activity. Second, participants find that their time is being well spent, because the scenario resonates with them. When participants feel a case is based on something they know—something they’ve experienced or heard about—the exercise seems like a better use of their time.

Finally, and most importantly, a role-play approach provides people with an opportunity to verbalize, experiment, and receive feedback on what they might say in such a situation. While group discussions on a scenario stimulate important and helpful thinking about potential options, finding the right words for the conversation is more challenging and provides a better learning opportunity. Instead of, “well, I would do this,” participants are forced to speak in the first person and actually try it out. Moreover, receiving in-the-moment and subsequent feedback from one’s role-play counterpart is also tremendously helpful. Realizing, “oh, I thought I was being helpful by starting the conversation off from my perspective, but it sounds like you felt I wasn’t interested in how the situation impacted you,” is better to do in a course than when the stakes are higher. In real life, when do we get the opportunity to experiment with our words in a safe environment and to learn about the impact on the other person? Diversity programs that engage participant attorneys in role-plays written from pre-program diagnostic calls will have the most impact on an attorney’s ability to engage in these types of conversations.

## II. A FOCUS ON “INQUIRY”

Law school and on-the-job training for attorneys ingrain in us the need to advocate zealously for our clients. “Never ask a question to which you don’t know the answer” is often a maxim law students are introduced to in law school trial advocacy courses and one echoed in law practice.

While this advice may help us in the courtroom or conference room, it is precisely the mindset that



hinders our ability to engage constructively in conversations involving diversity topics. When emotions run high, negative intentions are ascribed and avoidance becomes the norm. Under these conditions, effective communication skills are a must. Yet, ironically, it is these “soft” skills that are often overlooked entirely in our current legal education and in many attorney development programs.

When misunderstandings or conflicts arise concerning diversity issues, one important skill that can have tremendous impact is the skill of inquiry. Inquiry is defined as the ability to be genuinely curious to learn more about the situation at hand. Why does the other person see the situation that way? What relevant information might you be missing? What questions could you ask the other person to obtain this information? How could you frame your questions so that your good intentions are heard? The skill of inquiry, while seemingly basic, is often elusive when time is short, as is often the case in the legal world. Diversity programs that incorporate active use of this skill will help attorneys begin to develop the “muscle memory” to invoke inquiry in the moment when it is needed.

### III. FACILITATION OF GROUP DISCUSSIONS

Facilitated programs on diversity enable participants to learn from one another and exchange perspectives more freely. Role-play based diversity programming lends itself to the facilitation method of teaching. Facilitation is a teaching method that allows participants to explore diverse perspectives through inquiry to help them probe more deeply into their thinking and resulting actions. Why was a certain strategy taken? Was it successful in helping you reach your goal? What could be done differently next time? In facilitation, the instructor encourages learning by drawing out the experiences, observations, and questions of the group. In a role-play based program, facilitation would be used primarily for the group discussion and review following the role-play. Facilitation may hold particular promise if one goal of a diversity program is to allow all participants to learn more about diverse attorneys’ experiences as well as the challenges that people encounter in trying to address diversity issues constructively. A facilitated discussion, which relies upon the group’s shared experience in the prior role-play, is a safe environment where all participants are able to share their personal experiences. One way in which ideas and feedback on conversation strategies may be shared is through the following: “In the role-play, I appreciated when Dan asked me to talk about how the committee’s decision impacted us, because it gave me the chance to discuss how we felt singled out for negative treatment.” Because attorneys are wary of talking about workplace diversity issues, facilitated group discussions that promote a robust exchange of perspectives should be valued.

The role of the facilitator is also to help sharpen, and at times clarify, what is being said. We all have our own way of seeing the world, we make certain conscious and unconscious generalizations, and how we choose to express our thinking can be heard many different ways. In addition to fostering a productive group discussion, the facilitator is also tasked with the responsibility of helping participants understand both the intent behind what is being said and the impact of those words or actions. Having someone with this specific role helps ensure a productive dialogue.

While law practice diversity programs may have the best of intentions, at times, the impact is weak. At their worst, they are detrimental to the shared goal of promoting diversity in the profession. A combined use of customized role-plays, coaching on effective inquiry, and facilitation of group learning and experiences is one approach that holds the most potential for improving conversations on diversity in the law.

# Fisher and the Future of Affirmative Action

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*Kidder examines the current state of affirmative action and analyzes its possible future in light of the pending Fisher case.*

## The Friends One Keeps: Overview of *Fisher* Amici Briefs

In the landmark case of *Grutter v. Bollinger*,<sup>1</sup> the Supreme Court held that student diversity is a compelling governmental interest and that the University of Michigan Law School's race-conscious affirmative action program was narrowly-tailored to meet that interest. A critical factor in that 5-4 ruling was the numerous amici briefs filed in support of the University from all sectors of American society.<sup>2</sup> In particular, the court cited a brief by the American Educational Researchers Association and other leading social science works in finding, "The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"<sup>3</sup> Likewise, the Court cited the amici of Fortune 500 companies in declaring, "These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."<sup>4</sup>

Nearly a decade later, affirmative action is back before the Supreme Court in the pending case *Fisher v. University of Texas at Austin*. Justice Anthony Kennedy, who dissented in *Grutter*, is now widely regarded as the important potential swing voter in the case. With Justice Elena Kagan recusing herself because, as Solicitor General, her office filed a lower court brief backing UT Austin, supporters of affirmative action are looking for a 4-4 split ruling that would let stand the Fifth Circuit's ruling upholding UT Austin's admissions plan as consistent with *Grutter*.<sup>5</sup> Opponents of affirmative action are looking for—and many scholars are predicting—a 5-3 ruling against the University, with the real question being whether the ruling is narrow in scope or amounts to a reversal of *Grutter*.<sup>6</sup>

In addition, and as the University of Texas has pointed out in its filings, there are substantial procedural problems with the plaintiff's claim for relief in *Fisher*, so there is at least a small possibility the Court will declare the case to be moot. Though eminently sensible, such an outcome is unlikely in

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1. 539 U.S. 306 (2003).

2. Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J. COLL. & UNIV. L. 503 (2004).

3. *Grutter v. Bollinger*, 539 U.S. at 330.

4. *Id.*, at 330–31.

5. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011).

6. Several essays on the Fisher case were published online in the Vanderbilt University Law School, *Vanderbilt Law Review En Banc*, FISHER V. UNIVERSITY OF TEXAS AT AUSTIN, <http://www.vanderbiltlawreview.org/enbanc/roundtable/fisher-v-university-of-texas-at-austin/> (last visited Aug. 29, 2012).

light of the Court's decision to grant certiorari notwithstanding these procedural infirmities. On the merits, the University of Texas at Austin also makes a persuasive case that under the doctrine of *stare decisis* it would be abruptly "destabilizing" and "disruptive" for the Court to overrule its 2003 ruling in the Michigan Law School case when "nothing has changed since *Grutter* (other than the composition of this Court); this case will not be considered by the full Court (because of Justice Kagan's recusal); and this case concededly does not even present the central concern (the risk of disguised quotas) that critics of the consideration of race in the higher education context have attacked."

An important similarity between *Grutter* and *Fisher* is that the chorus of voices supporting the University of Texas in *Fisher* is no less remarkable than it was in *Grutter*. In addition to the Obama Administration, seventy amici briefs were filed in support of the University, and as with *Grutter*, the breadth of perspectives and institutional interests is of social significance. In addition to many expected "heavyweights" in the areas of higher education and civil rights, briefs were filed by more than a dozen states, U.S. Senators and members of Congress, fifty-seven Fortune 100 and other leading American corporations, small business associations, bar associations (including the ABA), myriad religious and student organizations and even basketball coaches.<sup>7</sup> Notably, the Anti-Defamation League, which in *Grutter* argued that the University of Michigan Law School's affirmative action program should be struck down, sided with the University of Texas in arguing that the holistic and flexible consideration of race at the Austin campus should be deemed constitutionally permissible.

## A Look at the Social Science Evidence

One important area of difference between *Grutter* and *Fisher* might be underappreciated if one were to simply peruse the briefs of the parties in *Fisher*. Abigail Fisher sued UT Austin as an individual plaintiff, making the posture of the case much like *Regents of the University of California v. Bakke*,<sup>8</sup> whereas *Grutter* was filed on behalf of a certified class of applicants. For that reason, the factual record in *Fisher* is rather thin in comparison to the University of Michigan cases and neither the petitioner nor the University focused significant attention on social science evidence.

Fortunately, other amici provided a robust synthesis of relevant social science literature and overcame what would otherwise have been a major shortcoming in the *Fisher* case. In some Supreme Court cases, peer-reviewed social science evidence can "struggle to be heard in a marketplace of ideas increasingly flooded with information of questionable quality."<sup>9</sup> Particularly in matters of university admissions policy, which the Court in *Grutter* recognized as involving "complex educational judgments" and is "an area that lies primarily within the expertise of the university,"<sup>10</sup> consensus voices of scholars who carry out research on higher education ought to be carefully considered in cases like *Fisher*.

I had the pleasure of working with an interdisciplinary team of scholars developing an amici brief in *Fisher* that was signed by 444 American social scientists from 42 states and 172 institutions.<sup>11</sup> This brief was convened through the Civil Rights Project at UCLA with Professor Liliana Garces as coun-

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7. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case* (Aug. 2012 working paper at page 54), *forthcoming in* 39 *Journal of College & University Law*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2123653](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123653). The ban on affirmative action took effect in 1997 at UC law schools and other graduate/professional school programs and 1998 at the undergraduate level.

8. 438 U.S. 265 (1978).

9. Rachel F. Moran, *What Counts As Knowledge? A Reflection on Race, Social Science, and the Law*, 44 L. & Soc'y REV. 515 (2010).

10. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

11. Brief for American Social Science Researchers as *Amici Curiae* Supporting Respondents, *Fisher v. Univ. of Texas at Austin*, 132 S.Ct. 1536 (2012), available at <http://www.utexas.edu/vp/irla/Documents/ACR%20American%20Social%20Science%20Researchers.pdf>.



In fact, underrepresented minority graduates of elite U.S. law schools—where it is much more difficult to maintain significant levels of diversity without affirmative action—have higher pro bono contributions and strongly disproportionate leadership contributions (relative to other law schools) in the ranks of corporate law firm partners, the professoriate and the federal judiciary.

sel of record. While debates and disagreements among researchers are common (and thank goodness for that), the brief by American social scientists sought to present the Court with the best available evidence responsive to the key questions before the Court. The brief by American social scientists primarily focused on the means the University employed to achieve the educational benefits of diversity (I will return momentarily to the question of central question of the diversity as a compelling governmental interest).

One point of contention between the Plaintiff and the University in *Fisher* runs counter to customary expectations insofar as Abigail Fisher claims that UT Austin's admissions program is constitutionally infirm because its impact is *too modest* (whereas in the Michigan cases and many others the inquiry focused on whether race was used too much). The district court characterized this as a "Catch-22" argument and squarely rejected it.<sup>12</sup> On this question the American social scientists point out that the proportion of African American students grew by an average of 46% and Latinos increased by an average of 35% when comparing the years with only the Texas Ten Percent Plan (1998–2004) to the years at issue in the legal challenge when the Ten Percent Plan was supplemented by race-conscious holistic admissions (2005–08). In short, even though the Ten Percent Plan has broadened the geographic diversity of freshmen entering UT Austin campus and improved racial/ethnic diversity compared to when affirmative action was first banned under the Fifth Circuit's *Hopwood*<sup>13</sup> ruling (later abrogated by *Grutter*), the Ten Percent Plan and other race-neutral efforts are not sufficient to yield results consistent with UT Austin's educational goals and mission.

## The Professions and the Pathway to Leadership

In *Grutter* the Court declared, "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified indi-

12. *Fisher v. Univ. of Texas at Austin*, 645 F.Supp.2d 587, 610 (W.D. Tex., Austin Div. 2009) ("[T]he question is not whether the means adopted by UT exceeds some undefined 'minimal effect' on diversity, but rather whether UT has demonstrated 'serious, good faith consideration of workable race-neutral alternatives.'" (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 734–35(2007))).

13. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

viduals of every race and ethnicity.”<sup>14</sup> In fact, underrepresented minority graduates of elite U.S. law schools—where it is much more difficult to maintain significant levels of diversity without affirmative action—have higher pro bono contributions and strongly disproportionate leadership contributions (relative to other law schools) in the ranks of corporate law firm partners, the professoriate and the federal judiciary.<sup>15</sup>

Conversely, the deleterious impact of ending affirmative action is abundantly clear at institutions such as the University of California, where Proposition 209 has been in effect for nearly fifteen years. In a recent working paper titled “Misshaping the River” I reviewed the data over the long term, and found that during a quarter-century with affirmative action the UC Berkeley School enrolled an average of 25.7 entering African American law students annually between 1970 and 1996.<sup>16</sup> Since the affirmative action ban (1997 to 2011) this figure dropped by half to an average of 12.5 African Americans per year. Similarly, at the UCLA Law School, ending affirmative action meant that African American entering law students plummeted by more than three-fifths, from an average of thirty per year in 1970–1996 to an average of eleven per year in 1997–2011.

Other professional fields, including medicine and business, face similar challenges. For instance, the entering classes of MBA students at all University of California business schools had a combined average of only 1.5% African Americans in 2000–2011, a three-fifths decline compared to the mid-1990s (3.6%).<sup>17</sup> Moreover, many of these individual UC business schools have had zero African Americans and American Indians in their entering classes. Latino enrollment at the UC Business Schools between 2000 and 2011 were roughly half (3.2%) of what it was in the mid-1990s (6.1%).

Connecting these points more directly to undergraduate education and *Fisher*, the American social scientists’ brief points out that the UT Austin admissions policy has important implications for the pathway to the legal profession and the development of future leaders. UT Austin produced 5000 applications to U.S. law schools in the last five years, which is the third highest number in the nation. Moreover, UT Austin produces more law school candidates than Texas A&M College Station (the other state flagship), UT Dallas, UT Arlington, UT San Antonio and Southwest Texas State *combined*.

### “Chilling Effects” and Racial Isolation: California’s Ban on Affirmative Action

The American social scientists’ brief draws upon the experiences of other states, highlighting the problem of “discouragement effects” that occur at the application or enrollment stages for underrepresented minority students in states that have banned affirmative action.<sup>18</sup> In my recent working paper, I show that California’s Proposition 209 is associated with “chilling effects” at the professional school and undergraduate levels.<sup>19</sup> Between the mid- and late- 1990s African American applications to the UC Berkeley Law and the UCLA Law School dropped by over two-fifths when the ban on affirmative action took effect. And by 1999 African Americans dropped below 3% of the applicant pool at the UC Davis School of Law named after Dr. Martin Luther King Jr. (King Hall). A full decade later—after years and years of energetic efforts to counteract this chilling effect—African American

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14. *Grutter*, 539 U.S. at 332.

15. See e.g., David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855, 1896 (2005); Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & SOC. INQUIRY 395 (2000).

16. WILLIAM C. KIDDER, MISSHAPING THE RIVER: PROPOSITION 209 AND LESSONS FOR THE FISHER CASE 54 (Aug. 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2123653](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123653). The ban on affirmative action took effect in 1997 at UC law schools and other graduate/professional school programs and 1998 at the undergraduate level.

17. *Id.* at 51–52.

18. See also Susan K. Brown & Charles Hirschman, *The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College*, 79 SOC. EDUC. 106, 119 (2006).

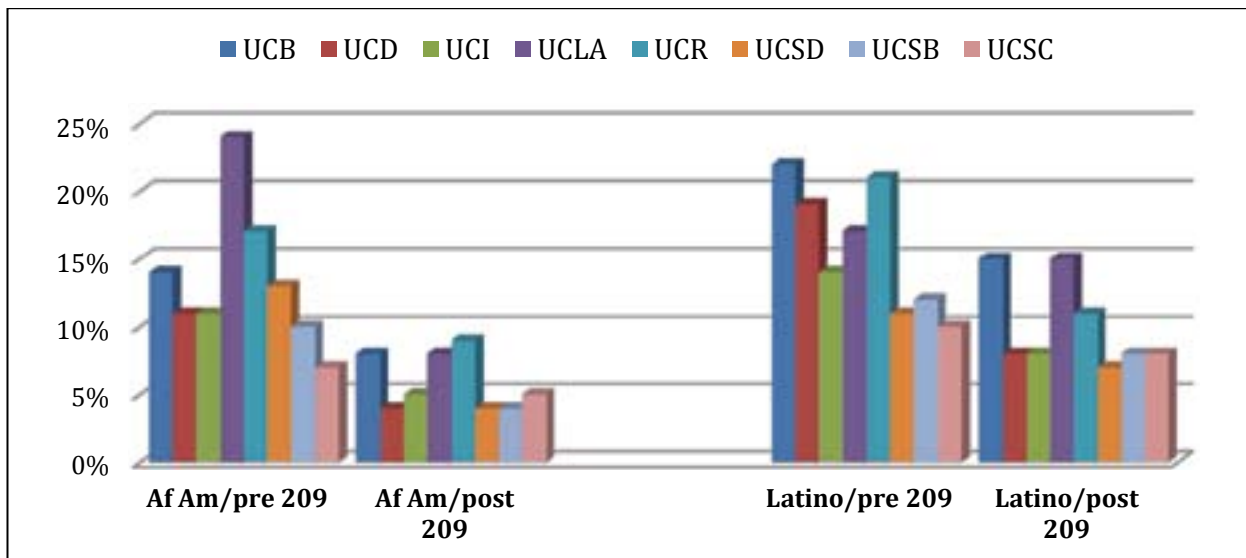
19. KIDDER, *supra* note 16.



applications were still more than one-third below pre-2009 levels at the UC Berkeley, UCLA and UC Davis law schools.<sup>20</sup>

At the freshmen level, a comparison of yield rates (i.e., the percentage of admitted students who choose to enroll) before and after Prop 209 at the University of California reveal that after the affirmative action ban yield rates to UC consistently declined for African Americans and Latinos in the top, middle or bottom thirds of UC's admit pool.<sup>21</sup> Conversely, after Prop 209 the most accomplished African American and Latino admits were increasingly likely to reject an offer from UC in favor of private selective colleges and universities with affirmative action. And the campus-level data in the chart below shows that yield rates for underrepresented minorities in the top third of admit pools consistently declined at eight UC campuses.

*African Americans and Latinos in the Top Third of UC Campus Admit Pools, Average Freshmen Yield Rates Pre- and Post-Prop 209 (1994–97 v. 1998–2011)*



The American social scientists' brief documents how affirmative action (as a tool to prevent low levels of racial diversity) is associated with a more positive campus racial climate for underrepresented minorities, which is contrary to the "stigma" critique of affirmative action advanced by Justice Thomas and others. In my recent paper I use a survey sample of nearly ten thousand African American and Latino undergraduates at eight UC campuses, UT Austin and two other leading American research universities. These recent survey data show that at UC (where affirmative action is banned by Prop 209) only 62% of African Americans feel that students of their race are respected on campus, which is significantly lower than African Americans at UT Austin (72%) and at two other peer research universities (75% and 76%). Likewise, Latino students at UC (77%) are less likely to believe that students of their ethnicity are respected as compared to UT Austin (90%) and two other peer universities (80% and 90%). Similarly, Hurtado and Ruiz's recent report on 32 institutions administering the Diverse Learning Environments Survey shows that at colleges with lower diversity, African American and Latino students feel more isolated and excluded than at institutions with higher levels of diversity on campus.<sup>22</sup>

20. *Id.* at 24–25.

21. *Id.* at 15–17.

22. SYLVIA HURTADO & ADRIANA RUIZ, THE CLIMATE FOR UNDERREPRESENTED GROUPS AND DIVERSITY ON CAMPUS 2 n.6

## The Educational Benefits of Diversity: Real and Substantial

These findings about the educational harms of racial isolation are a point of entry into the broader issue of why racial diversity is a compelling governmental interest in U.S. higher education. This is a core theme that runs through scores of amici briefs in *Fisher*, but it is made with the greatest force and rigor in the brief filed by the American Educational Research Association (AERA) and other leading research associations.<sup>23</sup> In *Grutter*, Justice O'Connor's majority opinion cited the AERA brief.<sup>24</sup> This time around, AERA et al. establish that the research on student body diversity has expanded in the nine years since *Grutter*. This well-established body of research literature continues to show that student body diversity leads to important educational benefits, including:

- improvements in intergroup contact and increased cross-racial interaction among students
- reductions in prejudice
- improvements in cognitive abilities, critical thinking skills, and self-confidence
- greater civic engagement
- enhancement of skills needed for professional development and leadership

For example, a meta-analysis by Pettigrew and Tropp reviewed over five hundred studies from higher education, workplace and informal settings, and concluded that positive intergroup contact reduces prejudice and that greater intergroup contact is associated with lower levels of prejudice.<sup>25</sup> The AERA brief points out that colleges and universities are more effective at reducing prejudice when they actively promote diversity and intergroup contact efforts in ways that are facilitated by race-conscious admissions. Thus, Pettigrew and Tropp further concluded that institutional support is "an especially important condition for facilitating positive contact effects."

Many studies show that greater cross-ethnic friendships early in college is associated with more positive inter-ethnic attitudes and lower intergroup anxiety later in college and beyond.<sup>26</sup> The AERA brief highlights the numerous recent studies showing that student body diversity fosters improvements in students' cognitive skills, including critical thinking and problem-solving.<sup>27</sup> Such benefits reach all students (sometimes even more so for white students) and result from students' exposure to novel ideas and situations challenges their thinking and results in cognitive development.

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(June 2012), available at <http://heri.ucla.edu/briefs/urmbriefreport.pdf>.

23. Brief for American Educational Research Association et al. as *Amici Curae* Supporting Respondents, *Fisher v. Univ. of Texas at Austin*, 132 S.Ct. 1536 (2012), available at <http://www.utexas.edu/vp/irla/Documents/ACR%20American%20Educational%20Research%20Association%20et%20al.pdf>.

24. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

25. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOLOGY 751, 766 (2006).

26. See e.g., Kristin Davies et al., *Cross-Group Friendships and Intergroup Attitudes: A Meta-Analytic Review*, 15 PERSONALITY & SOC. PSYCHOLOGY REV. 332 (2011); Mary J. Fischer, *Does Campus Diversity Promote Friendship Diversity? A Look at Interracial Friendships in College*, 89 Soc. SCI. Q. 631 (2008); Shana Levin et al., *The Effects of Ingroup and Outgroup Friendship on Ethnic Attitudes in College: A Longitudinal Study*, 6 GRP. PROCESSES & INTERGRP. REL. 76 (2003).

27. See, e.g., Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 REV. EDUC. RES. 4, 20 (2010); Mitchell Chang et al., *A Retrospective Assessment of the Educational Benefits of Interaction Across Racial Boundaries*, 50 J.C. STUDENT DEV. 67 (2009); Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCHOLOGICAL SCI. 507 (2004).

# The Door To Law School

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*Are the doors to America's law schools not quite as open to racial and ethnic minorities as they are to others who seek admission? Nussbaumer and Johnson examine the data and the disparate "shut-out" rates for law school applicants based upon their race, discuss the social and economic costs that result, and suggest a blueprint for change.*

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**"D**emocracies die behind closed doors." Judge Damon Keith wrote these words while ruling in favor of public access to government information. His words apply to the door to law school because if that door continues to remain only partially open for students of color, the increasing disparity between the diversity of the legal profession and the population it serves will result in a crisis of confidence in our democracy, our businesses, our leadership, and our justice system. For us as lawyers, this should be *the* civil rights issue of our generation.

While the door to America's law schools may not be completely closed to racial and ethnic minorities, it is not open equally to all who seek admission. The goal of this article is to document these inequalities, discuss their social and economic costs, and suggest a blueprint for action to open the door to law school.

## I. Disparate Shut-Out Rates

The Law School Admissions Council (LSAC) keeps publicly available statistics on the number of students who apply to, are accepted by, and matriculate at America's ABA-approved law schools. This data makes it possible to determine the percentage of each racial and ethnic group that is totally shut out from admission to law school by comparing the total number of students in that group who apply for admission to the number who secure at least one offer of admission. For example, if 100 students apply to law school and only 50 receive an offer of admission, the shut-out rate for that group is 50%.

Representative Stephanie Tubbs-Jones invited Dean Nussbaumer to present data on these shut-out rates in September 2007 at the Congressional Black Caucus Foundation's Annual Legislative Conference in Washington, D.C. Dean Nussbaumer continues to present updated data at various programs, including the January 2009 Annual Meeting of the American Association of Law Schools. The data analyzed in this article was published by the LSAC and covers ten law school entering class years, starting with the Fall 2000 entering class and ending with the Fall 2009 entering class.

The total number of applicants tracked during this ten-year sample is 819,250, of which 571,300 were Caucasian, 95,870 were African American, 71,240 were Asian American, 42,460 were Hispanic, 17,880 were Puerto Rican, 13,540 were Mexican American, and 6,960 were Native American.



The Law School Admissions Council also tracks the mean LSAT scores for these racial and ethnic groups. The most comparable data set available appears in LSAC Technical Report 08–03, which profiles LSAT performance by racial and ethnic groups for seven of the ten years analyzed above, from the 2001–02 testing year through the 2007–08 testing year.

Table 1 below pulls the LSAT scores and shut-out rates for these groups into chart form, listing the different groups in order from the lowest to highest shut-out rates:

<b>Table 1 – LSAT Scores and Shut-Out Rates by Applicant Group</b>		
Applicant Group	Average Mean LSAT Score	Shut-Out
Caucasian	153	31%
Asian American	152	37%
Native American	148	42%
Mexican American	148	43%
Hispanic	146	45%
Puerto Rican	139	52%
African American	142	60%

This data shows that while less than one-third of all Caucasian applicants are shut out from America’s ABA-approved law schools, the shut-out rates for every applicant group of color are higher, even for groups like Asian Americans whose LSAT scores are statistically indistinguishable from their Caucasian counterparts. Furthermore, out of the two largest applicant groups of color, Hispanics and African Americans, nearly one-half and two-thirds of all applicants, respectively, never got the chance to prove through performance that their LSAT scores are not the best measure of their ability to succeed.

Except for Puerto Rican applicants, a group’s LSAT score appears to determine its rank-order shut-out rate position—the lower a group’s LSAT score, the higher its shut-out rate. The exception for Puerto Rican applicants may be explainable in part by the existence of three Puerto Rican law schools that admit substantial numbers of Puerto Rican students.

## II. Enrollment Trends and Lost Ground

We also analyzed enrollment trends among the different racial and ethnic groups tracked in the publicly available data published by the ABA Section of Legal Education and the Law School Admissions Council. We looked first at the 2000–01 academic year and compared the enrollment numbers then to the numbers for the 2009–10 academic year. Table 2 below shows the net change for each group during this period compared to the net change for all students of color and all students during the same period.

This analysis shows that three groups lost ground in proportional representation during this ten-year period: African Americans lagged 15 percentage points behind the growth in all students of color and six percentage points behind the growth in all students; Mexican Americans lagged 19

Table 2 – Enrollment Trends and Lost Ground			
Applicant Group	Net Enrollment Change	Net Enrollment Change Among All Students of Color	Net Enrollment Change Among All Students
African Americans	+9%	+26%	+16%
Asian Americans	+39%	+26%	+16%
Hispanics	+56%	+26%	+16%
Mexican Americans	+7%	+26%	+16%
Native Americans	+34%	+26%	+16%
Puerto Ricans	-8%	+26%	+16%

percentage points behind the growth in all students of color and nine percentage points behind the growth in all students; and Puerto Ricans lagged 34 percentage points behind the growth in all students of color and 24 percentage points behind the growth in all students.

This occurred despite a substantial increase in the number of available law school seats during this same period, from 125,173 in 2000–01 to 145,239 in 2009–10, and slightly increasing or stable entrance credentials (i.e. LSAT scores and undergraduate GPA), at least among African American and Mexican American applicants. So, despite better entrance credentials, African American and Mexican American candidates still lost ground in proportional representation.

These numbers, however, do not tell the whole story. For example, although Hispanic enrollment grew by 56% during this period, which sounds substantial, there were still only 6,514 Hispanic students enrolled in all ABA-approved schools by the 2009–10 academic year, compared to a total of 145,239 enrolled students. Hispanics thus comprised only 4.5% of all students, despite their recent growth among America’s general population.

### III. Social and Economic Costs

In April 2010, the American Bar Association Presidential Initiative Commission on Diversity published *Diversity in the Legal Profession: The Next Steps*. This report outlines the following four rationales why creating greater diversity in the legal profession is a pressing priority:

- The **Democracy Rationale**: America’s lawyers and judges have a unique responsibility for sustaining our political system with broad participation by all our citizens. A diverse bench and bar create greater trust in the mechanisms of government and the rule of law.
- The **Business Rationale**: Business entities are rapidly responding to the needs of global customers, suppliers, and competitors by creating workforces from many different backgrounds, perspectives, and skill sets. Ever more frequently, clients now expect and sometimes demand lawyers who are culturally diverse. Much of the corporate call for diversity can be traced to the so called “Harry Pearce Letter” written in 1988 by Pearce, General Motors’ (GM) General Counsel at the time, to its 900 outside law firms demanding diverse representation in handling GM matters. Under Pearce’s successor, Thomas A. Gottschalk, GM would be the first corporation to

file an *amicus* brief in support of the University of Michigan Affirmative Action cases and then helped to lead over 60 other corporations to do the same. Professor Johnson joined GM in 1988 shortly after Pearce's letter was written and participated in the follow-up to the letter. Later, as GM's North American General Counsel, he lead many of GM's efforts to continue to not only diversify GM's outside counsel, but the legal profession as well, including having GM be among the first corporations to sign the *Call to Action* initiated by Rod Palmore, then General Counsel of Sarah Lee.

- The **Leadership Rationale**: Individuals with law degrees often possess the communication and interpersonal skills and the social networks (i.e. contacts with influential people) needed to rise into leadership positions, both in and out of politics.
- The **Demographic Rationale**: Our country is becoming diverse along many dimensions, and with regard to America's racial and ethnic populations, the Census Bureau projects that by 2042, a majority of America's citizens will be citizens of color.
- These rationales provide a good overall summary of the social and economic costs we face if we fail to achieve diversity in our lifetimes. Only about 10% of the legal profession are currently lawyers of color, and this figure has not changed significantly in the past decade. If we as lawyers fail to diversify our own ranks, as America becomes a country of color, we face the very real prospect of becoming the "apartheid" profession.

#### IV. Lost Opportunity Costs

The United States Bureau of Labor Statistics provides readily accessible data that allows us to compute detrimental financial impact that the denial of law school admission has on various candidates of color, their families and their respective communities because lawyers have a greater earnings potential than many other professions. We will refer to this as "lost opportunity costs" and will compute it by comparing the difference between the lifetime earnings of the average lawyer and the lifetime earnings of other occupations.

Table 3 below provides 2008 data from the Bureau of Labor Statistics, assuming a forty-year career for each occupation for which data is provided.

Table 3 – Lost Opportunity Costs			
Occupation	Median Annual Earnings	Lifetime Earnings	Lost Opportunity Cost
Lawyer	\$110,590	\$4,423,600	-----
Personal Financial Advisor	\$69,050	\$2,762,000	-\$1,661,600
Accountant/Auditor	\$59,430	\$2,377,200	-\$2,046,400
Human Resources Specialist	\$55,710	\$2,228,400	-\$2,195,200
Public Relations Specialist	\$51,280	\$2,051,200	-\$2,372,400



## Despite better entrance credentials, African American and Mexican American candidates still lost ground in proportional representation.

Therefore, on an individual case basis, by comparing a lawyer's lifetime median earnings to the lifetime median earnings of, for example, a human resources specialist in Table 3, yields an individual lost opportunity cost of \$2,195,200. That is, the impact of the denial of law school admission has a potential cost to each denied applicant of \$2,195,200 in potential lifetime earnings, which would dramatically impact the lives of these individuals. And the cumulative cost to the affected racial and ethnic communities is even greater.

For example, the data available from the LSAC for the Fall 2000–Fall 2009 entering classes shows that 95,870 African Americans applied to ABA-approved law schools during those ten entering class years, but only 38,240 received at least one offer of admission, meaning that 57,630 of those applicants were shut out from the opportunity to attend law school. If just 10% of those rejected applicants would have succeeded in law school, passed the bar, and entered the profession, the net lost opportunity cost to the African American community from these 5,763 rejected applicants in this ten-year period alone, at \$2,195,200 each, would be approximately \$12.6 billion dollars.

### **V. A Blueprint for Action**

This section provides a blueprint for action to open the door to law school to make the profession one that is more representative of the society that it serves. In broad general terms, there are at least three main ways to increase access to law school for applicants of color—one is to increase the entering credentials of those applicants, so that they are not shut out from existing law school programs; another is to change the way that law school admissions decisions are currently made, by rejecting the elitist pursuit of applicants with the highest entering credentials and instead basing admissions decisions on performance-based statistics on academic attrition, bar-passage rates, and aptitude in skills and ethics; and the third is to create magnet law schools that provide those students with meaningful opportunities to succeed in law school, pass the bar examination, and enter the profession. The following subsections provide an overview of how these three goals can be achieved.

#### **A. Increasing the Entering Credentials of Applicants of Color**

Achieving this goal requires the short-term strategy of leveling the LSAT preparation course playing field, and the long-term strategy of creating integrated pipeline systems that identify, mentor, and challenge promising applicants of color from at least the point at which these students enter their middle school years in the sixth, seventh, and eighth grades. Together, these strategies can make a difference in our lifetimes to increase the representation of lawyers of color in the legal profession.

## *1. Leveling the LSAT Preparation Course Playing Field*

While the extent to which LSAT preparation courses can raise the scores of individual applicants is open to reasonable debate, the proliferation, and profitability of these courses is a testament to the fact that most students who can afford such courses choose to take advantage of them. Furthermore, for applicants who are on the admissions bubble, there is no question that these courses can provide a sufficient boost to move them up the LSAT ladder, enough to open the door to law school.

The problem that disproportionately affects applicants of color is money, or more accurately, the lack thereof. And the solution is a concerted effort by corporations, bar associations, law firms, and individual lawyers to provide funding, either in the form of scholarships to promising applicants, or in the form of financial support for programs targeted at such applicants. This may require not only direct funding for the cost of these programs, but also indirect funding in the form of cost-of-living stipends for students who lack the parental or other resources necessary to support themselves during the time required to participate in these programs.

For those who are impatient with progress, and feel the need to do something now, this is the strategy of choice. What is crucial, however, are first, that this not be the sole strategy pursued, because of the limits on how much these programs can boost an applicant's score; and second, that we develop a transparent assessment process that measures the success rate of these programs and provides both funders and applicants with accurate consumer information to base their decisions on over time.

## *2. Creating Integrated Pipeline Systems*

This is both the more promising and more difficult strategy; and only for those who are in this struggle for the long haul, and who can live on faith with deferred gratification that may take years for concrete results to materialize.

There are literally hundreds of "pipeline" programs around the country that focus on the pre-law school stages of the educational process, which have as their goal improving the quality of the applicants who want to enter the door to law school. What is lacking, however, is the coordination of these programs into integrated pipeline systems that start at least as early as middle school, and that then help promising applicants move through each of the successive educational stages, from middle school to high school to college to law school. This lack of coordination and integration also makes it almost impossible to follow these students as they progress (or not) up the educational ladder, which in turn makes it almost impossible to track and assess the ultimate success of these programs.

The solution to this problem is the development of local, coordinated pipeline programs that work together to form an integrated system that connects all of the major stages of the educational process and shepherds promising applicants through from start-to-finish. The beauty of this approach is that we do not need to start from scratch, since quality programs and models for individual parts of the educational process already exist, at least at the high school and college level.

What is lacking, however, is similar programming at the middle-school stage, and the development of cooperating agreements and coordinating councils to connect these different components into cohesive, integrated pipeline systems. One of the entities that hopes to fill that gap is the ABA Council on Racial and Ethnic Diversity in the Educational Pipeline, which supports pipeline programs around the country.

What any such system must do to be successful is to first identify promising applicants. This can be a challenge, particularly as far back as middle school, and especially given that many students of

color in distressed school systems may have limited horizons of what careers they might realistically pursue in life. The solution to this problem is to provide interesting and relevant programming that exposes these students to the career opportunities in the law and, perhaps more importantly, exposes them to role models of lawyers and judges who have overcome similar challenges to become members of the legal profession.

A second essential ingredient is character mentoring programs that help these potential applicants avoid the pitfalls that many of them face, including drugs, alcohol, gangs, violence, criminal activity, and teen pregnancy, among others.

The third essential ingredient is programming designed to constantly challenge these potential applicants academically, setting high expectations and standards for them to aspire to, but to do so in an environment that balances this academic rigor with support, encouragement, and positive reinforcement.

## **B. Changing the Way that Law School Admissions Decisions are Made**

We have spoken much about the LSAT and about the lower scores that racial and ethnically diverse candidates on average achieve on the exam than their Caucasian counterparts. This impacts law school admissions in two critical ways.

First, the current American Bar Association Standards for Approval of Law Schools (ABA Accreditation Standards) require that as part of the admissions process students take an admissions test, and that if a test other than the LSAT is used, a variance must first be approved by the ABA Section of Legal Education.

Second, the LSAT profile of a school's incoming class is a significant portion of the *U.S. News and World Report Rankings*, which unfortunately have a disproportionate impact on how the legal community and prospective candidates view the "quality" of a law school.

The difficulty with so much reliance on the LSAT is that it is not designed to measure many of the things that make successful lawyers, such as judgment, values and ethics, composure, creativity, team-building, innovation, and the ability to interact with and influence others. As a result, this test is not a good measure of whether the person taking it will be a successful lawyer. The LSAC itself recognizes this fact and warns against law schools misusing the test in the admissions process. The ABA Accreditation Standards similarly contain a page of warnings about misuse of the test, yet such misuse persists, including the negative impact that the *U.S. News and World Report Rankings* have on the composition and diversity of entering classes.

Moreover, the LSAT only tests the knowledge component of legal education, rather than emphasizing the skills and ethics, as emphasized in the MacCrate and Carnegie Foundation reports. This has led the ABA Section of Legal Education Standards Review Committee to undertake a substantial revision of the ABA Accreditation Standards to include more requirements for skills and ethics based instruction in law school.

### *1. Experimenting with New Alternatives*

Professor Johnson is also looking at some alternatives to using the LSAT. Recently, the ABA Section of Legal Education has issued some waivers of the requirement that the LSAT must be used as part of the admissions process, permitting some schools to rely on other criteria such as the undergraduate Grade Point Average (GPA) of the candidate at the law school's undergraduate institution.





## The difficulty with so much reliance on the LSAT is that it is not designed to measure many of the things that make successful lawyers.

Building off of this trend, Professor Johnson is working with the ABA Council of Legal Education Opportunity to apply for a waiver of the LSAT requirement for students who successfully complete any one of a number of college pre-law programs, such as CLEO's Six Week Summer Institutes or the St. John's University Ronald H. Brown Preparation Program, which provide a rigorous test of a student's ability to be successful in law school by simulating the law school environment. Given that many of the students in these programs have lower LSAT scores, the fact that a school does not have to report the student's LSAT score should help to give schools an incentive to admit a student with a less elitist score because it will not have an adverse impact on the school's *U.S. News* ranking.

Because providing meaningful employment for these additional graduates is essential, another alternative conceived by Professor Johnson is to create greater job opportunities in the legal marketplace. Particularly, the difficult economic times that the country is currently facing had a significant impact on the employability of new lawyers. Those opportunities could be in the legal services arena for the underserved, whose needs by current estimates are only being met 20% of the time. The idea is to take the new lawyers who are unemployed or underemployed and train them to handle cases for legal services entities, using experienced lawyers nearing the end of their careers to provide training, mentoring, and supervision.

Another variation on this theme would be to train lawyers more effectively in opening their own practices and then find compensation for them in taking legal services cases. This compensation, which could work in either the pure legal services or solo practitioner model, could take the form of student loan forgiveness.

### i. Creating Magnet Law Schools

The concept of magnet schools has been used for many years at the elementary, middle, and high school levels as one way of remedying *de facto* racial segregation in public school districts. This concept can and should be embraced by legal education to create magnet law schools that provide students with less elitist entering academic credentials, regardless of race or ethnicity, with meaningful opportunities to succeed in law school, pass the bar examination, and enter the profession. These magnet schools can be either entirely new schools, existing schools that embrace magnet school principles, or branch campuses of existing schools that embrace those principles.

The ten key principles for these magnet schools are reasonable admissions requirements, low tuition, generous scholarships, flexible scheduling, geographic proximity to target applicants, academic support, externship programs, bar preparation support, career placement support, and employer recruitment support.



But beyond these significant negative implications of failing to diversify the legal profession, there is a very concrete dollar cost to the individuals who are denied admission to law school and the profession and the communities they otherwise would represent.

## VI. Conclusion

The shut-out rate data presented in Section I of this article shows that while less than one-third of all Caucasian applicants are shut out from America's ABA-approved schools, the shut-out rates for every applicant group of color are higher, even for groups like Asian Americans whose LSAT scores are statistically indistinguishable from their Caucasian counterparts. Nearly half of all Hispanic applicants and two-thirds of all African American applicants never get the chance to prove through performance that they have the character and the ability to succeed in law school and become a member of the legal profession.

The law school enrollment data presented in Section II shows that African Americans, Mexican Americans, and Puerto Ricans have all lost ground in terms of proportional representation during the first decade of this century, both in comparison to the growth in enrollment of all students of color and to the growth in enrollment of all students. This occurred despite a substantial increase in the number of available law school seats during the same period, and slightly increasing or stable entrance credentials, at least among African American and Mexican American applicants. This data makes unmistakably clear that substantial inequalities exist in terms of access to America's law schools, and that the door to law school is only partly open to certain groups.

As Section III explains, if we as lawyers fail to diversify our own ranks, as America becomes a country of color we face the very real prospect of becoming an "apartheid" profession and creating a crisis of confidence in our democracy, our businesses, our leadership, and our justice system. As previously noted, for us as lawyers, this should be *the* civil rights issue of our generation.

But beyond these significant negative implications of failing to diversify the legal profession, there is a very concrete dollar cost to the individuals who are denied admission to law school and the profession and the communities they otherwise would represent. These lost opportunity costs presented in Section IV can amount to millions of dollars over their lifetimes for the individuals who are denied admission, and even more for the communities they otherwise would represent. The thousands of dollars lost in failing out of law school for those who do not make the grade pale in comparison, and must be compared to these lost opportunity costs in order to make a balanced risk-benefit assessment.



The blueprint for action presented in Section V identifies three main ways to increase access to law school for applicants of color:

- We should increase the entering credentials of those applicants in the short term by leveling the LSAT preparation course playing field with financial support for these students, and in the longer term by creating integrated pipeline systems that identify, mentor, and challenge these students from the beginning to the end of their educational experience.
- We should change the way that law school admissions decisions are currently made by eliminating the LSAT as the required admissions test, increasing the consideration of skills, ethics, and values aptitudes, and by experimenting with new alternatives such as the CLEO/Ronald H. Brown variance concept.
- We should create magnet law schools that admit students with less elitist entering academic credentials and provide those students with meaningful opportunities to succeed in law school, pass the bar examination, and enter the profession, through programs that have reasonable admissions requirements, low tuition, generous scholarships, flexible scheduling, geographic proximity, academic support, externship programs, bar preparation support, career placement support, and employer recruitment support.

Through these efforts, we can provide students of color with the opportunity to prove through performance that, in the words of Dr. Martin Luther King, their LSAT scores are not the best measure of “the content of their character” and their ability to become competent and conscientious members of the legal profession.

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Diversity

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# Who's On Law Review?: A Study of Diversity on Law Reviews

**Marcey L. Grigsby**

**Adjunct Professor of Law, New York Law School and Faculty Publisher of the New York Law School Review**

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*Serving on law review is an important credential for many law firms, judicial clerkships, and academic appointments, but how diverse are law review editorial boards? Grigsby reports on her research findings examining the membership and leadership of the law reviews at each of the top 50 law schools as ranked by U.S. News and World Report. She then discusses what might be done to enhance the likelihood of diversity on such boards so as to enlarge the pool of prospective diverse candidates for such employment possibilities.*

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## I. Introduction

The issue of diversity within legal education continues to garner attention as studies examine how diversity affects law school admissions, law students' experiences, and prospects for future success in the legal profession. Law review membership in particular remains a strong indicator of academic success in law school and an important credential on the path to legal employment, especially important for prestigious law firms, competitive federal judicial clerkships, and coveted academic appointments.

In August 2010, a report examining female membership and leadership on the law review at each of the law schools ranked in the Top 50 by *U.S. News & World Report* (*U.S. News*) found that although the percentages of female students on those law reviews (44.3%) and in leadership positions (46.2%) were in line with the percentage of women awarded law degrees during the same time period (45.7%), the representation of women in the editor-in-chief (EIC) position was "disproportionately low" at just 33%.

**Table 1 – Summary of Key Findings**

Applicant Group	Top 50 Sample	Female Full-Time Faculty Sample	Minority Full-Time Faculty Sample
Average percentage of female law review membership	44.3%	52.2%	58.6%
Average percentage of female law review leadership	46.2%	58.6%	64.1%
Percentage of law reviews having a female EIC	33%	60%	46.2%
Percentage of law reviews having an EIC who identifies as a person of color	N/A	13.3%	41.7%

In 2011, the *New York Law School Law Review* (NYLS) conducted further research, examining gender and minority diversity on law reviews outside of the Top 50 by surveying law reviews in two samples based on criteria other than *U.S. News* rankings—specifically, the percentage of women and minorities who are full-time faculty members of ABA-accredited law schools.

NYLS found that law reviews at schools having a high percentage of female full-time faculty and at law schools having a high percentage of minority full-time faculty had, on average, significantly greater gender diversity among their 2010–2011 student membership and leadership than law reviews at the Top 50 schools surveyed in 2010, as well as a higher rate of female EICs.

## II. Survey Results and Discussion

In each of the three measures used in the Ms. JD 2010 survey (rates of female law review membership and leadership and gender of the EIC), law reviews in the two NYLS samples significantly outperformed those in the Top 50 sample, with female law students at schools with more diverse faculties becoming law review members and holding law review leadership positions at higher rates than their counterparts at law schools ranked in the *U.S. News* Top 50. These results indicate that there may be a positive relationship between the percentage of female full-time faculty members at a law school and the representation of female students in membership and leadership of the school's law review, as well as a positive relationship between the racial diversity of a law school's full-time faculty and the achievement of female students as measured by their representation on law review.

### A. Results from Law Reviews in the Female Faculty Sample

Law reviews at law schools having a high percentage of female full-time faculty (the female faculty sample) reported significantly higher percentages, on average, of female law review membership and leadership than law reviews at schools in the Top 50 sample, including a higher percentage of female students holding the highly coveted position of editor-in-chief.

- The average percentage of female law review members in this sample was 52.2%, compared with 44.3% among law reviews at the Top 50 law schools.
- The average percentage of female students holding law review leadership positions was 58.6% in this sample, compared with 46.2% among law reviews at Top 50 schools.
- 60% (9 of 15) of EICs in this sample were women, compared to just 33% of EICs at law reviews in the Top 50 sample.
- Only 2 of the 15 law reviews responding in this sample, or 13.3%, however, reported having an EIC who identified as a person of color.

### B. Results from Law Reviews in the Minority Faculty Sample

Law reviews at law schools having a high percentage of minority full-time faculty (the minority faculty sample) also reported a significantly higher percentage of female law review members, leaders, and EICs on average than law reviews in the Top 50 sample.

- The average percentage of female law review members in this sample was 58.6%, compared to 44.3% among law reviews at the Top 50 law schools.
- The average percentage of female students holding law review leadership positions in this sample was 64.1%, compared to 46.2% for law reviews in the Top 50 sample.



Although the 2010–2011 survey was limited in scope, the results suggest areas to explore in future studies in order to understand the factors contributing to or inhibiting diversity on law reviews.

- 46.2% of law reviews (6 of 13) in this sample had a female editor-in-chief, compared to only 33% in the Top 50 sample.
- Of the 12 law reviews that responded to the question of whether the EIC identified as a person of color, five (41.7%) answered in the affirmative.

### C. Comparing the Female and Minority Full-Time Samples

Comparing results from the two NYLS samples also yields interesting observations. As compared to law reviews in the female faculty segment, law reviews in the minority faculty segment had an even greater percentage of female members and the same rate of women in leadership positions, but fewer female EICs.

- While more than half of the EICs at law reviews in the female faculty sample (60%) were women, only two law reviews in that sample (13.3%) reported having an EIC who identified as a person of color.
- Notably, those two law reviews are at schools that also have a high percentage of minority full-time faculty and were therefore also included in the minority faculty sample.
- Of the 12 law reviews in the minority faculty sample that answered the question, 5 reported that their EIC was a person of color. Of the 13 law reviews in the minority faculty sample that responded to the question, 6 reported that the EIC was a woman.

This data suggests that although a more racially diverse faculty may have positive effects on law review diversity (both in terms of students of color and female students), schools with high rates of female full-time faculty may produce higher rates of law review achievement among female students only, but may not necessarily contribute to higher rates of students of color holding the EIC position.

## III. Challenges in Understanding Law Review Diversity and a Need for Best Practices

This research, which highlights potential gaps in opportunities for female and minority law students, reinforces the importance of examining diversity throughout legal education. Although the 2010–2011 survey was limited in scope, the results suggest areas to explore in future studies in order to understand the factors contributing to or inhibiting diversity on law reviews. In addition, the research highlights some challenges that law reviews face in understanding and fostering diversity within their organizations, and the need to both develop best practices that law reviews can apply and share and highlight successful case studies.

First, law review editors wishing to ensure a diverse organization need reliable data about their student members and leaders. Both the Ms. JD and NYLS research is based on data about the number of female and minority members on a law review, as reported by an editor at each law review. But how these editors make such determinations is unknown. Some law reviews may formally and systematically collect demographic information directly from their members—for example, by surveying their members about their gender and racial identities—and obtain any necessary consents to report that information. But anecdotal information suggests that this practice is not common, which means that an editor responding to the survey may be making some assumptions about the gender and race identities of the law review's members and leaders. This highlights a need to define best practices for law reviews to follow when collecting, analyzing, and reporting data about the composition of their student membership and leadership.

Another area for exploration is how membership selection methods may affect the diversity of a law review. Some law reviews select their members solely through a write-on competition and Blue-book exercises; others make selections based only on students' academic performance using grades or class rank; and some use a combination of these two. Still others may also ask students to submit a written personal statement. The same question applies to the methods law reviews use in choosing their executive board editors and editors-in-chief, including common methods such as direct election or some form of an application and interview process.

As law review editors consider the role of diversity within their organizations, it will be important for them to understand who is on their law review; the extent to which various methods of membership and leadership selection may promote or inhibit diversity; and best practices that can help them achieve their goals for diversity.

## About the Survey

For more information about the data and methodology used in this research, read the full 2010-2011 Law Review Diversity Report, available on the New York Law School Law Review's website at [www.nylslawreview.com/diversity](http://www.nylslawreview.com/diversity). The New York Law School Law Review plans to issue its 2011-2012 Law Review Diversity Report in fall 2012. Questions and inquiries should be directed to [features@nylslawreview.com](mailto:features@nylslawreview.com).

# Protecting Workers, Promoting Diversity, and Enforcing The Law

## Office of Federal Contract Compliance Programs—a Leading Worker Protection and Civil Rights Agency in the Obama Administration

Patricia A. Shiu

Director of the Office of Federal Contract Compliance Programs, U.S. Department of Labor

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*The U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") may not be the best known federal agency but for lawyers who represent clients involved in government contracting or whose own firms' contract with the federal government, it should be. OFCCP has raised the level of attention paid to compliance with federal diversity objectives by government contractors and even some major law firms are facing prosecution for failure to comply.*

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### I. Introduction

Federal contracts are big business. In fact, nearly one quarter of American workers are either employed by or seek jobs with a company that provides goods, services or construction for the U.S. Government. That's nearly 200,000 business establishments with almost \$700 billion in federal contracts or subcontracts to accomplish everything from building our missile defense systems and providing lunches to school children to managing the IT infrastructure of the government and providing vital legal services to federal agencies.<sup>1</sup> Because these companies profit directly from taxpayer dollars, the rules that require them to prohibit discrimination and take affirmative action are central to our democratic values. It is the responsibility of the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) to hold those who do business with the federal government—contractors and subcontractors—accountable to these rules. To put it simply, at OFCCP, we protect workers, promote diversity and enforce the law.

### II. About the Office of Federal Contract Compliance Programs

Before I joined the 17,000 dedicated men and women of the U.S. Department of Labor in 2009, I spent 26 years as a public interest lawyer fighting employment discrimination on behalf of vulnerable workers. My clients included students and workers with disabilities, garment and factory workers, immigrants and people with limited English proficiency. Again and again, what I observed was that these individuals wanted to be treated fairly. They wanted to be valued in their workplaces. Above all, they wanted to work. Work is not simply about a paycheck, it is about respect, about dignity and an individual's sense of integrity and self worth; it's also about financial stability and long-term security. After years of working outside the government to make the system fairer, I was humbled to join President Obama and Labor Secretary Hilda Solis to create change "from within" as the Director of the OFCCP.

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1. Recently, an Administrative Law Judge reaffirmed that law firms can fall within OFCCP's jurisdiction. In ruling for OFCCP, the Judge held that the law firm was a contractor, rejecting the law firm's argument that its legal work was a personal service and therefore not subject to OFCCP's jurisdiction.



Stephanie Enyart sued the National Conference of Bar Examiners to be able to use a computerized screen reader as well as a text magnifier. The U.S. Court of Appeals for the Ninth Circuit recently ruled in her favor.

The Department of Labor is the second largest enforcement agency in the federal government, and OFCCP is a civil rights and worker protection agency that audits contractor establishments and investigates complaints of discriminatory employment practices. Under President Obama, we have seen a restored commitment to our core values of equality, fairness and equal opportunity for all. The President understands the importance of the work we do and OFCCP's place as a premier worker protection and civil rights agency in the federal government. When the Administration came into office, our agency had fewer than 600 staff. Thanks to the leadership of President Obama and Secretary Solis, we have seen a 25% increase in our budget, which enabled us to expand our team to almost 800 people, including 200 new compliance officers.

Secretary Solis laid out a simple and straightforward vision for our Department: *"Good Jobs for Everyone."* Central to this vision is the idea that the ability to reach for good jobs must truly be within the grasp of everyone. The Secretary believes that every qualified worker should have a fair shot to compete for jobs and companies that profit from federal contracts—funded by taxpayer dollars—must not discriminate in employment decisions. That's where OFCCP comes in.

OFCCP is one of three federal agencies—born out of landmark civil rights laws of the 1960s—that protect Americans from discrimination at work. Along with the Civil Rights Division at the U.S. Department of Justice and the Equal Employment Opportunity Commission, we are on the front lines of defense for those who seek work and those who are at work. We enforce three laws that prohibit employment discrimination with respect to sex, race, color, national origin, religion, disability, and status as a protected veteran. We also enforce the legal requirement that government contractors take affirmative action to provide equal employment opportunity to qualified women, minorities, people with disabilities, and veterans. As part of our enforcement activities, we look at every aspect of employment (from hiring, placement, and compensation to training, promotions, terminations, harassment, retaliation, and other conditions of employment), every protected group, and every industry and job group.





Law school career placement offices need more education on how to place students with disabilities. Some students have been told they should only consider jobs with the government, that only the government would accommodate their needs and provide adequate benefits.

The story of OFCCP begins with President Franklin D. Roosevelt, who, in 1941, signed an Executive Order banning discrimination against African Americans by defense contractors. Over the years, that principle was expanded by Presidents Eisenhower and Kennedy. On September 24, 1965, President Lyndon Johnson signed the landmark Executive Order 11246, which established OFCCP and articulated new standards for non-discrimination and affirmative action throughout the federal contracting workforce. Over the past 47 years, OFCCP's legal authorities were expanded by amendments to LBJ's Executive Order, the passage of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). These two laws, both signed by President Richard M. Nixon, added employment protections for protected classes of veterans and people with disabilities. Today, OFCCP enforces section 503 of the Rehabilitation Act and section 4212 of VEVRAA.

For nearly half a century, the concept behind OFCCP has been a simple and straightforward one: taxpayer dollars must never be used to discriminate. After all, being a federal contractor is a privilege and not a right. With that privilege comes a responsibility to abide by the law and ensure equal employment opportunity for everyone.

### **III. About OFCCP Initiatives**

Under the Obama Administration, we have reinvigorated our core mission of ensuring equal employment opportunity in the federal contracting workforce by enhancing our enforcement activities, strengthening the regulations that guide our work, and broadening our outreach efforts to better educate workers about their rights and to provide training and technical assistance to contractors as they seek to comply with the law. In this article, I will discuss our enforcement efforts, regulatory agenda and outreach programs.

### **IV. Enforcement**

How do we determine whether contractors are complying with their legal requirements? Our primary enforcement mechanism is compliance evaluations, or audits, but we also investigate individual complaints. Each year, we use a neutral selection process to schedule about 4,000 contractor establishments for compliance reviews in which we evaluate their employment practices. Contractors are required to collect and maintain appropriate and accurate employment data and to develop



written affirmative action programs (AAPs). As part of our compliance evaluations, we review this data and conduct desk audits and onsite visits to determine whether the companies are meeting their legal obligations.

Compliance evaluations are a central part of what we do at OFCCP. Through these evaluations we can determine whether or not there are any unfair or artificial barriers to employment and ensure that all workers have a fair shot at finding, competing for, securing and succeeding in good jobs. Discrimination is an economic issue that harms American workers, their families and their communities. For this reason we are working to ensure that all contractors abide by their legal obligations. In the three years since President Obama took office we have audited more than 12,000 businesses, which employ almost 7 million workers. We have recovered more than \$35 million in financial remedies on behalf of over 70,000 workers affected by discrimination. Perhaps the most important number is 7,000. That's the number of potential job offers we have negotiated for workers who were unfairly subjected to hiring discrimination.

As part of our focus on increasing compliance, OFCCP is taking a comprehensive approach to our enforcement efforts. We use a number of measures to ensure thoroughness, quality and consistency of compliance audits at our 47 regional and field offices throughout the country. Ensuring quality is central to OFCCP's mission and enforcement responsibilities, and we are making a concerted effort to shift toward a higher *quality*—not just *quantity*—of audits. As part of our approach to conduct more thorough investigations, we have initiated an increase in onsite assessments and more focused reviews to look at all aspects of discrimination under our purview. We look at discrimination in hiring, compensation, placement, promotion, termination, harassment, and retaliation; discrimination based on all of the protected classes articulated by the law; and discrimination in various industries and job groups. We also are redirecting and expanding our enforcement activities to place a greater emphasis on affirmative action and equal employment opportunity for qualified workers with disabilities and veterans. For nearly a decade, despite the agency's mandate to enforce Section 503 and VEVRAA, OFCCP's enforcement activities narrowly focused on systemic hiring discrimination in blue-collar jobs on the bases of race and national origin.

In one recent example of OFCCP's comprehensive approach to enforcement, we uncovered discriminatory hiring practices that affected more than 21,000 job applicants at FedEx Ground shipping centers between 2003 and 2011. FedEx is a federal contractor that provides shipping services for the government. OFCCP investigators found that FedEx's hiring practices resulted in systemic discrimi-



One student notes he feels alienated from his classmates because of his very different experience. This feeling of isolation is the opposite of inclusion. Our profession should do more, starting at the law school level, if not before.

nation based on race, national origin, and sex—not just at one location, but at 23 facilities in 15 states. We looked at both anecdotal evidence and statistical data on who applied for the jobs and who actually got them. On March 22, 2012, OFCCP signed a conciliation agreement with FedEx to resolve those allegations.

In the conciliation agreement, FedEx promised to immediately correct any discriminatory hiring practices. The company also agreed to engage an outside consultant to perform an extensive review of its hiring practices and provide recommendations to change and improve those practices, to train incumbent and future supervisors and employees, and to monitor compliance with the equal employment opportunity laws enforced by OFCCP. Additionally, the company agreed to take necessary steps to comply with the recordkeeping requirements of Executive Order 11246.

Our agreement with FedEx also included make-whole remedies for the victims and ongoing relief for future job applicants—a lasting solution, not a temporary fix. OFCCP is committed to the principle that all workers have a fundamental right to compete for work on fair and equal terms—and we deliver. The agreement with FedEx will deliver \$3 million in back wages and interest to 21,635 rejected applicants. It will deliver job offers to more than 1,700 of the rejected applicants, and it will deliver fair consideration to all future FedEx applicants, because the company has committed to corporate-wide reform at more than 500 facilities across the country.

As Secretary Solis said, “We are committed to building an economy that lasts—one in which every qualified worker gets a fair shot to compete for jobs and where every employer plays by the same set of rules.” For more than 21,000 American workers, the FedEx agreement demonstrates our success at doing just that.

In 1963, President Kennedy made a promise to women in this country that they would get equal pay for equal work. Today, President Obama is putting his commitment behind transforming that promise into a reality. Just days after taking office, President Obama signed the Lilly Ledbetter Fair Pay Act. This Act states that the 180-day statute of limitations for filing an equal pay lawsuit resets with each new discriminatory paycheck. However, there is much more to be done to close the wage gap, and, as a member of the President’s National Equal Pay Task Force, OFCCP is playing a leading role in that effort.

Today in America, women still earn less than men. According to an analysis by the Department of Labor’s Chief Economist, a typical 25-year-old woman working full time all year in 2011 would earn \$5,000 less than a typical 25-year-old man. If that earnings gap is not corrected, by age 65, she will have lost \$389,000 over her working lifetime.<sup>2</sup> These are earned wages that could have been spent toward a child’s college education, toward owning a home, or toward one’s retirement. And for women of color, the pay gap is even greater than for white women.<sup>3</sup> Women earn less than men in every state and region of the country.<sup>4</sup> That pay gap is real and it matters. Eliminating gender- and race-based discrimination in compensation is a critical priority for OFCCP, and we are working to improve enforcement in the area of wage-based discrimination.

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2. THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, KEEPING AMERICA’S WOMEN MOVING FORWARD: THE KEY TO AN ECONOMY BUILT TO LAST (2012), available at [http://www.whitehouse.gov/sites/default/files/email-files/womens\\_report\\_final\\_for\\_print.pdf](http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf).

3. U.S. Dep’t of Labor, Bureau of Labor Stat., *Earnings*, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2012), [HTTP://WWW.BLS.GOV/CPS/EARNINGS.HTM#DEMOGRAPHICS](http://www.bls.gov/CPS/EARNINGS.HTM#DEMOGRAPHICS).

4. U.S. DEP’T OF LABOR, HIGHLIGHTS OF WOMEN’S EARNINGS BY REGION (2012), available at <http://www.dol.gov/equal-pay/regions/>.

In an effort to fully address this issue we are updating our protocols, developing policy and enforcement tools, and training compliance officers to identify and remedy compensation discrimination. Since data is the linchpin for civil rights enforcement and the ground on which we build good public policy, we are committed to improving the way we collect, analyze and share our data so we can close the pay gap once and for all. In one of our latest initiatives, we proposed the creation of a new tool to collect compensation data from federal contractors. To ensure such a data collection tool would be effective and efficient, we first issued an Advance Notice of Proposed Rulemaking (ANPRM) to solicit input from all key stakeholders. An ANPRM is sort of like a national brainstorming session, and through this process we received substantial input from the public on issues relating to the scope, content and format of a tool for collecting compensation data. We are reviewing these comments as we consider the next steps.

Last year OFCCP closed a major case involving alleged pay discrimination by one of the largest pharmaceutical companies in the world, AstraZeneca. We found that 123 female sales associates at an AstraZeneca business center in Philadelphia were unfairly being paid less: earning on average \$1,700 less than their male colleagues. While conducting a routinely scheduled audit, an OFCCP compliance officer discovered this pay discrepancy and, for almost nine years, OFCCP pursued AstraZeneca to fix the problem and make restitution to the affected women. In the end, the company settled and compensated the affected workers with \$250,000 in back wages, interest, and salary increases. Most importantly, OFCCP required AstraZeneca to reexamine its pay policies across multiple states and promise to rectify any and all discriminatory pay disparities.

This is the power of what we do. We believe that closing the pay gap requires all businesses to really examine their pay practices and to take steps to ensure fairness across the board. For our part, OFCCP is prioritizing pay discrimination in our enforcement and aggressively going after employers who break the law.

## V. Regulatory Agenda

The key to strong enforcement is good policy. However, some of the regulations we enforce have not been updated in nearly 40 years. Workplaces have changed a great deal since OFCCP was first established and discrimination is still a very real problem in our country. As a result, we are determined to bring our regulations into the 21<sup>st</sup> century and to that end we have developed a robust regulatory agenda. Our philosophy of promoting good business by promoting diversity is reflected in this agenda, and we attempt to strike a balance between improving employment opportunities for women, minorities, veterans and people with disabilities, while ensuring businesses' ability to efficiently and effectively build a strong workforce. In this section, I will focus on two of our regulations which seek to update VEVRAA and Section 503. I also will discuss the proposed rescission of our compensation discrimination guidelines.

### A. VEVRAA

Contractors' responsibilities with respect to affirmative action, recruitment and placement of veterans have remained unchanged since the VEVRAA rules were first published in 1976. Meanwhile, increasing numbers of veterans are returning from tours of duty in Iraq, Afghanistan and other places around the world, and many are faced with substantial obstacles in finding employment upon leaving the service. A recent report from the Bureau of Labor Statistics found that the annual unemployment rate for these post-9/11 veterans—referred to as “Gulf War-era II veterans”—was 12.1% in 2011. This is significantly higher than the 8.3% annual unemployment rate for all veterans and the 8.7%



Rather, we seek to provide contractors with clear, quantitative standards by which to measure their progress that are less ambiguous than current requirements, which simply call on contractors to make “good faith” efforts in employment.

annual unemployment rate for nonveterans.<sup>5</sup> Addressing the barriers our veterans face in returning to civilian life, particularly with regard to employment, is the focus of a number of legislative efforts such as the Returning Heroes Tax Credit, the Wounded Warriors Tax Credit and the Veterans Opportunity to Work to Hire Heroes Act of 2011 (VOW to Hire Heroes Act). Ensuring opportunities for our veterans is something we can and must get right.

OFCCP remains committed to assist those who served our country in uniform with their transitions back into civilian life. One way we can help veterans gain employment is to strengthen VEVRAA. Section 4212 of that law requires government contractors take affirmative action to employ and advance in employment qualified, covered veterans. OFCCP has proposed revisions to Section 4212, which will require that federal contractors conduct more substantive data analyses of recruitment and hiring actions, as well as maintain records of this data. These revisions also may require the use of numerical targets to measure the effectiveness of affirmative action efforts. These targets are not quotas. Rather, we seek to provide contractors with clear, quantitative standards by which to measure their progress that are less ambiguous than current requirements, which simply call on contractors to make “good faith” efforts in employment.

Prior to issuing our Notice of Proposed Rulemaking (NPRM) in April of 2011, we gathered input from various stakeholders, including the contractor community, state employment agencies, veterans’ service organizations, and other interested parties via town hall meetings, webinars, and listening sessions. We received over 100 comments on the NPRM and have reviewed these comments carefully in the process of drafting a final rule. We hope to issue the new rule later this year.

## **B. Section 503**

Section 503 of the Rehab Act prohibits federal contractors and subcontractors from discriminating on the basis of disability and requires that they take affirmative action to recruit, employ, train, and promote qualified individuals with disabilities. However, a substantial disparity in the employment rate of individuals with disabilities continues to persist despite much progress. For example, new technology has made it possible to apply for and perform many jobs from remote locations, and has allowed individuals to read, write, and communicate in an abundance of alternative ways.

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5. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT SITUATION OF VETERANS—2011, 5 (2011), *available at* <http://www.bls.gov/news.release/pdf/vet.pdf>.

Still, the unemployment rate of people with disabilities is nearly one and a half times higher than that of people without disabilities. Most shockingly, nearly four out of five people with disabilities are outside of the labor force altogether and not even included in the unemployment rate calculation.<sup>6</sup> Given these factors and the fact that the Section 503 regulations have not been updated since the 1970s, it is time to update and strengthen Section 503 to improve employment opportunities for the nearly 33 million working-age Americans with disabilities who simply want their fair shot to find, compete for, secure, and succeed in good jobs.

We believe that change can and must be a collaborative process among policy makers, workers, employers, advocates, and the public at large. That is why OFCCP engaged in a robust process of public input for the past two years as we developed our proposed regulations. In July of 2010, we published an ANPRM asking for public input on a series of questions about how best to improve disability employment in the contracting workforce. In December of 2011, we published an NPRM and held an extended period of public comment to get feedback on our proposals. Along the way, we met with thousands of stakeholders in listening sessions, town hall meetings, webinars, and other public forums to get honest feedback about what will work and what will not. We received, read, reviewed, and considered 413 comments on our NPRM and are now in the process of producing a final rule, which we hope to publish by the end of this year.

Our proposed rulemaking on Section 503 would strengthen affirmative action requirements, obligating contractors to ensure equal employment opportunities for qualified workers with disabilities. The proposed changes detailed specific actions contractors must take in the areas of recruitment, training, record-keeping, and policy dissemination—similar to those that have long been required to promote workplace equality for women and minorities. In the NPRM we published in December 2011, we suggested that contractors be required to set an employment goal of 7% for workers with disabilities for each job group in their workforce. This goal is neither a quota nor a restrictive hiring ceiling. It is an aspiration, and a failure to attain the goal would not, by itself, constitute a violation of the law. The goal is meant to be a tool to help employers measure the effectiveness of their outreach, recruitment, and hiring. In addition to these changes, we proposed that contractors be required to invite applicants to voluntarily self-identify as individuals with a disability at the pre- and post-offer stages of the hiring process, as permitted under the regulations implementing the Americans With Disabilities Act.

The point of all of this is to start a shift in the way employers think about employing qualified individuals with disabilities. We realize that changing the culture of workplaces takes time. Goals, recordkeeping, data collection, and analysis are important tools that help catalyze such change. Just as laws and regulations around pregnancy discrimination, racial bias, and sexual harassment have led to important changes in workplace practices, there must also be a shift in how employers think about hiring people with disabilities. Our rulemaking on Section 503 is an historic step forward in getting employers to start looking beyond disability to ability.

### **C. Compensation Guidance**

In early 2011, OFCCP issued a Notice of Proposed Rescission (NPR) of two compensation guidance documents that were published by the agency in 2006. These included the “Interpretive Standards for Systemic Compensation Discrimination” (Standards) and the “Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246” (Voluntary Guidelines). Following this NPR, we are in the process of reviewing and improving our investigation protocols, and have a pending Notice of Rescission for these Standards and Voluntary Guidelines.

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6. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2010 SUMMARY (2010), available at <http://www.bls.gov/news.release/disabl.nr0.htm>.



Our NPR raised concerns that the framework of the Standards and Voluntary Guidelines was too restrictive and not consistent with Title VII of the Civil Rights Act. The Standards delineate a procedure to investigate and analyze systemic compensation that, we believe, goes beyond established law under Title VII of the Civil Rights Act. For example, the Standards require both anecdotal evidence of compensation discrimination and the use of multiple regression analyses to determine if wage differences between groups are, in fact, discriminatory. In order to offer anecdotal evidence, of course, employees need to be aware of pay discrimination. But as the well-known case of Lilly Ledbetter demonstrated, employees are often not aware of their co-workers' wages. In addition, the use of multiple regression analysis is not required by Title VII principles; other statistical or nonstatistical methods of analysis may be better suited for making determinations as to compensation discrimination, depending on the facts of the case. Because these Standards essentially undermine OFCCP's ability to vigorously investigate, identify, and combat compensation discrimination, OFCCP proposed to rescind them in January 2011. Upon rescission, OFCCP would reinstitute the practice of flexibly using the various available investigative approaches and tools for investigating compensation discrimination. No final determinations have been made and we are currently reviewing comments.

The 2006 Voluntary Guidelines set forth procedures that contractors can use to conduct self-analyses of their pay practices. They suggest that OFCCP would consider contractors to be in compliance if their self-evaluation "reasonably meets" the procedures in the Voluntary Guidelines. The contractors' compensation practices would then be evaluated during a compliance evaluation as described in the Voluntary Guidelines. Yet, the guidelines have not been widely used by federal contractors, nor have they been effective in terms of enforcement. The prescribed analytical model establishes numerical thresholds by which similarly situated employee groupings should be analyzed. The thresholds in this guidance can be problematic and very difficult for some contractors to meet. Consequently, we are concerned that the Voluntary Guidelines may not be an effective vehicle for providing guidance on compensation discrimination analysis, and they do not provide the necessary incentives for contractors to conduct such analyses. OFCCP is, therefore, proposing to rescind the Voluntary Guidelines. To be clear, the rescission of these guidelines does not remove the requirement for contractors to conduct self-evaluations of compensation practices.

## VI. Outreach

Along with our robust regulatory agenda and our increased enforcement efforts, we are committed to bolstering our engagement with workers and contractors through outreach and compliance assistance to effectively support the agency's goal of ensuring compliance with the law. Prior to our initiative to educate workers about their employment rights, OFCCP's stakeholder outreach primarily consisted of compliance and technical assistance to contractors. Our shift from contractor-centric to a more balanced approach that includes community-based outreach allows us to identify vulnerable worker populations and to educate, locate and ultimately remediate applicants and workers experiencing employment discrimination. Over the past two years, we have made important strides in identifying vulnerable populations who are most at risk of discrimination in the workplace. In addition, we have engaged Community-Based Organizations (CBOs) that serve these populations.

We leverage valuable relationships with key CBOs to support enforcement efforts throughout the lifecycle of OFCCP investigations. Utilizing past enforcement and statistical data to identify and target vulnerable populations facing the most significant employment inequities, OFCCP aligns itself with CBOs that serve these at-risk audiences. CBOs are entrenched in the communities, understand the needs and concerns of vulnerable populations, and can help raise awareness among targeted audiences about their employment rights and about OFCCP. As a result, CBOs are well-positioned to play a critical role in OFCCP's enforcement efforts by encouraging individuals to file complaints

with the agency, help gather invaluable anecdotal evidence to strengthen open cases, and assist us in locating affected class members so that they may partake in financial remedies when we reach settlements with employers. In FY 2011, OFCCP hosted more than 1,800 events where we engaged more than 61,000 stakeholders. At these events, we promoted OFCCP's mission to ensure equal employment opportunity in the federal contractor workplace and educated workers about their employment rights.

While we strive to protect the most vulnerable workers, we also provide technical compliance assistance to contractors. Compliance assistance events made up about one third of our outreach events in FY 2011 and provided contractors with the information and tools they need to meet their EEO obligations. Compliance assistance consists of easy-to-access, clear information on how to comply with federal laws and can include seminars, workshops, website information and phone helpdesk assistance. Finally, OFCCP organized numerous events to bring together employers and CBOs to form linkage agreements. Through these linkages, CBOs identified organizations and resources to help contractors meet their requirements to recruit, hire, and retain qualified women, minorities, people with disabilities, and protected veterans.

As we move forward with our outreach efforts, we will continually assess the effectiveness of our external engagement with workers, CBOs and contractors to enhance the delivery of our services and support the agency's enforcement programs. By aligning our outreach and education program with our compliance efforts, we will continue to advance our agency's mission to level the playing field for businesses that play by the rules and to ensure equal employment opportunity for all workers.

## V. Conclusion

OFCCP works to ensure all individuals have equal employment opportunity in the federal contractor workplace. To achieve this, OFCCP will continue to strengthen enforcement, reform our regulations, and strategically engage our stakeholders to ultimately increase compliance among federal contractors.

As President Obama said, "We can either settle for a country where a shrinking number of people do really well, while more Americans barely get by, or we can build a nation where everyone gets a fair shot, everyone does their fair share and everyone plays by the same rules." As it turns out, when the playing field is level and everyone is included, and when the rules are enforced and everyone is treated fairly, our economy is stronger, our workers are better protected, our businesses thrive and our nation is well-positioned to compete in the 21<sup>st</sup> century.

# Resisting Challenges to the Diversity Value Proposition

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*When the children of professionally successful and affluent African Americans choose to become lawyers, do they bring the same level of diversity to the legal profession as those whose parents have not had the same level of socioeconomic success? Russell considers what we actually value when we pursue diversity and the need for a more sophisticated approach to our diversity and inclusion efforts.*

## I. Introduction

For the past 35 years, legal organizations around the country have been hosting programs and writing articles on increasing “diversity in the legal profession.”<sup>1</sup> In doing so, they attempt to solve the puzzle: why aren’t law firms and corporate law departments more diverse?<sup>2</sup>

These programs and articles make two very basic and fundamental assumptions: first, a diverse group is likely to be a better problem solver than a homogeneous group, and second, increasing diversity is “the right thing to do.” It is also assumed that because “diversity is good for business,” it must necessarily follow that it is also good for law firms and the corporate law departments of their clients. This is the “diversity value proposition.”

The unfortunate reality is that many law firms and corporate law departments do not, in fact, fully agree with these assumptions. Accordingly, rather than simply starting with these assumptions and taking them as given, this article will examine them on a deeper level to better understand how the benefits of diversity can be measured and why diversity makes a difference. With these understandings, law firms and law departments can then more effectively consider how greater diversity can be achieved.

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1. Despite the numerous articles, conferences and pledges to make the legal profession more diverse, progress continues to move at a slow pace. Some might argue that the legal profession has changed for everyone—not just diverse associates and partners—and today it is difficult for anyone to develop a “book of business” and make partner. Indeed, economic factors, corporate consolidation and greater competition in certain practice areas have impacted hourly rates, and corporate law departments also use more contract attorneys and vendor services to reduce the amount that outside counsel will spend. See GENERAL COUNSEL ROUNDTABLE, FIVE FORCES THAT WILL CHANGE LEGAL 3 (2011).

2. Corporate law firms remain some of the least diverse places to work, and not much has changed over the years. Howard University Law School Professor J. Clay Smith provides an historical perspective in an article entitled, *Uncovering an American Legacy: The Making of the Black Lawyer 1844-1944*, SOUTHERN U. L. SCH., (1994). Professor Smith estimates that in 1960 there were only 2,004 black attorneys in the United States, compared to 202,407 white attorneys; in 1970, the numbers were 3,379 and 260,152, respectively. Forty years later, the January 2012 NALP Report shows only 6.56% (3,712) of this country’s 56,599 partners at 1,349 member firms are diverse: 1.71 % (967) are African American, 2.36% (1,335) are Asian American, and 1.92% (1,086) are Hispanic, and only .048% (271) are Hispanic women. In 2012, there are only 271 Hispanic women partners, even though there are 25 million Hispanic women in the US. The bright news is the pipeline of diverse law students and associates. NALP reports that there are 10,504 minority associates (19.9%) in its 1,349 member firms.



## II. The Quantification Problem

In the corporate world, a company can sometimes quantify the assumption that diversity is good for business by measuring, for example, the sale of consumer products using a plan developed by a diverse group versus one developed by a homogeneous group—the product now sells to a particular demographic or at a higher rate, when before it did not. The diverse team knew the market better than the homogenous team and used this knowledge in developing its brand and advertising strategy. This makes it easy to conceptualize and understand in the consumer context why a diverse group may generate better ideas than a homogeneous group.

What about in the law firm environment? Is a diverse group of attorneys working on a project more likely to lead to more creativity, more analysis of available options, better service, and, ultimately, a better business solution and more value for clients than a homogeneous group? Do diverse attorneys add value to the law firm simply because they are diverse? More importantly, are these unanswered questions the real barriers to increasing the number of diverse attorneys in law firms and corporate law departments?

One reason often cited by in-house counsel for not using diverse outside counsel goes to the heart of the diversity value proposition. It's not uncommon to hear in-house counsel say, "I don't quite understand how using an attorney who happens to be diverse adds value in a deal or litigation." "How does the attorney's diversity help when you are reviewing documents, drafting and negotiating a contract, preparing a memorandum or presenting your case to a jury, which is what attorneys really do?" Moreover, in-house counsel will say, "even if diversity makes some sense as a general principle, what about diverse attorneys who grew up in wealthy towns and attended elite schools—how diverse are they? What real value do they bring to the firm and to clients?"

It is difficult to prove from a quantitative perspective that having diversity in a law firm is good for the business of the law firm and also for the client in terms of the work product they receive from the firm. One possible measurement might be to establish that the firm is more profitable because clients who value diversity are hiring that firm over less diverse firms. However, research suggests that few clients actually tell law firms that they received or did not receive business based upon the diversity of their lawyers.<sup>3</sup>

Moreover, in assessing the reasons behind law firm profitability, there are many variables to consider, from billing rates to hours billed, to the type of work performed, to the role of a diverse attorney on a particular project. A 2009 article in the *Journal of the Legal Profession* found that the majority of the top 200 firms in the United States based on revenues are also the most diverse.<sup>4</sup> However, they could not establish with certainty the cause and effect—whether the firms were already profitable, had money to spend on diversity, and thus became diverse or more diverse; or generated more business because they were diverse, and thus became more profitable.

## III. Supporting the Diversity Value Proposition

Despite these barriers to easy assessment and measurement, it is important to take a step back and recognize the underlying value of—and reasoning behind—the diversity value proposition.

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3. See THE INSTITUTE FOR INCLUSION IN THE LEGAL PROFESSION, THE BUSINESS CASE FOR DIVERSITY: REALTY OR WISHFUL THINKING 10, (2011) (80% of law firms have never been told by a corporation that they received business, in whole or in part, because of the diversity of the lawyers in the firm or the firm's diversity efforts).

4. Douglas E. Brayley & Eric S. Nguyen, *Goal Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1 (2009).

One way to gain a deeper understanding of the diversity value proposition is to look at the challenges most frequently lodged against it.

- For instance, a skeptic will ask: “When and/or how does the diversity of an attorney come into play if attorneys spend most of their time reviewing documents, analyzing cases and statutes, drafting memoranda and briefs, and meeting with partners and clients?” “Client communications are often over the telephone or by email,” the skeptic continues, “and a client may not even know you are diverse until the issue comes up or you meet in person.”
- Another argument often made by those who do not believe there is a business case for diversity is that if the element of race or ethnicity is removed from the equation, some diverse attorneys have a similar skill set to that of white attorneys. Does diversity really create a better work product, better service and more value to clients when the task does not clearly appear to call for that minority attorney to use his or her “diversity skills”?
- Finally, skeptics will point out that many diverse lawyers, in fact, are not that diverse. Are minority attorneys who were raised in privileged surroundings and attended prestigious high schools, colleges and law schools still bringing diversity value to corporate law firms when their career paths appear to mirror (if not exceed) those of most white attorneys? For example, do African American attorneys from privileged backgrounds bring the same diversity to the workplace as African Americans of modest means raised in the inner city?

There are no simple answers to these questions. However, we must consider whether these unasked questions are real barriers to making the profession more diverse.

Diversity advocates must continue to support the diversity value proposition and address these types of questions head-on. Strictly speaking, diversity might not add value for an attorney drafting a contract warranty provision. However, if this attorney negotiates the provision with another attorney, diversity could be an advantage. For example, a Hispanic attorney negotiating a contract with another Hispanic attorney in a Spanish-speaking country, beyond simply sharing a language in common, would be better able to connect on a direct and cultural level than would a non-diverse attorney. The complex understanding of cultures and their interactions that the diverse attorney has developed, in contrast with many of his or her non-diverse peers, provides keen insight into how to connect and interact with other cultures—whether or not these are cultures with which the diverse attorney has prior experience.

What about the minority attorney who grew up in a privileged setting? Does she offer unique diversity skills? Should we assume that attorney does not bring diverse value to the group because she did not grow up in the inner city? Perhaps counter-intuitively, the African American attorney from a privileged community may actually add more value to the team. First, those raised by parents who grew up during the civil rights movement of the 1950s, 60s and 70s may have a deeper understanding and appreciation of the rule of law and the significance of their becoming attorneys. Although these attorneys may be from wealthy towns that are overwhelmingly white or may have attended elite universities, they are likely to be more aware of race and ethnicity issues because they see and feel them daily. To have gotten to this point, they must have developed effective ways of finding common ground with people of differing perspectives, in order to work well as part of a team and make others feel comfortable around them. They often develop unique people skills and the rare ability to connect with people across a wide spectrum of race, ethnicity and social class. An African American attorney who grew up in the inner city among African Americans may not develop her diversity skills to the same extent as an African-American attorney raised in a wealthy community.



African Americans growing up in privileged environments are acutely aware of their race because, in most cases, there were relatively few students, teachers and professors who looked like them.

In contrast, the white attorney raised in a wealthy town who attended elite schools may have never needed to develop social skills across racial, ethnic and class lines, and indeed may have a harder time presenting to and connecting with a diverse jury, negotiating opposite a diverse team on the other side of a transaction, or working with a diverse client.

For example, African Americans growing up in privileged environments are acutely aware of their race because, in most cases, there were relatively few students, teachers and professors who looked like them. In predominantly white high schools and colleges, African Americans are more likely to hear insensitive and inappropriate racial comments and be put in a position where they need to persuade others that they need to see an issue in a different way. There are constant reminders on television and in the media about how African Americans are different, and these reminders make no distinction as to whether a person is from a privileged background. There are presumptions, stereotypes and unconscious biases about African Americans, including attorneys, which they cannot escape no matter how they dress, act or speak. In the African American community, there is a familiar term “DWB,” which stands for “Driving While Black.” It is expected and unfortunately, almost a certainty, that, at one time or another, the police will pull over and question an African-American male, if he is driving an expensive car or walking in a privileged neighborhood.

Alternatively, diverse attorneys from the inner city without elite backgrounds also offer an important perspective. They must overcome numerous obstacles and biases to make it to a major corporate law firm, and along the way these attorneys learn how to self-motivate, how to accept criticism, and how to stay focused despite concerns that they lack the type of background and experience that lends itself to working in these firms. They also understand more than most what it is like to work hard for everything they achieve. They have experienced all the good and the bad that the inner city has to offer—including high rates of poverty and crime. With these experiences, inner-city attorneys develop the ability to conceptualize the challenges of the less fortunate and thus have unique insight into many legal issues, such as commercial and residential real estate projects and environmental matters.

In general, most African Americans can recall a situation in which their white colleagues felt the need to describe them as being “articulate” —something more likely to be assumed about an educated white colleague. In every facet of their lives, from attempting to hail a taxicab to walking into an expensive store, African Americans are often made aware that they are different. This means that African Americans must continue to refine their social skills to remain competitive in non-diverse

environments such as law firms. They bring these experiences and skills to the law firm, which add value to the team.

The bottom line: minority attorneys—whether raised in wealthy communities or in the inner cities—provide value to law firms because of their unique life experiences.

#### IV. Helping Diverse Attorneys Succeed

Given the inherent value of these unique points of view, it is important that law firms and corporate law departments take effective action to promote diversity. To increase the number of diverse attorneys in law firms and ensure that they have opportunities to succeed and to provide value to clients, diverse attorneys need support from their law firms and clients.

General Counsel are able to play a key role in setting the tone, expectations and goals of their corporate law departments as they relate to the hiring and use of diverse outside counsel. Since the general counsel often directs in-house counsel staff to carry out the company's diversity mandate, in-house counsel themselves must also be on board and supportive of the company's initiative. In-house counsel frequently control the selection of outside counsel and how matters are staffed, ultimately making the difference as to whether diverse associates become partners, and whether diverse partners succeed.

Yet, the unfortunate reality is that many in-house counsel are reluctant to move valuable business away from close friends or long-time advisors to diverse attorneys in law firms for the purpose of promoting diversity in the profession. This resistance—which must be acknowledged before real progress can be made—makes it more difficult for diverse attorneys to succeed in law firms and to provide value to corporate clients.

When diverse attorneys are asked to identify the barriers to becoming partner in their law firms, they most frequently cite the inability to build a sustainable “book of business.” It is common to hear minority attorneys recount one or more of the following:

- “The general counsel says he supports diversity, but the in-house counsel in charge of my area of expertise told me he already has well-established relationships;”
- “They said thanks for your presentation and promised to look for the *right matter* to send my way, but it has never happened;”



To increase the number of diverse attorneys  
in law firms and ensure that they have  
opportunities to succeed and to provide  
value to clients, diverse attorneys need  
support from their law firms and clients.



So does diversity add value when an attorney is reviewing documents and drafting provisions of a contract and working with counsel? The short and clear answer is “yes.”

- “We would like to use you, but you have not handled this exact type of case before;” and
- “I can’t take the risk of using you and your firm because if something goes wrong, they will question my judgment.”

It is understandable that companies will want to use outside counsel with whom they have extensive prior experience on “bet the company” cases. However, it is important for someone who supports diversity to create opportunities to broaden his or her list of “go to” firms on other types of work. By limiting work allocation to existing relationships, corporate law departments lose out on the opportunity to tap into law firms’ diverse talent, which would allow them have more diverse teams available to provide creative solutions to their problems. They also miss a significant opportunity to develop a talent pool of diverse attorneys to consider for future in-house positions. In-house counsel should consider the idea of giving diverse counsel “test drives,” and allowing them the opportunity to earn the work, including potential “bet the company” work, going forward.

## V. The Million-Dollar Question

So does diversity add value when an attorney is reviewing documents and drafting provisions of a contract and working with counsel? The short and clear answer is “yes.” Without question, diversity experiences come into play when processing information and offering advice. It’s also important not to dismiss the diversity value of minorities who have had the benefit of more privileged backgrounds—this effectively penalizes the offspring of those who, despite racism, discrimination and prejudice, have managed to succeed in a very competitive world.

Attorneys responsible for increasing diversity in law firms and corporate law departments should embrace the diversity value proposition. When confronted with doubts, they need to address them honestly and cordially, not use concerns as an excuse to maintain the status quo. Since corporate law departments regularly look for well-trained diverse talent in law firms to hire as in-house counsel, both sides must work together on these issues. Instead of looking for more reasons not to use diverse counsel, in-house counsel should look for more reasons to interview diverse lawyers and to engage them.

It’s true that the answers to these questions are not easy or obvious. While it may not be possible to prove with absolute certainty that diverse attorneys provide additional value to a client team, it should be readily conceded that different life experiences by reason of one’s race, ethnicity, social class or sexual orientation affect how one sees the world, how one reacts to challenges, and the advice one may give. As the world becomes increasingly diverse, finding more ways to collaborate and increase diversity will bring value to the legal profession.

# Rhetoric or Rule?: Race-Blindness in French and American Antidiscrimination Law\*

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*The U.S. Supreme Court is considering a challenge to race-conscious affirmative action in Fisher v. Texas. Over the last forty years, race-conscious policies have coexisted with our ideal of colorblindness to promote the American vision of racial equality. Meanwhile, across the Atlantic, race-conscious action is considered so contrary to the French principle of colorblindness that the state cannot even collect or use racial or ethnic statistics. This more extreme form of colorblindness significantly hampers the struggle to remedy the inequalities faced by blacks and North Africans in France. How did two countries that embrace ostensibly similar ideals of equal protection of the laws develop these different manifestations of race-blindness? Might the comparison illuminate the future of race-conscious action in the United States?*

## I. Introduction

In November 2005, French cities burned at the hands of youths, many of North and sub-Saharan African descent. The rioters were reacting to the persistence of employment discrimination against people of North African origin.<sup>1</sup> American observers compared the riots in France to the race riots in American cities in the past. One *Washington Post* columnist wrote, “French analysts have been warning for decades about the dangers of warehousing African and Arab immigrants in the suburbs....”<sup>2</sup> Other commentators suggested that France’s refusal to adopt race-conscious affirmative action policies was exacerbating its race problem.

Yet, it is highly unlikely that the French will embrace race-conscious affirmative action any time soon, just as it is highly unlikely that Americans will ever throw a person in jail for questioning whether the Holocaust happened. Anti-Semitism and genocide in France, and the slavery and segregation of African Americans in the U.S., have given rise to two very different antidiscrimination regimes.

By engaging the historical explanations for this difference, the American lawyer and scholar can reach a deeper understanding of American antidiscrimination law. Close comparison of the French and American principles of race-blindness reveals that American antidiscrimination law is more concerned with prohibiting practices perpetuating racial hierarchies or group-based subordination (an “antisubordination” approach) than it is with the protection of every individual’s right to be judged on their merits (an “anticlassification” approach). Compared with that of France, America’s antidiscrimination law adheres more closely to this “antisubordination” principle than to any literal or long-term vision of a truly colorblind society.

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The riots began as a direct response to the death of two North African adolescents who were electrocuted while they were hiding from police, fearing harassment.

1. David Ignatius, *Why France Is Burning*, WASH. POST Nov. 9, 2005, at A31.



This article compares the historical development of antidiscrimination norms in France and the U.S. It also explores certain features of contemporary French antidiscrimination law that are striking to American eyes: the predominance of criminal, rather than civil, regulation of non-violent discriminatory conduct; as well as the extensive regulation of racist speech. Other, more subtle differences include France's rigid ban on racial distinctions, and its tendency to universalize and add seemingly infinite new protected categories to employment discrimination law. The purpose of the comparisons is not to determine whether one country should copy the other. Rather, it is to ask questions that might not otherwise be asked.

## II. French Antidiscrimination Law

In France, non-discrimination is, first and foremost, a constitutional principle. The first article of the Declaration of Rights of Man in 1789 defined equality as the absence of arbitrary social distinctions: "Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good." In doing away with the inequalities of the pre-Revolutionary system of hereditary nobility, the Declaration explained, "All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents." Thus, equality in France has had, for over 200 years, a close nexus to the principle of individual merit.

The current constitution also enshrines the French Revolution's republican concept of sovereignty. This conception echoes Rousseau's theory in *The Social Contract*. On this account, sovereignty is indivisible. The French Revolution created a "nation one and indivisible," partly in reaction to a past in which France was a patchwork of many jurisdictions and territories. Thus, the 1958 constitution explicitly bans racial and other group distinctions. It assures equality before the law of all citizens "without distinction of origin, race, or religion." To say that the republic is indivisible is to prohibit any differentiation between citizens.

In addition to these constitutional guarantees of equality and non-discrimination, statutory prohibitions of discrimination are found in both the Penal Code and Labor Code. The Penal Code prohibits discrimination, defined as "any distinction operated between physical persons," not only on the basis of race or religion, but also on the basis of "sex, pregnancy, family situation, physical appearance, family name, state of health, handicap, genetic characteristics, sexual orientation, age, political opinions, union activities, membership or non-membership, real or supposed, in an ethnicity, nation, race, or religion." In other words, the ban on racial discrimination has been universalized to prohibit discrimination based on a whole range of other characteristics.

Additionally, a 1990 law prohibits the denial of the existence of crimes against humanity as defined by the 1945 Treaty of London. The 1990 law, known as the Gayssot law, explicitly prohibits denial of the Holocaust, as expressed orally in public places, in writing, print, drawings, inscriptions, paintings, emblems, images, or any other speech or image sold or distributed or put on display. The legislative debates leading up to the adoption of the Gayssot law reflected the conviction by legislators that denial of the Holocaust was a contemporary manifestation of anti-Semitism. Those who denied the existence of the Holocaust did so, it was believed, to awaken the racist belief that Jews had lied about their oppression in order to gain sympathy and advantage.

The French Labor Code includes civil remedies for employment discrimination. A 1982 labor law banned discrimination in matters of hiring, firing, disciplining, training, and promotion, on the basis of origin, race, sex, family situation, political opinions, union activities, or religious convictions. A 2001 law modified the Labor Code's antidiscrimination provision by adding a prohibition of "indirect discrimination."



Despite these labor laws, however, employment discrimination remains largely a matter of criminal law in France. One explanation for this is that French civil procedure, as contrasted with criminal procedure, makes proof of discrimination extremely difficult.<sup>3</sup> Thus, for the most part, the Labor Code's discrimination provision is simply considered one of many protections for employees against various forms of arbitrary treatment by employers.

### III. Vichy Memories

The histories of the major French statutes against racism and discrimination reveal the centrality of the memory of Vichy<sup>4</sup> to the law's definition of race discrimination. French race-blindness reflects a synthesis of the republican ideal of the French Revolution with the post-World War II rejection of Vichy's "race" laws. The Vichy regime explicitly categorized persons on the basis of race. One 1940 law on the "status of Jews" defined a Jew in explicitly racial terms, as a person who had three grandparents of "the Jewish race" or "two grandparents of the same race, if his or her spouse is Jewish." The Vichy regime's official discrimination against Jews on the basis of their race culminated in the deportation and murder of Jews in concentration camps. The memory of Vichy has made racial distinctions far more odious than other forms of social distinctions in the French legal perspective.

Today, the main legal framework for combating racial discrimination is a set of provisions in the Penal Code that were adopted in 1972 and built on an existing legal framework designed to combat anti-Semitism.<sup>5</sup> The French legislature adopted the 1972 law against discrimination—the first law explicitly prohibiting racial discrimination as such—at the height of France's preoccupation with its collective responsibility for the anti-Semitic acts of the Vichy regime. Even though the legislators did not view the statute as being limited to, or even primarily addressed at, the anti-Semitism that had culminated in Vichy's worst crimes, it is clear that the memory of Vichy shaped both the legal framework and the understandings of the functions of antidiscrimination law. The legislative debates invoked the Nazi and Vichy past, not only to condemn that past, but also to note the dangers of not acknowledging French responsibility for racism.

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3. In France, plaintiffs have the burden of proving the facts that constitute discrimination. Documentary evidence is often in the hands of the employer, yet compelling discovery in civil proceedings in France is rare. This is despite a 2001 amendment of the labor law that eased the burden of proof for plaintiffs in employment discrimination cases.

4. Vichy France was established after France surrendered to Germany in June of 1940. It took its name from the government's administrative centre of Vichy, in central France.

5. The Marchandreau decree specifically banned racial defamation under threat of criminal punishment. The law came back into effect when the Vichy regime was defeated in 1946. That the Marchandreau law served as the model for subsequent discrimination law in France is not surprising, particularly in light of the extent to which the memory of Vichy and the Holocaust were debated in France in the early 1970s. Prior to the late 1960s, the popular understanding of Vichy was that, on the whole, France had been a nation of resisters, not collaborators. Only in the 1970s did French collective responsibility for Vichy begin to be publicly discussed. To a large extent, the impetus for these discussions was the popular 1971 documentary *The Sorrow and the Pity*. Through interviews and archival footage, the documentary showed that, prior to November 1942, the German occupation had little influence on the Vichy regime. Shortly after the release of *The Sorrow and the Pity*, another Vichy-related controversy erupted. On November 23, 1971, Georges Pompidou, the President of France, granted a pardon to a former official of the Vichy regime, Paul Touvier. News of the pardon broke only two days before the National Assembly began its parliamentary debates on the racial discrimination statute. A widely circulated newsmagazine published a detailed account of Touvier's Vichy career, including his pillaging of various apartments belonging to Jews. It was extremely critical of Pompidou's pardon. Days before the Senate began its deliberations on the bill, 1,500 demonstrators gathered at the Monument of the Deported in Paris to protest the Touvier pardon.



## French race-blindness reflects a synthesis of the republican ideal of the French Revolution with the post-World War II rejection of Vichy's "race" laws.

The extent to which the anti-Semitic past has shaped French laws against racism and discrimination is also evident in the modification of the laws passed in 1972. In 1990, the legislature adopted a law "tending to repress every racist, anti-Semitic, or xenophobic act." This revision explicitly prohibits the denial of the Holocaust. As with the 1972 law, the 1990 law was adopted during a time at which the nation was debating its collective memory of Vichy.<sup>6</sup>

### IV. The Persistent Unemployment and Exclusion of North Africans

To say that the reaction against anti-Semitism and Vichy shaped the French understanding of "race" in its anti-racism laws is not to suggest that anti-Semitism is the only form of racism that has existed in French history. Indeed, prior to the French Revolution, there was race-based slavery in the French Caribbean colonies, regulated by a legal regime known as the Code Noir, or Black Code. Black slavery was abolished during the French Revolution, though later reintroduced by Napoleon. Slavery was not abolished universally until the Revolution of 1848. Yet French laws against racism and discrimination are more explicitly concerned with the memory of Vichy than with the memory of colonialism. As the 2005 riots confirm, French blacks and North Africans, many descended from former colonial subjects, complain of persistent racial discrimination and alienation from mainstream French society.

In France, despite the existence of civil remedies for discriminatory conduct under the Labor Code, as a practical matter, most forms of racism, including discrimination, are addressed through criminal law. But criminal enforcement has done little to root out the discriminatory employment practices that exclude North Africans. This is unfortunate, since the 1972 anti-racism law aspired to address all these manifestations of racism—the salience of Vichy memories notwithstanding.

In the legislative debates on the bill, members of Parliament described the problems to which the law was attempting to respond. The first examples of racism invoked in the opening of the National Assembly's debates on the bill were the disadvantages faced by North African immigrants—not anti-Semitic propaganda. Yet, the legal framework that was ultimately adopted was better suited to fighting anti-Semitic propaganda than to remedying the widespread disadvantages faced by immigrants. The 1972 statute attempted to accomplish all these tasks, reaching beyond anti-Semitism

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6. A series of highly publicized genocide trials began in France in the late 1980s. First, Klaus Barbie, the Gestapo official of Lyon, was tried in 1987. By 1990, Paul Touvier had also been arrested, and charges were being brought against him for crimes against humanity. A week after the debates on the 1990 law began in the National Assembly, the Jewish Cemetery at Carpentras was desecrated. A massive rally, attended by President Mitterand, followed a few days later.



## French laws against racism and discrimination are more explicitly concerned with the memory of Vichy than with the memory of colonialism.

and racist speech. For the first time ever, it introduced a law that prohibited “racial discrimination” by both public authorities and private individuals. “Discrimination” included the state’s denial of a right or benefit, and a private person’s refusal of a benefit or service, refusal to hire, or termination of employment, on the basis of the victim’s origin, membership, or non-membership in a particular ethnicity, nation, race, or religion.

At the time that racial employment discrimination was prohibited for the first time, however, the only existing law against racism, adopted to condemn anti-Semitic expression, was a criminal provision. But there are significant differences between racist speech (of the variety that affected Jews before Vichy) and racial discrimination in employment or provision of goods and services, which mostly affects blacks and North Africans. These differences render criminal law ineffective at addressing the latter harms.

When the statute was passed, there was little discussion in the parliamentary debates as to how the *intention* of the discriminator would be detected and punished.<sup>7</sup> The racist intention of an actor is far more apparent in a speech than it is in the kinds of discrimination the 1972 statute sought to curtail: discriminatory denial of a good, service, or employment. For those kinds of discrimination, the intent is not apparent without direct evidence, such as racist comments by the alleged discriminator. This is significant because criminal intent is a necessary element of a criminal offense, as articulated by the general provisions of the French Penal Code. As a result, the difficulties of proving intent to discriminate make criminal convictions rare. Although the Labor Code also creates a civil cause of action for employment discrimination, the lack of adversarial party-led discovery has posed additional barriers to proving discrimination in civil proceedings, even when intent to discriminate is not necessary.

Thus, racial disparities in employment have persisted since the 1972 law was adopted. The unemployment rate for immigrants of North African origin has steadily increased over the last 30 years. Young North African men comprised 9–15 percent of all unemployed persons in 1975, yet in 1982, they constituted 19–38 percent of all unemployed persons, and in 1990, 34–45 percent of all unemployed persons. This constitutes a disproportionate representation of people of North African descent among the unemployed: they make up less than ten percent of France’s population.

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7. Additionally, legislatures seem not to have considered how criminalization would alleviate the problems of immigrant poverty and lack of integration. The approach does not allow for remedies, such as compensation, which go beyond the punishment of perpetrators.

## V. Comparing French and American Law

At first glance, the French commitment to race-blindness appears to be similar to that under U.S. law. After all, the U.S. Supreme Court has repeatedly articulated race-blindness as an ideal embodied in the Equal Protection Clause. But one small difference has enormous consequences: French law leaves no room for the possibility of justifying racial distinctions to remedy past harms or to promote diversity, as U.S. law does. Indeed, the American ideal of race-blindness has, for the past 40-odd years, coexisted with its most important exception: race-conscious affirmative action. The significance of this exception is overwhelming when we consider it alongside the French antidiscrimination regime that has strictly rejected this exception.

First, although there are debates today about “affirmative action” in France, all “affirmative action” proposals are based on class or geography, not race. An important barrier is the French statute on data collection, which explicitly prohibits the storage of statistical data that distinguishes people on the basis of race. The data collection law poses a major obstacle to the use of statistics to fashion public policy to promote racial equality. This law prohibits the mention in computerized and other databases of certain descriptors. These include racial origins, political, philosophical, or religious opinions, and membership in associations and groups.

In contrast, the American government regularly collects data about the percentages of blacks and other races represented in a variety of public and private contexts. For example, the census asks persons to self-identify as a member of a racial group, and generates information about the racial composition of various income groups. Furthermore, the Equal Employment Opportunity Commission collects data about the percentages of minority groups employed by every employer to whom Title VII applies, as well as federal contractors. Detecting patterns of racial inequality is a necessary predicate to the creation of remedies or policies aiming to eradicate racial inequality.



French antidiscrimination law tends to be universalistic in scope, especially in matters of employee protection. The law protects a wider range of persons than U.S. antidiscrimination law, and the list is ever-expanding. U.S. antidiscrimination law reaches only a few select protected categories like race, color, religion, national origin, sex, age, and disability.



## The persistence of civil, rather than criminal, liability has helped create the enduring assumption in U.S. antidiscrimination law that discrimination involves a concrete injury.

A second difference between U.S. and French antidiscrimination law is found in the two systems' willingness to expand the scope of protected categories. French antidiscrimination law tends to be universalistic in scope, especially in matters of employee protection. The law protects a wider range of persons than U.S. antidiscrimination law, and the list is ever-expanding. U.S. antidiscrimination law reaches only a few select protected categories like race, color, religion, national origin, sex, age, and disability. U.S. courts are very cautious about expanding antidiscrimination law to protect individuals from arbitrary treatment based on characteristics that are not sufficiently related to membership in historically subordinated social groups. By contrast, French antidiscrimination law protects against discrimination on the basis of race, sex, origin, and disability, as well as sexual orientation, family situation, supposed (in addition to real) membership in an ethnicity, nation, race, or religion, political opinions, union activities, religious convictions, physical appearance, and family name. Race, sex, religion, and disability are indistinguishable in the republican framework from beauty, obesity, and other individual traits.

What explains the universalizing tendency of French antidiscrimination law to add new protected categories? The antidiscrimination provision of the Labor Code reflects the understanding that what's really wrong with employment discrimination is not the harms it occasions on racial or ethnic subgroups, but the harm it does to the right of every individual to be free from arbitrary adverse treatment in the workplace. According to this perspective, race is not the only arbitrary basis for employment decisions, nor is it the worst. It is equally wrong, then, to fire or discipline an employee on the basis of other arbitrary characteristics, such as physical appearance, family name, age, and so forth. This universalistic approach to the rights of individuals as citizens, as we shall see, is wholly missing from American antidiscrimination law.

### VI. Interrogating American Equality

The French contrast raises questions about features of U.S. antidiscrimination law that may, in the absence of comparison, seem unremarkable. Why does U.S. antidiscrimination law impose civil, rather than criminal, liability? Why does it focus on the material disadvantages caused by racist acts rather than the symbolic harms of racist speech? Just as France's legal commitment to race-blindness is explicitly a reaction against Vichy, America's commitment to race-blindness is explicitly a reaction to White Supremacy, slavery, and segregation. Like French race-blindness, American race-blindness arose to overcome a previous, corrupt legal order. But the racist practices of these previous legal orders were different, so the utopian visions that replaced these dystopias were also different.

From the start, the Supreme Court emphasized the centrality of slavery's legacy to American antidiscrimination law. In the *Slaughter-House Cases*,<sup>8</sup> the very first equal protection case to be examined, the Court held that the equal protection guarantee was intended to invalidate the "[l]aws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." It offered additional "constitutional protection to the unfortunate race who had suffered so much."<sup>9</sup>

Thirteenth and Fourteenth Amendment cases following *Slaughter-House* continued to emphasize the memory of American slavery. The Court also began to invalidate federal legislation as beyond the scope of federal power under Section Five of the Fourteenth Amendment. For example, the *Civil Rights Cases*<sup>10</sup> invalidated Congressional legislation prohibiting private discrimination under threat of criminal punishment. Pointing out that "[t]he long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents," the Court concluded that being denied admission to an inn on racial grounds had "nothing to do with slavery or involuntary servitude."<sup>11</sup> The court subsequently invalidated all criminal provisions punishing private acts of discrimination. The basis for all of these invalidations was the same: Congress could not legislate beyond the purpose and scope of the Civil War Amendments, which was to eradicate slavery and the related inequality of civil and political rights before the state. With these cases, the Court began to conceive of discrimination by non-state actors as private civil wrongs.

The persistence of civil, rather than criminal, liability has helped create the enduring assumption in U.S. antidiscrimination law that discrimination involves a concrete injury. In contrast to the French criminal liability regime, the private cause of action conceptualizes the harm of discrimination as something that is primarily an injury to particular plaintiffs, rather than as a more diffuse injury that harms the entire republic and is worthy of public, rather than private, prosecution. As a result, the American concept of discrimination has always included tangible harm—often in the form of concrete disadvantages or exclusions from civil and political rights—as an essential element of discrimination.

When Congress passed the Civil Rights Act of 1964, prohibiting discrimination in public accommodations, it had to overcome the Supreme Court's holding in the *Civil Rights Cases* that the Fourteenth Amendment had not authorized federal regulation of private discrimination. It did so by emphasizing the concrete, economic harms sustained by blacks that had an impact on the national commerce. The famous footnote eleven in *Brown v. Board of Education* also emphasized that segregation's harm to children's ability to learn was an important element in the Court's finding that segregation was inherently unequal and violative of equal protection.<sup>12</sup> In other words, material harm is central to the way in which American antidiscrimination law defines discrimination.

## VII. Applying Race-Blind Principles

France's literal conception of race-blindness with regard to Jews after World War II seems more plausible than it does with regard to African Americans in the U.S. at any historical moment. Many Jews are not apparently distinguishable from other Frenchmen through visible appearance or geographical segregation. Without data about the ancestral roots of a person, one could not confidently know who

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8. 83 U.S. 36 (1872).

9. *Id.* at 70.

10. 109 U.S. 3 (1882).

11. *Id.* at 22, 24.

12. 347 U.S. 483, 495 n.11 (1954).



was Jewish or not. To strive for this *literal* race-blindness—the inability to see race—seems to be a plausible goal under such circumstances. The utopian vision connected to literal race-blindness is one in which every person is, first and foremost, an individual French citizen, judged only on the basis of individual abilities, virtues and talents, and a participant in “one nation, indivisible.”

The challenge for French race-blindness, so understood, is that the groups that are most often subject to discrimination in France today, blacks and North Africans, can be and often are crudely identified by their darker skin tones and by family name. These groups are increasingly referred to as “visible minorities.” And arguably, it is the “visibility” of these minorities, as well as their economic and social disadvantages, that make these groups different and more difficult to help through the existing post-Vichy antidiscrimination regime.

Rather than practicing affirmative action on the basis of race, however, French institutions have begun to adopt affirmative action policies based on socioeconomic circumstances. After the November 2005 riots in impoverished urban areas, the French legislature went to work immediately on a bill on “equality of opportunity.” Because of the strict ban on recognizing any person’s race or origin, French policymakers had to craft universalistic, race-blind solutions to the patterns of disadvantage that affected North African immigrants and citizens of North African descent. Opportunities are not tied to race or origin, but to geographical zones classified by socioeconomic indicators.

Like France, the U.S. developed the race-blind ideal in reaction to a historically specific experience in which one group was subordinated at the hands of the state, aided by the state’s use of racial classifications. But Americans have never aspired to literal race-blindness as the French have. Instead, what has emerged is the notion that an individual, whether he belongs to the privileged race or disadvantaged race, is injured by racial distinctions because the distinction fails to respect a “personal right” to be treated with “equal dignity and respect.” Invoking a notion of individual merit in *Gratz v. Bollinger*,<sup>13</sup> the Supreme Court held that the University of Michigan’s undergraduate admissions policy violated equal protection because its design fell short of giving individualized consideration to each applicant, suggesting that some form of individualized consideration is required by equal protection. This is probably why so many American scholars describe our law as having rejected the antistatutory principle in favor of the anticlassification principle.

But the French contrast forces us to confront the resistance of U.S. antidiscrimination law to expansion, particularly expansion in ways that would better realize the principle that individuals should be judged *only* on the basis of individual traits like ability and talent. As compared to French antidiscrimination law, which protects individuals from discrimination on individual traits like physical appearance, U.S. antidiscrimination law tends to limit the protection from discrimination to traits associated with membership in social groups like races, ethnicities, religions, and genders. Consistent with the republican notion of equal citizenship, French antidiscrimination law is expanding to pursue the ideal that individuals should not be treated arbitrarily, or judged on the basis of anything other than merit. But U.S. equal protection law has never fully embraced a similar commitment to individual merit. Instead, U.S. law tends to limit antidiscrimination law to problems that look like, or are analogous to, the historic problems of race-based slavery and segregation, emphasizing the historic harm to groups rather than individuals.

In that sense, U.S. antidiscrimination law has focused on protecting individuals on the basis of their membership in groups that are subject to discrimination. The Supreme Court’s early emphasis on the history of black slavery and segregation has limited the ways in which equal protection has expanded. The Court remains skeptical of applying heightened scrutiny to other characteristics. For example, in 1976, the Court rejected heightened scrutiny for alleged age discrimination, noting that

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13. 539 U.S. 244 (2003).



“[the aged], unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a ‘history of purposeful unequal treatment.’”<sup>14</sup> And, in *City of Cleburne v. Cleburne*, the Court declined to extend heightened scrutiny to the mentally retarded, in part because “if the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others.”<sup>15</sup> Notwithstanding the fact that the aged and the disabled are protected from employment discrimination by statutory law—the Age Discrimination in Employment Act and the Americans with Disabilities Act—the Supreme Court’s reasoning about denying these categories heightened scrutiny in the equal protection context reveals the importance of the history of group-based discrimination in justifying constitutional protection.

## VIII. Conclusion

Compared to French antidiscrimination law, it is clear that U.S. antidiscrimination law is more concerned with groups than individuals. U.S. courts have been unwilling to protect people from discrimination based on immutable characteristics unless those characteristics have led to group discrimination. It seems that eradicating group inequality is more central to U.S. antidiscrimination law than the Supreme Court’s rhetoric of race-blindness would suggest. If American antidiscrimination law were really moving towards an anticlassification approach, antidiscrimination law in the U.S. would—as in France—expand to include more traits. Viewed in comparison with the French approach, it becomes easier to regard the language of race-blindness in U.S. antidiscrimination law as rhetoric rather than rule.

14. Mass. Bd. Of Retirement v. Murgia, 427 U.S. 207, 313 (1976).

15. 473 U.S. 432, 445 (1985).

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# IILP Review 2012: Gender Diversity and Inclusion Issues in the Legal Profession

# Gender and the Billable Hour

Nicole Nehama Auerbach

Founding Member, Valorem Law Group

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*Just because something has been done a certain way for a long time doesn't mean it is the best or the only way to do it. Consider the billable hour. Auerbach examines the impact that the billable hour as a basis for compensation has on women lawyers and their career progression and offers strategies combat the negative impact the billable hour can have on women lawyers.*

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For as long as I have been a lawyer—since 1993, if anyone is counting—the percentage of women graduating from law school has hovered right around the fifty percent mark. In fact, the year that I graduated was also the year with the highest percentage of women enrolled in law school—50.4%.<sup>1</sup> Although there has been an increase in the number of women partners in law firms since that time—13.4% in 1995 compared to 19.5% in 2011<sup>2</sup>—given that snail's pace of change, a 2012 Catalyst report on “Women in Law in the U.S.” estimated that it will take more than a woman lawyer's entire lifetime, if born in 2010, to achieve equality in the partnership ranks in law firms.

Academics and lawyers alike have grappled for years with the causes of the proverbial “leak in the pipeline” given the ample supply of women graduating law school and entering the ranks of lawyers in law firms. To this day, there is no consensus about why women are not achieving equality in partnership status, or, commensurately, in pay. Still, the search for the illusive “cause” continues.

A myriad of explanations, such as the existence of explicit or implicit bias—for example, that there are differences in the way women were raised or have learned to generate business—have all been explored, *ad nauseum*. However, a contributing factor of another kind—the role of the billable hour—has largely been overlooked. This may be because the billable hour is so inextricably intertwined with the law firm model and has been since long before women began achieving parity in terms of the total number graduating from law school. Whatever the reason, the billable hour cannot be ignored as one of if not *the* likely culprit contributing to the stagnant advancement of women in law firms today.

**Disclaimer:** This is probably the appropriate time for full disclosure. In 2008, I left my partner position in a large Chicago law firm to co-found a new firm designed to “kill the billable hour” by offering litigation representation using alternative fee arrangements. Admittedly, my obsession with the billable hour—or, put more accurately, with its demise—can be characterized as a strong bias. With that disclaimer out of the way, let me explain the basis for my belief that the billable hour model materially inhibits the advancement of women.

Under the traditional law firm model, a lawyer's value is measured by two tangible things: (1) hours billed; and (2) revenue generated by bringing in new business. Statistics show that, in general,

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1. AMERICAN BAR ASSOCIATION, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1947—2010 (2010), *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/1947\\_2010\\_enrollment\\_by\\_gender.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/1947_2010_enrollment_by_gender.authcheckdam.pdf).

2. Due to the antiquated manner in which law firms report their partnership numbers, this “total number of partners” does not even paint the full picture, as the number of equity partners within the “grand total” are purposely hidden instead of broken out separately.



It follows that as external demands on women increase, the ability to meet billable hour demands becomes that much more unattainable.

women do not generate as much business in law firms as men.<sup>3</sup> In fact, the disproportion is staggering.<sup>4</sup> This means that most women must make their mark via the other method of measurement—by the number of hours billed per year. We all know that the number of hours available in any given day, week, or year is finite. The more things that require attention during those limited number of hours—for example, raising a family, caring for aged parents, sleeping, etc. . . .—the fewer hours available for billing. The fewer hours devoted to billing, the less valuable that lawyer is to the firm.

Despite great strides in the amount of time men devote to raising a family today compared to twenty or thirty years ago, women still bear the brunt of the responsibility for raising children and running a household—even women who work full time.<sup>5</sup> Needing to care for elderly parents and children at the same time has also become more prevalent; hence the moniker, “the sandwich generation.”<sup>6</sup> It follows that as external demands on women increase, the ability to meet billable hour demands becomes that much more unattainable. With both of the measures of value either unattainable or unsustainable, it is no wonder that women often settle for part-time or “contract lawyer” positions or drop out of firm life entirely.<sup>7</sup> For women coming “up in the ranks,” seeing a dearth of women lawyers in the partnership ranks, particularly at the equity level, reaffirms the message that it simply cannot be done.

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3. Almost half of large firms count no women at all among their top ten rainmakers. In 2011, a National Association of Women Lawyers (NAWL) Survey found that women partners constituted only sixteen percent of those partners who received credit for at least \$500,000 in business generation. See NAWL, REPORT OF THE SIXTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS (2011), available at <http://www.scribd.com/doc/72250477/NAWL-2011-Annual-Survey-Report-FINAL-Publication-Ready-11-9-11>.

4. The disparity in the generation of business is a topic worthy of discussion, but not the one I focus on today.

5. Kathy Wetters, *Work-Life Balance-Men share responsibility of raising children and caring for elderly parents*, RIGHTATHOME.NET, <http://www.rightathome.net/chiswsuburbs/blog/workplace-policies-fail-to-acknowledge-that-men-share-the-responsibility-of-raising-children-and-caring-for-elderly-parents/> (Oct. 31, 2010) (last visited Aug. 13, 2012) (as of 2010, childcare responsibilities were split two-thirds to women, one-third to men; adult daughters provide two-thirds of unpaid care for elderly parents; adult sons provide about one-third). See also ARLIE HOCHSCHILD, *THE SECOND SHIFT* (1989) (arguing that motherhood is a second shift of work at home, and inhibits women’s ability to succeed in the workforce).

6. *Id.*

7. See NAWL Report, *supra* note 3 (women represent fifty-five percent of all staff attorneys and thirty-four percent of the “of counsel” positions in law firms).

Ironically, even the natural by-products of mastering the juggling act of working while raising a family do not seem to help under the billable hour model. For example, being more efficient or more nurturing are two qualities that the billable hour disfavors. In fact, the more efficient a lawyer becomes under the billable hour model, the more work that must be undertaken to meet the billable hour minimums. (Never has the phrase “slow and steady wins the race” taken on such significance as in the traditional law firm world.) And because “nurturing” client relationships or internal client teams—a talent many women seem to have—is simply an “intangible” that rarely finds its way into the rigid calculation of a lawyer’s value to the firm, even this quality is disfavored in the billable environment.

Put another way, consider the qualities that are valued in a non-billable environment, such as one where a fixed-fee arrangement is in place. Being efficient becomes more valuable; doing only that which needs to be done helps maximize profits that are otherwise squandered by doing unnecessary things or spending more time than necessary on any given task. Being creative ranks equally high on the value scale, because “thinking outside of the box” and looking at things from a new perspective eliminates the weighty red tape that accompanies repetitively performing the same work the way without question. In the non-billable hour world, quality also reigns supreme over quantity.

Similarly, boiling the ocean to make a cup of tea or uncovering every stone simply to see what lies beneath is anathema under the non-billable hour model. Perhaps the most determinative factor to the value of a lawyer outside of the billable world is something rarely, if ever, looked at in the traditional law firm model—the results achieved.

When the formalistic measurements of value are eliminated, the incentive to reward quantity over quality falls by the wayside. For women who are disproportionately burdened by the many demands on the finite commodity of time, doing away with the billable hour—or that aspect of the measurement of value—shifts the focus to the measurement of the many intangible qualities that women have in spades. Perhaps when the billable hour model is finally dead—or at least maimed in a significant way—women will find it possible to not only persevere in law firms but also thrive.



When the formalistic measurements of value are eliminated, the incentive to reward quantity over quality falls by the wayside.

# Diversity in the Legal Profession: Comparing Professional Work and Personal Lives of Female Lawyers in U.S. and German Cities

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*As American law firms with a multinational view establish a presence in Germany, it is probably no surprise that they find that diversity and inclusion issues in Germany differ from those in the US. It is particularly apparent in terms of gender diversity. Plickert recently undertook a comparative study to examine the career challenges and opportunities facing women lawyers in Germany and the US and reports her findings here.*

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## I. Introduction

The legal profession has been studied extensively in North America.<sup>1</sup> Particular attention has been given to study the legal profession in single cities, statewide settings, and in rural areas, which has the advantage of holding additional factors constant, but it also limits our knowledge about broader variation in the legal profession, especially beyond the U.S. and North America more generally. There is still too little cross-cultural empirical research on which we could develop our understanding of the organization of the legal profession in other countries and its impact on the personal lives of lawyers. Cross-national studies may help us to understand how similarities and differences between countries/or various legal contexts influence and shape the professional and personal lives of lawyers.

For example, the rapid increase of female entrants into the legal profession in the U.S. and around the world is a significant point of cross-national similarity and reason to assume a development of convergence in the organization of the practice of law across various legal settings. As a result, the following questions emerge: How do various national legal structures impact young lawyers' balancing of work and family? How do national differences in professional norms and organization particularly influence women's professional and personal pathways? What can we learn from cross-national comparative studies? What does it mean when we study different legal cultures or legal settings? What is our understanding of diversity when we cross borders?

When speaking of *diversity* in the legal profession in North America, race, ethnicity, gender, sexual orientation, religion, and social status are key terms or concepts that are included in the discussion. A strand of research explores and seeks to understand the relationships between gender, race, ethnicity, or social status associated with professional and personal career success.<sup>2</sup> While these concepts and

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1. MARC GALANTER & THOMAS PALAY, (1991) TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991); JOHN HAGAN & FIONA KAY, GENDER IN PRACTICE: A STUDY OF LAWYERS' LIVES (1995); JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); LAWYERS IN SOCIETY: THE CIVIL LAW WORLD (Richard L. Abel & Philip S.C. Lewis, eds., 1988); Cynthia Epstein, et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291 (1995).

2. CAROLL SERON, THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL FIRM ATTORNEYS (1996). John



## How has the increase of women within the legal profession affected developments within the profession? Have recent effects of globalization similarly impacted the balance between work and family of young lawyers beyond national borders?

their effects on the legal profession are significant for shaping and improving the legal profession in North America, we still lack a clear understanding about the impact of 'global' processes in specific national legal settings and *how* social and cultural categories and concepts of diversity transfer, translate, and impact the career paths of individual lawyers. Because of the small number of empirical comparative studies, it remains a challenge to identify the mechanisms of diversity nationally and internationally. The current research sets forth some key findings from a German-U.S. Lawyer Study in an attempt to shed light on the personal and career-related experiences of young female lawyers, experiences that provide a snapshot of similarities and persistent differences in the legal profession. Additionally, the findings suggest a need for more comparative research, both to see if the current explanations endure as the legal professional culture in Germany and other European countries and cities encounter national and international pressures for change, and how changes in social and cultural categories of diversity may advance or shift our understanding of social inclusion.

### II. Comparative U.S. and German Lawyer Study – Key Findings

An empirical cross-national study of the professional lives of lawyers allows us to examine potential similarities and/or differences in the legal profession beyond national boundaries. How has the increase of women within the legal profession affected developments within the profession? Have recent effects of globalization similarly impacted the balance between work and family of young lawyers beyond national borders? In order to explore and compare the professional and personal lives of young female lawyers, this study examines female lawyers practicing in New York City, Washington D.C., Frankfurt, and Berlin. The selected cities represent significant economic and political centers. For comparison the study explores the effects of workplace size on female lawyers' childbearing. The sampled female lawyers are about ten years into practice.<sup>3</sup>

The legal profession in Germany is still very traditional and committed to preserving distinctive cultural norms and structures that operate somewhat autonomously from profit-driven goals.<sup>4</sup> In contrast, the legal profession in the U.S. is dominated by fast-changing and modern mega-law firms

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Hagan & Fiona Kay, *Even Lawyers Get the Blues: Gender, Depression and Job Satisfaction in the Legal Practice*, 41 L. & Soc'y REV. 51 (2007). Nancy J. Reichman, & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923 (2002).

3. The study compared about 1000 female lawyers from both Germany and the United States. 45% of women surveyed in Germany had not had a child, and more than 67% of women surveyed in the United States had not had a child at the end of data collection in 2009.

4. Sigrid Quack, *Legal Professionals and Transnational Law-Making: A Case of Distributed Agency*, 14 ORG. 643 (2007).





The most notable similarity is that female lawyers in the U.S. *and* German cities are less likely to have children or to have children later when working in larger firms/organizations. Still, a persistent national difference is found in the practice of law between the U.S. and Germany.

distinguished by their size and focus on generating revenue.<sup>5</sup> In large American firms, women often report obstacles to bearing and raising children, and parallel complaints are encountered from female lawyers in Germany. Family formation decisions are among the most important decisions that individuals make in their lives, and the patterning of these decisions can disclose a great deal about how the professional organization of work influences personal lives. It also is assumed that cross-nationally, lawyers who work in large departmentalized organizations may have more in common than lawyers who work alone or in small partnerships. This bifurcated view of the organization of legal practice in terms of workplace size is widely assumed to be important in the U.S. and Great Britain, but to a lesser extent in other industrialized nations.<sup>6</sup> The questions that emerge are: how has the practice of law converged or diverged in nations like Germany, which must engage with other international economic and political actors despite distinctive national influences? How does the large-scale entry of women into the rapidly-changing legal profession affect these processes?

In Germany and in Europe, there is a distinctive approach to the organization of work in law firms that challenges the assumptions of American law firms.<sup>7</sup> The American mega-law firms emphasize hierarchical structures, with rewards based on closely monitored performance standards. In contrast, European firms tend to be smaller and more locally influenced.<sup>8</sup> There is much to be learned from these differences.

#### **A. Cross-national similarities and differences**

The results presented show both remarkable differences and similarities between work and family formation in the selected U.S. and German cities. The most remarkable difference is that German female lawyers are more likely to have children and earlier than the American female lawyers (see Figures A and B).

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5. John P. Heinz, Robert L. Nelson, Rebecca L. Sandefur, & Edward O. Laumann, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005).

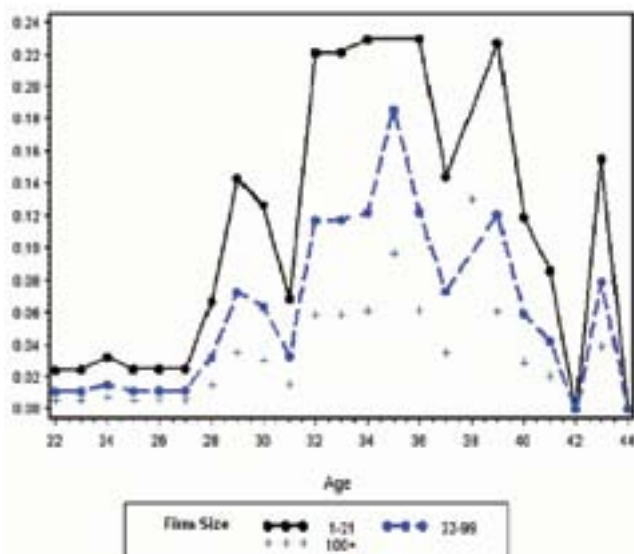
6. HEINZ & LAUMANN, *supra* note 1; GALANTER & PALEY, *supra* note 1.

7. Quack, *supra* note 5.

8. James R. Faulconbridge & Daniel Muzio, *Reinserting the Professional Into the Study of Professional Service Firms*, 7 *GLOBAL NETWORKS* 249 (2007).

**Figure A.**

Likelihood of childbirth by firm size among German female lawyers

**Figure B.**

Likelihood of childbirth by firm size among U.S. female lawyers

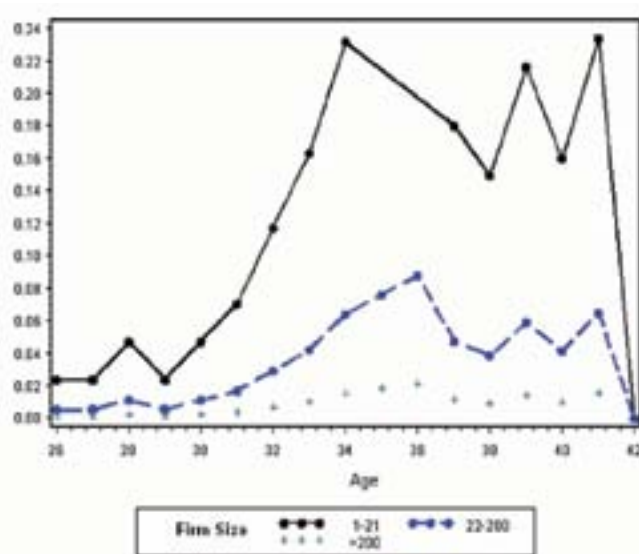


Figure A and B illustrates that workplace size has a substantial effect on family formation of young female lawyers in these two national settings. Figure A shows that German female lawyers have children in their early-to-late 30s and this is more likely when working in smaller workplaces. Yet, the childbirth is also notably lower for women in work settings with more than 100 employees. However, only about 15% of German female lawyers are employed in these larger settings. Figure B illustrates, as in Germany, that U.S. female lawyers are more likely to have children when employed in smaller workplaces. U.S. female lawyers have fewer children when employed in larger workplaces. Unlike in Germany, female lawyers in the selected U.S. cities are more likely to work in larger workplaces. This impacts significantly the number of children they have or do not have. For these U.S. female lawyers, the findings show a dramatic decline in having children compared to the selected sample of German female lawyers.

The most notable similarity is that female lawyers in the U.S. and German cities are less likely to have children or to have children later when working in larger firms/organizations. Still, a persistent national difference is found in the practice of law between the U.S. and Germany. The national structure and culture of the legal profession in Germany allows young German female lawyers to have children more easily than young American female lawyers, and this is especially true in smaller German firms. The incentive for young female lawyers in the U.S. to forego having children—or to have only one child later in their lives—is the likely promise of professional advancement in larger firms or organizations. In contrast, the greater incentive for young female lawyers in Germany to have one or more children earlier in their careers is the greater freedom to make more flexible part-time or even full-time arrangements in smaller firms. Several interviews with German women support this interpretation:

A: "...I was flexible when my child was sick because of my independence (in a practice with three other lawyers). When my children are sick I can stay at home and organize my cases/clients from home. Since I am self-employed I can manage my time better between my family and my work."

B: "I never would work in a large firm or company, because as a woman you have to prove yourself [more] and you are evaluated according to your biological clock—your career is determined by these things . . . I didn't want to expose myself to this pressure. That's why I decided to become self-employed [in a small legal practice] and to find time for my family and handle my work."



We need to clarify what defines diversity,  
in order to assess and understand what  
institutional attributes and social and  
cultural categories facilitate cooperation  
and legal diversity, in today's complex  
cross-border transactions.

*C: "In firms (in Germany) it is expected that women are going to work part-time after three years due to having children. This appears to be different in America where more women have possibilities to become partners (in law firms). In comparison, Germany remains a man's world when it comes to large firms."*

### III. Conclusion and Potential Practical Implications for Legal Diversity

What can we do to expand our *local* knowledge and perspectives of diversity within the legal profession? Cross-national/cultural research both within and without the legal profession can provide a better understanding of issues of convergence and divergence within the profession, and can expand our understanding of potential similarities and differences within legal diversity. Information from this research may provide valuable insights for concrete endeavors to understand the processes and causalities of legal diversity across multiple dimensions (e.g., political, administrative, and individual). We need to clarify what defines diversity, in order to assess and understand what institutional attributes (e.g., within law schools and firms/organizations) and social and cultural categories facilitate *cooperation* and *legal diversity*, for example, in today's complex cross-border transactions.

#### A. Needed and Preferred Research Designs

Empirically-oriented survey work on the legal profession is still highly concentrated in North America. There is too little cross-national/cross-cultural empirical research through which we could develop our understanding of the organization and management of legal diversity in other countries, and its impact on the professional and personal lives of lawyers. Survey research and narratives are needed to study issues of legal diversity. Ideally, and if possible, multiple design approaches (e.g., surveys, interviews, or case studies) should be explored in comparative research. Cross-cultural comparisons might be especially appealing to help us understand how interdependent demographic characteristics (e.g., gender, age, race, and ethnicity) affect the quality and success of professional work and the management of legal diversity.

What lessons can we learn locally and cross-culturally? Should we limit our focus on exclusion and/or disadvantage, or should we also examine diversity more broadly? Unless we undertake analyses beyond the United States, and in closely coordinated ways, for example, by using parallel sample and survey designs, it will be difficult or impossible to draw conclusions about the legal profession and legal careers across national settings. We are at a critical historical juncture in the globalization process when cross-national research can be extremely useful.

## B. Identifying the Social and Cultural Categories and their Meanings Across Legal Cultures

Social and cultural categories such as gender, race, ethnicity, sexual orientation, social status, and other dimensions of identity interact on multiple and simultaneous levels, and all contribute to social inequality. These categories do not work independently of one another; instead they interrelate and create a system of inequality that reflects an intersection of multiple forms of discrimination.

Cross-cultural comparisons are challenging because of the many complexities involved in identifying multidimensional conceptualizations that explain how socially constructed categories of difference interact to create a social hierarchy. For example, it is not sufficient to know that women in firms are disadvantaged in their earnings compared to their male counterparts. It is also important to examine potential gender inequality in earnings due to race, class, and sexual orientation, as well as their social context and society's attitude toward each of these categories. Gender, race, ethnicity, age, religion, sexual orientation, educational training, or prestige of work setting might assume universal connotations, yet their mechanisms might not be universally intertwined with the terms or concept of diversity as understood in North America. The more complicated question remains: Who is *included* or *excluded* in legal diversity when we cross legal borders?

Furthermore, cross-cultural comparisons are challenging because of our own mindset, educational training, and the language barriers that further influence our access to the contextual interiors of research sites. What is needed? Experiences from recent comparative studies suggest that collaboration, access to current research and readings (e.g., general and academic) on diversity in other national settings are crucial. Exploring the rules, norms, and legal expectations of the *home* country are essential before the development of research questions and empirical concepts, but research should not be confined within national borders.

## C. Reassessment of Diversity Structures – Remaining Questions

How can conventional structures (approaches) of legal education and careers become more diverse and *inclusive*? How can legal education and the legal profession in practice become more relevant for the attainment of access to justice?



Exploring the rules, norms, and legal expectations of the *home* country are essential before the development of research questions and empirical concepts, but research should not be confined within national borders.

# IILP Review 2012:

## Racial and Ethnic Diversity and Inclusion Issues in the Legal Profession

# Are Ideal Litigators White? Measuring the Myth of Colorblindness

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(by courtesy), UCLA**

**with Nilanjana Dasgupta, Kumar Yogeeswaran, and Gary Blasi**

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*Some people like to say that we live in a post-racial society, that society, or at least they themselves, are colorblind and able to see people beyond their color. While that may or may not be true individually, research by Kang and his colleagues suggests that despite good intentions, for most people, our perceptions of who is a good litigator are influenced by implicit biases of which we may not be aware. And the implications for litigators whose racial or ethnic identity may not fit those biases can be career-hindering. This article opens a new level of discussion about how implicit biases are impacting the legal profession.*

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## **I. Introduction<sup>1</sup>**

Today, few terms generate greater anxiety, concern, resentment, and passion in American society than “racial discrimination.” Being a victim of racial discrimination is to feel debased, dehumanized, and righteously resentful. Conversely, to be accused of racial discrimination is to be tarred with a great sin, sometimes with legal consequences. But such moral and emotional intensity does not shed much light on what “racial discrimination” actually is. Even if we define racial discrimination narrowly—to cover only disparate treatment of a specific individual because of that individual’s race—there remains a substantial empirical complexity about what “because of” actually means.

The empirical complexity arises, in part, from the operation of implicit social cognitions (ISCs). A social cognition is a thought or feeling about a person or social group, such as a racial group. An ISC is a social cognition that pops into mind quickly and automatically without conscious volition. We typically are unaware of (or mistaken about) both the source of that cognition and its influence on our judgment and behavior. Indeed, it may be a thought or feeling that we would reject as inaccurate or inappropriate upon self-reflection.

In the past decade, scientists working across the boundaries of neuroscience, cognitive psychology, social psychology, and behavioral economics have demonstrated the existence of ISCs generally, including ISCs about racial groups. These ISCs turn out not to be randomly-oriented; instead, they are biased in predictable directions in favor of groups higher on the social hierarchy. More recently, scientists have been documenting evidence of “predictive validity”—namely, that ISCs predict decisions, choices, and behavior in realistic settings. Such findings convert esoteric mind science into a real-world problem—if ISCs based on race predict worse treatment in the real world, then we have identified a new stream of “race discrimination” even when defined narrowly.

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1. This is an abbreviated version of the full article, Jerry Kang, et. al, *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEG. STUDIES 886–915 (2010).



To respond thoughtfully to the problem of racial discrimination, more behavioral realism about how and when race-based ISCs predict behavior is needed. This article studies the link between ISCs and behavior within the legal domain. Specifically, the study poses the following question: when individuals imagine the ideal litigator, does a White man (as compared to an Asian American man) come to mind? More importantly, do such implicit stereotypes influence evaluation of the litigator?

To answer this question, researchers used a sample of 68 adults (62 White Americans, 2 African Americans, and 4 Hispanic Americans) who volunteered for the UCLA Law School Witness Program. The researchers attempted to measure the participants' explicit and implicit racial biases and then determine to what extent these biases affected their evaluations of White and Asian American litigators. The study focused on litigators because the traits and behaviors used to describe ideal litigators, such as ambitious, assertive, competitive, dominant, and argumentative typically bring to mind White professionals, especially White male professionals. Moreover, such attributes differ starkly from stereotypes of Asian Americans, who are commonly thought of as being strongly oriented toward mathematical and technical academic achievement but deficient in interpersonal social skills deemed essential for success as a litigator. The study proposed that these stereotypes were likely to elicit discrimination against Asian American litigators. Spoiler alert: the study found that both explicit and implicit stereotypes produced a net racial discrimination against Asian American lawyers and favoritism toward White litigators.

## II. Background: ISCs and Role Congruity Theory

The study drew from the insights of two psychological theories: ISCs and Role Congruity Theory. As mentioned above, ISCs are those thoughts or feelings that automatically pop into our minds without conscious volition. It is well known that our brains process information through schemas—templates of knowledge that help us organize specific examples into broader categories. For example, when we see something with a seat, back, and legs, we recognize it as a “chair,” and we sit down without expending valuable mental resources.

Schemas apply not only to objects, of course, but also to human beings. Through simple categorical thinking, we map people into available social groups, such as those demarcated by age, gender, and race. This, in turn, automatically activates the thoughts and feelings associated with those social groups. Some of these cognitions are stereotypes (traits that we associate with a group) and some are attitudes (global evaluative feelings associated with a group that are either positive or negative). Implicit bias includes both stereotypes and attitudes.

If we have particular stereotypes or negative attitudes about a racial group, research suggests that these social cognitions will influence our evaluation and behavior towards individuals who are categorized into that group. In order to predict whether we will act in a discriminatory manner, however, we need to discover our true racial stereotypes and attitudes. The easiest and most obvious way to determine if a person possesses certain stereotypes or negative attitudes is to simply ask them what they think. Of course, there are two main problems with that method: (1) people may not be willing to tell you what they think; and (2) they may be unable to tell you what they think on an implicit level.

The best-studied and most widely accepted methods for measuring ISCs are reaction time instruments, such as the Implicit Association Test (IAT). These tests rely on the fact that any two concepts that are closely associated in our minds are easier to group together. As performed on a computer, a typical race-attitude IAT requires participants to group together categories of pictures and words. For example, in the Black-White race attitude test, participants sort pictures of European American faces and African American faces, good words and bad words into two “piles” using two



computer keys. Most people respond more quickly when the European American face and good words are assigned to the same key and African American face and bad words assigned to the other key, as compared to the opposite combinations. The average time differential, scaled to appropriate units, is deemed to be the measure of implicit bias.

The second psychological theory underlying the study—Alice Eagly’s Role Congruity Theory—examines the relationship between gender stereotypes and stereotypes of successful professionals in leadership roles. Eagly and her colleagues argue that discrimination against a woman in a high status professional role can arise from the degree to which people perceive a “good fit” between the characteristics assumed to describe women in general and the requirements of specific social roles. For example, characteristics of women such as nurturing, kind, affectionate, and interpersonally sensitive are perceived as not fitting the role of ideal leaders, who are expected to be assertive, ambitious, independent, competitive, and confident.

This study involved two extensions of the Role Congruity Theory. First, the study applied the theory’s logic to race; and second, the study switched its focus from leaders to litigators.

Like the ideal leader, studies have found that people share consensual expectations of the ideal successful lawyer’s personality. These studies suggest that people both inside and outside the legal profession expect ideal lawyers to be assertive, dominant, and argumentative. Stereotypes of lawyers and litigators are not only strongly gendered but also strongly racialized, which to date has not received empirical attention. Specifically, as mentioned above, the traits and behaviors used to describe ideal litigators typically bring to mind White male professionals and differ starkly from stereotypes of Asian Americans (i.e., Asian Americans are perceived to be quiet and deferential; whereas the ideal litigator is competitive and dominant).

By combining the insights of ISCs and Role Congruity Theory, the study predicted that the psychological “mismatch” between people’s stereotypes of ideal litigators and their stereotypes of Asian Americans would operate both explicitly and implicitly. Thus, while people may have explicit stereotypes that the ideal litigator is White, not Asian—i.e., they may be conscious of these beliefs and even endorse them—people may also have implicit stereotypes that they are not fully aware of and cannot articulate. Either way, the study proposed that explicit and implicit stereotypes would produce a net racial discrimination against Asian American lawyers and favoritism toward White litigators.

### III. The Study

The study consisted of three parts. First, researchers attempted to measure the participants’ implicit stereotypes by using two different IATs. In both tests, they used photographs of five White and five Asian faces to represent the racial groups. In order to control for gender influences, all of the photographs were of males. Since the category “Asian American” encompasses a huge variety of peoples, this study used photographs of East Asians.

Through the first test, the study attempted to measure the degree to which the participants associated traits that embody the ideal litigator with White versus Asian Americans. The participants were asked to group together the photographs with five words representing stereotypical characteristics of litigators (eloquent, charismatic, verbal, assertive, and persuasive) and five words representing stereotypical characteristics of scientists (analytical, methodical, mathematical, careful, and systematic). In selecting scientist as the comparison profession, the goal was to find an appropriate profession that was of equal status and social influence as legal professionals, but where

people could readily imagine professionals who were Asian or White. In theory, if a participant implicitly envisioned White individuals in the professional role of litigator, they would be faster to group together the White faces and litigator words with one response key and Asian faces and scientist words with a different response key (White + Litigator / Asian + Scientist), as compared to the opposite combinations.

Through the second test, the study attempted to measure the participants' implicit racial attitudes or the degree to which they generally favored one racial group over the other. Five positive words (beauty, gift, happy, joyful, and enjoy) and five negative words (filth, repulsive, pain, hurt, and sick) were used to represent positive and negative concepts. Implicit attitudes were measured as the differential speed with which participants categorized "Asian American + Good" and "White American + Bad" stimuli together compared to the speed with which they paired opposite combinations of stimuli.

The second part of the study was focused on "predictive validity"—that is, whether implicit biases predict people's actions. After taking the IAT tests, the participants listened to two realistic but fake depositions created to be comparable in complexity, length, quality of performance, and ability to capture the listener's interest. Both litigators and deponents spoke with what might be called a "standard" American accent. Participants saw the deposing litigator's picture and name for five seconds before each deposition began. The study manipulated the race of the litigator by varying his name and photograph to be prototypically White ("William Cole") or Asian ("Sung Chang"). After listening to each deposition, participants were asked to evaluate the litigator on three types of dimensions: the litigator's competence, the litigator's warmth, and the participants' willingness to hire him and recommend him to friends and family.

Finally, because explicit bias may also help explain racial discrimination, the study asked participants direct questions to measure explicit bias. These included questions about (a) personal endorsements of stereotypes (i.e. how eloquent do you think White American litigators are?), and (b) knowledge of societal stereotypes (i.e. according to most Americans, how eloquent are litigators who are White American?).

#### IV. Results

The study found evidence of both explicit and implicit bias against Asian American litigators. With respect to explicit bias, the study did not reveal any personal reported bias—on average, the participants reported that White and Asian Americans possess litigator-related characteristics to an equal degree—but participants reported that others in society tended to have this bias. In other words, they believed most (other) Americans think that Asian Americans possess fewer characteristics necessary to be a successful litigator than White Americans, thus demonstrating a cultural bias. In addition, the IAT showed that, on average, participants paired litigator-related traits with White faces faster than with Asian faces. Participants also paired positive valence words with White faces faster than with Asian faces. This revealed medium-sized implicit stereotypes associating the ideal litigator as White as opposed to Asian.

The deposition aspect of the study showed the potential real-world impact of this bias. Both implicit and explicit stereotypes affected the participants' evaluations of the litigators, although not in the same fashion. The participants' evaluations of the White litigator's performance were most strongly related to their implicit stereotypes of whom they envisioned as the ideal litigator; whereas their evaluations of the Asian litigator's performance were most strongly related to their explicit stereotypes about ideal lawyers.

Implicit stereotypes were measured by using the differential speed with which participants paired Asian and White faces to “Litigator” or “Scientist.” The more a participant showed an implicit stereotype by pairing the litigator-related traits with White faces compared to Asian faces, the stronger they viewed the White litigator’s performance compared to the Asian litigator. However, the participants’ evaluations of the White litigator were uncorrelated with explicit stereotypes about ideal lawyers. In contrast, the more the participants showed an explicit stereotype (the more they personally or explicitly endorsed the belief that the qualities required to be a successful litigator are more prevalent among Whites than Asians), the poorer they viewed the Asian litigator’s performance. However, the participants’ implicit stereotypes were uncorrelated with their evaluations of the Asian litigator.

We call this type of racial discrimination as “Janus-faced.” Implicit stereotypes predicted ingroup favoritism—more favorable evaluations of the White attorney by White participants—while explicit stereotypes predicted outgroup derogation—worse evaluations of the Asian American attorney. To appreciate the magnitude of the effect sizes, imagine a juror who has no explicit stereotype but a large implicit stereotype (an IAT D score of 1) that the ideal litigator is White. On a 7-point scale, this juror would favor a White lawyer over an identical Asian American lawyer 6.01 to 5.65 in terms of competence, 5.57 to 5.27 in terms of likability, and 5.65 to 4.92 in terms of hireability.

## V. Conclusion

As a matter of impact, although the specific form of discrimination differed, both implicit and explicit stereotypes predictably produced disparate treatment of Asian versus White litigators in judging the quality of their work, likeability, and hiring and recommendation decisions. The study demonstrated that stereotypes about litigators and Whiteness altered how the participants evaluated identical lawyering, simply because of the race of the litigator. Both types of bias, explicit and implicit, produced net racial discrimination either by elevating Whites or by putting down Asians.

The study’s findings may be even more significant because the study used a racial minority group that is typically designated as “model” in our society, i.e., many of the common stereotypes of this group are positive. Asian Americans were intentionally chosen for this study because it was thought to be more difficult to show racial bias towards this “model” minority group as compared to other minority groups. In addition, the experiment took place in Southern California, with many participants drawn from neighborhoods near UCLA, where social contact with Asian Americans should have been high compared to the rest of the United States. In other words, the study did not target a rare racial/ethnic group with whom contact was infrequent and thus toward whom more prejudice was likely. Nevertheless, the study recorded evidence of racial bias and prejudice against Asian Americans. The participants were not colorblind, at least not at the implicit level.

People who decry the play of the “race card” believe that we already compete in something like a meritocratic tournament in which individuals are evaluated on their performance only. Differences in evaluation are presumed to come only from differences in actual merit, independent of social categories such as race. But do we really live in such a world? If people are sincere and accurate about their colorblindness, then the race of the litigator should not cause one iota of difference in how a garden-variety deposition is evaluated. But this study shows otherwise—that race still does matter. More evidence is needed to determine how and why race matters; and more importantly, what we might do about it.

# Race, Law and Latino Communities: The Diversity Pipeline

Juan Cartagena

President and General Counsel, LatinoJustice PRLDEF

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*Latinos are the fastest growing ethnic group in the United States but the intersection of an increasingly pervasive criminal justice system, growing numbers of participants in civil disobedience activities by an energized youth movement, and Latino communities is leading to discriminatory consequences for the pipeline of Latinos into the legal profession. Cartagena explains the Latino Pipeline problem and offers suggestions to address it before it becomes an even greater crisis.*

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The diversity pipeline for Latino enrollment in our nation's law schools and for the ultimate integration of the law profession is beset by significant challenges. Indeed, the pipeline is ruptured in many places as far as Latinos are concerned. This article will highlight a few of these obstacles including: 1) the next U.S. Supreme Court pronouncement on the constitutionality of the use of race as one of many factors in graduate school admissions; 2) the pervasiveness of the criminal justice system and its discriminatory consequences on all facets of life for Latino communities including schooling, employment, and licensure; and 3) the need to continue to research the consequences for bar licensure of increased participation in civil disobedience activities by an energized youth movement.

## I. Diversity and Higher Education

All diversity pipeline programs in the country—various models throughout different minority communities—will be directly affected by the decision of the U.S. Supreme Court to rule on the admission practices at the University of Texas in *Fisher v. University of Texas*. The viability of race-based remedies has been a particular focus of the conservative elements of the Supreme Court for years now. The University of Texas was victorious in the Fifth Circuit, thus making the Court's acceptance of the appeal a potential sign of retreat in the permissible uses of race in graduate school admissions. The fact that the ultimate decision in *Fisher* will likely be decided by only eight justices makes the stakes even higher.

Specifically, at issue in the *Fisher* case is the University's recognition that its ten percent program—where the top ten percent of its graduates from high schools in Texas were granted admission—was not enough to cure the absence of under-represented minorities in the state university system. Hence, it adopted an additional program where race was one of the factors used. And yet, as the District Court ruled, race was a “factor of a factor of a factor” in the university's attempts to address this under-representation; a sign of how low race was prioritized in the scheme of a total candidate portfolio. Nonetheless, the admission program was challenged and will now become a new chapter in the Supreme Court's jurisprudence of race-based remedies.

The danger that *Fisher* poses to an already weak pipeline in Latino communities from elementary school to law school to law practice is significant. As recently as nine years ago, the Court in *Grutter v. Bollinger* upheld the use of race as one of many factors in higher education admissions, in part, because the value of diversity to a university setting is key to the producing well-rounded, educated,

and highly skilled graduates. Since the days of *Regents of California v. Bakke* in 1978, the Supreme Court has been whittling away at the notion that race-conscious remedies were important tools in eliminating the discrimination that our country's institutions had inherited and/or promoted. Conceptualized as reverse discrimination, affirmative action efforts and programs have become programs that discriminate. But *Grutter* is also important on another front: for diversity programs to work they need to create a "critical mass" of underserved students from people-of-color communities to ensure vibrant, cross-racial class discussion. Tokenism is not enough.

All of these concepts are up for grabs during the next term of the Supreme Court. At play is the role of the White House in all of these strategic discussions. Should this administration survive the next election, it must put forth the strongest case in support of the use of race conscious remedies for university admissions. For example, the excellent *amicus curiae* brief in the *Grutter* litigation by the retired members of the military, exalting the value of diversity in admissions to the nation's military educational institutions, and thus to the military overall, were an important contribution to this discourse. Such a viewpoint, which is alive and well in the Department of Defense, should be prioritized in the briefing by the federal government. Even with a possible change in administration in November, the need to add this critical viewpoint from the nation's military branch is critical.

## II. The Next Challenge: The US Criminal Justice System

The pipeline for people of color and Latinos, in particular, does not work in isolation. What permits the free flow of students from elementary and high school into universities and the professional ranks can be seen in the challenges of surviving within urban America. Especially because of the racially skewed outcomes it produces, no other challenge is more important in urban America than the devastating effects of our criminal justice system.

America's rate of incarceration is the highest in the world: 751/100,000. Stated another way, there is no country ruled by a democracy, a dictator, a monarchy, an oligarchy, or an entrenched state apparatus that incarcerates more people than the United States.

Equally important, incarceration in America, like the decisions to Stop, Frisk, Arrest, Charge, Bail, Conviction, and Sentence, all produce racially skewed outcomes, even when controlling for crime. Thus, the recent trends show that U.S. incarceration rates are:

- 1 in 100 of all U.S. adults
- 1 in 194 for Whites
- 1 in 29 for Blacks
- 1 in 64 for Latinos

Incarceration rates, however, provide only one predictor for how criminal background checks affect workplace diversity and thus diversity within the legal profession. The current estimates for Americans with criminal histories range from fifty-nine to sixty-five million persons. The U.S. Department of Justice estimates that thirty percent of Americans have a criminal record on file with the states. That is nearly one-third of the entire U.S. population! Moreover, the National Employment Law Project estimates that ninety-two percent of U.S. large employers run criminal background checks on all or some employees.

The Title VII guarantees of nondiscrimination in the workplace are clearly implicated in these trends. Analogies in this regard can easily be made to voting rights; specifically, how it manifests in the decisions of election authorities. Felon disfranchisement is the amalgamation of election laws and practices that eliminate the most important badge of citizenship—the right to vote—from citizens



solely because of their criminal histories. When state election systems defer decisions about voter eligibility to a corollary institution in state government, i.e., the criminal justice system, then the latter's production of racially skewed outcomes infects the former. Similarly, when the guarantee of nondiscrimination in employment is blindly deferred to decision making that turns exclusively on the outcomes of our broken criminal justice system, the promise of equality is abdicated.

Thus, when it comes to hiring, termination, and licensure, the Equal Employment Opportunity Commission fortunately revised its policies and only recently issued a new guidance on the use of arrest and conviction data in employment affecting the:

- Age of Conviction
- Nature of Conviction
- Reliance of Arrests Not Leading to Convictions
- Timing of Inquiry in Application Process

It should be noted that New York, Connecticut, Massachusetts have been leading the way in creating a balanced approach, along the lines noted above, to address the complexities of nondiscrimination and public safety in the workplace.

Each of these factors, whether from federal or state law in New York, Connecticut, or Massachusetts, will affect the law profession's pipeline challenges in this world of mass incarceration.

### III. The Law School Diversity Pipeline

As if these co-institutional challenges were not enough, the law school pipeline is undergoing significant transformation in this economic recession. There has been a precipitous overall drop in students taking LSAT last June (eighteen percent), October (seventeen percent), and December (fifteen percent) as per the data of the Law School Admission Council; for the nation's racial and ethnic minorities, the intensity of these trends are profound. For example, from 1993 to 2008 while overall applications from Blacks and Latinos remained constant and overall law school enrollment increased, Black and Mexican-American enrollment decreased by eight percent. For Latinos, the Law School Admissions Council's modest increases in Hispanic enrollees mask a larger problem: Mexican-American and Puerto Rican enrollment—the two largest segments of the Latino community—either stagnated or decreased in last eight years despite more seats available in law schools.

Other trends in law school enrollment also play a significant role, one of them being age. The fact is that law school enrollment is delayed now more than ever before by college graduates. At LatinoJustice PRLDEF our pipeline and leadership training programs have corroborated this trend in recent years. Thus, sixty-eight percent of students using our pipeline programs are "alumni applicants" having obtained undergraduate degrees over a year earlier. According to 2010 LSAC data, older applicants have lower LSAT scores, apply to a smaller number of schools, and are thus less likely to be accepted into law schools. Nonetheless, our pipeline programs at LatinoJustice PRLDEF, especially our intensive LawBound Program, address the needs of these "alumni applicants" in the New York metropolitan area.

While comparable data addressing exclusively lawyers is not available at this time, data from the late 1990s demonstrates that people of color representation among lawyers lags behind many other professions:

- In 1998: Only 7% of lawyers were persons of color; the corresponding ratios were:
- 14.3% of accountants
- 9.7% of physicians

- 9.4% of college & university teachers
- 7.9% of engineers

#### IV. The Law Profession Diversity Pipeline, Law Practice, and Criminal Justice Consequences

In an era of mass incarceration—what some have labeled the punishment industry—an open question that requires more research surrounds the intersection between criminal histories and licensure via bar admission. Given that bar admission is decided exclusively by the states and their courts, there appears to be no set national standard at present. Moreover, it remains to be seen if the Equal Employment Opportunity Commission’s guidance on the use of arrest and conviction histories will apply with the same force in a licensure context.

Nonetheless, at least in the New York context where LatinoJustice PRLDEF is headquartered there are few clear signs. For example, one of the few reported decisions on the fitness to practice law from applicants with previous criminal histories is found in *Weisner v. Nardelli*, a federal court case with a long procedural history in both federal and New York State courts. Mr. Weisner was an applicant for New York State Bar admission who was twice convicted of drug-related felonies many years before completion of his law school education.

The federal court in that iteration of Mr. Weisner’s due process clause litigation concluded that the practice of law is not a fundamental right under the constitution. Despite the plaintiff’s argument that the New York State Corrections Law requires a balancing of the multiple factors that would inform the Issuance of license to practice law—many of which mirror the recent guidance issued by the EEOC—the federal court did not assume jurisdiction of the claims and dismissed the complaint, thus leaving for another day whether the prevalence of criminal justice engagements with such a large swath of our American populace will have an effect on the diversity of the law profession.

Admittedly, I have raised more questions than solutions to some of these vexing problems. But given the damage to the pipeline in Latino communities from elementary school to law practice I am simply highlighting the intersection between criminal justice consequences and professional licensure—especially because our profession that conditions practice on such inchoate principles like moral turpitude, good conduct, and fitness of character to practice law.

So in this regard I leave with two unanswered questions that would hopefully attract the researchers amongst you:

- 1) As civil disobedience and street protests increase, such as evidenced in the Occupy Wall Street Movement, and as more segments of our youth engage in this form of activism, how does bar admission practice balance the factors present in the EEOC Conviction Guidance (or that of New York, Connecticut, and Massachusetts) to promote the principle of equal opportunity?
- 2) As the Obama administration exercises its prosecutorial discretion, deferring action and deportation of hundreds of thousands of deserving DREAMers (undocumented students who have obtained a high school diploma and/or served in our military) what, if any, are the consequences of their presence in America, post-age of majority, on their fitness to practice law?

I submit that both questions, and the government institutions they highlight, have important diversity and pipeline consequences for our nation’s largest and ever-growing racial and ethnic minority: Latinos.



# Lawyers in Florida: As Diverse as the Sunshine State Itself

**Yara Lorenzo**

**Judicial Law Clerk, US Court of Appeals for the 11th Circuit**

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*The Hispanic community is not a monolithic entity. Nowhere is that more apparent than in Florida where diversity among the Hispanic community is readily apparent. For those less familiar with Florida or the Hispanic legal community, Lorenzo examines some of the differences as well as similarities between the disparate groups that comprise Florida's vibrant Hispanic legal community.*

**T**he notion of diversity in structured social settings has been a controversial topic for policy makers, employers, and academics for years. Diversity cannot be easily explained or compartmentalized, and the diversity within the Hispanic community is no different. It exists in many more ways than stakeholders, such as governmental authorities, recognize. While there are no hard and fast rules, I will do my best to illustrate how the experience of Hispanic attorneys differs based on whether you are practicing in the North, Central Part of the State of Florida, or in South Florida.

First, a little about me so that readers understand the lens through which I view this issue. I was born in Cuba and my family immigrated to this country during the late eighties, when I was six. Like any working-class immigrant, I had to face the struggle of integrating myself into the legal community without the benefit of a family with a well-established professional network. However, because my family had the foresight to move to South Florida, I had the huge benefit of being in a community where decades earlier, Cuban Americans had blazed a path for me to follow. Because of their struggles, my integration into the legal profession was significantly easier. I share this only as background, because I am aware that I write from a place of privilege. My career has blossomed in an area where Hispanics are socially mobile. Case in point, the only elected Hispanic member currently serving on the Florida Bar Board of Governors is from South Florida (Miami).

With a population of 19,057,542, roughly twenty-three percent of all Floridians identify as Hispanics. The Florida Bar is the second largest bar association in the country, smaller only to California's Bar. The diversity amongst Hispanic lawyers in our state is vast and experiences vary greatly depending on socio-economic status. While generalizing based on anecdotal evidence can be tricky, I will do my best to provide readers with a glimpse into who the Hispanic lawyers across the state are, the main organizations they are active in, and the communities that provide the stage and backdrop for their professional growth and community service. For the sake of accuracy, I reached out to Hispanic attorneys in Central and Northern Florida for their perspectives on practicing law. Since I am from South Florida, that is where I will begin.

In Miami, Hispanics are not only the majority, they are also economically and politically empowered. It is that combination that makes practicing law here the ideal setting for any Hispanic; whether one is third generation and born into a family with deep community roots or an immigrant. Across the country, there are other large metropolitan cities where Hispanics may be in the majority, but they lack the economic and political clout to have significant role in shaping their communities. This is slowly changing generation by generation, but it is not a process that can be rushed.



In Miami, Hispanics are not only the majority, they are also economically and politically empowered.

Here the legal community for Hispanics is what it is thanks to the path that was forged by Cuban-Americans decades ago. In 1974, community leaders came together and established the Cuban American Bar Association (CABA). Their membership quickly grew in size and soon included judges, lawyers, and law students of Cuban descent, as well as those who are not of Cuban descent but are interested in issues affecting the Cuban community. CABA's mission is to promote equality of its members, serve the public interest, and increase diversity in the judiciary and legal community. With time, CABA became the premier bar association for Hispanics. In 1982, CABA founded the CABA Pro Bono Project as a separate not-for-profit organization in order to provide legal assistance to the underprivileged in our community. Today, CABA's Pro Bono Project serves recently arrived immigrants from across Latin America and Haiti who are doing their best to make a new life for themselves in this country. CABA positioned itself as a leading organization in the community and its members greatly benefit from the organization's work.

The growth of the Hispanic community in South Florida, coupled with CABA's work, has provided fertile ground for the establishment of other minority voluntary bar organizations. Groups range from the Colombian-American Bar Association, to the Puerto-Rican Bar Association, to the Nicaraguan-American Bar Association. The most active among them is the Puerto Rican Bar Association. Other than the local licensing bar association in the Commonwealth of Puerto Rico, there are three mainland Puerto Rican bar associations, each of them are non-profit corporations with no legal affiliation to each other. The oldest is the Puerto Rican Bar Association in New York. There is the Puerto Rican Bar Association of Illinois. The third is the one in Florida. In addition to those groups, the National Hispanic Bar Association's (HNBA) Florida Region Chapter also has an active presence. The HNBA is an incorporated, not-for-profit, national membership organization that represents the interests of more than 100,000 Hispanic attorneys, judges, law professors, legal assistants, and law students in the United States and its territories. Through them, one can connect with a valuable national network of Hispanic attorneys.

Since Miami is an international city and the gateway to Latin America, being a Hispanic attorney is not a barrier to success, it is an asset. However, it was not always this way. This community endured growing pains, like other cities across the United States are now experiencing. In the eighties, there was an English-only movement, which was very divisive. In 1980, voters approved an anti-bilingual ordinance. It was a racist provision, which was repealed by the county commission in 1993. It was a hard-fought battle and it took a lot of activism to secure the ordinance's repeal.

Going just a little further north, in Broward, you will find the Broward County Hispanic Bar Association. Their voluntary bar for Hispanics was founded in 1989 as a forum for Hispanic lawyers



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to address issues of importance in their community. Many of the organization's past presidents and members are also highly respected members of the Broward County Judiciary. Although not far from Miami, Hispanics in Broward have encountered their share of discrimination and hostility. During the 2008 elections, three incumbent Hispanic judges lost their seats. In 2010, of the ninety judges in Broward, five were black and five were Hispanic. Every minority judge whose term was up—three blacks and two Hispanic—drew opponents. The perception was that they were targeted because of their names. With racial tension in the air, the situation for Hispanic attorneys was less than ideal.

In central Florida, you will find the Hispanic Bar Association of Central Florida in addition to the HNBA, who also has a presence in Orlando. The Puerto-Rican Bar Association is also active there by way of a Vice-President who represents the Orlando area. Despite the existence of an emerging legal community, one practitioner told me he feels that there still exists an old-boys club mentality; Hispanics have not been able to forge an entry. His experience moving to Orlando from New York was a difficult one, despite his credentials. He sees that in Orlando, if you are perceived as a powerful and influential lawyer, rulings come your way. He shared strong feelings that the judicial system favors the powerful and influential. Thus, minorities, particularly Hispanics, have the odds stacked against them. This attorney's us-versus-them mentality is not one that I have encountered in Miami. The size and empowerment of the Hispanic community is the reason why. But there is evidence of a firmly emerging Hispanic legal community in central Florida. The Hispanic Bar Association of Central Florida, Inc. is yet another voluntary bar organization, which was incorporated in September 1991. They organized because they recognized the immense need for support and representation of the Hispanic community, which made up a significant part of the Central Florida population.

With growth come opportunities. As international business expands to Orlando and Tampa, being Hispanic and bilingual will give attorneys an edge there. This is why I often suggest to recent graduates who are battling Miami's job market to pursue opportunities elsewhere in the state. Despite having to confront less established legal and Hispanic communities, the opportunity to be one of the pioneers is an exciting one.

Finally, in North Florida, you have the Hispanic Bar Association of Northeast Florida. Their organization was founded in September 2004 to foster fellowship among Hispanic judges, lawyers and law students. In addition, they provide networking opportunities, serve as a referral source for clients and educate the general legal and business communities about issues affecting Latin America and Hispanics in the United States, among other goals.

Across the state, these groups do essentially the same thing: provide a forum for Hispanic attorneys to come together, gain strength in numbers, and build the foundation for vibrant Hispanic networks that will be strong and influential in years to come. Based on my limited research, the further north you go in Florida, the less established and empowered the Hispanic community is. As a result, the legal communities are also in their nascent stages. There is a lot of work to be done and, in my opinion, a lot to be learned from the progress in South Florida. The one thing that cannot be rushed is time. Our legal and Hispanic community is forty-years in the making.

It would seem a simple solution to speed-up the trickle-down process by collaborating across the state on issues that affect us all as Hispanic-Americans. The first obstacle to that is how geographically spread out Florida is. But also, an equally important factor is the differences among the various ethnic groups that impede collective action. Hispanics are not a monolithic group. We do not vote the same way. Our views on foreign policy are not same, and the issues that we can collaborate on are limited. For example, a bar association in central Florida, composed of mostly Puerto Ricans may take a position on a Cuba-related issue which dampens collaborations with CABA in Miami. The same conflict could arise for Hispanics in Jacksonville, who are mostly Mexican, Puerto Rican, and Central American, in taking a position opposed by the mostly Puerto Rican population in Orlando.

As Americans however, working together for a more diverse bench and bar should be imperative. For next-level success as a group we must find the common ground. And we need that, not for the sake of power itself, but so that the barriers to talented, rising Hispanic attorneys are eliminated. In the past several years, there have been attempts to elect another Hispanic to the Florida Bar Board of Governors. Those efforts have failed, and I can only imagine how those outcomes would have been different if every Hispanic voluntary bar in the state got on the same page and behind one candidate. The difficulty, as I've mentioned is that as Hispanic-Americans, we wear two hats. Our allegiance to the United States is first and foremost, but our sense of national pride for the mother counties we hail from does not fall far behind.

Thus, while on the outside collaboration seems a simple and obvious solution, we have some internal barriers we need to move beyond in order to forge a common agenda. This will empower us all in ways we have yet to see. As a young attorney, I hope to be one of the leaders breaking down the barriers to cross-state collaboration in order to see growth, not just for Hispanic lawyers, but our communities at large.



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# Apples, Bananas, Coconuts and Oreos – the Fruit Salad and Dessert of Race: American Indians in the Diversity Discourse

Lawrence R. Baca

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*American Indians are the only group of people to have their own title in the United States Code (Title 25). As Native Americans, many consider them to be a race. Case law says they are a body politic, citizens of sovereign tribes. Are they either, or both, or something else? And depending upon how one answers that question, what are the implications and ramifications for Native American lawyers?*

The Supreme Court has recently granted certiorari in *Fisher v. University of Texas, Austin* to review the use of race in admissions as a tool for promoting greater diversity at the university.<sup>1</sup> While the case on its facts seems to be limited to whether the University of Texas, Austin can use race as a factor in admissions to create diversity, most of us assume that accepting this case is about more. As counsel for the defendant has pointed out, she cannot ask for prospective relief as she is about to graduate from another school. Moreover, she cannot apply for admissions as a new or transfer student; the only retrospective relief she is seeking is fifty dollars for her non-refundable application fee and fifty dollars for her also non-refundable housing deposit. Either the Court has taken a case to resolve a one-hundred dollar dispute, or something else is afoot.<sup>2</sup> Obviously, the potential exists that the Court will overrule its decision in *Grutter v. Bollinger*<sup>3</sup> and forbid the use of race in any way in school admissions. This could have long-term ramifications for diversity in law school and the legal profession. Then again, it may not affect Indians in the diversity discourse, because Indians are different.

## I. Two Conversations on the Meaning of Diversity

As people of color, we occasionally make derogatory terms out of the names of certain fruits or desserts. We use the words Apple, Banana, Coconut, and Oreo to describe people of our race or ethnicity whom we believe are only superficially of our race or ethnicity but in reality white people with dark skins.<sup>4</sup> An interesting component to our assessment is that we must believe them to be of our racial or ethnic group to begin with; else, we cannot accuse them of being white on the inside when we believe they should be something else.

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1. *Fisher v. Univ of Tex., Austin*, 631 F.3d 213 (5<sup>th</sup> Cir. 2011), *cert granted*, 132 S.Ct. 1546 (2012).

2. See Brief in Opposition, at 2, *Fisher v. Univ. of Tex., Austin*, 132 S.Ct. 1546 (2012) (No. 11-345), 2011 WL 6146835, at \*2–\*3 (noting that based on the facts as presented by the Petitioner, the Respondents could moot the case by paying her the \$100 but fails to state why the University does not pay the \$100).

3. 539 U.S. 306 (2003).

4. To exaggerate the obvious, each of these food items are Red, Yellow, Brown or Black on the outside but white on the inside.



The challenge is to find a way to either reinvigorate those black institutions that sustained us and socialized us in the past – e.g., the Black Church, the NAACP, etc. – and/or to invent new institutions that can do the same or a better job.

I was having lunch one day in 1973 with two of my classmates at Harvard Law School. One, let's call him Paul, was White and the other, let's call him Harold, was Black. In the general course of first year student small talk we learned that Harold was from an educated and financially well-off family, his father being a lawyer and his mother a doctor. He told us that he'd gone to Choate Prep School and then Princeton for his undergraduate degree. Paul looked up at Harold and announced with great incredulity, "Well, you're not Black. You don't know anything about the Black experience in America. You grew up just like me!" Harold chuckled softly and said in the best "street" he could muster, "Paul, if I take a White woman to dinner in South Boston . . . trust me, *I be Black*."

Paul didn't get Harold's subtlety, culturally or linguistically.

On the flip side, several years ago I worked with a man in my alumni association who announced to me one day with great pride that he'd been able to get his grandson into graduate school. Apparently the young man had been denied admission to several schools to which he had applied. My colleague helped him go over his application and in the course of many hours they discovered that one of the young man's grandparents on his mother's side was from Spain. So, on his next application they checked the Hispanic Heritage box and he was accepted into that school. While my associate thought he'd pulled a great coup, he in fact had undermined diversity at that school. His grandson had absolutely no relationship to Hispanic or Spanish culture. He didn't even know that he had such heritage on his family tree previous to that day. He had never identified himself as Hispanic nor would he while in graduate school. He brought no Hispanic diversity to the classroom because he never had a Hispanic experience. He knows nothing of Hispanic culture and he has never been discriminated against for being Hispanic. If the two components of diversity that I discussed above with respect to my law school classmate Harold hold true, this young man had neither an Hispanic cultural experience nor a racialized experience to bring to the discourse.

So what is diversity in the field of law about in the first place? Is it the importance of bringing a cultural, racial or life experience to the legal discourse that is different from others into the classroom or a workplace? Does that include just being a member of a different race in an all white classroom or law firm?

In *Grutter v. Bollinger* the Court approved the Michigan law school's diversity program describing it as one that, "does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions."<sup>5</sup> The

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5. 539 U.S. 306, 316 (2003).





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policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."<sup>6</sup> By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School."<sup>7</sup>

So according to Sandra Day O'Connor "diversity" in law school admissions is broader than race and ethnicity.

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."<sup>8</sup>

In the two scenarios that I presented we clearly have judgments being made about diversity. In the first, Paul didn't judge Harold to be Black, while Harold was pretty sure he had a grip on what it means to be Black in America. Paul would not have found that Harold brought diversity to the class of '76. In the second, I have made the judgment that the young man with his newly discovered Spanish ancestor to be little more than a fraud. He has no more connection to Hispanic heritage than someone who changes their name from Joseph White to Jose Blanco. He might bring something diverse to his class but it won't be Hispanic diversity.

Diversity, of course, means more than the color of your skin or your last name. Recognizing that racial and ethnic diversity can have many layers and components let me focus on how law schools can decide, "What makes someone an Indian?"

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6. *Id.*, (citations omitted).

7. *Id.*, (citations omitted).

8. *Id.* at 333.



## II. Indians Are Different

We are the last people in America for whom there is a legal definition. Being Indian is a mix of racial makeup, cultural heritage, and citizenship in a tribe. In the seminal treatise on Federal Indian Law, published in 1942, Felix S. Cohen wrote:

The term “Indian” may be used in an ethnological or in a legal sense. Ethnologically, the Indian race may be distinguished from the Caucasian, Negro, Mongolian, and other races. If a person is three-fourths Caucasian and one-fourth Indian, it is absurd, from the ethnological standpoint, to assign him to the Indian race. Yet legally such a person may be an Indian. From a legal standpoint, then, the biological question of race is generally pertinent, but not conclusive. Legal status depends not only upon biological, but also upon social factors, such as the relation of the individual concerned to a white or Indian community.

Recognizing the possible diversity of definitions of “Indianhood,” we may nevertheless find some practical value in a definition of “Indian” as a person meeting two qualifications: (a) That some of his ancestors lived in America before its discovery by the white race, and (b) that the individual is considered an “Indian” by the community in which he lives. The function of a definition of “Indian” is to establish a test whereby it may be determined whether a given individual is to be excluded from the scope of legislation dealing with Indians.<sup>9</sup>

In the 1970’s, I was asked to write a chapter for the Smithsonian Handbook of North American Indians on the Legal Status of American Indians. One of the first things I addressed was the question of “who is an Indian?” Some statutes or regulations provide that they grant benefits to persons who have a specific quantum of Indian blood, others require membership in a federally recognized tribe.<sup>10</sup> In general, the answer is probably: “It depends on the purpose for which the question is asked.” In the Handbook, I essentially proposed continued use of the Cohen definition but altered slightly. I modified Cohen’s (b) and made it “considered an Indian by the community in which he lives or where he was raised.” I wanted to recognize that in the modern mobile society some of us may be recognized as Indians in our home communities but not necessarily in our present community. I also added a third prong (c) that “the person holds themselves out to be an Indian.” This addresses two concepts: first, perhaps somebody shouldn’t be assigned to a race they don’t hold themselves to be;<sup>11</sup> and, second, someone who has always held themselves out to be one race shouldn’t be allowed to call themselves a different race to achieve a benefit.<sup>12</sup>

Indians are a race, but we are also members of bodies politic: we are citizens of our tribes. When Bill Clinton was President, he established a Race Advisory Board with White, Asian, Hispanic, and Black members. But, he didn’t appoint an Indian to the board. I spent a lot of time and ink criticizing

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9. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942), available at <http://thorpe.ou.edu/cohen.html>.

10. Tribal membership is controlled almost exclusively by tribal law and custom. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

11. In the infamous *Plessy v. Ferguson*, few remember that Plessy argued that he had a legal right - a property right - to his race. He had always held himself out to be white and he argued that he had a right to be white even though the railroad wanted to assign him to the car for “the colored race.” In fact, the statute allowing separation of the races in the passenger cars had a section exempting the conductors and the railroad from liability for assigning someone to the “wrong car” for their race. Plessy also challenged that part of the statute as being unconstitutional but the issue was deemed by the Supreme Court not to be properly before the Court. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

12. As I have previously written about, the National Native American Bar Association has a great concern about individuals who lie about their race because they believe affirmative action will get them into law school. We call them box checkers. We occasionally ask the question of such students, “What race were you before you filled out the law school application?”

the President for that, alleging everything from “he didn’t think Indians are a race” to “not thinking Indians are a race important enough for the Race Advisory Board”. I took some heat from my fellow Native Americans because of a legal doctrine developed by the Supreme Court in the case of *Morton v. Mancari*, the political distinction doctrine.<sup>13</sup> In that case, a non-Indian employee of the Bureau of Indian Affairs challenged the BIA employment regulations that give preference in hiring and promotion to individuals who are members of federally recognized tribes.<sup>14</sup> The Supreme Court addressed the matter as follows:

Contrary to the characterization made by appellees, this preference does not constitute “racial discrimination.” Indeed, it is not even a “racial” preference. [FN24] Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency.

FN24. The preference is not directed towards a “racial” group consisting of “Indians”; instead, it applies only to members of “federally recognized” tribes. This operates to exclude many individuals who are racially to be classified as “Indians.” In this sense, the preference is political rather than racial in nature.<sup>15</sup>

In simple terms, the Court found that membership in an Indian tribe was a political distinction and not a racial distinction and, therefore, the preferences based on membership did not violate the Equal Employment Opportunity Act of 1972<sup>16</sup> or the Due Process Clause of the Fifth Amendment. The *Mancari* distinction has then lead many to state that Indians are a political group not a racial group. I was therefore criticized for putting too much of a spotlight on Indians as a racial group which some feared would cause the Supreme Court to revisit the concept and overturn *Mancari*, which could then in turn eliminate Title 25 to the United States Code as being racially motivated and unconstitutional.<sup>17</sup>

As a civil rights lawyer, I know the keen distinction between race and tribal membership. My father was assaulted and stabbed 27 times for walking into a “whites only” establishment in 1939. The six men who jumped him didn’t ask if he was an enrolled member of a federally recognized tribe. They made a facial, racial judgment that he was an Indian in a place Indians were not allowed. While our tribe is a federally recognized tribe, my father was not enrolled, nor am I. But, by the Cohen definition and that of the Handbook of North American Indians, we are clearly both Indians. In my father’s case, he spoke a little of the tribal language but never taught any of it to his sons because he wanted us to “fit in” to Anglo-society without any linguistic impediment that may come with having spoken a language other than English as a first language. He was raised in an Indian home but not on an Indian reservation. When he walked into grocery stores in Southern California in the 1960’s people would shout, “Hey, Chief!” to him. Clearly, socially, he was an Indian. In that bar in 1939, he certainly got “racially Indian” treatment.

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13. 417 U.S. 535 (1974).

14. There are 573 tribes in the United States that the federal government agrees that it has a government-to-government relationship with. These tribes are known as “federally recognized” and are on a list published annually in the Federal Register. With very limited exception, membership in a tribe is governed by the tribes’ rules and regulations on membership. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

15. *Morton v. Mancari*, 417 U.S. 535, 553–554 (1974).

16. 42 U.S.C. 2000e *et seq.*

17. Title 25 of the U.S. Code is “Indians.” We are the only racial group in America to have our own title in the United States Code.



## As a civil rights lawyer, I know the keen distinction between race and tribal membership.

As his sons, while a great many details are not necessary here, my brothers and I also experienced racialized treatment growing up. Let your imagination wander through facing the use of derogatory terms like “half-breed” or “redskin” to describe you and the general social stigma that leads to having your girlfriend beaten with a soup ladle by her mother for going out with you because of your Indian background. When you get caught pitching pennies with white kids, you and the Hispanic boy get suspended for being “the ring leaders” while the white kids have notes sent home to their parents. You get kicked off the cross-country team because your long hair violates the school’s dress code.<sup>18</sup> It’s all the usual stuff that gives you a negative racialized experience. We faced the social rejection based on Indian status. Alternatively, I have been elected President of the National Native American Bar Association three times. I have social acceptance by the Indian community as an Indian. So, while we might not be enrolled members of our tribe, we *are* Indians.

In the federal criminal code, United States Code Title 18, there are a pair of statutes most lawyers have never heard of called the Indian Country Crimes Statutes:

### Sec. 1152. Laws governing

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.<sup>19</sup>

This section shall not extend to offenses committed by *one Indian* against the person or property of *another Indian*, nor to *any Indian* committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.<sup>20</sup>

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18. Forget that you wear your hair uncut for religious reasons; the First Amendment does not protect Indians at your high school.

19. Indian Country is also a legal term of art defined at 18 U.S.C. § 1151:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

20. 18 U.S.C. § 1152 (emphasis added).



## Being an Indian is not just membership in a federally recognized tribe.

### Sec. 1153. Offenses committed within Indian country

(a) *Any Indian* who commits against the person or property *of another Indian or other person* any of the following offenses, ... within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.<sup>21</sup>

When examining these statutes, courts have routinely held that being Indian is an element of the crime that must be proven by the prosecuting United States Attorney. Consider the recent case of *United States v. Stymiest*,<sup>22</sup> where the following jury instruction was given at the end of the trial in a prosecution under 18 U.S.C. §1153:

The second element is whether Matthew Stymiest is recognized as an Indian by the tribe or by the federal government or both. Among the factors that you may consider are:

1. enrollment in a tribe;
2. government recognition formally or informally through providing the defendant assistance reserved only to Indians;
3. tribal recognition formally or informally through subjecting the defendant to tribal court jurisdiction;
4. enjoying benefits of tribal affiliation; and
5. social recognition as an Indian through living on a reservation and participating in Indian social life, including whether the defendant holds himself out as an Indian.

It is not necessary that all of these factors be present. Rather, the jury is to consider all of the evidence in determining whether the government has proved beyond a reasonable doubt that the defendant is an Indian.

It is pretty clear in this context that being an Indian is not just membership in a federally recognized tribe. The distinction between being an Indian and not Indian is important. If an Indian and a non-

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21. 18 U.S.C. § 1153(emphasis added).

22. 581 F.3d 759, 767 (8th Cir. 2009).

Indian assault and do serious bodily harm to a non-Indian within Indian Country, they will be charged under different laws and be tried in different courts. Because of 18 U.S.C. § 1153 the Indian will be charged with a federal crime in federal court while the non-Indian will be charged for a state crime and tried in state court.<sup>23</sup> Even where the penalties or the elements of the crime are different between the two statutes, the Supreme Court has approved of the distinction:

The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.<sup>24</sup>

This case stands for the proposition that no matter what the Supreme Court does next term in the Texas case, Indians can still be targeted by colleges and law schools for diversity preference. Not the race of Indians, but Indians who meet the *Mancari* standard and are enrolled members of federally recognized tribes.

In what could be a very interesting turn of events, if the Court were to forbid the use of race in admissions, more Indians could in fact be admitted in to law school. The National Native American Bar Association has argued that half or more of all of the people in law school today who claim to be Indians really are not but have checked the box to receive the diversity points. This then allows law schools to say they have significant numbers of Indian students when they really don not. If the use of race in admissions is forbidden there will be no market for non-Indians to lie about being Indian. If law schools keep their diversity commitment and start asking for enrollment numbers and tribal affiliation non-Indians will not be able to lie about being Indian, and so only actual Indians will be counted as Indians by law schools.

I told you, Indians are different.

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23. See generally *United States v. McBratney*, 104 U.S. 621 (1881).

24. *United States v. Antelope*, 430 U.S. 641, 645 (1977) (citing *Morton v. Mancari*, 417 U.S. 535 (1974)) (citation omitted).



I told you, Indians are different.

# Discrimination faced by Gypsies and Travellers in the United Kingdom

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*The Roma, better known as Gypsies and Travellers, have been romanticized and exoticized in books and films for Americans. They are, however, a real group of people who, by their history, culture and lifestyle, have been subjected to myriad forms of prejudice and discrimination, often under color of law. While their issues are better known in Europe, there is a growing community of Roma in the US and understanding some of the challenges they face in the United Kingdom might help prevent similar problems in the US.*

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## I. Introduction

The eviction of a large number of Irish Traveller families from a caravan site in England known as Dale Farm in October 2011 was publicised across the Globe. This article discusses the discrimination faced by Gypsies and Travellers in the United Kingdom.

## II. The Ethnic Identity of Romani Gypsies and Irish Travellers

Romani Gypsies have been residents of the United Kingdom since the 16th century. Irish Travellers have been residents of mainland Britain since at least the 19th century. Yet, despite this long history, they remain two of the most disadvantaged racial groups in our society.

It is important to note that Romani Gypsies and Irish Travellers have been held to be “ethnic groups” for the purpose of the Race Relations Act (RRA) of 1976. In *CRE v Dutton*,<sup>1</sup> the Court of Appeal found that Romani Gypsies were a minority with a long, shared history, a common geographical origin and a cultural tradition of their own. By so ruling, the court held that they qualified for “ethnic group” status.

In *O’Leary v Allied Domecq*,<sup>2</sup> HHJ Goldstein reached a similar decision in respect of Irish Travellers. Although only a county court judgment, it should be noted that in Northern Ireland, Irish Travellers are explicitly protected from discrimination under the Race Relations (Northern Ireland) Order 1997 Article 5(2), and this makes it highly unlikely that their status as members of a separate ethnic group could be open to challenge again in the United Kingdom.<sup>3</sup> As HHJ Goldstein said in *O’Leary*:

[I]f indeed it be the case, as the defence argue, that Irish travellers do not bring themselves within the definition of an ethnic social group under the Act, then we have a very strange anomaly that Irish travellers are protected in Ireland but not protected in England as a result of legislation by a British government.<sup>4</sup>

Romani Gypsies and Irish Travellers are protected from discrimination by the RRA 1976 whether or not they pursue a nomadic way of life. It is their identity as separate groups that makes them eligible for protection.

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1. [1989] Q.B. 783 (Eng.).

2. (unreported) 29 August 2000 (Case No CL 950275–79), Central London County Court, Goldstein HHJ.

3. MICHAEL CONNOLLY, TOWNSHEND-SMITH ON DISCRIMINATION LAW: CASES AND MATERIALS 147 n.47 (2d ed. 2004).

4. *O’Leary*, *supra* note 2, at 26.





That said, New Travellers who cannot claim an ethnic heritage may be able to argue that a decision taken by a public body which discriminates against them on grounds associated with their lifestyle violates their rights protected by Article 14 of the European Convention on Human Rights (ECHR).

### III. New Travellers

New Travellers and other occupational Travellers (other than those who can claim an ethnic heritage) do not fall within the definition of a racial group. In *O'Leary*, HHJ Goldstein made it clear that the court's decision would not enable all Travellers to claim ethnic status, and that it should not be seen as "opening the floodgates to endless applications from amorphous groups seeking to take advantage of this decision."<sup>5</sup> Furthermore, it was made clear by Stocker LJ in *CRE v. Dutton* that a strong case would need to be made by others and that "the fact alone that a group may comply with all or most of the relevant criteria does not establish that such a group is of ethnic origin."<sup>6</sup>

That said, New Travellers who cannot claim an ethnic heritage may be able to argue that a decision taken by a public body which discriminates against them on grounds associated with their lifestyle violates their rights protected by Article 14 of the European Convention on Human Rights (ECHR).

### IV. Discrimination Suffered by Gypsies and Travellers

Although race relations legislation has been in force in the United Kingdom since 1965 and has developed considerably to protect against increasingly subtle forms of discrimination, Gypsies and Travellers are still experiencing discrimination of the most overt kind: "No blacks, no Irish, no dogs" signs<sup>7</sup> disappeared decades ago, but "No Travellers" signs used intentionally to exclude Gypsies and Travellers are still widespread, indicating that discrimination against these groups remains the last "respectable" form of racism in the United Kingdom.<sup>8</sup>

This is supported by the findings of a 2003 MORI poll conducted in England in which 34 per cent of respondents admitted to being personally prejudiced against Gypsies and Travellers.<sup>9</sup> In 2004, Trevor

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5. *Id.* at 39.

6. 2 WLR 17 at 34.

7. See, e.g., Robbie McVeigh, *Nick, Nack, Paddywhack: Anti-Irish Racism and the Racialisation of Irishness*, in *RACISM AND ANTI-RACISM IN IRELAND* 136–152 (Ronit Lentin & Robbie McVeigh eds., 2002).

8. See, e.g., DEREK HAWES & BARBARA PEREZ, *THE GYPSY AND THE STATE: THE ETHNIC CLEANSING OF BRITISH SOCIETY* 148–155 (1996).

9. STONEWALL, *PROFILES OF PREJUDICE: THE NATURE OF PREJUDICE IN ENGLAND* (2003).





A key contributor to the poor socioeconomic condition of Gypsies and Travellers is the fact that thousands of families have no lawful residence: they are routinely refused planning permission and face constant eviction or other enforcement action, including criminal proceedings, when trying to pursue their traditional way of life by living in their caravans.

Phillips, former Chair of the Commission for Racial Equality (CRE) and current Chair of the Equality and Human Rights Commission (EHRC), compared the situation of Gypsies and Travellers living in Great Britain to that of black people living in the American Deep South in the 1950s. Similarly, in 2005, CRE Commissioner Sarah Spencer drew further attention to their plight in an article entitled *Gypsies and Travellers: Britain's Forgotten Minority*.<sup>10</sup>

The European Convention on Human Rights . . . was a key pillar of Europe's response to the Nazi holocaust in which half a million Gypsies were among those who lost their lives. The Convention is now helping to protect the rights of this community in the United Kingdom . . . .

The majority of the 15,000 caravans that are homes to Gypsy and Traveller families in England are on sites provided by local authorities, or which are privately owned with planning permission for this use. But the location and condition of these sites would not be tolerated for any other section of society. 26 per cent are situated next to, or under, motorways, 13 per cent next to runways. 12 per cent are next to rubbish tips, and 4 per cent adjacent to sewage farms. Tucked away out of sight, far from shops and schools, they can frequently lack public transport to reach jobs and essential services. In 1997, 90 per cent of planning applications from Gypsies and Travellers were rejected, compared to a success rate of 80 per cent for all other applications . . . . 18 per cent of Gypsies and Travellers were homeless in 2003 compared to 0.6 per cent of the population . . . .

Lacking sites on which to live, some pitch on land belonging to others; or on their own land but lacking permission for caravan use. There follows a cycle of confrontation and eviction, reluctant travel to a new area, new encampment, confrontation and eviction. Children cannot settle in school. Employment and health care are disrupted. Overt discrimination remains a common experience . . . . There is a constant struggle to secure the bare necessities, exacerbated by the inability of many adults to read and write, by the reluctance of local officials to visit sites, and by the isolation of these communities from the support of local residents . . . . But we know that these are communities experiencing severe disadvantage. Infant mortality is twice the national average and life expectancy at least 10 years less than that of others in their generation.<sup>11</sup>

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10. 4 EUR. HUM. RTS. L. REV. 335 (2005).

11. Id.

## V. Shortage of Suitable Accommodation

A key contributor to the poor socioeconomic condition of Gypsies and Travellers is the fact that thousands of families have no lawful residence: they are routinely refused planning permission and face constant eviction or other enforcement action, including criminal proceedings, when trying to pursue their traditional way of life by living in their caravans.

There is a significant shortfall in accommodation for Gypsies and Travellers throughout England and Wales, and about 20–25% of those living in caravans are homeless. In order to understand how the shortfall has arisen one must appreciate the effect of legislation and policy on the provision of accommodation for Gypsies and Travellers over the last 50 years.

### A. Past Policy

In 1960, Parliament passed the Caravan Sites and Control of Development Act (CSCDA). That Act was designed to regulate and control private caravan sites and provided that no occupier of land could use it as a caravan site without a site licence and that a site licence could not be obtained unless planning permission had been granted for the use of the land for such a purpose. Section 23 of the CSCDA 1960 gave local authorities the power to close common land to Gypsies and other Travellers. This power was used enthusiastically by local authorities. Section 24 also gave local authorities the power to provide caravan sites to compensate for the closure of the commons. However, local authorities failed to make use of this collateral power and it became increasingly difficult for the Gypsy and Traveller population to carry on their nomadic way of life.

In 1968, having recognised the problems caused by the 1960 Act, Parliament passed the Caravans Sites Act (CSA). It came into effect on April 1<sup>st</sup>, 1970 and was designed to convert the Section 24 CSCDA 1960 discretionary power into a duty imposed on County Councils to provide caravan sites for Gypsies resorting to or residing in their area. Though sites were built as a result of the CSA 1968 a number of authorities failed to comply with their duty and there remained a significant shortfall in authorised accommodation. As J. Sedley noted in *Regina v. Lincolnshire Cnty. Council*:<sup>12</sup>

For the next quarter of a century there followed a history of non-compliance with the duties imposed by the Act of 1968, marked by a series of High Court decisions holding local authorities to be in breach of their statutory duty, to apparently little practical effect.

Then in 1994 Parliament passed the Criminal Justice and Public Order Act. The CJPOA 1994 repealed much of the CSA 1968, including the duty imposed on County Councils to provide authorised sites. Though the Section 24 CSCDA 1960 power to provide sites has been retained it has not been utilised and as a consequence the number of local authority sites has fallen.

At the same time the CJPOA 1994 gave both the Police and local authorities additional powers to remove Gypsies and Travellers when they park their caravans on unauthorised encampments: see sections 61 and 77 of the CJPOA 1994 respectively.<sup>13</sup>

The government also issued Circular 1/94, which contained new planning advice on the provision of Gypsy sites. It advised local authorities to quantify the need for Gypsy sites in their areas and to identify locations where such sites could be built with planning permission in their local plans. However, that advice was roundly ignored by local authorities, and as a consequence Gypsies and Travellers were given no guidance on where they could develop their own private sites and the shortage of lawful accommodation increased.

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12. [1997] JPL 65.

13. *Id.* Failure to comply with a direction given by a Police officer is a criminal offence and can lead to an arrest without warrant, imprisonment on conviction and the seizure of vehicles: Police and Criminal Evidence Act, 1984, c. 60, §24; Criminal Justice and Public Order Act, 1994, c. 33, § 61 sch. (4), § 62, sch. (1). Failure to comply with a local authority's Section 77 removal direction is also a criminal offence and a person who remains on the land after the removal direction has expired risks having their goods (including their caravan and home) removed from the site and impounded.

It is clear that Circular 1/94 failed to deliver sufficient sites for Gypsies living in England. Indeed, the effect of the repeal of the 1968 CSA, coupled with the changes to planning guidance, the enforcement powers given to local authorities and the Police by the CJPOA 1994, and the existing remedies available to private landowners has been to render it virtually impossible for those Gypsies and Travellers without an authorised site to continue living their traditional way of life within the law.

## **B. Circular 1/06 – A New Policy Regime**

On 2<sup>nd</sup> February 2006 the government issued the ODPM Circular 01/06 “Planning for Gypsy and Traveller Caravan Sites.” This replaced Circular 1/94. The government decided that it was necessary to issue new planning advice precisely because the evidence showed that Circular 1/94 had failed to provide adequate sites for Gypsies and Travellers in many areas of England over the last 12 years.

In Paragraph 5 of Circular 1/06 the government referred to the poor health and low level of educational attainment amongst Gypsies and Travellers.<sup>14</sup> In the same paragraph the government expressed the view that the new Circular should enhance their health and education outcomes.

In Paragraph 12 the government indicated that it is intended that Circular 1/06 will, inter alia:

- Create and support sustainable, respectful and inclusive communities where Gypsies and Travellers have fair access to suitable accommodation, education, health and welfare provision;
- reduce the number of unauthorised encampments and developments;
- increase significantly the number of Gypsy and Traveller sites in appropriate locations with planning permission in order to address under-provision over the next 3–5 years;
- recognise, protect and facilitate the traditional travelling way of life of gypsies and travellers, whilst respecting the interests of the settled community;
- underline the importance of assessing needs at regional and sub-regional level and for local authorities to develop strategies to ensure that those needs are dealt with fairly and effectively;
- identify and make provision for the resultant land and accommodation requirements;
- promote more private Gypsy and Traveller site provision in appropriate locations through the planning system, while recognising that there will always be those who cannot provide their own sites;
- help avoid Gypsies and Travellers becoming homeless through eviction from unauthorised sites without an alternative location available.

## **C. The New Planning System**

Circular 1/06 sets forth how the new planning system will work in the context of the provision of Gypsy sites. It makes it clear that Local Planning Authorities (LPAs) should begin the process by assessing the accommodation needs of Gypsies and Travellers and using that data to produce Gypsy and Traveller Accommodation Assessments (GTAAAs).

The information from GTAAAs is to be fed to the Regional Planning Boards (RPBs), who would then benchmark the GTAAAs and prepare Regional Spatial Strategies (RSSs) that identify the number of pitches required (but not their location) for each LPA and a strategic view of needs across the region.

It would then fall to individual LPAs to produce their own Development Plan Documents (DPDs), which set out site-specific allocations for the number of pitches that the RSSs have specified they need

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14. See e.g. GYPSIES AND TRAVELLERS: BRITAIN’S FORGOTTEN MINORITY 335 (2005).



Those representing Gypsies and Travellers fear that this new approach will not address the site shortfall, and that many local authorities will, true to historical form, bow to pressure from local people and “NIMBYism”<sup>15</sup> and do little or nothing to address the existing need for sites.

in order to accommodate Gypsies and Travellers within their areas.

LPAs would need to demonstrate that the proposed sites are suitable and that there is a realistic likelihood that specific sites allocated in DPDs can and will be made available for that purpose. DPDs will also need to explain how the required land would be made available for a Gypsy site, and must provide projected timelines for such provision.

All DPDs are subject to independent examination by an Inspector, and the conclusions reached by such an Inspector will be binding. If an LPA fails to allocate sufficient sites for the needs of identified Gypsies and Travellers, then the Inspector could recommend the alteration of the DPD to include additional sites. The Secretary of State also has default powers over the DPDs.

The government recognised that it would take some time for LPAs to complete GTAAs, for RPBs to produce RSSs which accurately identify the number of pitches that individual LPAs should be required to provide, and for LPAs to then adopt site specific DPDs. As a consequence of this delay, the government gave LPAs advice on steps that might need to be taken during the transitional period and the circumstances in which temporary planning permission might be granted.

## VI. Coalition Government Policy Changes: A Recipe for Inaction?

Following the general election in May 2010, the coalition government was formed and Eric Pickles, the new Secretary of State for Communities and Local Government, announced that Circular 1/06 would be replaced with “light touch guidance.” This replacement guidance has not yet been published, but those representing Gypsies and Travellers fear that any watering down of the existing policy will have a negative effect on site provision.

Significantly, Mr. Pickles also announced that he intended to abolish regional bodies and that the RSSs will no longer play a part in the planning process. As a consequence, it seems that LPAs will be left to decide for themselves the extent to which they make provision for Gypsies and Travellers.

Those representing Gypsies and Travellers fear that this new approach will not address the site shortfall, and that many local authorities will, true to historical form, bow to pressure from local people and “NIMBYism”<sup>15</sup> and do little or nothing to address the existing need for sites. If this happens, all the good work done up and down the country to reduce the shortage of sites will be wasted.

Such a result would have a catastrophic effect on Gypsies and Travellers and their ability to access the healthcare and education that the rest of our society enjoys. It will also do nothing to ensure that evictions like that which occurred on Dale Farm in 2011 never happen again.

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15. “NIMBY” is an acronym for “Not In My Back Yard,” which aptly represents the typical historical response to the locations of Gypsy and Traveller sites.

# Memo to Law Firms: How to Better Recruit and Retain South Asian American Lawyers

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*The South Asian American community – including Americans of Indian, Pakistani, Bangladeshi, and Sri Lankan ancestry – is a non-homogenous group that brings together a variety of ethnic, religious, and linguistic characteristics that all fall under the label of “South Asian,” or the even larger “Asian American.” Stone explores some of the particular challenges facing South Asian American lawyers and strategies that some law firms are using to successfully recruit and retain South Asian Americans.*

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A Caucasian colleague once shared with me that his then six-year-old son told him that when he grew up he wanted “to be Asian”, just like his best friend who was Indian. Despite his father telling him that was not possible, his son simply replied, “yes it is—you told me I could be anything I want.” Imagine what the world would be like if everyone shared this child’s ingenuousness and acceptance!

Now imagine a legal profession in the United States where all ethnicities are equally represented in law firms. Even though the legal profession has made considerable progress towards inclusion, the fact remains that women and minorities continue to face challenges in rising to the top positions. According to the National Association for Law Placement (NALP), only 6% of partners at firms are minorities, and a mere 2% are minority women. Notably, while racial and ethnic minorities make up nearly 30% of the U.S. population, they account for less than 15% of the practicing attorneys in this country.<sup>1</sup> This racial divide is expected to become even more expansive, “as statistics project that by the year 2050, the United States will nearly be a ‘majority-minority’ country, and the Latino population will exceed all of the other minority populations combined; a true demographic sea change.”<sup>2</sup>

The changes in the practice of law have contributed to the obstacles facing minority attorneys. For instance, when I was in law school, the expectation was that a bright law student could expect to work as a summer associate at a firm, earn an offer at the end of the summer, rise through the ranks from associate to partner, and eventually retire from that same firm. Today, however, the legal profession is experiencing unprecedented transformations.<sup>3</sup> Attorneys at all levels are making lateral moves with greater frequency, and there is no longer the job security that was once in place for established partners. In-house counsel are likewise not immune from difficulty, as they are being asked to handle more assignments internally with smaller budgets and less support. Additionally, private law firms are merging, shrinking, or dissolving, and minority attorneys are finding it even harder to advance in their field. This article focuses on South Asian American attorneys, and how law firms can better recruit and retain these (and other) diverse attorneys.

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1. ABA Presidential Advisory Council on Diversity in the Profession, *The Critical Need to Further Diversify the Legal Academy & the Legal Profession*, THE PIPELINE INTO THE LEGAL PROFESSION: SELECTED FACTS & STATISTICS (October 2005), <http://apps.americanbar.org/op/pipelineconf/acdreport.pdf> [hereinafter *The Critical Need*].

2. *Id.*

3. See, e.g., Joshua Kubicki, LEGAL TRANSFORMATION: THE CHANGING LEGAL PROFESSION, <http://www.legaltransformationblog.com/> (last visited on Aug. 23, 2012).





Even though the legal profession has made considerable progress towards inclusion, the fact remains that women and minorities continue to face challenges in rising to the top positions.

## I. Who is a “South Asian American” Attorney?

While the term “Asian Americans” is used generically to refer to someone of Asian descent, this group as a whole includes very diverse groups: Asian Indians, Chinese, Filipino, Japanese, Korean, South Asians (Bangladesh, Bhutan, India, Nepal, Pakistan, and Sri Lanka Americans), and Southeast Asians (Burmese, Cambodian (Kampuchean), Lao, Lao Hmong, Lao Mien, Thai, Vietnamese Americans).<sup>4</sup> Drilling down further, a “South Asian American” attorney is someone who is part of a non-homogeneous group comprised of individuals who possess a variety of ethnic, religious, and linguistic characteristics.<sup>5</sup> Over three million South Asians live in the United States, and the four largest South Asian groups in America include Indians, Bangladeshis, Pakistanis and Sri Lankans.<sup>6</sup> The largest groups of South Asian Americans in the U.S. reside in metropolitan areas on the East and West coasts, including New York/New Jersey, San Francisco Bay Area, Chicago, Los Angeles, and the Washington D.C. Metro area.<sup>7</sup> These populations practice a variety of religions, including Buddhism, Christianity, Hinduism, Jainism, Judaism, Islam, and Sikhism. Other than English, common languages spoken by South Asians in America include Bengali, Hindi, Punjabi, Gujarati and Urdu.<sup>8</sup>

In addition to their religious, ethnic, and linguistic diversity, South Asian Americans also have varying socioeconomic statuses. The majority of South Asians who live in the United States are foreign-born, with over 75% of the population born outside of the United States.<sup>9</sup> With respect to employment, many South Asian Americans have careers in the technology and medical fields; yet, many within the community also are employed in lower-wage jobs as cashiers, taxi workers, and restaurant workers.<sup>10</sup> However, South Asian American attorneys are one of the fastest growing sectors of the legal community, and the North American South Asian Bar Association has over 6,000 members in twenty-seven chapters across the country.<sup>11</sup>

## II. Statistics from the Legal Profession

Part of the dialogue in cultivating a legal climate that includes South Asian American attorneys is recognizing that they are a distinct group. For example, there are no formal resources that specifically

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4. University of California, Berkeley, Department of Ethnic Studies, *Asian American Studies Collection*, ETHNIC STUDIES LIBRARY, <http://eslibrary.berkeley.edu/asian-american-studies-collection> (last visited Aug. 23, 2012).

5. South Asian Americans Leading Together, *About The South Asian Community*, SAALT, <http://www.saalt.org/pages/About-the-South-Asian-Community.html> (last visited Aug. 23, 2012).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Emilie R. Ninan, *Message from the President*, NASABA, <http://www.nasaba.com/?page=PresidentsMessage> (last visited Aug. 23, 2012).



## There are few Asian American lawyers in partnership or management positions in law firms.

track the enrollment of South Asian American attorneys in law schools, their respective placements, or the number of South Asian American attorneys in law firms. Rather, South Asian Americans are included in groups that track “Asian American” attorneys as a whole. The “Asian American” category is enormous, including people from the Far East, Southeast Asia, or the Indian subcontinent. Even by lumping Asian Americans into one big group, the statistics that are available for this diverse population paint a bleak picture. According to the American Bar Association, for instance, Asian American attorneys in 2010 accounted for only 3.4% of the total number of lawyers in the United States.<sup>12</sup>

Also, among all employers listed in the 2010–2011 NALP Directory of Legal Employers, just over 6% of partners were minorities, 1.95% of partners were minority women, but many offices reported no minority partners at all. As of 2010, 9.39% of Asian Americans were associates, and Asian American women only accounted for 5.15% of all associates. Worse yet, Asian Americans only accounted for 2.3% of law firm partners, and Asian American women accounted for 0.81% of partners. The U.S. Equal Employment Opportunity Commission reports that, while 74.3% of male associates felt advancement opportunities were available to all associates in law firms, only 50.0% of women associates felt that way.<sup>13</sup> While 70.2% of non-minority associates in law firms felt opportunities for partnership were equal, only 30.8% of minority associates had the same perception.<sup>14</sup>

Asian Americans often are called the “model minority,” to account for their successes and their characteristics as “hard working, diligent, smart (particularly good with mathematics and sciences), willing to abide by rules, regulations and structure, and self-effacing.”<sup>15</sup> The fact remains, however, that there are few Asian American lawyers in partnership or management positions in law firms. A study conducted by the New York City Bar found, “[o]ver multiple periods of tracking the diversity benchmark data, the representation of Asian attorneys consistently declined with increasing levels.”<sup>16</sup> The concept of the “model minority” is inflated; while Asian American lawyers are presumed to be successful, they are still underrepresented in law firm recruiting classes, associate ranks, and partnership circles.<sup>17</sup>

12. AMERICAN BAR ASSOCIATION, *LAWYER DEMOGRAPHICS* (2012) (available at [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_demographics\\_2012\\_revised.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf)).

13. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *DIVERSITY IN LAW FIRMS* (2003) (available at [www.eeoc.gov/eeoc/statistics/reports/diversitylaw/lawfirms.pdf](http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/lawfirms.pdf)).

14. *Id.*

15. Lily Liu, *Combating Stereotypes: “All Asians Are Good At . . .”*, *DIVERSITY AND THE BAR* (May 2001) <http://www.mcca.com/index.cfm?fuseaction=page.viewPage&pageID=1290>.

16. Vivia Chen, *Asian American Lawyers Still Underdogs*, *THE CAREERIST* (February 3, 2011) <http://thecareerist.typepad.com/thecareerist/2011/02/asian-american-lawyers.html>.

17. *Id.*



### III. What is Driving the Low Numbers?

#### A. Recruiting Process

As many South Asian Americans can attest to, our familial culture places a high value on education and a strong work ethic. In grade school, I was part of a group of students in a “Learn about Lawyers” program where we visited a courtroom and talked with judges and practicing attorneys. There were no other lawyers in my family (and I still am the only attorney, even in my extended family), but after that field trip, I was excited about arguing cases and helping clients. My parents had advised me to become a physician (which my older brother eventually became), but I persuaded my family that law was the right career for me. During law school, however, I was mindful during on-campus interviews and throughout the recruiting process about the lack of South Asian American attorneys in law firms.

My experience resonates with other South Asian American lawyers. “My parents and all my Indian friends’ parents expected us to become doctors or engineers like them,” confesses a South Asian American partner in Boston. “My parents were surprised that I wanted to pursue law, but they viewed it as an ‘acceptable profession’ so supported me. Some of my other friends weren’t as lucky and were *told* by their families, including extended members of their families, to pursue medicine because there would be senior Indian doctors to help them along the way. There were no senior Indian lawyers helping me along the way.”

Jolsna John, Associate House Counsel at Operating Engineers Local Union No. 3 and current President of the North American South Asian Bar Association (NASABA) and Emilie Ninan, Managing Partner of Ballard Spahr LLP’s Wilmington, Delaware office and President-Elect of NASABA have similar observations. They note that South Asians primarily still are a first generation of attorneys in the U.S. and Canada, and over time the numbers will continue to increase. South Asians have the fastest growing membership base due to the sheer numbers of South Asians now entering the legal field. “We are encouraged by the promotion of South Asians to partnership and management,” John notes. Still, she cautions, “Although, we have been pleased to see with the progress that South Asians have been making in recent years within law firms, corporate law departments, government, academia and the judiciary, there is still a long way to go.”

Sarabjeet Kapoor, an attorney at the Fairfax, Virginia office of The Chugh Firm says that, with limited job opportunities in this climate, the cost-benefit analysis of law school does not make sense. “This is problem that pervades the entire legal industry. It’s simply not a good economic decision to go to law school. For many South Asians, it makes more sense to go into medicine or IT.”

One Pakistani shareholder in New York City offers an interesting perspective. “My parents immigrated to America when I was four years old and with very little money; they wanted a better life for us. They often worked multiple low-paying jobs so I could go to school. There were no students who looked like me or talked like me. In fact, I was the only minority kid in my class for years. Law school wasn’t much different. Because of my parents’ discipline, I knew I had to work hard and make something of myself, which meant that during the recruiting process I had to not only have good grades, but also the cultural and social skills to be a top candidate for law firms. Frankly, I still feel that pressure today, where I feel I need to ‘assimilate’ in order to identify with colleagues and clients.”

Kapoor agrees, “I think South Asian attorneys may have trouble adjusting to the culture of law firms. Almost from the day they are hired, they can be considered ‘different’ and are required to act differently to fit in.”

Traditionally, attempts to improve the diversity of attorneys focused on law firm recruiting at law

schools. Many groups now advocate, however, that true change requires beginning much earlier than on-campus recruiting. The focus has shifted to “pipeline” efforts, which are created to reach out to minorities early and throughout their educations. While the percentage of Asian American students graduating from high school and college remains high, the crisis in the pipeline to the legal profession continues in disproportionately lower application, enrollment, and graduation rates of Asian American students in U.S. law schools. In Fall 2004, for example, Caucasian/white students accounted for 65% of all applicants to ABA-accredited law schools.<sup>18</sup> Asian students made up only 8.5% of that same pool of applicants and represented only 8.2% of all first year law students in 2004.<sup>19</sup> Compared to other minority groups (including African Americans, Hispanics, and American Indians), in recent years Asian Americans have had the largest number of students matriculating from law school.<sup>20</sup> Nevertheless, Asian Americans and South Asian Americans in particular remain underrepresented in law firms.

The notion that South Asian Americans are among the “model minority” also prevents law firms from recognizing and eliminating obstacles faced by South Asian American lawyers with respect to promotion to partnership and advancement within the legal profession. Because they believe South Asian American attorneys are intelligent and hard-working, law firm managers mistakenly assume that these lawyers do not face discrimination and hurdles to development and progression similar to those faced by other minorities.<sup>21</sup> Such individuals, and the firms in which they work, “are unlikely to take significant action to address these issues and to recruit and develop Asian American talent.”<sup>22</sup>

Like the “Learn about Lawyers” program I was enrolled in, pipeline programs target South Asian American students who are interested in law in college, high school, and even elementary schools. The goal is to overcome socioeconomic inequalities that cause “leaks” in the pipeline and, consequently, the number of minority college students with an interest in and ability to pursue a legal career.<sup>23</sup> The American Bar Association has devoted resources to remedying these leaks and offers three strategies to overcome these difficulties:

- Breaking down institutional and systemic barriers that impede the educational success of minorities;
- Developing meaningful mentoring and networking opportunities for minorities; and
- Providing quality academic assistance to minorities.<sup>24</sup>

One focus of pipeline recruiting is to enable diverse students to develop and sustain long-term, meaningful relationships with their mentors and role models, so that these sponsors can help foster goals and tangible accomplishments. The idea is that, by reaching South Asian American students at a young age and guiding them through their academic careers, these students will develop and maintain the interest, grades and mindset to successfully obtain a legal career. While the full effect of these programs remains to be seen, these pipeline programs are gaining momentum and support.

However, their success is tied, in large part, to funding. Funding can be very challenging, especially during weak economic times. Reliable and predictable funding sources from both the public and private

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18. *The Critical Need*, *supra* note 2.

19. *Id.*

20. *Id.*

21. *See* Liu, *supra* note 16.

22. *Id.*

23. Roy S. Ginsburg, *Pipeline Programs Enhance Diversity Efforts in the Legal Profession*, INTERNET FOR LAWYERS, <http://www.netforlawyers.com/page/pipeline-programs-enhance-diversity-efforts-legal-profession> (last visited Aug. 25, 2012).

24. *The Critical Need*, *supra* note 2.

sectors is needed.<sup>25</sup> The sustainability of these programs requires all collaborators—especially law firms—to place a high priority on educating communities and funding resources of the benefits diversity in the legal profession.<sup>26</sup>

### ***1. What is Going on Now in Law Firm Recruiting?***

Only approximately 25% of 2010's graduating law school class, down from 33% in 2009, secured offers with big law firms, according to NALP. The average debt for a private law school student is nearly \$100,000, and jobs at top-tier law firms are extremely competitive. Judge Patrice Ball-Reed serves as Associate Judge in the Circuit Court of Cook County, Illinois. She believes that the sheer cost of law school and the inability for the majority of law school students to afford a house, car, and kids is partly to blame for the declining numbers of diverse attorneys. She rose through the ranks during the civil rights movement and recalls it as a time when all minority attorneys were struggling. As a result, there was a lot of information sharing and helping. Now, however, she feels minority attorneys do not have time or resources to give back to their communities, and we are losing a generation because they do not have enough support.

Reena R. Bajowala, an attorney at Jenner & Block LLP, serves on Jenner's Hiring Committee and its Associate Board of the Diversity Committee. She explains that, at Jenner, diversity has always been valued, "but the eternal question is how best to cultivate and attract diverse talent. One aspect of that is ensuring that attorneys who go on campus reflect the values Jenner espouses in selecting callbacks. Then, once candidates are interviewed and offered callbacks, we offer them the opportunity to meet with firm leaders who might share common interests. For example, we have an Asian Forum at Jenner, whose members might offer a relevant perspective for Asian American candidates."

Kapoor reports that, in terms of recruiting, his organization reaches out to local South American Bar Association (SABA) chapters and recruits heavily from those chapters. He observes, however, "I don't think young South Asian attorneys actually understand what it means to work for a law firm. Many young attorneys have an image of lawyers that were created by their immigrant parents who don't really understand what it takes to make it in the industry."

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25. Ginsburg, *supra* note 15.

26. *Id.*



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Another Los Angeles-based partner who serves on his national law firm's recruiting and hiring committee admits, "Unfortunately, as a firm, we are not going to as many law school campuses now as we used to. Our summer associate classes—that at one time had as many as fifteen to twenty summer associates—have shrunk considerably. In our bigger cities, we still have one or two summer interns, but in many of our smaller offices, we have cut the summer associate program entirely. So, recruiting for South Asian American associates, much less *any* summer associates, is markedly different than prior years."

## ***2. What is Missing from the Law Firm Recruiting Process?***

According to Bajowala, the process must start earlier than the interviewing stage. "At Jenner, we participate in numerous pipeline programs to ensure that grade school, high school and college students of color are exposed to the legal industry as a viable career option for all individuals. Through these programs, students are exposed to various aspects of legal practice and, importantly, to attorneys of color who have succeeded in pursuing a legal career. In addition, Jenner maintains a regular presence on the campuses of law schools, for example by supporting events and initiatives of race-based affinity groups."

The idea of educating South Asian Americans about law school and legal careers at an earlier stage is echoed by Kapoor, who recommends, "There needs to be more of a focus on cultivating young talent in college for potential careers in the law. I didn't realize that even college law internships can really make a difference in your career." Bajowala adds, "The recruiting process is still an imperfect one. Law students don't know the real story on the law firms they are interviewing with, and recruiting is often numbers and prestige driven. The personal element is what we need to continue to foster."

Judge Ball-Reed concurs. She advocates for more pipeline programs that need to address leadership skills and help minority attorneys, such as the Just the Beginning Foundation in Chicago. With respect to the large debt of law school loans, she suggests that more emphasis be placed on public interest fellowships and loan forgiveness programs through the government.

Raja Krishnamoorthi, President of Sivananthan Laboratories and an attorney, finds that the increased competition in law firm recruiting and within law firms is causing more South Asian Americans to turn away from the legal profession. Krishnamoorthi has fielded several calls in the last few months from South Asian American attorneys who are underemployed or unemployed and from South Asian American law students who cannot find summer work. Acknowledging that it is a tough time in the legal industry, Krishnamoorthi encourages them, "Whatever you do, if you really want to be an attorney, make sure there are no gaps in your resume as an attorney and your legal work. Even if you have to volunteer or do pro bono work, it is essential that South Asian American attorneys keep up their legal skills." He supported one South Asian American attorney's decision to take a volunteer externship with a judge, for example, because it will let the attorney keep up his legal skills while networking with members of the bar and an influential judge. "[Volunteering] also gives people a risk-free chance to know you and your legal work."

Clarissa Cerda is Senior Vice President, General Counsel & Secretary at LifeLock, Inc. and serves on the Minority Corporate Counsel Association (MCCA) Board of Directors. She feels that more work needs to focus on creating a pipeline so that, while in school, students can see commonality with people in the profession. She also believes that South Asian American attorneys need to be able to identify mentors, including those who do not necessarily have an Asian background.

When asked about the perception that many South Asian American attorneys are hard workers who typically keep their head down and do a good job (the "model minority" myth), Cerda says it is

not enough to just sit in one's office. Doing so will not break the subconscious biases that exist. South Asian Americans must exude confidence and assert their intelligence, capabilities, and social skills to their supervisors and clients.

Bajowala says, "The most significant change needs to be an increase in the number of South Asians entering law schools." A Sikh attorney born in India and practicing as a partner in his own firm in San Francisco shares this view. "I wear a turban as part of my religion and identity. Even in a city as culturally advanced as San Francisco, I got—and still get—a lot of looks and questions about it. I felt shut out during law school recruiting in part because of my heritage and background, and that's why I started my own firm. It wasn't easy, but I did it. I think law schools need to do a better job about educating law firms, the judiciary, bar organizations, and law students about tolerance and inclusiveness. Then maybe more South Asian American attorneys will enroll and feel they have solid job prospects upon graduation."

NASABA leaders John and Ninan also believe change must occur at all levels of the legal profession. Ninan explains, "For real change, minorities need to be part of and in the decisionmaking roles in law schools, law firms, and management to drive the inclusion of more minorities in these institutions. Seeing someone else like themselves in a particular organization and programs to assist minorities feel welcome and included will naturally drive the numbers up."

## **B. What are the Reasons for Low Retention?**

While increasing the number of diverse attorneys through recruitment is necessary, the focus should not end there; law firms must create a work environment that acknowledges and appreciates diversity and inclusion. Hidden barriers often account for the poor retention for diverse attorneys. There is no single reason for the low number of South Asian American attorneys in law firms and leadership positions. Rather, there are a number of issues that lead to the attrition of diverse lawyers in firms. Whether actual or not, some of these hidden barriers for retention at law firms include the following:<sup>27</sup>

- focus only on recruitment
- failure to acknowledge the firm's culture
- inadequate opportunities to develop business
- insufficient access to existing and prospective clients
- stereotypes
- lack of meaningful work assignments
- lack of inclusion
- unfair evaluations
- lack of meaningful relationships with attorneys in the law firm
- limited mentoring
- poor training
- failure to understand the implications of a changing workforce

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27. See Jennifer Daniel Collins, *CLI Works to Remove Hidden Barriers to Retaining Diverse Attorneys*, 41 Co. LAWYER 23 (2012).

Additional barriers, as discussed below, include the lack of role models and sponsors, generational differences, economic factors, and law firm models. In order to address these barriers, law firms must recognize and acknowledge them, eliminate actual barriers, and/or change misperceptions. The change must occur at all levels of a law firm organization, and upper management must commit to setting diversity metrics and holding itself accountable for meeting those metrics. A system of accountability in place for partners, associates, and staff can govern the success or failure of recruitment and retention initiatives.

### ***1. Lack of Role Models and Lack of Sponsors***

Wes Kumagai, General Counsel of Isuzu North America Corporation, believes that the lack of role models and sponsors is a factor in the low number of South Asian American attorneys. When asked why, he answers, "Simple arithmetic, really. Role modeling and sponsorship depend on perceived affinity, so the smaller the number of members within any group with which people identify who have achieved power/influence, the more difficult for less experienced group members to obtain the benefits of role models and sponsors."

Bajowala disagrees, "I don't believe there are a lack of role models and lack of sponsors. I think a misperception among younger attorneys of color is that their role model or sponsor must mirror their background. Instead, I've found that seeking out and learning from multiple role models of various backgrounds provides the best perspective and guidance. That being said, if there are zero diverse attorneys at the management and policy-making levels of a law firm, even where qualified attorneys appear to be excellent candidates for those positions, that raises some questions as to the attainability of those roles in that firm."

Moreover, identifying with non-South Asian American or non-minority attorneys is not easy for all South Asian Americans. Kapoor reveals, "There are very few attorneys who look like me in Virginia. I'm constantly seeking out mentors who can help me break into the 'good ole boy' club of lawyers in the area. We still have a long way to go before we have appropriate mentors/role models." Greg Dickson, a Managing Member of the legal recruiting firm JobClimbers, LLC, also considers role models very important. "In my opinion, role models create visions of success and sponsors nurture development of talent. The more role models and sponsors there are to encourage and mentor, the more the numbers will increase."

John offers this advice, "Yes, [the lack of role models] can be an issue, but organizations such as NASABA can facilitate career progression and assist its members in finding sponsors within the individual's firm and role models within the industry. While one does not necessarily have to work together with one's role model, it is critical that each South Asian attorney have a sponsor at his or her employer." Ninan cautions, "Otherwise, they need to find another home for their career progression. Without a sponsor, an attorney cannot move up in the ranks of a business."

According to Cerda, one of the reasons for attrition in law firms is because there are fewer top diverse candidates interested in law firms now. She believes South Asian American attorneys have many more options, and that corporations are far more progressive than law firms in recognizing, recruiting and retaining diverse employees. South Asian American attorneys often have great training in the sciences and are heavily recruited by technology firms. As a result, "I think they realize they do not need law firms to be successful," Cerda observes.

She also thinks that the concept of qualitative inclusion versus quantitative diversity metrics needs to ensure that South Asian American attorneys feel that they have "true buy-in" at the firms where they work. Acknowledging that the law is a slow moving profession, Cerda believes that change still needs to occur with respect to all minorities, including African Americans, Hispanics, and South



The entire onus does not lie with the law firms; diverse attorneys also need to take ownership of their careers and identify mentors who are outside of their own comfort zones.

Asian Americans. “It is not a malicious bias in 99% of the cases, but has to do with the comfort factor.” People are comfortable with people who look and act like them, and if people have not dealt with an African American or other diverse lawyer before, it takes them outside of their comfort zone.

While Cerda says some responsibility lies with law firms for not prioritizing inclusion, she also says that South Asian American attorneys are at fault for not taking advantage of a diverse pool of mentors. In other words, the entire onus does not lie with the law firms; diverse attorneys also need to take ownership of their careers and identify mentors who are outside of their own comfort zones. In her case, some of Cerda’s strongest mentors looked and acted nothing like her (a Hispanic female). Rather, her top three mentoring relationships were borne out of the fact that she reached out to people who thought could guide and instruct her. First, Ronald H. Brown, the first African American Secretary of Commerce and the first African American Chair of the Democratic National Committee, was an important mentor to her. He taught Cerda to “keep the door open.” Because of Brown, she measures true success as not only her own accomplishments, but the fact that making an impact can help people who look like her walk through the door in the future.

Second, Attorney Paul Miller at the Sonnenschein, Nath & Rosenthal firm in Chicago was another one of Cerda’s influential mentors. “As a white male who was very right wing and conservative, we were so different on paper, yet he became one of my best professional relationships.” In fact, when Miller first met Cerda, knowing she had ties to the Clinton White House, Miller told her he did not want to have lunch with her. Rather than dismiss him, however, Cerda kept her mind open and now credits him with teaching her critical negotiation and tactical skills that she has used in the boardroom. Through her hard work and dedication, Cerda became the first female Hispanic partner at Sonnenschein in the firm’s 100-year history.

Third, Cerda credits her grandmother as someone who taught her to value education. “My grandmother was not allowed to go to school, and, as a result, she is one of the strongest pro-education for women advocates,” Cerda comments. She admired and learned from her grandmother’s perseverance and resilience. “As you can see, my collection of mentors has been very broad. If I had waited for a female, Hispanic, securities partner to be my mentor, I might still be waiting and never would have made it.”

## ***2. Generational Differences***

The goals and values of the next generation of attorneys also may be a factor in the retention issue. I spoke on a panel at a recent bar leadership event for junior minority attorneys (practicing under five years), where I talked about how to set career goals and accomplish them. This bright, select

group of lawyers applied for and were chosen to be part of this program. One of the objectives of the event was to teach this group about some of the unwritten rules in law firms and how to negotiate organizational politics tactfully and successfully. However, I learned something in return when one of my co-panelists, a former law firm partner who now works in the government sector, asked the group a critical question. “How many of you want to reach the partnership ranks in your firm or any law firm?” Naturally, I thought the majority of them would answer yes. I was astonished when, out of a group of fifteen, not a single one raised his or her hand.

When we explored why, the participants revealed a number of reasons why they did not have their eye on partnership, including (1) they felt it was not a realistic objective, (2) they wanted to have a real work/life balance, and (3) some thought they would eventually go in-house, (4) they thought they could advance their careers much better outside of a private law firm setting, and (5) even if they made partner, they were not sure they could sustain a significant book of business over time. These junior attorneys did not view partnership as the proverbial “golden ring” that prior generations have coveted.

Kumagai has a similar observation. “How [generational differences] affect diversity, I am probably not qualified to say, but I do think that law firm partnership seems much less attractive to younger attorneys than I recall it being for prior generations.” Dickson shares this view, stating, “Overall, I think the general work ethic has changed from older generations to younger ones. I believe the younger generation has different views of success and values—other than the dollar and corner office. To become a partner takes dedication, hard work and commitment to your profession. There will always be a certain number of partner level candidates, overall perhaps the drive has to change gears and direction?”

Cerda agrees that generational issues factor into the number of successful South Asian American attorneys. “When younger attorneys do not see enough people like them, they do not really believe that firms are committed to diversity. They then realize they could be working somewhere else,” she notes.

Bajowala discloses, “I do think that lawyers of my generation have a complicated sense of choices to make. There seems to be a backlash against the model where an attorney forsakes her personal life to be a successful lawyer. I also think the rising cost of law school is a large factor. If you graduate with six figures worth of debt, you will seek out the highest paying job for a few years to pay that debt down.”

According to Judge Ball-Reed, junior lawyers must understand that, regardless of their ultimate goals, the top two things they must focus on are their education and reputation. A solid education can open doors, and as a minority attorney, bad work “reflects poorly on you and people like you . . . you are representing everyone in your group whether you like it or not,” she counsels. While people may try to tarnish your reputation, she instructs, “maintain and protect your reputation. You want people to say you are a hard worker, ethical, honest, and possess integrity.”

### ***3. Economic Factors***

Cerda also believes that economic factors may hurt South Asian American attorneys, especially because they do not typically have a portfolio of business that they inherit from senior partners. Succession planning occurs more informally at law firms, and there is at least a shot for a young white male attorney who “looks like and acts like” a senior white male attorney. She comments, “Again, it goes back to the idea that it is harder [for a senior white partner] to turn over a matter to someone he is not comfortable with and who is outside his comfort zone.”



Bajowala shares, “The economic downturn in 2008 had an unprecedented effect on the legal industry. Class sizes across all legal entities are smaller, the market of unemployed but qualified junior attorneys is fairly saturated, and the use of contract attorneys has increased greatly. I think that translates into associates having fewer opportunities to get the experience they need to succeed. Clients’ belts are tightening as well, which sometimes results in a reluctance to present opportunities to junior associates who may need to spend additional time on a new task. In addition, the poor economy and saturation of unemployed, but qualified junior attorneys results in fewer attorneys leaving law firms for other positions. That makes going to the next level that much harder.”

“The weak economy has affected everything. New norms are being established. How long, if ever, will it take to get back to a strong, robust, sustained economic growth climate? The legal industry will have to adjust to new and changing market conditions and develop new growth strategies,” submits Dickson. Krishnamoorthi confirms this sentiment. “The economy has changed everything over the last few years. While diversity is very important, cost is the biggest factor for many companies right now.”

John and Ninan acknowledge that it is a tight economy now, but offer insights on how South Asian Americans can use it to their advantage. “It is tough for everyone right now, and there are a limited number of jobs available despite high numbers of law school graduates. However, a weak economy in some sense may actually provide South Asian attorneys an opportunity to shine because an objective criteria such as business development takes precedence above all else (as some would say, now the only color that matters is green). Now an attorney’s career advancement potential is directly linked to that attorney’s demonstrated business development skills. In recognition of this shift, [NASABA] has changed its model to assist our members in this weaker economy to succeed by facilitating more meetings between our law firm attorneys in our in-house counsel committee and restructuring our annual convention to further highlight the advancement of so many successful South Asians in both business and law firm partnerships.”

According to Kumagai, “Based on my personal observation of the law firms and legal departments with which I have business, and the small number of younger attorneys with whom I interact personally (most of whom would, I think, be thought to increase diversity at large firms and legal departments), I would speculate that the dramatically increasing cost of law school education combined with perception of increasing competitiveness for the entry level opportunities within the more lucrative segments of the profession may be discouraging diverse candidates disproportionately.”

#### ***4. Model of Law Firms***

Law firms measure profitability in terms of the billable hour and client revenues. There is a tendency for linear thinking, pressure to assimilate, and many unwritten rules on how to grow business and advance in firms. Bajowala observes, “I think the biggest barrier for young associates of color is learning and navigating the unstated rules for succeeding in a law firm. Then you come in feeling like an outsider, and without the benefit of practical advice from a family member or close friend who has been there before, the law firm culture can seem like uncharted territory. If those same attorneys are not provided with the right type of opportunities or not included in important business development or networking functions, they may be uncertain of how to seek out those experiences. At a law firm, lack of experience tends to have a snowball effect. From there, it could be the firm making a decision that the associate is not meeting expectations, or the associate making that decision for herself (whether true or not) and self-selecting out.”





## The biggest barrier for young associates of color is learning and navigating the unstated rules for succeeding in a law firm.

Judge Ball-Reed recognizes that the law firm model requires people to bring in business in order to be profitable, which often is a challenge for minority attorneys. She believes that this model causes many diverse attorneys to become in-house counsel or change their business plans because it is difficult to build and maintain a solid book of business. She cautions that South Asian American attorneys must keep themselves relevant and abreast of changes in their field in order to remain competitive.

NASABA leaders John and Ninan share that the comment they hear most often in this regard are South Asian American attorneys being left out of important informal networks. Consequently, organizations like NASABA are vital in providing role models in terms of managing partners, industry leaders, C level executives and others to inspire South Asian attorneys to stay within the legal profession. Last year, NASABA also launched its Career Coaching Program, specifically directed to mid-level attorneys, to provide guidance, coaching, and potential sponsors for their career progression and retention within the legal profession.

Cerda advises that South Asian American attorneys must make an investment in their careers. Even as General Counsel of a notable company, Cerda cannot simply rest on her laurels. “My CEO told me about the importance of golf for business, so I learned how to play. Don’t tell anyone, but I recently beat him!” She notes that it is critical to work hard and put aside any entitlement issues, especially in a law firm setting.

Bajowala adds, “In addition, I think certain South Asian cultural norms could affect an associate’s success at a law firm. For instance, cultural norms like not talking back might be manifested within a law firm as an associate withholding valid points in meetings. Likewise, not wanting to rock the boat might translate into an associate not pursuing a particular assignment or case. These types of inclinations, of course, do not apply across the board. But I think they are still a possibility to consider.”

### **C. What do Law Firm Managers Really Think?**

A Chicago managing partner at a national law firm concedes, “[The legal profession] admittedly is behind corporate America in terms of our diversity. I am not saying that diversity initiatives are taking a back seat, but the challenges of the bad economy have made us reprioritize our budgets and recruiting efforts.”

With respect to client initiatives, another managing shareholder in Miami reveals, “We recognize that sophisticated clients want to see women and minorities on their legal teams, and we are obligated to fulfill that directive. It is the right thing to do, and it makes sense financially.” What about the majority of clients who do not mandate that firms abide by a diversity scorecard, though? Does this mean if there is no “financial incentive” to staff cases with South Asian American attorneys, they will be overlooked? Too often, that is happening across law firms, as the statistics indicate.

A South Asian American associate in Dallas reports, “Even though some clients require diverse staffing on their matters, they still expect high quality. Thank goodness I work on matters for a client that insists on diverse attorneys. The bulk of my workload comes from this client. Without this source of work, I probably could not make my billable hours.”

Krishnamoorthi believes that, in addition to diversity scorecards, referrals from South Asian American business leaders to South Asian American attorneys are an effective tool in recruiting and retaining top South Asian American talent in law firms. “While there are not many South Asian American lawyers in the General Counsel seat, there are a ton of South Asian Americans who are Vice Presidents of Operations, CIOs, CFOs, etc. Those South Asians who are doing well in the upper echelons of corporations can help by opening doors for South Asian attorneys. That may be the best entrée at this point. All it takes is one phone call and an introduction to a trusted South Asian American attorney.”

## IV. Business Case and Recommendations

### A. What do Clients Expect?

As a purchaser of legal services, Cerda wants top talent. She also wants that top talent to include the maximum number of diverse people. When working as Assistant Counsel to the President at The White House, for example, Cerda oversaw the summer associate class. “I did not want every candidate to be from Yale and Harvard.” She wanted people who were smart, but who were from different geographical locations, ethnicities, and genders. Doing so broadened the ability to offer up solutions to problems and expanded the spectrum to translate diversity into more problem-solving answers.

Kumagai similarly expects the outside law firms he uses to have diverse attorneys on his matters. “When management of legal services improves generally, the demographics of legal service providers will converge with the demographics of society in general. Convergence would be more rapid if access to higher education also improves.”

Corporations recognize that racial demographics are changing, and they need to reflect that change. By 2050, less than 53% of the population is expected to be non-Hispanic White, and 10% is expected to be Asian and Pacific Islander.<sup>28</sup> The fastest growing race groups will continue to be the Asian and Pacific Islander population, and this population is predicted to expand to 41 million by 2050.<sup>29</sup>

According to Cerda, corporations are more advanced than law firms because there is a business case for doing so. Corporations have a consumer base to whom they are selling services and products. The population at large is changing from a white majority into a much more diverse group, and companies must be able to sell to everyone. Traditionally, the buyers of legal services have been General Counsels, CEOs, or CFOs. In Fortune 500 companies, those titles have historically and continue to belong to white men. As a result, law firms do not have the same pressure from buyers to reflect society’s diversity.

Krishnamoorthi acknowledges the importance of diversity and inclusion, but weighs in on the price of legal services. “The number one factor in choosing outside counsel for my company is quality—skill set is very important. As a small company, we cannot afford a lot of overhead and need an attorney who is efficient. Diversity is very important to us, and we do not exclude anyone.

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28. United States Census Bureau, U.S. POPULATION PROJECTIONS, <http://www.census.gov/population/www/projections/> (last visited Aug. 25, 2012).

29. *Id.*

But, the legal business is not our business, and we hate lawsuits. Therefore, we are extremely cost-conscious.” His advice to South Asian American attorneys is to demonstrate cost-efficiency, while exhibiting initiative and keeping clients updated on matters. “That is the best way to form a [client] relationship fast.”

## **B. Recommendations**

What can law firms do to recruit, retain and advance their qualified South Asian American attorneys? The Defense Research Institute (DRI) suggests a few ways that non-minority partners can cultivate an inclusive environment:<sup>30</sup>

- Educate firm members and employees on diversity issues
- Implement hiring guidelines and strategies to recruit lawyers belonging to a minority group
- Include diverse attorneys on marketing and networking opportunities
- Create attorney case and trial teams that reflect gender and racial diversity
- Establish clear goals and objectives
- Make diversity part of the firm’s strategic plan

Merle Vaughn is the Leader of Major, Lindsey & Africa’s Law Firm Diversity Practice and believes exposure is key. “As a minority lawyer and legal recruiter, I believe that the pipeline problem needs to be addressed by large law firms, law schools and recruiters much sooner. We need to create and support programs starting as young as elementary school. I was introduced to the idea of becoming a lawyer when I was in 5<sup>th</sup> grade by a wonderful public school teacher in Compton, [California]. I have never forgotten being exposed to that idea, which most minority kids don’t get at home because not many of our family members are lawyers.”

Vaughn notes, “Once students are in law school, we need to make sure that they understand how important it is to get good grades and how important it is to participate in the On Campus Recruiting process starting with the first summer. At this point, I believe that too many minority law students only focus on public interest careers. Private sector employers should provide exposure to the various practice area options when students are first years. Students need to understand that working for a large law firm does not mean that they will have to forgo helping other minorities. To the contrary, the only way to facilitate change is to be fully represented in all areas, and at all levels, of legal service.”

“Finally,” Vaughn concludes, “once minority lawyers get to the large law firms, retention plans need to be in place to keep them and the lawyers must be committed to staying until they make partner. This requires a concerted effort between the minority lawyers and the law firms. The law firms must make sure that the minority lawyers are exposed to sophisticated matters, influential firm mentors and valuable client contacts. In exchange, minority lawyers must be committed to helping their firms recruit and retain other minority lawyers.

Moreover, while partnership status may or may not be the goal of every South Asian American attorney, law firms must understand that these junior attorneys do have a desire to work hard, but on terms that deviate from traditional methods. For example, many junior lawyers are able to work remotely, requiring less face time in the office. They also want recognition that they have lives outside of the office.

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30. DRI, THE DRI LAW FIRM DIVERSITY RETENTION MANUAL, 2005.

Kumagai recommends, “Develop better legal managers and improve the management of legal service delivery generally, while improving the efficiency of higher education in a way that makes it more accessible to less advantaged communities.” Dickson notes that it is important to recruit and retain South Asian American attorneys in order “[t]o provide a broader range of views for consideration and understanding.” He recommends that the legal profession inspire students in the formative years of their careers about their hopes, desires and realistic long-term decisions.

If there are not enough South Asian American attorneys in leadership ranks in law firms, non-diverse managing partners and shareholders also should make a concerted effort to reach out to minority associates and encourage relationship-building. South Asian American associates likewise need to make the reciprocal effort and seek out mentors and sponsors who make not look or talk like them, but nevertheless can provide invaluable guidance and support.

Judge Ball-Reed advises that South Asian American attorneys need to understand that practicing law is like a game, and they need to learn how to play it. Diverse attorneys must have merit, but they also must “develop a circle of influence” and set career goals, identify people who can help them accomplish those goals, and self-promote. Female South Asian American attorneys in particular are often stereotyped as being shy and reserved. Judge Ball-Reed says that is not enough; women must shed cultural stereotypes and “do the ask” so they can advance themselves. She once served on a panel when a co-panelist astutely observed, “Men and women are programmed differently. A male who asks for opportunities might get told no, but he will ask again. No does not mean ‘no forever’ to him, it means ‘no for now’. A female, on the other hand, thinks a no is a ‘final no’ and will not revisit opportunities.” She also says, “Do not be afraid to ask for help or to spread your own name. Thank people who help you and appreciate your blessings.”

## V. Conclusion

Diversity is an integral part of a successful business and global strategy. Recognition that diversity is important is a good first step, but the legal profession has a long way to go towards increasing the number of South Asian Americans in law firms. As the world becomes more multicultural, it is going to be more critical for law firms to meet the demands of their clients who expect diverse outside counsel. Information sharing and commitment from non-minority leaders in law firms is crucial. Law firms must create an inclusive work environment without regard to background, ethnicity, gender, or sexual orientation when delivering their best. Law firm leadership must understand and support this way of thinking in order to achieve their diversity and business goals.

# Japanese America at a Crossroads: Toward a Dynamic Model of Community

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*Japanese Americans were once one of the largest of the Asian ethnic groups in the United States but now, in the generational aftermath of World War II internment, out-marriage rates among the highest for any ethnic group, and little immigration from Japan, is this community on the verge of extinction, a precursor for other ethnic communities, or a 21st Century model for the evolution of the American melting pot? Yoda examines the history of this community, considers where it is today, and contemplates its future.*

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## I. Introduction

**A**mong Asian Americans, Japanese Americans, in particular, have an especially long history in the United States. Much of their experience has even made its way into the mainstream annals of American history. In 1903, for example, Japanese American farm workers in Oxnard, California united with Mexican American farm workers and successfully pressed for fair wages and working conditions;<sup>1</sup> in 1922, Takao Ozawa attempted to persuade the Supreme Court that he was eligible for nationalization despite racially restrictive immigration laws;<sup>2</sup> during World War II, nearly 120,000 Japanese Americans were evicted from their West Coast homes and incarcerated in concentration camps without due process of law;<sup>3</sup> also during World War II, thousands of Japanese American men served in the nation's famed 442nd Regimental Combat Team, 100th Military Battalion, and Military Intelligence Service;<sup>4</sup> after World War II, Japanese Americans successfully challenged alien land laws (which prohibited Asian immigrants from owning land) and successfully lobbied the United States government for redress and an apology for its wartime incarceration of them;<sup>5</sup> from the 1960s onward, Japanese Americans helped to lead the Asian American movement; and many prominent Japanese Americans have served as leaders in local, state, and federal government.

## II. Deadlocked Demographics

Notwithstanding this long history (or perhaps because of it), the Japanese American community has not grown significantly in size over the last several decades. In 1970, Japanese Americans constituted the largest Asian American subgroup; by 2000, Japanese Americans were the smallest of the six major Asian American subgroups (*i.e.*, Asian Indian, Chinese, Filipino, Japanese, Korean, and

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1. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 198–99 (1989).

2. *Ozawa v. United States*, 260 U.S. 178 (1922); Devon W. Carbado, *Yellow by Law*, 97 CAL. L. REV. 633 (2009).

3. *Korematsu v. United States*, 323 U.S. 214 (1944); Notice of Exclusion of Persons of Japanese Ancestry, 7 Fed. Reg. 3725 (May 10, 1942); *see also* JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons ed., 1989).

4. LYN CROST, HONOR BY FIRE: JAPANESE AMERICANS AT WAR IN EUROPE AND THE PACIFIC (1994).

5. *Oyama v. California*, 332 U.S. 633 (1948); CONG. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982).

Vietnamese). There are many potential explanations for this trend. First, Japanese American birth rates have decreased over time and are lower than Asian American birth rates generally. In 1990, the average Japanese American woman had 1.1 children.<sup>6</sup>

Second, since 1965, new immigration from Japan has been low and outpaced by immigration from other Asian countries. Illustratively, in 2009, only 43.9 percent of Japanese Americans were foreign-born; by contrast, 76.7 percent of Korean Americans and 72.5 percent of Asian Indians were foreign-born.<sup>7</sup>

Third, Japanese Americans are likely to outmarry. In 2010, 62.8 percent of married Japanese American men were married to Japanese American women and 44.4 percent of married Japanese American women were married to Japanese American men.<sup>8</sup> Of the six major Asian American subgroups, Japanese Americans are the *least* likely to marry endogamously (*i.e.*, within their own ethnic group).<sup>9</sup>

In light of these demographic trends, many observers predict the demise of the Japanese American community. As one website puts it:

Japanese American history brings us to some critical questions. What the future holds for fourth-generation Japanese Americans (the Yonsei) is unclear. The Japanese American ethnic community may disappear in that generation, or complete assimilation may bring about the demise of the values that pushed Japanese Americans to socioeconomic success. It is uncertain whether the Yonsei will retain their Japanese characteristics and inculcate them in the next generation.<sup>10</sup>

Similar concerns are sometimes expressed among Japanese Americans as well.

### III. The Reports of the Japanese American Community's "Demise" Have Been Greatly Exaggerated

As a fourth-generation Japanese American myself, I reject such notions of community as wrongheaded. Terms and phrases like "disappear," "demise," and "retaining Japanese characteristics" are premised upon a static notion of community that improperly enshrines the immigrant generation as the gold standard against which to compare all future generations.

Such a mindset, even at the most basic of levels, overlooks the inherent nature of immigration and assimilation, which necessarily entails *some* change or evolution in the immigrant community. As a practical reality, there simply cannot exist an immutable immigrant group that is hermetically sealed from other groups.

In addition, this mindset tends to overlook the United States' own domestic notions of ethnic relations. Whether the United States is a "melting pot" or a "salad bowl" of cultures, Americans of all ethnicities intermix. A natural result is that, over time, ethnic Americans develop unique subcultures that are not purely "ethnic" and not purely "American." The Chicano community is an example of

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6. U.S. DEP'T OF COMMERCE, ECON. & STATISTICS ADMIN., BUREAU OF THE CENSUS, *WE THE AMERICANS: ASIANS 4* (1993).

7. LARRY SHINAGAWA ET AL., UNIV. OF MD., *ASIAN-AMERICAN STUDIES PROGRAM, A DEMOGRAPHIC OVERVIEW OF JAPANESE AMERICANS 6* (2011) [hereinafter *Demographic Overview*].

8. C.N. Le, *Interracial Dating & Marriage*, *ASIAN NATION: THE LANDSCAPE OF ASIAN AMERICA*, <http://www.asian-nation.org/interracial.shtml> (last visited Aug. 13, 2012).

9. *Id.*

10. Stanley E. Easton & Lucien Ellington, *Japanese Americans*, *COUNTRIES AND THEIR CULTURES*, <http://www.everyculture.com/multi/Ha-La/Japanese-Americans.html> (last visited Aug. 13, 2012).



this. The Japanese American community itself is another. For example, *taiko* drumming and *obon* festivals in the United States, while rooted in ancient Japanese traditions, have developed their own unique American flair.<sup>11</sup> Even the ubiquitous California roll, available at practically all Japanese restaurants in the United States, is an American twist on traditional Japanese sushi. Evolution is inevitable—and that is not necessarily bad.

#### IV. Creating A More Dynamic Japanese American Community

What does this mean for Japanese Americans? While little can be done to change macro demographic trends, the “demise” of community is not necessarily inevitable. “Demise” is in the eye of the beholder, and it turns on the beholder’s definition of “community.” If Japanese Americans continue to define themselves along traditional racial lines, then their “demise” may very well be in the offing. If, however, Japanese Americans adopt a more dynamic notion of self and community, then there is no threat of “demise” at all. There are at least three specific ways in which Japanese Americans can gravitate toward a more dynamic notion of self and community.

First, Japanese Americans should embrace a more colorblind notion of “Japanese American.” The simple truth is that the number of single-ethnicity Japanese Americans (*i.e.*, Japanese alone) is decreasing. Between 2000 and 2009, the number of single ethnicity Japanese Americans decreased by 2.1 percent.<sup>12</sup> At the same time, however, the number of Japanese Americans of mixed ethnicity increased by 7.9 percent.<sup>13</sup> Mixed ethnicity Japanese Americans now constitute approximately 31.8 percent of the overall Japanese American community.<sup>14</sup> One can only assume that this figure will increase in the future. The fact of the matter is: Japanese Americans are becoming more colorful and Japanese Americans can no longer afford to narrowly define their community on purely racial terms.

Second, Japanese Americans should embrace all who embrace their history and culture. Japanese American history occupies a unique place within the American consciousness at large. This was evident in the aftermath of 9/11, when the specter of Pearl Harbor and the wartime incarceration of Japanese Americans was routinely raised in popular media. Clearly, Japanese American history teaches many important lessons with universal appeal. As stewards of that history, Japanese Americans should openly welcome into the community all individuals who appreciate and respect that history (regardless of color). Indeed, it likely will be those very individuals who will act as *future* stewards of that history. Incidentally, the same can also be said for all individuals who appreciate and respect Japanese American culture. Thus, “being Japanese American” might ultimately come to be defined by one’s state of mind as opposed to one’s racial composition.

Third, Japanese Americans should embrace newer Japanese immigrants. The first and largest wave of Japanese immigration to the United States occurred between 1880 and 1924, when the Immigration Act of 1924, which effectively banned future immigration from Japan, was passed.<sup>15</sup> That ban was not lifted until 1952, and it was not until the Immigration Act of 1965 that mass immigration from Asia was once again permitted.<sup>16</sup> By that time, of course, Japan was experiencing its own economic prosperity and the number of immigrants from Japan was relatively low as compared to other Asian countries. For these reasons, the majority of Japanese Americans today are descendants of that first

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11. In 2005, TaikoProject, a largely Japanese American *taiko* ensemble based in Los Angeles, became the first and only non-Japanese group to win first place at Japan’s most prestigious *taiko* competition, the Tokyo International Taiko Contest.

12. *Demographic Overview*, *supra* note 7, at 5.

13. *Id.*

14. *Id.*

15. Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 72, 80–81 (1999).

16. Immigration Act of 1965, Pub. L. No. 89-235, 79 Stat. 911 (1965) (amended 1994).

wave of Japanese immigrants between 1880 and 1924. Many of their forebears, who suffered during World War II because of their race, distanced themselves psychologically from their Japanese ancestry. The lingering effects of that self-denial, combined with the fact that Japanese Americans today speak little to no Japanese, tends to create a cultural gap between most Japanese Americans and newer Japanese immigrants. That gap should be bridged.

As indicated above, appreciation of and respect for Japanese American history and culture is not a function of color. Thus, there is no reason why newer Japanese immigrants (as opposed to any other group) could not appreciate and respect the same. Furthermore, newer Japanese immigrants (like Japanese immigrants of the past) still face challenges to assimilation. To the extent a common heritage can facilitate that process, Japanese Americans should provide such support. At the same time, newer Japanese immigrants can help bring Japanese Americans closer to their cultural roots. One small example of such symbiotism can be seen within the Japanese American Bar Association (JABA), based in Los Angeles. Several years ago, JABA created a new standing committee called the “*shin issei* committee” (or “new Japanese immigrant committee”) in order to bring newer Japanese immigrant-attorneys into its fold. Thanks to its formation, tighter bonds between older Japanese American attorneys and newer Japanese immigrant-attorneys have been forged. As a result, JABA can now better serve the Japanese immigrant community at its *pro bono* law clinics by matching clients to older Japanese American attorneys that have the necessary expertise in a specific field but have little to no Japanese language fluency, *and* to newer Japanese immigrant attorneys with Japanese language fluency but with little to no expertise in the specific field requested. Likewise, the *shin issei* committee has helped JABA to forge bonds with the local Japanese consulate—thereby promoting greater cultural understanding between older Japanese Americans and newer Japanese immigrants.

Finally, Japanese Americans should embrace Asian America generally. The Asian American movement was initiated in the 1960s by Chinese American, Filipino American, and Japanese American students, who forged solidarities across strict ethnic boundaries and created a larger collectivist identity to combat the prejudice and discrimination faced by all Americans of Asian ancestry. That was and is a worthy cause.

As a group with a long history in the United States, Japanese Americans should bring its collective experience and memory to aid newer Asian immigrants in their own struggles. By continuing to forge such solidarities, Japanese Americans can continue their struggle for social equality. For this reason, Japanese Americans should see “Japanese America” and “Asian America” as part and parcel of each other.

## V. Conclusion

By expanding the notion of self and community in these ways, Japanese Americans need not lament the demise of community. If anything, by embracing a more dynamic notion of self and community, the Japanese American community can be continually expanded.

# Redefining the Black Face of Affirmative Action: The Impact on Ascendant Black Women

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*The racial and ethnic ancestries of blacks benefitting from affirmative action is changing, as foreign-born blacks and blacks with a non-black parent constitute disproportionately large percentages of blacks attending many selective higher education institutions. Coupled with the challenges arising from the educational achievement levels of black males during the past two decades, Brown and Turner examine the implication of these developments and the likelihood that they are creating further disadvantages for black women lawyers.*

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## I. Introduction

By agreeing to hear the Fifth Circuit decision in *Fisher v. University of Texas*,<sup>1</sup> the Supreme Court once again decided to enter the fray of affirmative action and deliver its fourth major opinion addressing affirmative action in higher education. Thus, for the next several years, scholars, commentators, and journalist will discuss and debate the impact of this upcoming opinion on the admission prospects of underrepresented minorities to selective higher education programs with a history of discrimination. Many of these discussions will talk about the dire consequences for people of color, and the ramifications of the decision, particularly for blacks, if the Court strikes down or severely limits the consideration of race in the admissions process.

The term “black,” however, obscures a major development occurring with regard to which blacks benefit from affirmative action. A number of articles have appeared in the legal literature and popular media over the past decade pointing to the changing racial and ethnic ancestries of blacks benefitting from affirmative action.<sup>2</sup> These articles have noted that foreign-born blacks, their sons, and their daughters (we will call those with a foreign-born black parent “Black Immigrants”) and blacks with a non-black parent (we call individuals with one black and one non-black parent “Black Multiracials”), constitute disproportionately large percentages of blacks attending many selective higher education institutions. Furthermore, given the increasing numbers and percentages of Black Immigrants and Black Multiracials reaching the age at which most people attend colleges and universities, if current trends continue, the children of two American-born black parents (as determined by the application of the one-drop rule), will soon no longer constitute a “critical mass” of the black students benefitting from affirmative action. Some scholars have referred to this racial/ethnic group of blacks as “third generation” or “legacy” blacks. However, we will use the term “Ascendant Blacks” in order to denote

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1. 631 F.3d 231 (2011) cert. *gran* \_\_\_\_ U. S. \_\_\_\_ (2012).

2. See, e.g., Kevin Brown and Tom I. Romero, II, *The Social Reconstruction of Race & Ethnicity of the Nation's Law Students: A Request to the ABA, AALS, and LSAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133 (2012).



The experiences of women of color are the result of the intersection of patterns of racism and sexism. As a result of this intersectionality, discourse shaped by women of color tends to get marginalized in discussions about the issues that impact women and people of color.

the historical connection between this racial/ethnic group of blacks and the history of the ascendancy of blacks out of slavery and segregation. The ascendancy of this group of blacks made it possible for the dramatic increases in Black Multiracials and Black Immigrants attending universities that have occurred over the past fifty years and the proliferation of affirmative action admissions policies.

Regardless of whether the Supreme Court's opinion in *Fisher* limits, expands, or prevents the use of affirmative action, it is unlikely to address the changing racial and ethnic ancestries of blacks who are benefiting from affirmative action. As a result, unless there are dramatic changes in the admissions practices of selective higher education institutions to take account of the steadily declining numbers and percentages of Ascendant Blacks in their student bodies, the Court's decision in *Fisher* will be largely irrelevant for the very group of blacks originally responsible for the development of affirmative action programs.

In her 1991 groundbreaking article entitled *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, Kimberle Crenshaw noted that "identity-based politics has been a source of strength, community, and intellectual-development."<sup>3</sup> However, one of the problems with such politics is that it often conflates or ignores intragroup differences. Crenshaw goes on to note:

Feminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains. Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and antiracist practices. And so, when the practices expound identity as women or person of color as an either/or proposition, they relegate the identity of women of color to a location that resists telling.<sup>4</sup>

Crenshaw points out that, frequently, the experiences of women of color are the result of the intersection of patterns of racism and sexism. As a result of this intersectionality, discourse shaped by women of color tends to get marginalized in discussions about the issues that impact women and people of color.

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3. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

4. *Id.*



Despite how large the percentage of Black Immigrants and Black Multiracials are among black students at selective higher education institutions now, their percentages are likely to substantially increase over the next decade. This is due to the dramatic increases in foreign-born blacks admitted to the country and increases in Black Multiracials of college age over the next ten years.

When Crenshaw published her article over twenty years ago, there was little talk about the changing racial and ethnic ancestries of blacks in the United States. Since we are taking our lead from Crenshaw's intersectionality approach, we will do so from the perspective of Ascendant Black Women. Thus, in this essay, we will apply Crenshaw's intersectionality approach to the changing racial and ethnic ancestries of blacks attending selective higher education institutions. While these changes have received some public attention for the past ten years, the significance of these changes has yet to grab the attention of the general public or of admission officials at selective higher education programs. The reason for this may lie in the fact that Ascendant Black Women are the ones who bear the major brunt of the racial and ethnic changes of blacks benefitting from affirmative action, as opposed to Ascendant Black Men.

Section I will discuss the evidence pointing to the changing racial and ethnic ancestries of blacks attending selective higher education institutions. Due to the "crisis" situation involving the educational achievement levels of black males, the changing racial and ethnic make-up of blacks benefitting from affirmative action effectively means that Black Immigrants and Black Multiracials are largely replacing Ascendant Black Women at selective higher education institutions. Thus, Section II will discuss how these racial and ethnic changes are primarily reducing the prospects of Ascendant Black Women being admitted into the student bodies of selective higher education institutions far more so than they are reducing the prospects for Ascendant Black Men. In addition, Black males are two to three times more likely to engage in interracial cohabitation and marriage than their black female counterparts. To the extent that Black Multiracials replace Ascendant Blacks in selective higher education institutions, it also means that selective higher education programs have institutionalized admissions practices that more likely provide preferences for the children of black men at the expense of the children of black women. Thus, Section III will discuss how the changing racial and ethnic



ancestry of blacks on affirmative action further disadvantages Ascendant Black Women in their roles as mothers. Finally, as Black Immigrants and Black Multiracials come to constitute disproportionately larger and larger percentages of blacks attending selective higher education institutions, this provides an additional incentive for Ascendant Blacks to procreate with individuals from another race or with foreign-born blacks. Yet, given the far greater propensity of black males to marry outside of the race, Ascendant Black Women are further disadvantaged because these changes provide a reason for black men to prefer other women. Section four will, therefore, discuss how Ascendant Black Women are even further disadvantaged by these changes due to the negative impact on their prospects as potential mates and spouses.

## II. Evidence of the Changing Racial and Ethnic Ancestry of Blacks Attending Selective Higher Education Institutions

Since the origin of affirmative action and until the 2010/2011 academic year, selective higher education programs typically lumped all of their black students into a unified Black/African/African American category, regardless of their race or ethnicity.<sup>5</sup> However, at a gathering of the Harvard Black Alumni in the summer of 2003, Harvard professors Lani Guiner and Henry Louis Gates noted that Black Multiracials and Black Immigrants comprised two-thirds of the black undergraduate population at their university.<sup>6</sup> After the “Harvard Revelation,” a 2005 article in *Diverse Issues in Higher Education* pointed to a study of the black presence that entered twenty-eight selective colleges and universities in 1999. The study revealed that Black Multiracials made up seventeen percent of black freshmen and forty-one percent were either Black Multiracials or Black Immigrants. According to Dr. Michael T. Nettles, Vice President for Policy Evaluation and Research at the Educational Testing Service, “[i]f Blacks are typically 5% and 6% of the population at elite colleges, then the representation of native United States born African-Americans might be closer to 3%.”<sup>7</sup> Specifically with regard to the increasing percentages of Black Multiracials among blacks enrolled in selective undergraduate institutions, a published study tallied the 2007 reports from the Consortium on Financing Higher Education (COFHE) Enrolled Student Survey. COFHE is an institutionally supported organization of thirty-one selective private colleges and universities and includes many of the most elite private institutions in the country. According to this study, nineteen percent of the black students indicated that they had a non-black parent. However, according to the 2000 Census counts, in 2007, only 6.3 percent of the black population between the ages of seventeen and twenty-one indicated another racial category. Statistics from the admissions office of Indiana University-Bloomington provides further evidence of the widespread nature of the increasing percentages of Black Multiracials among blacks enrolled in selective higher education institutions. According to those statistics, Black Multiracials comprised 18.7% of black students in their combined incoming freshman classes in the Fall of 2010 and 2011.

Despite how large the percentage of Black Immigrants and Black Multiracials are among black students at selective higher education institutions now, their percentages are likely to substantially increase over the next decade. This is due to the dramatic increases in foreign-born blacks admitted to the country and increases in Black Multiracials of college age over the next ten years. Since 1970,

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5. However, in the fall of 2010, new Department of Education (DOE) regulations regarding the collecting and reporting of racial and ethnic data to the DOE went into effect. Under these new regulations, self-identified Black Multiracials are reported in a count of a new Two or More Races category as opposed to the black category. For an extended discussion of the history that led to the adoption of the new regulations and how they changed the collecting of racial and ethnic data see Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 How. L. J. 255, 256-57 (2011).

6. For support of statistics in this paragraph see Kevin Brown and Tom I. Romero, *supra* note 2, at 1181.

7. Ronald Roach, *Drawing Upon the Diaspora*, DIVERSE ISSUES IN HIGHER EDUCATION, Aug. 25, 2005, [http://www.diverseeducation.com/artman/publish/article\\_4558.shtml](http://www.diverseeducation.com/artman/publish/article_4558.shtml).



the number of black immigrants, mostly from the Caribbean and Africa, coming into the United States has skyrocketed. The percentage of blacks that are foreign-born has increased from 1.1 percent in 1970, to 4.9 percent in 1990, to 8.8 percent in 2010.<sup>8</sup> Thus, the percentage of Black Immigrants among the college age black population is on a steep upward trajectory. Increased interracial dating, cohabitation, and marriage have also increased the percentage of Black Multiracials. Census Bureau figures from the 2010 Census show that 7.4 percent of those who checked the black racial box, up from 4.8 percent in 2000, also designated another racial category.<sup>9</sup> As one might expect, the younger blacks are the more likely they are to be multiracial. In 2010, the percentage of mixed-race blacks between the ages of fifteen and nineteen was only 6.5 percent. However, for blacks between the ages of five and nine it increased to 11.9 percent. As a result, the percentage of Black Multiracials among the black college age population will increase by over eighty percent in the next ten years.

Given the evidence of the overrepresentation of Black Immigrants and Black Multiracials currently attending selective higher education institutions and the expected increases in their percentage among the blacks of college age, Ascendant Blacks will almost certainly come to make up only a small percentage of the black students in many of our selective colleges and universities within the next ten years if they don't already. For example, at the authors' law school, of the fifteen blacks who enrolled in the first year Fall of 2011 class, eleven of them were either Black Immigrants or Black Multiracials.<sup>10</sup>

### III. Implications for the Prospects of Ascendant Black Women Attending Selective Higher Education Institutions

In 1983, Walter Leavy introduced the black community to the provocative question: "Is the black male an endangered species?"<sup>11</sup> To emphasize the deteriorating condition of the African American male, Leavy pointed to a number of factors including high rates of unemployment, homicide, and imprisonment, as well as a decrease in life expectancy that negatively impacts their ability to prosper in life. Thirty years after Leavy's article, one place where we can see the consequences of these destructive influences on black males is with regard to their educational achievement levels. For some time, black women have outpaced black men in achieving educational success. In 1976, there were 1,033,000 black students enrolled in higher education institutions, of which 563,100 were women.<sup>12</sup> By 1990, the number of black women had almost doubled, while the number of black men rose only slightly. Thus, black women comprised 1,037,700 of the 1,640,000 black students in higher education institutions.<sup>13</sup> As a result, while black women made up 54.3 percent of black higher education enrollment in 1976, their percentage climbed to 63.3 percent by 1990. The same gender disparity continued through the decade of the 1990s, with black women making up 63.4 percent of blacks enrolled in college in 2001.<sup>14</sup> Data collected during the 2004–05 academic year illustrates not only the disparity in college enrollment, but also that black women earned almost twice as many bachelor's degrees as black men.<sup>15</sup> In addition to outnumbering black men, black women may also

8. For 1970 and 1990 figures see Campbell Gibson & Emily Lennon, *Race and Hispanic Origin of the Population by Nativity: 1850 to 1990*, U.S. CENSUS BUREAU (1999), available at <http://www.census.gov/population/www/documentation/twps0029/tab08.html>. For 2010 figures see U. S. CENSUS BUREAU, *The Black Alone or in Combination Population in the United States: 2010 tbl.4* (2010), available at <http://www.census.gov/population/race/data/ppl-bc10.html>.

9. See Kevin Brown and Tom I. Romero, II, *supra* note 1, at 1174–5.

10. From personal observations and discussions, seven of the black first-year students are from Ghana, Liberia, Jamaica, Kenya, Nigeria, and Trinidad and Tobago, and the remaining four are Black Multiracials.

11. Walter Leavy, *Is the Black Male an Endangered Species?*, *EBONY*, Aug. 1983, at 41.

12. FLORENCE B. BONNER, MARIE-CLAUDE JIPGUEP-AKHITAR & R.J. HARRISON, *HOWARD UNIV., EDUCATIONAL ATTAINMENTS OF U.S. BLACK MALES AND FEMALES: 1971 TO 2003* (2010).

13. *Id.*

14. There were 1.1 million black women, but only 635,200 black men enrolled in higher education institutions in 2001. *Black Men Have Fallen Severely Behind in College Enrollments*, 47 J. OF BLACKS IN HIGHER EDUC. 21, 21 (2005).

15. The total number of bachelor's degrees earned by black women and men were 90,312 and 45,810. *African Americans Making Solid Gains in Bachelor's and Advanced Degrees: Black Women Far Out Ahead*, 57 J. OF BLACKS IN HIGHER EDUC. 62, 63 (2007).



Some surveys of honor roll students at the nation's historically black colleges and universities show that upwards of eighty percent of these students are women.

outperform their black male counterparts in the classroom. For example, some surveys of honor roll students at the nation's historically black colleges and universities show that upwards of eighty percent of these students are women.<sup>16</sup>

As a result of the institution of affirmative action programs, when graduate schools at predominately white institutions first started admitting blacks into their programs in large numbers, black males were the primary beneficiaries. However, the predominance of black males over black females in selective higher education institutions no longer exists. For instance, black men historically comprised the majority of blacks pursuing legal education. It was not until 1956 that the first black woman graduated from Harvard Law School; nearly a century after the first black man had earned a law degree there.<sup>17</sup> Yet, by the 1998–99 academic year, black women constituted 64.7 percent of all black first-year law students. By 2008, however, black women received 1893 law degrees compared to only 1109 for black men.<sup>18</sup> With regard to medical school, black males also historically outnumbered black women. In 1972, black men accounted for 86 percent of all black medical school graduates.<sup>19</sup> Four years later, of the 711 black graduates from medical school, 72.6 percent were males.<sup>20</sup> By 2008, however, black women received almost twice as many medical degrees as black men, 751 compared to 396.<sup>21</sup> In 2004–5 academic year, the total number of master's degrees earned by black women more than doubled those of black men, 38,748 and 15,733, respectively.<sup>22</sup> With regard to professional degrees, black women earned 64 percent of all of those awarded to African Americans in 2005.<sup>23</sup> Richard Banks in his recent book *Is Marriage for White People?* noted that in 2008, there were more than twice as many black females in graduate school than black males—125,000 as opposed to 58,000.<sup>24</sup>

As troublesome as the decline in the participation rates of black males in higher education programs noted by the statistics above may be, these statistics show that for some time, black women have far outpaced black males in academic success. Thus, the increasing percentages of Black Immigrants and Black Multiracials among blacks at selective higher education institutions points to the conclusion that they are much more likely to be replacing Ascendant Black Women than Ascendant Black Men.

16. *Black Women Now Dominate African-American Law School Enrollments*, 30 J. OF BLACKS IN HIGHER EDUC. 64, 65 (2001).

17. *Id.*

18. *Id.*

19. Trueblackness, *Black Women Dominate Best Medical Schools*, GROUPS.YAHOO.COM (Dec. 26, 2003), <http://groups.yahoo.com/group/trueblackness/message/7153>.

20. *A Half-Century of Progress of Black Students in Medical Schools*, 30 J. OF BLACKS IN HIGHER EDUC. 28, 30 (2001).

21. RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 37–38 (2011).

22. *African Americans Making Solid Gains in Bachelor's and Advanced Degrees: Black Women Far Out Ahead*, 57 J. OF BLACKS IN HIGHER EDUC. 63, 66 (2007).

23. *Id.* at 67

24. RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 37 (2011).



The increasing acceptance of interracial marriage has also increased the numbers of such marriages, as well as interracial cohabitation.

#### IV. Implications for Ascendant Black Women as Mothers

Another consequence of the changing racial and ethnic ancestry of blacks at selective higher education institutions is what it means for Ascendant Black Women as mothers. Because black men are much more likely to be involved in interracial dating and marriage than black women, Black Multiracial children are more likely to have a black father than a black mother.<sup>25</sup> Thus, by preferring Black Multiracials to Ascendant Blacks in the admissions of selective higher education institutions, these institutions are also providing a preference that more likely benefits the children of black males at the expense of the children of Ascendant Black Women.

In 1960, before selective higher education institutions engaged in efforts to open their institutions to blacks, interracial marriage between blacks and whites was still illegal in over twenty states. Of the almost twelve million blacks over the age of fifteen in the country, only 51,000 were married to whites and black women were slightly more likely to have a white spouse than black men.<sup>26</sup> Acceptance of interracial marriages in the United States, however, has increased dramatically since the 1960s. Surveys in the 1960s showed that about ninety-two percent of whites stated they would not consider marrying an African American.<sup>27</sup> As late as 1965, forty-eight percent of whites in a national poll indicated approval of anti-miscegenation laws. In the South, the feeling was even stronger with seventy-two percent of whites and thirty percent of blacks approving of such laws. In a 1997 Gallup poll, however, seventy-seven percent of blacks and sixty-one percent of whites indicated their approval of interracial marriages.<sup>28</sup> The percentage of those who object to interracial marriage has continued to decrease. This is especially true among younger adults, the ones in their prime reproductive years. According to a 2010 Pew Research Center Report, almost all Millennials (18 to 29 year olds) accept interracial dating and marriage.<sup>29</sup> The Report notes that ninety-two percent of white and eighty-eight percent of African American Millennials say that they would be fine with a family member marrying someone outside of their group.

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25. At least one study of information from the 2008 American Community Survey data also showed that U.S.-born black men are more likely to marry foreign-born black women than U.S. born black women are to marry foreign-born black men. According to the study, of the 79 foreign-born black men included in their data who married in 2008, 40.5% married U.S. born black women. In contrast of the 70 foreign-born black women included in their data who married that year in the survey 50% married U.S. born black men. Zhenchao Qian and Daniel T. Lichter, *Changing Patterns of Interracial Marriage in a Multiracial Society*, 73 J. OF MARRIAGE & FAMILY 1065, 1072 tbl. 2 (2011).

26. U.S. CENSUS BUREAU, *Race of Wife by Race of Husband: 1960, 1970, 1980, 1991, and 1992* tbl.1 (1998), available at <http://www.census.gov/population/socdemo/race/interractab1.txt>.

27. ROBERT J. SICKELS, *RACE, MARRIAGE AND THE LAW* 117, 121 (1972).

28. See Maria Root, *The Color Of Love*, AM. PROSPECT, Apr. 8, 2002 at 54. Another survey of American attitudes showed that in 1997, 67 percent of whites and 83 percent of African Americans approved of interracial marriages. See HOWARD SCHUMAN, CHARLOTTE STEEH, LAWRENCE BOBO & MARIA KRYSAN, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 285 (1997).

29. See PEW RESEARCH CTR. PUBLICATIONS, *Almost All Millennials Accept Interracial Dating and Marriage* (Feb. 1, 2010), <http://pewresearch.org/pubs/1480/millennials-accept-interracial-dating-marriage-friends-different-race-generations>.

The increasing acceptance of interracial marriage has also increased the numbers of such marriages, as well as interracial cohabitation.<sup>30</sup> The percentage of blacks with a spouse of another race increased from 1.1 percent in 1970 to 2.4 percent in 1980 to 4.1 percent in 1990 and, for single race blacks in 2000, to 7.0 percent.<sup>31</sup> Viewing the increasing percentages of blacks who marry outside of the race, however, obscures the differences in interracial marriage rates broken down by gender. Among racial minorities, blacks are the only group where the men are more likely to marry outside of the race than the women.<sup>32</sup> Whereas the percentage of married black males who married outside of the race increased from 1.5 percent in 1970 to 5.8 percent in 1990, for married black women the percentages only increased from 0.8 percent in 1970 to 2.3 percent in 1990. Data from the 2000 Census also revealed that 9.7 percent of married black men, but only 4.1 percent of married black women, reported having a spouse of another race. Younger blacks are even more likely to cohabit and marry outside of their race. A study comparing Census data from 1990 to that of 2000 of married couples between the ages of twenty and thirty-four,<sup>33</sup> pointed out that native-born African Americans between the studied ages who married outside of the race increased from the 1990 figure of 8.3 percent to 14.2 percent for single-race black men. If multiracial black men were included, then the percentage goes to 15.4 percent. For native-born black women, the increases were from the 1990 figure of 3.3 percent to 5 percent for single-race black women, and 6 percent if multiracial black women were included.<sup>34</sup> A recent Pew Center Research Report also noted that interracial marriages make up a much larger percentage of new marriages by blacks, when compared to the total of blacks currently married. Thus, in 2008, 22.0 percent of black male and 8.9 percent of black female newlyweds married outside of their race, compared to 12.5 percent of all married black males and 5.5 percent of all married black females.<sup>35</sup>

We have not been able to find data that reports the percentage of Black Multiracials who have a black father as opposed to a black mother. The above data on interracial marriage and cohabitation, however, suggests that black men are two to three times more likely to marry or cohabit outside of the race than black women. While these figures do not specifically tell us that Black Multiracials are far more likely to have a black father than a black mother, they strongly suggest that is the case. Thus, to the extent that Black Multiracials are replacing Ascendant Blacks in selective higher education institutions, effectively, it means that the children of black fathers are more likely to benefit from a preference based on affirmative action in the admissions process in comparison to the children of black mothers.

## V. Implications for Marriage and Companionship Prospects of Ascendant Black Women

Recent articles have reported that the African American community has seen a dramatic decline in the rate of marriage among black women, especially among highly educated black women.<sup>36</sup> U.S.

30. While many individuals will get married, an alternative to marriage is cohabitation. Cohabitation is normally a short-term, marriage-like arrangement. It has contributed to a reduction in marriage rates in early adulthood and an increase in the average age of first marriage.

31. Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriages*, 60 POPULATION BULL. 1, 12 tbl. 2 (2005), available at <http://www.prb.org/pdf05/60.2NewMarriages.pdf>.

32. *Id.*

33. See Zhenchao Qian & Daniel T. Lichter, *Social Boundaries and Marital Assimilation: Interpreting Trends in Racial and Ethnic Intermarriage*, 72 AMER. SOC. REV. 68, 79 (2007).

34. *Id.* The study also saw similar increases in the percentage of blacks involved in interracial cohabitation arrangements. The authors stated that the percentage of African American males in interracial cohabitation arrangements increased from 14.7 percent to 21.9 percent between 1990 and 2000. For black women the increase was more modest, from 5.6 percent to 6.2 percent. *Id.*

35. JEFFREY S. PASSELL ET AL., PEW RESEARCH CTR., MARRYING OUT: ONE-IN-SEVEN NEW U.S. MARRIAGES IS INTERRACIAL OR INTERETHNIC 11-12 (2010), available at <http://pewresearch.org/pubs/1616/american-marriage-interracial-interethnic>. For 2010, the percentage of black males who married that year who married outside of the race increased to 23.6% and for black females to 9.3%. See PAUL TAYLOR, WENDY WANG, KIM PARKER, JEFFREY S. PASSELL, EILEEN PATTEN & SETH MOTEL, PEW RESEARCH CTR., THE RISE OF INTERMARRIAGE: RATES, CHARACTERISTICS VARY BY RACE AND GENDER 9 (2012), available at <http://www.pewsocialtrends.org/files/2012/02/SDT-Intermarriage-II.pdf>.

36. Linsey Davis & Hana Karar, *Single, Black, Female -- and Plenty of Company*, ABC NEWS/NIGHTLINE (Dec. 22, 2009); Ralph Richard Banks, *An Interracial Fix for Black Marriage*, WALL STREET J. (Aug. 6, 2011).



Census data between 1970 and 2010 highlights the dramatic decrease in the rate of marriage among black women. The percentage of black women over the age of eighteen who were married declined from sixty-two percent in 1970 to forty-three percent in 1990.<sup>37</sup> In 2010, twenty-three percent of white women had never married.<sup>38</sup> However, this contrasts very favorably with the 45.2 percent rate for black women.<sup>39</sup> The 2010 figure for black women represents an increase from the 42.7 percent figure in 2005 and the 44 percent figure in 2008.<sup>40</sup> At least one critic of this recent data pointed to the fact that while the numbers show younger black women (beginning at eighteen years old) are unmarried, when analyzing black women who are thirty-five and older, the percentage drops from 43 percent to 25 percent.<sup>41</sup> Thus indicating that black women get married later on in life.<sup>42</sup> While this may be true, the total percentage of unmarried black women thirty-five and older was still twice that of their white female counterparts.<sup>43</sup>

There are a number of reasons for the difficulties black women encounter in finding a suitable mate. Of any minority group of women, black women are the least likely to marry outside of their race. For example, in 2000, only 4.1 percent of married black women were married outside of the race. In contrast, 57.6 percent American Indian, 21.6 percent Asian women, 45.8 percent of Hawaiian women, 18.2 percent of Some other Race women and 56.6 percent of multiracial women who were married had married outside of their race.<sup>44</sup> As a result, their potential marriage pool is primarily restricted to black men. However, black women significantly outnumber black men. Recent data shows that there are 1.9 million more black women over the age of fifteen than black men,<sup>45</sup> with black women making up almost fifty-five percent of this portion of the black population.<sup>46</sup> As a result, there is a tremendous gender imbalance between the numbers of black women of marrying age when contrasted with the numbers of black men.

The marriage pool of black men is then further constrained by a number of other negative factors. In a thirty-year period, the U. S. prison population increased from 300,000 to almost two million.<sup>47</sup> This large American prison population has had a devastating impact on the marriage pool of eligible black men. According to statistics from the U.S. Bureau of Justice, in July 2009, about 840,000 black men in United States prisons made up approximately forty percent of all male inmates,<sup>48</sup> and an estimated 32.2 percent of African American males will spend part of their life in prison versus 17.2

37. Kyle D. Crowder & Stewart E. Tolnay, *A New Marriage Squeeze for Black Women: The Role of Racial Intermarriage by Black Men*, 62 J. OF MARRIAGE AND THE FAMILY 792, 792 (2000).

38. Eric Johnson, *Nightline Face-Off: Why Can't Successful Black Women Find a Man?*, ABC NEWS/NIGHTLINE (Apr. 21, 2010). See also U.S. CENSUS BUREAU, *America's Families and Living Arrangements: 2010 tbl. A1 (White alone) (2010)*, available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html>.

39. U.S. CENSUS BUREAU, *America's Families and Living Arrangements: 2010 tbl.A1 (Black alone) (2010)*, available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html>.

40. BLACKDEMOGRAPHICS.COM, *African American Population: Marriage in Black America*, <http://www.blackdemographics.com/population.html> (2010).

41. Ivory A. Toldson & Bryant Marks, *New Research Shatters Myths and Provides New Hope for Black Love and Marriage*, EMPOWER MAGAZINE, Aug. 8, 2011, available at <http://www.empowernewsmag.com/listings.php?article=2051>.

42. Angela Stanley, *Black, Female and Single*, N.Y. TIMES (Dec. 10, 2011), <http://www.nytimes.com/2011/12/11/opinion/sunday/black-and-female-the-marriage-question.html?pagewanted=all>.

43. Ivory A. Toldson & Bryant Marks, *supra* note 41.

44. Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriages*, 60 POPULATION BULL. 1, 12 tbl. 2 (2005), available at <http://www.prb.org/pdf05/60.2NewMarriages.pdf>.

45. Ivory A. Toldson & Bryant Marks, *supra* note 41.

46. According to 2010 Census figures, of the 30,450,000 blacks over the age of 15, 16,630,000 were women (16,630,000/30,450,000 = 54.7%). See U.S. CENSUS BUREAU, *America's Families and Living Arrangements: 2010 tbl.A1 (Black Alone or in Combination with One or More Other Races) (2010)*, available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html>.

47. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS* 6 (2010).

48. Heather C. West, *Prison Inmates at Midyear 2009-Statistical Tables*, U.S. DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS, June 2010, at 19 tbl.16, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>.



## Another factor in the decreased income potential of black men is the changing labor market in the United States.

percent of Hispanic males and 5.9 percent of white males.<sup>49</sup> Wisconsin sociology professor Pamela Oliver further points out that, “about a third of African American men are under the supervision of the criminal justice system, and about 12% of African American men in their twenties and thirties are incarcerated.”<sup>50</sup>

The pool of marriageable black men is further reduced because a large number of black men cannot provide a stable source of income to support a family. For example, when incarcerated black men are released from prison, they find that having a criminal record will also reduce their employment prospects. Since the Internet has made it far easier to do criminal background checks of potential employees, a prospective employee’s criminal background is far more likely to be disclosed in the hiring process today;<sup>51</sup> most employers admit that they would not hire an applicant that they knew had a criminal record.<sup>52</sup> Ex-offenders typically have several characteristics employers find undesirable such as less education, fewer job skills, and higher rates of untreated drug addiction and mental illness. However, there are additional characteristics that ex-offenders possess related to their criminal record that makes them unattractive to potential employers. For example, those released from prison have a very high rate of recidivism during the first three years.<sup>53</sup> For prospective employers this creates concerns about the long-term employment prospects of ex-offenders, as well as the possibility that their criminal behavior could affect the employer’s workforce. In addition, employers are concerned about liability stemming from possible negligent hiring lawsuits if the employee harms someone while on the job.<sup>54</sup>

Another factor in the decreased income potential of black men is the changing labor market in the United States. Over the past forty years employers have automated or outsourced overseas many of the high-paid, low-skilled jobs that less-educated workers used to do. Black male workers were disproportionately employed in those industries that suffered from international competition.<sup>55</sup> Also, as noted above, far fewer black men earn college degrees than black women. Thus, fewer black males can take advantage of the increased job opportunities and income potential that a college degree generates. One study, however, points out that black men still earn more than black women and are

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49. Michael Connett, *Employer Discrimination Against Individuals With A Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1012 (2011).

50. See Pamela Oliver, *Racial Disparities in Criminal Justice*, UNIV. OF WIS., <http://www.ssc.wisc.edu/~oliver/RACIAL/RacialDisparities.htm> (last visited Mar. 2, 2012).

51. See James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 207 (2008) (reporting that growing number of states are making criminal record information publicly available on state websites).

52. JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 31 (2001). See also Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 271 (2009) (stating that employers are “more reluctant to hire ex-offenders than any other group of disadvantaged persons.”).

53. See Patrick A. Langan & David J. Levin, U.S. Dep’t of Justice, *Recidivism of Prisoners Released in 1994*, BUREAU OF JUSTICE STATISTICS 1 (2002) (reporting that “67.5% of prisoners were rearrested for a new offense” within three years of release).

54. See, e.g., Ryan D. Watstein, Note, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender’s Employment Prospects*, 61 FLA. L. REV. 581, 584 (2009).

55. See Jessica Gordon Nembhard, Steven C. Pitts & Patrick L. Mason, *African American Intragroup Inequality and Corporate Globalization in AFRICAN AMERICANS AND THE ECONOMY* 217 (Cecial Conrad et al. eds., 2005).



overrepresented in several occupations that do not require a college degree, but still provide a good income.<sup>56</sup> These occupations include managers, truck drivers, police officers, construction workers, bailiffs, corrections officers, jailers, janitors, and building cleaners. However, while these occupations may provide sufficient incomes, this does not guarantee that these working-class black men are compatible with college-educated black women.

Another factor that reduces the marriage pool for black women stems from one discussed earlier. Black men are two to three times more likely to engage in interracial dating or cohabitation than black women.<sup>57</sup> Further, studies have pointed out that “black/white intermarriages tend to occur when the white spouse trades the privilege of racial status for the higher status of a better-educated black partner.”<sup>58</sup> Thus, there is evidence which suggests that interracial marriages increase as both black men and women obtain higher levels of education; this is particularly true for black males.<sup>59</sup> This is important because students attending selective higher education programs tend to come from higher socio-economic backgrounds. For example, one report that looked at 146 selective colleges and universities in the United States, noted that approximately seventy-four percent of all students hail from the upper-income quartile, whereas only three percent come from the lowest-income quartile, and only 10 percent are from the bottom half of the SES distribution.<sup>60</sup>

Thus, another stark reality of the changing racial and ethnic ancestry of blacks attending selective higher education institutions for Ascendant Black Women is the impact on their prospects of finding that companion with whom they will have and raise children. With the current overrepresentation of Black Immigrants and Black Multiracials attending selective colleges and universities and their increasing percentages approaching college age, over the next ten years Black Immigrants and Black Multiracials will virtually crowd Ascendant Blacks out of selective higher education institutions. Thus, based on this reality, it is now sound advice to tell an Ascendant Black that if they want their child to graduate from one of these institutions “they should seek to have children by someone who is either foreign-born or of another race.” However, given the broader marriage and co-habitation opportunities presented to black males as opposed to black females, such advice further reduces the prospects of Ascendant Black Women to find that acceptable companion, because black males are presented with yet another reason to select someone other than them.

## VI. Conclusion

As the nation waits with bated breath for the Supreme Court to decide the *Fisher* case, the nation’s attention should also focus on an issue of almost equal importance: the changing racial and ethnic ancestries of blacks benefitting from affirmative action. It is a well-settled principle that affirmative action

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56. See generally Robert T. Palmer & Dina C. Maramba, *African American Male Achievement: Using a Tenet of Critical Theory to Explain the African American Male Achievement Disparity*, 43 EDUC. AND URBAN SOC’Y 431 (2010) (stating 725,922 black men earn more than \$75,000 as compared to 528,204 black women).

57. At least one study of information from the 2008 American Community Survey data also showed that U.S.-born black men are more likely to marry foreign-born black women than U.S. born black women are to marry foreign-born black men. According to the study, of the seventy-nine foreign-born black men included in their data who married in 2008, 40.5 percent married U.S. born black women. In contrast of the seventy foreign-born black women included in their data who married that year in the survey 50 percent married U.S. born black men. See Zhenchao Qian and Daniel T. Lichter, *Changing Patterns of Interracial Marriage in a Multiracial Society*, 73 J. OF MARRIAGE & FAMILY 1065, 1072 tbl 2 (2011).

58. SIMON CHENG & SEENA MOSTAFAVIPOUR, *THE DIFFERENCES AND SIMILARITIES BETWEEN BIRACIAL AND MONORACIAL COUPLES: A SOCIODEMOGRAPHIC SKETCH BASED ON THE CENSUS 2000* 6 (2005), available at

[http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/2/2/1/9/pages22192/p22192-1.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/0/2/2/1/9/pages22192/p22192-1.php).

59. See Ivory A. Toldson & Bryant Marks, *supra* note 41.

60. See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity* (2004), available at <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>. See also Anthony Carnevale & Stephen J. Rose, CENTURY FOUNDATION, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions* 11 (2003), available at [http://tcf.org/publications/pdfs/pb252/carnevale\\_rose.pdf](http://tcf.org/publications/pdfs/pb252/carnevale_rose.pdf).

was enacted to remedy past discrimination, particularly the systematic racism inflicted upon African Americans embodied in the institutions of slavery and Jim Crow segregation. After all, the Supreme Court's opinion in *Grutter v. Bollinger*,<sup>61</sup> approved an affirmative action plan that sought to obtain a critical mass of underrepresented minorities with a history of discrimination. As O'Connor noted,

"By virtue of our Nation's struggle with racial inequality, such [underrepresented minority] students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences."<sup>62</sup>

How can we as a society justify affirmative action based upon benefiting groups with a history of discrimination when we eliminate the one group, Ascendant Blacks, who not only come from the group most victimized by that history of discrimination, but also the very group that affirmative action was primarily created to assist.<sup>63</sup>

This essay took a unique approach by analyzing the changing racial and ethnic ancestry of blacks attending selective higher education programs. However, it did so from the perspective of Ascendant Black Women. This allowed us to point out that these changes negatively impact Ascendant Black Women in terms of reducing their opportunities for attending a selective higher education program; negatively impact them in their roles as mothers because their children are far less likely to benefit from affirmative action than the children of black males; and reduces their prospects to find long-term relationships with males. The changing racial and ethnic ancestry of blacks on affirmative action has received some publicity in the popular media and the legal literature; however, it has not truly caught the nation's attention. It may very well be that a principal reason why more discussion has not occurred about the changing racial and ethnic ancestry of blacks benefitting from affirmative action is because Ascendant Black Women are the ones paying most of the price.

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61. 539 U.S. 306 (2003).

62. *Id.* at 333, 338.

63. Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 *How. L. J.* 255, 294 (2011).



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# IILP Review 2012: Disability Diversity and Inclusion Issues in the Legal Profession

# Diversity in the Legal Profession Cuts Both Ways: The Lawyer's Dual Role as Employer and Public Accommodation

**Michael A. Schwartz**

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*What is the legal profession doing to address access to legal services for people who are deaf or hard of hearing? Should there be a link between employing a lawyer with a disability and accommodating a client with a disability? Schwartz considers access, employment and accommodation for lawyers with disabilities, , their employers and their clients.*

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## I. Introduction

The Institute for Inclusion in the Legal Profession (IILP) seeks greater diversity in the ranks of lawyers based on “race, ethnicity, color, culture, gender, nationality, disability, sexual orientation, gender identity and expression, religion, geography and age.”<sup>1</sup> The IILP seeks to break down barriers to employment in the legal profession and to increase hiring of lawyers who come from all walks of life.<sup>2</sup> With respect to disability, Title I of the Americans with Disabilities Act (ADA) compels lawyers and law firms to treat applicants and employees with disabilities fairly and equitably.<sup>3</sup> However, lawyers are not just employers of legal talent; they are also places of public accommodations serving the general public, and under Title III of the same law, these lawyers and firms must accommodate people with disabilities who seek or receive legal services from them.<sup>4</sup> Unfortunately, when it comes to deaf and hard-of-hearing individuals, the legal profession has fallen far short in accommodating their communication needs in the legal setting. Hence, the IILP’s call to diversify the profession raises the question: What is the profession doing to address access to legal services for people who are deaf or hard of hearing?

The answer is, very little.

Should there even be a link between employing a lawyer with a disability and accommodating a client with a disability?

The answer is, yes, indeed.

## II. The ADA, Lawyers, and the Noncompliance Problem

Enacted in 1990, the ADA requires a place of public accommodation like a lawyer’s office to pro-

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1. THE INSTITUTE FOR INCLUSION IN THE LEGAL PROFESSION, <http://www.theiilp.com/> (last accessed Aug. 25, 2012).

2. *Id.*

3. 42 U.S.C. §12101 *et seq.*, 29 C.F.R. §1630 *et seq.*

4. 42 U.S.C. §12181 *et seq.*, 28 C.F.R. §36.101 *et seq.*



## Lawyers and law firms continue to resist or refuse sign language interpreters for those who need them. It's not just a local problem; it's a national problem.

vide appropriate auxiliary aids if necessary for effective communication in the office.<sup>5</sup> The law explicitly includes a sign language interpreter in the definition of an appropriate auxiliary aid; CART (computer aided real-time transcription) is another example.<sup>6</sup> Moreover, the lawyer is forbidden from charging the deaf person for the provision of the auxiliary aid.<sup>7</sup> An estimated half-million deaf people in the United States use American Sign Language (ASL),<sup>8</sup> and in order for a deaf signer and a hearing speaker to communicate effectively, a sign language interpreter skilled in ASL is necessary in order to establish a communication bridge between the parties.

Although the ADA has now been law for over twenty years, the reports from the Deaf community paint a picture of noncompliance: lawyers and law firms continue to resist or refuse sign language interpreters for those who need them. It's not just a local problem; it's a national problem.<sup>9</sup>

How do I know?

I am Supervising Attorney and director of the Disability Rights Clinic (DRC), part of the Office of Clinical Legal Education at Syracuse University College of Law.<sup>10</sup> The DRC is a two-semester clinic where I supervise ten law students in advocacy and enforcement related to disability rights. I have been deaf since birth; speech therapy and tutoring enabled me to learn to read, write and speak English. I did not learn sign language until age 23. In fact, because deafness was stigmatized in the 1950s—the decade of my birth—I ran away from being deaf and refused to learn sign and to meet

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5. See *supra* note 4. See also 28 C.F.R. §303(a) ("A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.") See also 28 C.F.R. §36.303(c) ("Effective communication. A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.")

6. "The term 'auxiliary aids and services' includes...qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments." 28 C.F.R. §303(b)(1).

7. 28 C.F.R. §36.301(c). The only defenses to an ADA charge of discrimination for failure to provide an appropriate auxiliary aid are undue burden (significant difficulty or expense) and fundamental alteration of the lawyer's services. 28 C.F.R. §303(a). No court to date has found that the provision of a sign language interpreter constitutes either defense.

8. Ross E. Mitchell, Travas A. Young, Bellamie Bachleda, Michael A. Karchmer, *How Many People Use ASL in the United States? Why Estimates Need Updating*, GALLAUDET RESEARCH INSTITUTE, GALLAUDET UNIVERSITY, (Feb. 2005), available at [http://research.gallaudet.edu/Publications/ASL\\_Users.pdf](http://research.gallaudet.edu/Publications/ASL_Users.pdf).

9. See, e.g., Sharon Caserta, Esq. *Providing Effective Communication for Clients who are Deaf, Hard of Hearing, or Deaf/Blind: A Handbook for Florida Attorneys*, (Oct. 2008), available at [http://www.floridalegal.org/deaf/deaf\\_hard\\_of\\_hearing-handbook.pdf](http://www.floridalegal.org/deaf/deaf_hard_of_hearing-handbook.pdf). This outlines the problem of access for Deaf Floridians and happens to be an excellent primer on what to do and not do when representing or speaking with a Deaf person or client.

10. SYRACUSE UNIVERSITY DISABILITY RIGHTS CLINIC, (2010), available at <http://www.law.syr.edu/academics/clinical%2Dlegal%2Deducation/disability-rights-clinic.aspx>.

deaf people. In college, a chance encounter with the National Theater of the Deaf and its charismatic star, Bernard Bragg, a deaf man born to deaf parents, changed my life. I quickly learned to sign and became culturally Deaf—I embraced my identity as a Deaf man, put down roots in the Deaf community and married a sign language interpreter. As such, I consider myself an insider in the Deaf community. Because I received my Ph.D. in Education from Syracuse University School of Education where I studied under the auspices of the Cultural Foundations of Education, the home of disability studies at the University, I locate myself in the disability rights movement.

Given who I am and where I work, I receive intelligence from the Deaf community about how well lawyers and law firms in my region—Central New York—are complying with their obligation under federal law to be communication-accessible to members of the Deaf community who receive or seek legal services. This intelligence discloses a pattern and practice of refusing to properly accommodate Deaf and hard-of-hearing people by providing them with sign language interpreters and CART services in the lawyer’s office. For instance, I received two reports, each involving a different attorney who had received an assignment through the Assigned Counsel Plan to represent a deaf client who needed a sign language interpreter to communicate with the attorney. Each attorney refused to provide the interpreter in the lawyer’s office, a violation of the ADA. Instead the attorney waited until a few minutes before the court proceeding and asked the court’s interpreter to facilitate communication with the deaf client. How is such an encounter in compliance with the ADA? Indeed, when does a hurried five minutes’ consultation with a client just prior to a court proceeding constitute effective assistance of counsel?<sup>11</sup>

Deaf people in the community tell me it is very difficult to find a lawyer willing to provide a sign language interpreter. A typical experience for a deaf person is to call the lawyer’s office in an attempt to make an appointment with the lawyer. Sometimes the person calls through a video relay interpreter—the deaf person and the relay interpreter see each other on their TV screens via web or TV camera, and the deaf person asks the interpreter to call a hearing person on the interpreter’s telephone.<sup>12</sup> Once

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11. I brought these matters to the attention of the local Assigned Counsel Plan and requested an instruction to its members that they comply with the ADA when representing deaf and hard of hearing clients. My complaint was discounted as legally erroneous and my request for the instruction rejected.

12. For a full explanation of how this system works, see [www.sorensonvrs.com/vrs](http://www.sorensonvrs.com/vrs).



In a move designed to send the nation’s lawyers a message, the U.S. Department of Justice sued Gregg Tirone, a lawyer in Rochester, New York, home of the largest per capita Deaf population in the United States, because Tirone refused to provide his deaf client with a sign language interpreter.





## Two factors are at the heart of the problem of noncompliance with the ADA: one economic, the other cultural.

the interpreter has the hearing person on the phone, the interpreter will serve as a relay: transmitting sign into voice and voice into sign. Sometimes the deaf person chooses to call with the assistance of a relative or a friend. Whether via video relay interpreter or a family member or friend, it is generally easy for the lawyer to determine that the caller is deaf, and this is where the trouble starts. What I am being told is that the lawyer will do one of two things: he or she will refuse to accept the call (in essence, denying the caller an opportunity to speak with the lawyer), or will refuse the deaf person's request for an accommodation like an interpreter or CART. Both moves violate the ADA.<sup>13</sup>

The problem of noncompliance with the ADA is not just peculiar to Central New York. It is a problem of national proportion. In a move designed to send the nation's lawyers a message, the U.S. Department of Justice sued Gregg Tirone, a lawyer in Rochester, New York, home of the largest per capita Deaf population in the United States, because Tirone refused to provide his deaf client with a sign language interpreter. The settlement required Tirone to provide interpreters when necessary to effectively communicate with his client.<sup>14</sup>

### III. Why Noncompliance?

Two factors are at the heart of the problem of noncompliance with the ADA: one economic, the other cultural. The going rate for an interpreter obtained through an interpreter referral agency is anywhere from \$60 to \$80 per hour, with a two hour minimum. Compared to the lawyer's bill for the consultation (in some case, the consultation is free), the interpreter's bill of \$120 to \$160 for a visit that may last no longer than one hour appears to bite into the lawyer's fee or income. However, the bill compared to the lawyer's annual income is a mere pittance for the lawyer and must be considered as part of the cost of doing business. Moreover, the Internal Revenue Service may allow a lawyer or law firm to claim a tax credit for ADA-related accommodations provided to clients and those seeking legal services.<sup>15</sup>

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13. Certainly a lawyer can decline a call for help if the lawyer's docket is full or the call for help is in an area outside the lawyer's specialization. These were not the reasons offered by the lawyers turning away my Deaf informants.

14. See Settlement Agreement Between the United States of America and Gregg Tirone, Esq., (Jan. 2004), *available at* <http://www.ada.gov/tirone.htm>. According to paragraph 21 of the settlement, the lawyer, Gregg Tirone, agreed that it was his obligation to ensure effective communication with his clients who have hearing disabilities, and that he could not charge them for the cost of the interpreter services or charge any other surcharge to recover this cost. He further agreed to post the following statement in the local paper once a month for 2 months, or in the Bar Association's newsletter or the local Daily Record once a month for 2 months: "The law office of Gregg Tirone welcomes clients with disabilities, particularly clients with hearing disabilities. Our firm is in compliance with the Americans with Disabilities Act, and will provide interpreter services when requested to do so. To ensure effective communication, when a client requires a sign language interpreter, this firm will provide a qualified sign language interpreter. The client shall not be charged for the cost of this service. The interpreter will be qualified to interpret legal terms." Tirone also agreed to post this statement prominently in his office, in a place clearly visible to the public.

15. See IRS, TAX BENEFITS FOR BUSINESSES WHO HAVE EMPLOYEES WITH DISABILITIES, (June 2012), *available at* <http://www.irs.gov/businesses/small/article/0,,id=185704,00.html>. The credit is not available for firms making over \$1 million, but firms making that much money cannot claim that a \$160 bill constitutes a financial hardship.

The failure to provide effective communication access in the lawyer's office rests, in large part, on the lack of "cultural competency" with regard to the needs of Deaf and hard-of-hearing people when they need to communicate with a lawyer who cannot sign fluently in ASL. Many people, including lawyers, who have no or little experience with deafness, think that a deaf person can read lips. True, some deaf people can read lips, but that is heavily dependent on the circumstances: the deaf person is skilled in lip-reading; the lawyer clearly articulates his speech, which renders it clearly visible on the lips; the deaf person is keyed into the context of the discussion; and, the room where they are sitting has little or no visual distraction. But for many deaf people, reading lips is not an option. Moreover, the complexity of the subject matter under discussion can increase the likelihood that the deaf lip-reader will miss or misunderstand a key point the lawyer is trying to make. Another fallacy is that writing notes back and forth is an effective method of communication. Think about this: would a lawyer use this method with a hearing person, and more importantly, would a lawyer use this method to discuss a matter as complex as a divorce or a real estate sale? The answer is no. A lawyer competent in dealing with deaf clients—possessing the knowledge and sensitivity he or she needs to navigate a professional relationship with a deaf client—would retain an interpreter in order to render effective communication access to his or her client.

This is where I come back to the IILP's call to diversify the ranks of the legal profession. The solution to the problem facing the deaf community in the United States lies in employing lawyers with disabilities, particularly those who are deaf or hard of hearing. As a lawyer with a disability well understands, the goal of securing justice for the client can only happen if the lawyer and the client can communicate effectively with each other. Lawyers with disabilities are more likely to possess the knowledge, competency and sensitivity required to meet the needs of these clients. A lawyer with a disability may be more likely to grasp not only the importance of properly accommodating a client, but also how to do so in an effective way as required by the law.

#### IV. Conclusion

The drive for diversity in the legal professional must be coupled with the drive to ensure effective communication with deaf and hard-of-hearing clients. It would be strange to comply with the employment provisions of Title I of the ADA but not the public accommodation provisions of Title III of the ADA. Hiring lawyers with disabilities goes a long way in ensuring a mindset, a cultural competency, which will enhance the likelihood the firm will be accessible to deaf people and people with other disabilities.<sup>16</sup>

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16. The alternative is a lawsuit from the United States Department of Justice, the State Attorney General's Office, or an aggrieved member of the community. See *People of the State of New York by Vacco v. Mid Hudson Medical Group*, 877 F. Supp. 143 (S.D.N.Y. 1995) (upholding the authority of the New York State Department of Law to prosecute an ADA violation under its *parens patriae* authority if a pattern or practice impacted on the safety, health or welfare of a discrete group of New Yorkers).

# Consciously Overcoming Unconscious Biases Against Lawyers with Disabilities

Paula Pearlman

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*Many employers of lawyers are reluctant to hire, promote, or retain people with disabilities. Lawyers with disabilities face a multitude of implicit biases for a variety of reasons, most based on misconceptions and misperceptions about people with disabilities. Pearlman discusses two sources of power to actively change socially-constructed beliefs that perpetuate implicit biases against lawyers with disabilities.*

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While listening to a panel discussion about federal employment opportunities at the 6<sup>th</sup> Annual Conference of the National Association of Law Students with Disabilities, I was struck by the enthusiasm of the students at the prospect of employment as a lawyer, and their simultaneous apprehension about whether they will be denied employment due to their disability. While their excitement is encouraging, some of their fears may be legitimate: the contemporary recession resulted in the highest rates of unemployment since 1983.<sup>1</sup> In addition, since the recession began—across disability types—both Federal and private sector employees and applicants with disabilities have faced disproportionately increasing rates of job termination and rejection upon application.<sup>2</sup>

From March 2010 to March 2012, the number of working people with disabilities dropped from 19.4% to 17.1%, while the number of working people without disabilities has increased from 63.2% to 63.7%.<sup>3</sup> Even now, as the economy begins to improve and employment among people without disabilities is increasing, people with disabilities continue to face a downward trend in employment in both the public and private sectors. Unfortunately, however, discrimination against employees with disabilities is not unique to the current recession. At every economic downturn, people with disabilities are often the first fired and the last hired.<sup>4</sup>

The history of discrimination against people with disabilities in the United States is long and well-documented, particularly in the employment context.<sup>5</sup> Data suggests that, since the adoption of the

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Special thanks to Shawn Kravich, Associate Director of the Cancer Legal Resource Center, for his assistance with this article. In 2010, the unemployment rate reached 9.6%: the highest rate since 1983. U.S. Bureau of Labor Statistics, Employment Status of the Civilian Noninstitutional Population, 1940 to Date (2011), available at <http://www.bls.gov/cps/cpsaat1.pdf>.

1. In 2010, the unemployment rate reached 9.6%: the highest rate since 1983. U.S. BUREAU OF LABOR STATISTICS, EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION, 1940 TO DATE (2011), available at <http://www.bls.gov/cps/cpsaat1.pdf>.

2. See generally, H. Stephen Kaye, *The Impact of the 2007–09 Recession on Workers with Disabilities*, MONTHLY LABOR REV., OCT. 2010, at 19, 29–30 (Oct. 2010), available at <http://www.bls.gov/opub/mlr/2010/10/art2full.pdf>.

3. Figures from March 2010 to March 2011. U.S. Department of Labor, Bureau of Labor Statistics, EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY SEX, AGE, AND DISABILITY STATUS, NOT SEASONALLY ADJUSTED (March 2011), available at <http://www.bls.gov/news.release/empsit.t06.htm>.

4. See, e.g., LAURA TRUPIN ET AL., TRENDS IN LABOR FORCE PARTICIPATION AMONG PERSONS WITH DISABILITIES, 1983–94, U.S. DEPARTMENT OF EDUCATION, NATIONAL INSTITUTE ON DISABILITY AND REHABILITATION RESEARCH (1997).

5. See, e.g., H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 31–32 (1990), reprinted in 1990 U.S.C.C.A.N. at 267, 313 (quoting testimony before the House Subcommittee on Select Education and Employment Opportunities).



Research indicates that many employers are reluctant to hire, promote, or retain people with disabilities based on implicit biases that employers—and indeed all people—possess against various populations of people with disabilities, indicating a systemic undervaluing of applicants and employees with disabilities.

Americans with Disabilities Act (ADA) in 1990, some people with disabilities have experienced less discrimination and greater accommodation on the job than before the ADA. However, other groups of people with disabilities have seen no apparent increases in hiring or job retention.<sup>6</sup> Research indicates that many employers are reluctant to hire, promote, or retain people with disabilities based on *implicit biases* that employers—and indeed all people—possess against various populations of people with disabilities, indicating a systemic undervaluing of applicants and employees with disabilities.<sup>7</sup> Even with equally-rated work qualifications, applicants and employees with disabilities receive less favorable hire recommendations than those without disabilities, across the board.<sup>8</sup> Both private and public sector employers still largely maintain negative attitudes toward hiring persons with mental and/or emotional disabilities in particular.<sup>9</sup> Many employers believe that people with disabilities present a risk of poor attendance and productivity,<sup>10</sup> while other employers are concerned about these individuals' ability to interact with other employees.<sup>11</sup> Because of these misconceptions about people with disabilities, employers are more likely to choose to hire applicants without disabilities, even when that applicant may be less qualified for a position than their counterpart with a disability.<sup>12</sup>

Several years ago, disability advocates developed exercises to highlight these types of unconscious biases that operate against people with disabilities in and out of the employment context. For one exercise, "Pick a Disability," the audience is instructed to select what they perceive to be the most preferred and least preferred disability of a list of five (e.g., blindness, deafness, paraplegia, depression,

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6. Gina A. Livermore & Nanette Goodman, A REVIEW OF RECENT EVALUATION EFFORTS ASSOCIATED WITH PROGRAMS AND POLICIES DESIGNED TO PROMOTE THE EMPLOYMENT OF ADULTS WITH DISABILITIES 23 (2009).

7. See NATIONAL COUNCIL ON DISABILITY, EMPOWERMENT FOR AMERICANS WITH DISABILITIES: BREAKING BARRIERS TO CAREERS AND FULL EMPLOYMENT 73 (2007).

8. *Id.* at 75.

9. Teresa L. Scheid, *Stigma as a Barrier to Employment: Mental Disability and the Americans with Disabilities Act*, 28 Int'l J. L. & Psychiatry 670–690 (2005); Darlene D. Unger, *Employers' Attitudes Toward Persons with Disabilities in the Workforce: Myths or Realities?*, 17 Focus on Autism and Other Developmental Disabilities 1 (2002). See generally, EEOC Commission Meeting of March 15, 2011, *Employment of People with Mental Disabilities*, available at <http://www.eeoc.gov/eeoc/meetings/3-15-11/index.cfm> ("The greatest barrier to employment for people with intellectual and psychiatric disabilities are employers' myths and fears about their condition, not the disabilities themselves.").

10. Unger, *supra* note 9, at 2–10 (2002).

11. *Id.*

12. National Council on Disability, *supra* note 7, at 75.



Unconscious biases are particularly insidious—indeed, more dangerous than explicit prejudices—because they result from “automatic processes, which often (but not necessarily always) escape conscious detection.”

and epilepsy). A discussion ensues with audience members explaining their selections in a comfortable, nonthreatening environment that encourages people to come forth with their ideas so that biases can gently be exposed. In most circumstances, the selections are based on personal experiences, for instance, an audience member may share that they have a cousin who was blind or a friend who is deaf. In addition, these selections are based upon socially constructed assumptions that surround a particular disability; for example, in this discussion many people reveal that they associate “blindness” with a total darkness. However, when this point is made by a member of the audience, the facilitator has the opportunity to explain that there is a vast spectrum to the concept of “blindness” and that most people who are blind experience excessive light—not darkness. In addition, the facilitator can then explain the various types of assistive technologies available to people who are blind, such as screen-readable format software. In this way, an explicit discussion can expose the unconscious biases associated with various disabilities and provide new information to challenge and deconstruct these previously unquestioned conceptions.<sup>13</sup>

Unconscious biases are particularly insidious—indeed, more dangerous than explicit prejudices—because they result from “automatic processes, which often (but not necessarily always) escape conscious detection.”<sup>14</sup> In order to effectively combat these biases, we must explicitly bring them to light and work collectively to create new social constructions to replace the old. One way of targeting biases against people with disabilities is to focus on the language that we use on a daily basis. The disability rights community started an initiative to use “People First Language,” focusing on the person and not the disability, i.e. “a person who uses a wheelchair” as opposed to an outdated description, “wheelchair-bound.” By putting “people first,” we intentionally work to reframe the concept of identity—to place a larger value on the person, the *individual*, than on the disability itself.

As lawyers and as employers, we have two sources of power to actively change the socially-constructed beliefs that perpetuate implicit biases against people with disabilities. By hiring, accommodating, and promoting job applicants and employees with disabilities and by pushing ourselves to deconstruct and replace our own internal outdated frameworks for looking at what it means to have a disability, we can effectively change the legal and employment landscape to offer an inclusive, productive environment for the next generation of qualified, eager people.

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13. See generally American Bar Association, *Webinar on Disability Awareness and Sensitivity*, AMERICAN BAR ASSOCIATION, available at <http://apps.americanbar.org/abastore/index.cfm?pid=CET11APGCDR&section=main&fm=Product.AddToCart>.

14. Jody David Armour, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 145 (1997).



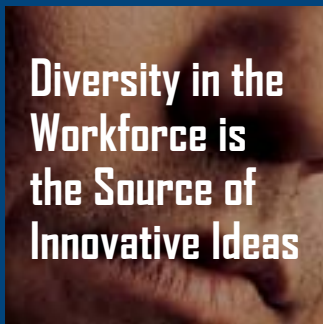


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# IILP Review 2012: LGBT Diversity and Inclusion Issues in the Legal Profession

# Major LGBT Legal Developments of 2011

Arthur S. Leonard

New York Law School and Editor, Lesbian/Gay Law Notes

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*This annotated compilation of case law and legislation – federal, state, and foreign – represents the most comprehensive update on the status of legal developments as they pertain to the LGBT community.*

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## I. Most Important U.S. LGBT Legal Rights Developments of 2011

**T**he New York Marriage Equality Act was passed on June 24 and went into effect on July 24, 2011. New York is the largest U.S. state thus far to legislate to allow same-sex couples to marry. With the addition of New York, U.S. jurisdictions that currently allow marriages between same-sex partners also include Massachusetts, New Hampshire, Vermont, Connecticut, Iowa, and the District of Columbia. Marriage Equality legislation pending in Maryland, Illinois and Washington State may come to a vote during 2012. New Jersey legislative leaders indicated they would attempt to move forward a Marriage Equality bill, as a pending lawsuit argues that the Civil Union Act fails to comply with the equality requirements of the New Jersey Constitution. Activists in Maine hoped to put a same-sex marriage initiative on the state ballot. And pending litigation over the constitutionality of Proposition 8 may result in reopening marriage to same-sex couples in California, perhaps as soon as this year. \*\*\* However, a pending lawsuit challenging the validity of the New York Marriage Equality Law's enactment partially survived a motion to dismiss, on the theory that the state's Open Meetings Law may have been violated when Governor Andrew Cuomo met with the Republican Senate Caucus in a closed-door meeting to discuss the pending bill.<sup>1</sup> In New Hampshire, there was a serious threat that veto-proof Republican majorities in the state legislature might repeal the state's Marriage Equality law during 2012 and override the veto promised by the state's Democratic governor.

*Glenn v. Brumby*, 2011 WL 6029978 (U.S.Ct.App., 11<sup>th</sup> Cir., Dec. 6, 2011), is the first U.S. appellate decision to hold that discrimination based on gender identity by a state government employer is subject to heightened scrutiny as a form of sex discrimination under the Equal Protection Clause of the 14th Amendment. An employee of the State Assembly's Office of Legislative Counsel signified they were transitioning male to female and the Director of the Office ordered their discharge due to his own discomfort with the situation. The state defended the suit on the ground that gender identity discrimination was not prohibited by the 14th Amendment and their rational concerns about restroom use in the state capitol were sufficient to justify the action. The district court and then the court of appeals disagreed, finding that gender identity discrimination is sex discrimination, so heightened scrutiny applies. While restroom concerns might justify the action under the rational basis test, said the court, such speculation is insufficient to justify discrimination based on a quasi-suspect classification.

*Implementation of the Don't Ask, Don't Tell Repeal Act of 2010*, ending the requirement that lesbian, gay and bisexual military members conceal their sexual orientation, took place on

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1. See *New Yorkers for Constitutional Freedoms v. New York State Senate*, No. 807-2011 (N.Y.Sup.Ct., Livingston Co. Nov. 18, 2011) (ruling on a motion to dismiss).

September 20, 2011. The U.S. Court of Appeals for the 9th Circuit then vacated a 2010 decision holding the DADT policy unconstitutional, pending before them on appeal by the government, as moot (see *Log Cabin Republicans v U.S.*, 658 F.3d 1162 [9th Cir., Sept. 29, 2011]). For the first time since before World War II, there was no official policy effectively banning military service by individuals known to be lesbian, gay or bisexual. However, DADT repeal did not include the adoption of a ban on sexual orientation discrimination in the military, was subject to the continuing restrictions imposed by the Defense of Marriage Act, did not change the military criminal sodomy law (Article 125, Uniform Code of Military Justice), and did not address the continued ban on service by transsexuals under Defense Department Regulations. New lawsuits that might generate decisions during 2012 have been filed challenging some of the unequal treatment that inevitably will follow.

**Obama Administration Changes its Position on the Unconstitutionality of Section 3 of the Defense of Marriage Act (DOMA).** In a letter to House Speaker John Boehner (February 23, 2011), Attorney General Eric Holder announced that the Justice Department, after having studied the issue to determine how to respond to new lawsuits against various federal agencies contesting the provision of federal law that defines the terms “marriage” and “spouse” to exclude recognition of same-sex marriages, concluded that this constituted sexual orientation discrimination, that sexual orientation involves a “suspect classification” under the 5th Amendment’s Equal Protection requirement, and that Section 3 of DOMA lacks sufficient justification to withstand the test of strict scrutiny. Consequently, although the Executive Branch would continue to enforce Section 3 until it was either definitively ruled unconstitutional or repealed by Congress, the Department would no longer defend it in the courts. The Justice Department filed briefs in pending cases arguing that Section 3 is unconstitutional and should be struck down, including the appeals in the 1st Circuit of District Judge Joseph Tauro’s rulings in *Gill v Office of Personnel Management*, 699 F.Supp.2d 374 (D.Mass. 2010) and *Commonwealth of Massachusetts v U.S. Department of Health and Human Services*, 698 F.Supp.2d. 234 (D.Mass. 2010) (which held Section 3 unconstitutional as lacking any rational basis). The Justice Department sent the head of its Civil Division to argue that Section 3 is unconstitutional in oral arguments on pretrial motions in *Golinski v Office of Personnel Management*, No. C 10-00257 JSW (N.D. Cal., oral argument held on Dec. 17, 2011). The “Bipartisan Legal Advisory Group” of the U.S. House of Representatives (BLAG) voted 3-2 (on party lines) to hire former Solicitor General Paul Clement to intervene selectively in pending DOMA-related litigation to defend Section 3. The lawsuits that provoked this change of position are *Windsor v United States*, 10 Civ. 8435 (JCF) (S.D.N.Y., filed Nov. 9, 2010), and *Pedersen v Office of Personnel Management*, No. 3:10-cv-01750-VLB (D. Conn., filed Nov. 9, 2010).

## II. Other Significant Developments of 2011

### A. United States Supreme Court Decisions (and Non-Decisions)

*Snyder v. Phelps*, 131 S.Ct. 1207 (March 2, 2011). The Court held, with but one dissenting vote, that picketers from the Westboro Community Church were not subject to tort liability for emotional distress inflicted upon the father of a soldier whose funeral they picketed with signs condemning the United States for tolerance of homosexuality. (The soldier was not gay. Westboro’s leader, Rev. Fred Phelps, takes the position that the deaths of U.S. soldiers are due to divine vengeance on the United States for its tolerance of homosexuality.) According to the Court, such picketing is political speech protected by the 1st Amendment, and so long as the Westboro picketers were complying with local zoning rules and directions from local police, they could not be sued in tort. Justice Samuel Alito, dissenting, found the Court’s 1st Amendment precedents inapposite.

***Denials of Petitions for Writs of Certiorari:*** When the Court refuses to review a case, it is also making a decision that a lower court's ruling is final as between the parties, but not a ruling on the merits of the case. Among LGBT-related cert denials last year:

***Adar v. Smith***, 132 S.Ct. 400 (October 11, 2011). A gay male couple adopted a Louisiana-born child in a New York court proceeding and then sought to have a new birth certificate issued by Louisiana, showing them as the child's legal parents. The state balked, arguing that its policy against adoptions by unmarried couples precluded issuing the license. The couple sued the state in federal court. The district court, affirmed by a three-judge panel of the 5th Circuit, found that the refusal to issue the revised birth certificate failed to accord required Full Faith and Credit to the New York adoption decree. Ruling en banc, 639 F.3d 146 (5th Cir., April 12, 2011), the 5th Circuit reversed, holding that the Full Faith and Credit Clause is an instruction to state courts and provides no jurisdiction for federal courts to adjudicate claims arising under it; in what must be considered dicta, the en banc panel opined that refusing to issue the certificate did not violate the Full Faith and Credit Clause. The Supreme Court's refusal to review the case was surprising, in light of an apparent conflict with a 10th Circuit ruling striking down an Oklahoma policy against issuing such birth certificates, and the likely recurring nature of the issue.

***Catholic League for Religious and Civil Rights v City and County of San Francisco***, 131 S.Ct. 2875 (May 2, 2011). The Court refused to review the 9th Circuit's decision affirming a district court ruling that the San Francisco Board of Supervisors did not violate the 1st Amendment when it passed a resolution that condemned Roman Catholic Cardinal William Levada's directive prohibiting Catholic adoption agencies in the city from placing children with same-sex couples.

***Debra H. v Janice R.***, 131 S.Ct. 908 (Jan. 10, 2011). The Court refused to consider constitutional arguments raised in objection to the New York Court of Appeals' ruling in a lesbian custody dispute that while a non-biological and non-adoptive parent has no standing to seek visitation rights or custody, the couple's Vermont civil union prior to the child's birth made the plaintiff the child's parent under Vermont law and thus comity requires recognition of her parental status in New York. It is not surprising that the Supreme Court could find the lack of a federal constitutional question worth addressing in a decision by a state court to recognize the parental status of a person based on comity extended to the law of a neighboring state, since the ruling was not premised on the U.S. Constitution's Full Faith and Credit Clause and the federal Defense of Marriage Act does not require states to refrain from applying traditional comity principles to issues involving legal relationships formed in other states.

***Jackson v District of Columbia Board of Elections and Ethics***, 131 S.Ct. 1001 (January 28, 2011). Opponents of allowing same-sex couples to marry sought to place a proposition on the ballot in the District of Columbia establishing a definition of marriage as being only between one man and one woman. The District's Board of Elections and Ethics ruled that the proposition was not proper under District law and refused to place it on the ballot. The Supreme Court refused to review lower court decisions backing up the Board's ruling. The D.C. City Council passed a law establishing marriage equality in the District while the lawsuit was pending.

***MacDonald v Johnson***, 131 S.Ct. 1574 (Feb. 28, 2011). Responding to an attempt to get the Court to explicate in more detail the precedential scope of *Lawrence v. Texas*, the Court refused to review the Virginia sodomy conviction of a man who had performed oral sex on teenage girls. In *Lawrence*, the Court had observed that it was not considering the constitutionality of laws prohibiting sex between adults and minors, and evidently there were not at least four members of the Court who were interested in having the court decide that issue.

## **B. Legal Recognition of Same-Sex Couples: Legislative and Executive Actions (United States)**

### ***i. Marriage Equality***

**New York** – Enactment of Marriage Equality Act on June 24, effective July 24, 2011. The enactment was challenged in *New Yorkers for Constitutional Freedom v. New York State Senate*, No. 807-2011 (N.Y. Sup. Ct., Livingston Co., Nov. 29, 2011) (denying motion to dismiss on claimed violation of open meetings law). In July, the State Department of Taxation issued guidance for married New York resident same-sex couples, requiring those who marry in New York during 2011 or who were married elsewhere prior and reside in New York during the tax year to use the “married” filing status for their 2011 NY State and local income taxes. See [http://www.tax.ny.gov/pit/marriage\\_equality\\_act.htm](http://www.tax.ny.gov/pit/marriage_equality_act.htm).

**Iowa** – In Iowa, where same-sex marriages have been legal since 2009, the Department of Administrative Services announced that state employees in same-sex marriages would be entitled to equal family leave benefits, after the Attorney General advised the Department that this was required under *Varnum v Brien*, 763 N.W.2d 862 (Iowa 2009), the same-sex marriage decision. Shortly after 2012 began, an Iowa trial court similarly instructed the state government that same-sex marriages enjoyed the same parental status presumptions as different sex marriages for purposes of issuing birth certificates when lesbian couples have children through donor insemination.

### ***ii. New Civil Union Laws***

Delaware, Hawaii, Illinois and Rhode Island enacted civil union laws. The Delaware and Rhode Island laws confer state law rights associated with marriage on same-sex couples. The Hawaii and Illinois laws extend the right to civil unions to both same-sex and different sex couples, thereby posing a threat to so-called “traditional marriage” that could have been avoided by enacting a marriage equality law.

### ***iii. Recognition of same-sex marriages from other jurisdictions***

New Mexico Attorney General Gary K. King issued A.G. Opinion No. 11-01 (January 4, 2011), stating that under principles of comity New Mexico would recognize same-sex marriages validly performed elsewhere as marriages. New Mexico is one of a handful of states that does not have a mini-DOMA or anti-marriage constitutional amendment.

Washington State enacted a law providing that same-sex marriages, civil unions and domestic partnerships formed in other jurisdictions would be recognized as domestic partnerships in Washington, enjoying the state law rights associated with marriage.

### ***iv. State Legislation or Administrative Action Concerning Partner Benefits***

**California** enacted an Equal Benefits Law disqualifying large state contractors who fail to provide equal benefits to same-sex spouses of their employees.

The **Michigan** Civil Service Commission voted to extend benefits to domestic partners of state civil service rated employees. The state subsequently passed a statute banning domestic partnership benefits for some state and local government agency employees, but carving out those whose terms of employment are determined by the Civil Service Commission as well as employees of the public universities in the state, both of which enjoy autonomy in their human resources policies by virtue of the state constitution.

## *v. Local Legislation*

The following local governments established domestic partnership benefits for their employees: *Allentown, PA; University City, Missouri; El Paso, TX; Milwaukee County, WI; Appleton, WI; San Antonio, TX* (status of this in doubt due to legislative wavering); *Baltimore County, MD* (benefits recognized for employees who married their same-sex partners out-of-state).

The following municipalities voted to establish domestic partnership registry systems:

*Asheville, NC; Orlando, FL*

*Broward County (FL)* adopted a policy barring contracts with companies that fail to provide domestic partnership benefits for employees.

## *vi. Proposed Constitutional Amendments*

The *Minnesota* and *North Carolina* legislatures placed anti-same-sex marriage constitutional amendments on the general election ballot for 2012. The *Indiana* legislature gave initial approval to a proposal for an anti-same-sex marriage state constitutional amendment. Passage through the next elected legislature would be required to place the measure on the ballot, in 2014 at the earliest.

## **C. Legal Recognition of Same-Sex Couples: Litigation Developments, including cases involving the Defense of Marriage Act (DOMA) (United States)**

### *i. Lawsuits Seeking Marriage Equality*

Lawsuits have been filed by same-sex couples either pro se or represented by counsel seeking marriage licenses and are pending in *Hawaii, Minnesota, New Jersey, Montana and Virginia*. In *Benson v Alverson*, Case File No. 27 CV 10-11697 (Minn. 4th Jud. Dist., March 7, 2011), the trial court dismissed a suit by same-sex couples seeking marriage licenses, relying on *Baker v Nelson*, an unsuccessful same-sex marriage case from the 1970s. The lawsuit is on appeal. In *Donaldson v State of Montana*, Case No. BDV-2010-702 (D. Mont., April 19, 2011), the trial court granted the state's motion to dismiss in a similar suit, and the case is on appeal. In *Garden State Equality v Dow* (N.J. Super. Ct., Mercer Co., filed June 29, 2011), Lambda Legal sued on behalf of seven same-sex couples, arguing that the state's civil union law violates constitutional due process and equality requirements. On Nov. 4, 2011 Mercer County Assignment Judge Feinberg dismissed all claims except the plaintiffs' state constitutional equal protection claim, allowing the case to proceed.

### *ii. Lawsuits Implicating the Constitutionality of Section 3 of the Defense of Marriage Act*

As noted above, the U.S. Department of Justice now takes the position that Section 3 of DOMA, which provides that the federal government will not recognize lawfully contracted same-sex marriages for any purpose, violates the Equal Protection requirements of the 5th Amendment. In the following cases, while nominally defending the case, the DOJ is arguing to the courts that Section 3 is unconstitutional:

*Balas and Morales, In re*, 449 B.R. 567 (Bankr. C.D.Cal., June 13, 2011) (denying United States Trustee's motion to dismiss joint bankruptcy petition filed by a married same-sex couple, finding that Section 3 of DOMA as applied in this case is unconstitutional; unprecedentedly, 20 Bankruptcy Judges of the Central District of California in Los Angeles signed the opinion). To similar effect, see *In re Somers*, 448 B.R. 677 (Bankr. S.D. N.Y., May 4, 2011); *In re Ziviello-Howell*, No. 11-22706-A-



7 (Bankr. E.D.Cal., May 31, 2011). As a result of these rulings, the U.S. Trustee (an agency of the Department of Justice), has stopped filing such motions.

*Dragovich v US Department of the Treasury*, 764 F.Supp.2d 1178 (N.D.Cal., Jan. 18, 2011) (denying the government's motion to dismiss in suit brought by three government employees and their same-sex spouses following the government's refusal to extend health benefits to the employees' spouses; order issued certifying the requested plaintiff class (N.D.Cal., July 15, 2011)).

*Gill v Office of Personnel Management*, 699 F.Supp.2d 374 (D.Mass. 2010) and *Commonwealth of Massachusetts v U.S. Department of Health and Human Services*, 698 F.Supp.2d. 234 (D.Mass. 2010), in which the district court held that Section 3 is unconstitutional, are pending on appeal before the U.S. Court of Appeals for the 1st Circuit. DOJ has informed the court of its change of position, and BLAG has intervened to defend Section 3. This is the furthest advanced DOMA challenge, with oral argument likely this spring.

*Golinski v Office of Personnel Management*, No. C 10-00257 JSW (N.D. Cal., oral argument held on Dec. 17, 2011) (challenging OPM's reliance on DOMA to refuse to comply with a ruling by the 9th Circuit's internal dispute process that a lesbian employee of the circuit court is entitled to enroll her same-sex spouse for insurance coverage under the federal employee health plan; BLAG intervened to defend).

*Lui v Holder*, No:2:11-CV-01267-SVW (C.D.Cal., Sept. 28, 2011) (in the case of a U.S. Citizen who filed a family-based immigration petition on behalf of his Indonesian husband, the court relied on the old 9th Circuit ruling in *Adams v. Howerton* and refused to recognize the couple's same-sex marriage for immigration purposes, dismissing the case without prejudice; BLAG intervened to defend against a challenge to Section 3 of DOMA incorporated into the case, and has appealed, seeking dismissal with prejudice, while the plaintiff appeals seeking a reversal from the 9th Circuit). (For other cases relating to asylum, immigration, and same-sex families, see Part K, below.)

*Pedersen v Office of Personnel Management*, No. 3:10-cv-01750-VLB (D. Conn., filed Nov. 9, 2010) (challenging OPM's refusal to recognize same-sex marriages) (prompted DOJ to change its position and file a brief arguing Section 3 is unconstitutional; pretrial motions pending; BLAG intervened to defend).

*Windsor v United States*, 10 Civ. 8435 (JCF) (S.D.N.Y., filed Nov. 9, 2010) (challenging the Internal Revenue Service's refusal to recognize same-sex marriages) (prompted DOJ to change its position and file a brief arguing Section 3 is unconstitutional; pretrial motions pending; BLAG intervened to defend).

### **iii. Other Federal Lawsuits**

*Diaz v Brewer*, 656 F.3d 1008 (9th Cir., Sept.6, 2011) (affirming a preliminary injunction blocking implementation of an Arizona law that would prohibit state employees from receiving health benefits for same-sex partners, until the case is decided on its merits; state filed petition for hearing en banc on Sept. 29, 2011).

*Doe v. Reed*, Case No. C09-5456BHS (W.D.Wash., Oct. 17, 2011), motion for injunction pending appeal denied by U.S. Supreme Court (Nov. 21, 2011) (finding that 1st Amendment does not bar disclosure of petitions filed in support of proposed ballot measure to repeal "everything-but-marriage" state domestic partnership).

*National Organization for Marriage v Daluz*, 654 F.3d 115 (1st Cir., Aug. 11, 2011); *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir., Aug. 11, 2011) (state laws requiring reporting and disclosure of donors does not violate 1st Amendment rights of organization opposed to same-sex marriage that is seeking to place anti-marriage initiatives on the ballot in Rhode Island and Maine).

*Perry v Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal., Aug. 4, 2010) (holding that Proposition 8 -- which amended the California Constitution to define marriage as solely between a man and a woman -- violates the 14th Amendment rights of same-sex couples); motion by proponents of Prop 8 to stay the order denied by 702 F.Supp.2d 1132 (N.D.Cal., Aug. 12, 2010); stay granted by 2010 WL 3212786 (9th Cir. Aug. 16, 2010) (unpublished decision); motion to vacate stay denied by *Perry v Brown*, 639 F.3d 1153 (9th Cir., March 23, 2011). The 9th Circuit panel then certified questions concerning the Proponents' standing to appeal to the the Supreme Court of California, 628 F.3d 1191 (9th Cir., Jan.4, 2011) and affirmed denial of motion to intervene in the appeal brought by the County of Imperial, the county's Board of Supervisors and the county's Deputy Clerk, 630 F.3d 898 (9th Cir., Jan. 4, 2011). (Circuit Judge Reinhardt explained that he would not recuse based on his wife's involvement with the ACLU, 630 F.3d 909 (9th Cir., Jan. 4, 2011). On pending motions, the District Court held that the decision should not be vacated on the basis of alleged conflict of interest of the trial judge, 2011 WL 2321440 (N.D.Cal., June 14, 2011), denied a motion by Proponents to require the parties to surrender to the court all copies of the trial recording made for Judge Walker, *Perry v Schwarzenegger*, No. C 09-02292 JW (N.D.Cal., June 14, 2011), and ruled that the recording of the trial should be made public, 2011 WL 4527349 (N.D.Cal., Sept. 19, 2011), which the 9th Circuit stayed on Sept. 26, 2011). In *Perry v. Brown*, 52 Cal. 4th 1116 (Cal. Sup. Ct., November 17, 2011), responding to the 9th Circuit's certified question, California Supreme Court ruled that Proponents of Prop 8 would have standing under state law to defend Proposition 8 against constitutional challenge in California courts. Appeals from District Judge Ware's rulings are pending at the 9th Circuit, together with the issue of Proponents' appellate standing and, potentially, the merits of the constitutionality of Proposition 8.

*United States v. Peterson*, 2011 WL 5110246 (S.D.N.Y., Oct. 28, 2011) (District court finds that property jointly acquired and maintained by San Francisco same-sex gay male couple during their co-habiting relationship is community property under *Marvin v. Marvin*, thus innocent partner retains property interest in forfeiture proceeding against partner convicted of federal offenses subjecting him to forfeiture of property).

#### ***iv. Other State Court Litigation***

***Alaska:*** *Schmidt v State*, No. 3AN-10-9519 CI (Alaska Super. Ct., 3rd Dist., Sept. 19, 2011) (holding that a state tax exemption granting benefits based on marital status violates the Equal Protection Clause of the Alaska Constitution as Alaska recognizes only marriages between different-sex couples)

***Connecticut:*** *Mueller v. Tepler*, 2011 WL 6347880 (App. Ct. of Connecticut, Dec. 27, 2011) (civil union status cannot be applied retroactively to support a loss of consortium claim brought by a same-sex partner stemming from medical malpractice committed prior to the formation of the civil union).

***Maryland:*** *State v Snowden*, No: 21-K-11-45589 (Maryland, Washington Co. Cir. Ct., June 23, 2011) (in a criminal prosecution wherein the prosecutor sought to compel testimony of a woman against her same-sex spouse whom she married in Washington, D.C., the court held that the marriage would be recognized and therefore the spousal testimonial privilege was applicable in this case)

**New York:** *Putnam/Northern Westchester Board of Cooperative Educational Services v Westchester County Human Rights Commission*, 81 A.D.3d 733, 917 N.Y.S.2d 635 (App. Div., 2nd Dept. Feb. 8, 2011) (holding that the Board's extension of employment benefits to the same-sex domestic partners of employees but not to different-sex domestic partners is not discrimination based on marital status as the option of marriage is not available to same-sex couples in New York)

**New York:** *Ranftle, In re Estate of*, 81 A.D.3d 566, 917 N.Y.S.2d 195 (N.Y.App.Div., 1st Dept. Feb. 24, 2011) (finding same-sex marriage performed in Canada to be recognized in New York, dismissed suit by decedent's brother contesting probate of will favoring surviving spouse) \* \* \* *Ranftle, In the Matter of*, No. 2008-4585, NYLJ 1202515287643, at \*1 (N.Y. Surr. Co., N.Y. Co., Sept. 14, 2011) (in the case of a brother of the decedent seeking to vacate the granting of probate of the will to the decedent's same-sex spouse, the court held that the decedent's state of domicile at death was New York, not Florida, and therefore the marriage will be recognized for probate purposes in New York).

**Wisconsin:** *Appling v Doyle*, No. 10-CV-4434 (Dane Co.Cir.Ct. Wis., June 20, 2011) (holding that a domestic partnership registry does not violate the amendment to the state constitution which defines marriage as between a man and a woman and prohibits the creation of legal statuses equivalent to marriage)

#### **D. International Developments on Marriage Equality and Legal Rights of Same-Sex Couples (See Part M., Below, for Transsexual Marriage Developments)**

**Australia:** The Parliament in Queensland enacted a Civil Union Law on December 1, 2011. The Labour Party conference voted to endorse efforts to enact a federal marriage law open to same-sex partners, but it was uncertain whether the government would bring the matter to a vote in the Parliament, as the Prime Minister is opposed.

**Austria:** *Kaiser v Austria* (Austria Const. Ct., Nov. 11, 2011) (in the case of a gay man who registered his civil partnership in the city of Graz and whose request to hyphenate his last name with that of his partner's was denied, the Constitutional Court held that same-sex couples enjoy the constitutional protection of the family, and that the state presented no serious reasons to justify requiring different-sex couples to hyphenate their surnames but prohibiting same-sex couples from doing so).

**Brazil:** The Supreme Court of Brazil ruled May 5 that the state would recognize same-sex civil unions, and an appellate court ruled on October 25 that such civil unions should be recognized as marriages. This ruling is subject to further appeal.

**Canada:** *In the Matter of Marriage Commissioners Appointed Under the Marriage Act 1995*, S.S. 1995, c. M-4.1, 2011 SKCA 3 (holding by the Court of Appeal for Saskatchewan that a proposed law that would allow for marriage commissioners to refuse to solemnize same-sex marriages on religious grounds is unconstitutional)

**Colombia:** *Colombia Diversa v Colombia* (Col. Const. Ct., July 26, 2011) (requiring the nation's legislature to implement marriage equality legislation by June 20, 2013)

**Denmark:** The Danish government announced it would consider opening up marriage to same-sex couples during 2012. Denmark was the first country to establish registered partnerships for same-sex couples, but has fallen behind several other European Union countries that have opened up marriage to same-sex couples.

**France:** *Cestino v France* (Fr. Constitutional Council, Jan. 28, 2011) (rejecting a claim by lesbian partners who asserted they have the right to convert their civil partnership to a marriage, as the court determined that such a question should be left to the legislature because it was the legislature who determined that there are differences between same-sex and different-sex couples that justify different legal statuses for each type of relationship).

**Liechtenstein:** The Parliament approved establishment of registered partnerships for same-sex couples that would carry all the legal rights, benefits and privileges of marriage, but the effect of the measure was forestalled when sufficient petitions were submitted to place it on the ballot for a public referendum. The public then voted overwhelmingly in support of registered partnerships, allowing the measure to go into effect.

**United Kingdom:** The United Kingdom's Conservative Government announced that they would be initiating a process to change the law to allow same-sex marriages. Britain now has civil partnership legislation affording same-sex couples the same rights as marriage, and has gender recognition legislation enabling transgendered individuals to marry in their preferred gender. A stumbling block to full marriage rights for same-sex couples has been the opposition of the Church of England, an established church.

## **E. Divorce & Dissolution (Marriages & Civil Unions)**

**New York:** Even before the Marriage Equality Act went into effect, New York courts had begun to entertain issues concerning divorce, dissolution or property distribution by parties who were married or civilly united in other jurisdictions, yielding the following decisions:

*Dickerson v Thompson*, 928 N.Y.S.2d 97 (N.Y. App. Div. 3rd Dept., July 21, 2011) (Supreme Court has equitable jurisdiction to dissolve a Vermont civil union); *S.M. v C.R.*, Index Number Redacted (N.Y. Sup. Ct., May 18, 2011) (NYLJ 12202494607706, at \*1, May 23, 2011) (granting a divorce to a lesbian couple married in Connecticut); *Taylor v. Taylor*, 30 Misc.3d 1240(A) (N.Y. Sup. Ct., Westchester Co., March 22, 2011) (a house purchased jointly by a lesbian couple prior to their Connecticut marriage was not a marital asset, so an action to partition outside of a divorce proceeding is appropriate); *Wesley v Smith-Lasofsky*, 105819/10, NYLJ 1202508854947, at \*1 (Sup.Ct N.Y., N.Y. Co., July 18, 2011) (granting the dissolution of a Vermont civil union and holding that a defendant does not have parental rights to the plaintiffs' adopted child who was adopted *after* the couple separated).

**Texas:** Some Texas trial judges were willing to entertain divorce actions despite the state's ban on performing or recognizing same sex marriages. In *State v. Naylor*, 330 S.W.3d 434 (Tex. Ct. App., Jan. 7, 2011), the court held that the Attorney General lacked standing to appeal from a divorce decree entered on behalf of a lesbian couple who married in Massachusetts but resided in Texas. In *Marriage of Rebecca Louise Robertson and James Allan Scott*, NO. DF-10-16083 (255th Judicial Dist., Dallas County, Texas, Nov. 21, 2011), the trial court refused to dismiss a divorce counterclaim brought by a female-to-male transsexual in response to his wife's action seeking to have the marriage declared void on the ground that Texas does not recognize gender transition.

**Wyoming:** In *Christiansen v Christiansen*, 253 P.3d 153 (Wyo., June 6, 2011), the state's supreme court ruled that the district court has subject matter jurisdiction to grant a divorce to a lesbian couple married in Canada, even though the state defines marriage as being only between a man and a woman.

## F. Adoption of Children

**Arizona:** The state enacted a law giving preference in adoption to married different-sex couples. Critics noted that a third of adoptions in Arizona are by single adults.

**Arkansas:** *Arkansas Department of Human Services v Cole*, 2011 Ark. 145 (April 7, 2011) (holding that the state law that prohibits cohabiting unmarried adults in intimate relationships from adopting children to be unconstitutional, as it violates privacy rights implicitly guaranteed in the state constitution).

**Louisiana:** *Adar v Smith*, 639 F.3d 146 (5th Cir., en banc, April 12, 2011), cert. denied, 132 S.Ct. 400 (October 11, 2011) (in dispute over refusal of state to issue birth certificate naming both adoptive fathers as parents of a Louisiana-born child who was adopted in New York, court ruled that federal district court did not have jurisdiction to enforce the Full Faith and Credit Clause, as that provision is a direction to state government and courts and not a jurisdictional grant to federal courts; in dicta, the majority of the court opines that Louisiana has not failed to accord full faith and credit to the New York adoption decree).

**Maryland:** *In re Adoption/Guardianship of Cross H.*, 200 Md. App. 142, 24 A.3d 747 (July 21, 2011) (affirming the termination of parental rights of a child's biological parents, who suffer from a history of drug abuse and incarceration, as being in the best of the child who is now in the foster care of a male same-sex couple).

## G. Parental Rights and Obligations

**Arkansas:** *Bethany v Jones*, 2011 Ark. 67, 2011 Ark. 67 (Feb. 17, 2011) (affirming trial court's grant of visitation to the mother's former same-sex partner on theory of *in loco parentis*)

**California:** *S.Y. v. S.B.*, 2011 WL 6129594 (Cal. 3rd Dist. Ct. App., Dec. 9, 2011) (lesbian co-parent who did not adopt partner's adoptive child for fear of endangering her military career is a legal parent under California's gender-neutral construction of the Uniform Parentage Act).

**California:** *In re M.C.*, 195 Cal.App.4th 197, 123 Cal.Rptr.3d 856 (Cal. Ct.App., 2nd Dist., May 6, 2011) (in case where biological mother, biological father and mother's ex-wife all sought custody, holding lower court erred in finding all three to be presumptive parents as a child can only have two parents at a time)

**Connecticut:** *Raftopol v Ramey*, 299 Conn. 681, 12 A.3d 783 (Jan. 5, 2011) (in case of agreement between gay male couple and surrogate, non-biological father who is "intended parent" is recognized as the child's legal parent).

**Delaware:** *Smith v. Guest*, 16 A.3d 920 (Del., March 14, 2011) (lesbian who assisted in raising child with her former partner, the child's adoptive parent, is a *de facto* parent under Delaware Uniform Parentage Act; recognizing *de facto* parent's rights does not deprive adoptive parent of due process of law).

**Florida:** *T.M.H. v. D.M.T.*, 2011 WL 6437247 (Fla. 5th Dist. Ct. App., Dec. 23, 2011) (both the genetic mother, whose ovum was fertilized with anonymously donated sperm, and the birth mother, in whom embryo was implanted resulting in live birth, were legal parents of the child when they had intended to raise the child together as a family; custody/visitation/support issues raised after the parents split up to be determined based on best interest of the child).



**Michigan:** *Harmon v Davis*, 489 Mich. 986, 800 N.W.2d 63 (July 22, 2011) (former same-sex partner of mother does not have standing to seek custody or visitation in the absence of biological or adoptive relationship with child or spousal relationship with mother).

**Minnesota:** *Hay v King*, 2011 WL 1546586 (Ct. App. Minn., April 26, 2011) (unpublished decision) (lesbian mother who moved to Arizona with child must pay half the cost of travel for child to visit mother's former same-sex partner, who has third-party parental rights, in Minnesota).

**Nebraska:** *Latham v Schwerdtfeger*, 282 Neb.121, 802 N.W.2d 66 (Aug. 26, 2011) (extending doctrine of *in loco parentis* to same-sex parents in the case of a lesbian couple where the non-biological and non-adoptive parent sought visitation with the child born to the biological parent during the relationship and raised by the couple until their relationship ended; remanding the case to the trial court to determine the relationship between the non-biological parent and the child in order to make a conclusion on custody and visitation)

**New Jersey:** *Robinson v. Hollingsworth*, Docket # FD-09-001838-07 (N.J. Superior Court, Hudson Co., Dec. 13, 2011) (although surrogacy agreement between gay male couple and the sister of one of them was void as a matter of public policy, it was in best interest of child to be in custody of member of gay male couple who was the sperm donor; sister is a parent entitled to visitation rights; other man in couple has no legal relationship with the child).

**Ohio:** *In re Mullen*, 129 Ohio St.3d 417, 953 N.E.2d 302 (Ohio Sup. Ct. July 12, 2011) (juvenile court lacks jurisdiction to determine if lesbian co-parent can be granted custody of the child she and her ex-partner raised together because there was no express agreement wherein the birth mother relinquished her exclusive custody rights to her ex-partner)

**Ohio:** *Rowell v Smith*, 2011 WL 2407746 (Ohio Ct. App., 10th Dist., June 9, 2011) (juvenile court lacks jurisdiction to grant visitation order on behalf of non-biological mother after termination of her relationship with the child's biological mother).

**Oregon:** *Shineovich v Kemp*, Case No. 0703-63564 (Or. Multnomah County, March 31, 2011), on remand from *Shineovich v Kemp*, 229 Or.App. 670, 214 P.3d 29 (July 15, 2009) (plaintiff and her former partner were a same-sex couple, thus the plaintiff is a parent of her former partner's children, who were conceived through donor insemination with plaintiff's consent during the relationship; court of appeals had mandated a gender neutral construction of the parental status presumption regarding children born to a couple in a committed relationship)

**Texas:** *Berwick v Wagner*, 336 S.W.3d 805 (Tex. Ct. App., Feb. 10, 2011) (Texas was required to recognize and register a California judgment granting the non-biological father parental status of a child conceived through a surrogacy agreement between plaintiff, his former partner, and a California surrogate).

**Washington:** *In re Parentage and Custody of A.F.J.*, 251 P.3d 276 (Wash. Ct. App., May 16, 2011) (where parent-child relationship pre-existed designation of mother's former same-sex partner as a foster parent to the child, foster parent can be treated as *de facto* parent who can seek custody).

**Washington:** Washington amended its version of the Uniform Parentage Act to include many gay-friendly measures, including abolishing the significance of marriage for purposes of a child's right to maintain a relationship with adult parental figures in its life and clarifying that registered same-sex domestic partners who conceive children through donor insemination are both presumed to be the legal parents of the resulting children.



## H. Student Rights

### i. Legislative Developments

**Arizona:** State enacted a law that forbids public universities from refusing to fund religious student groups due to their religiously-motivated refusal to comply with discrimination policies.

**California:** State enacted a law that requires schools to include LGBT history and contributions in the public school curriculum. Petitions are circulating to place a repeal initiative on the fall general election ballot in 2012. A first attempt to gather sufficient signatures to place the measure on the spring 2012 primary ballot fell short by the deadline. \* \* \* The state also enacted “Seth’s Law,” requiring public schools to adopt anti-bullying policies, as well as laws requiring non-discrimination on the basis of sexual orientation and gender identity and anti-bullying policies in higher education institutions in the state.

**West Virginia:** State Board of Education added sexual orientation and gender identity to the state’s anti-bullying policy for public schools.

### ii. Court Decisions

**Arkansas:** *Wolfe v Fayetteville, Arkansas School District*, 648 F.3d 860 (8th Cir., Aug. 9, 2011) (student seeking to hold school district liable for sexual harassment under Title IX for failing to take action against student bullying motivated by the belief he was gay, must establish that the harassment was motivated by either his sex or his failure to conform to gender stereotypes)

**California:** *Alpha Delta v Reed*, 648 F.3d 790 (9th Cir., Aug. 2, 2011) (San Diego State University’s denial of recognition to school groups that require members to meet religious requirements does not violate the 1st and 14th Amendments; remanding to determine if the policy was enforced selectively)

**Colorado and New Jersey** enacted School Anti-Bullying Bills that cover actual or perceived sexual orientation and gender identity.

**Florida:** Miami-Dade County Public Schools adopted an anti-bullying policy specifically applicable to sexual orientation and gender identity.

**Michigan:** State enacted an anti-bullying bill that does not specify forbidden bases for bullying, an omission that knowledgeable commentators have stated will make the measure relatively ineffective in protecting LGBT students from harassment.

**Mississippi:** *Sturgis v Copiah County School District*, 2011 WL 4351355 (S.D.Miss., Sept. 15, 2011) (denied motion to dismiss 1st Amendment claim by student whose picture and name were omitted from yearbook because she wore a tuxedo in the picture; settled by agreement that in future students will be photographed in gender neutral academic gowns for yearbook).

**New York:** *Pratt v Indian River Central School District*, No. 7:09-CV-0411-GTS-GHL (N.D.N.Y., March 29, 2011) (denying the defendant school’s motion for summary judgment in case where the school failed to protect a gay student from bullying and harassment and did not allow a Gay Straight Alliance formed by students equal access to school facilities)

## I. Criminal Law

### i. Civilian Cases

**Arizona:** *Kemp v Ryan*, 638 F.3d 1245 (9th Cir., April 28, 2011) (denial of murder convict's motion for writ of habeas corpus, which argued that he should have been given the opportunity to voir dire the jury based on homosexual bias after his motion to exclude evidence of his sexual assault on a man was denied)

**California:** *People v Garcia*, 2011 WL 4347861 (Cal.Ct.App., 2nd Dist., Sept. 19, 2011) (not officially published) (upholding murder conviction of man who killed his gay employer, allegedly in self defense).

**California:** *People v Hofsheier*, 129 P.3d 29 (Cal., March 6, 2006) (a law that required that individuals who performed oral sex with a teenager register as sex offenders but that did not require that those who engaged in vaginal sex with a teenager do so violated Equal Protection).

**Idaho:** *Cook v Reinke*, 2011 WL 1843001 (D.Idaho, May 16, 2011) (dismissing habeas petition by gay man who pled guilty to committing an "infamous crime against nature" for performing oral sex on a man with down syndrome; sexual conduct was not constitutionally protected as the other man was incapable of giving consent)

**Ohio:** *In re D.B.*, 129 Ohio St.3d 104, 950 N.E.2d 528 (Ohio, June 8, 2011) (holding a statutory rape law unconstitutional as applied to a twelve year old boy who had sexual contact with an eleven year old boy because the statute is vague as applied to children under the age of thirteen who engage in sexual conduct with other children under the age of thirteen and the application of the statute violated the twelve year old defendant's rights to Equal Protection as only he was charged with violating the statute even though two other boys under thirteen engaged in sexual conduct with him)

**Ohio:** *Lowe v. Swanson*, 2011 WL 6091318 (U.S.Ct.App., 6th Cir. Dec. 8, 2011)(rejecting habeas petition from man convicted in Ohio court of incest for sexual relationship with his adult step-daughter; holding *Lawrence v. Texas* does not extend to his due process claim).

**Michigan:** *People v Cutler*, 2011 WL 2424685 (Mich. Ct. App., June 16, 2011) (unpublished disposition) (court rejected the defendant's claim that he acted in self-defense when his gay victim allegedly sexually assaulted him, as the defendant used excessive force)

**Minnesota:** *State of Minnesota v. Muchow*, 2011 WL 6757423 (Court of Appeals of Minnesota, Dec. 27, 2011) (unpublished opinion) (prosecutor committed plain error by references to sexual orientation and lifestyle of defendant and complainant in domestic violence prosecution).

**New York:** *Pinter v. City of New York*, 2011 WL 5604689 (U.S.Ct.App., 2nd Cir., Nov. 18, 2011) (NYC undercover police officers enjoyed qualified immunity from liability for false arrest claims brought by gay man wrongly charged with prostitution; denies summary judgment to NYC on claims of abuse of process, sexual orientation discrimination, and denial of the right of free association).

**Texas:** *Jackson v State*, 2011 WL 2320819 (Tex. Ct. App., Dallas, June 14, 2011) (unpublished decision) (sustains prostitution statute; *Lawrence v Texas* does not require court to use heightened scrutiny to determine whether Texas can penalize sex for compensation).

## **ii. Military Cases**

*U.S. v Hartman*, 69 M.J. 467 (March 15, 2011) (vacating a charge of sodomy in the military after determining that the trial judge did not conduct the proper procedures to determine if the defendant was entering an informed guilty plea)

*U.S. v. McInnish*, 2011 WL 6088635 (Army Ct. Crim. App., Nov. 30, 2011) (vacating sodomy guilty plea under Art. 125 on grounds that military judge and defendant did not have sufficient colloquy concerning distinction between protected and unprotected behavior as a result of *Lawrence v. Texas*).

*U.S. v. Simmons*, NMCCA 201100044 (US Navy-Marine Corps Court of Criminal Appeals, Sept. 27, 2001) (partially dismissing charges against Marine who appeared in gay pornographic film wearing portions of his uniform).

*U.S. v Truss*, 2011 WL 3891821 (U.S. Army Ct.Crim.App., Aug. 31, 2011) (not reported in M.J.) (affirming Army private's court-martial for sodomy in violation of Article 125 of the Uniform Code of Military Justice and finding that *Lawrence v Texas* does not apply as the consensual nature of the encounter was in question and that the military requires a stricter sense of discipline for unit cohesion which is pertinent here because both men involved were in the same company)

## **J. Discrimination Law**

### **i. Legislative Developments**

**Alaska:** The City of Anchorage will hold a referendum on whether to add sexual orientation and gender identity to the city's anti-discrimination law.

**California and Connecticut:** Both states amended their human rights laws to add "gender identity or expression" to the list of expressly forbidden grounds of discrimination.

**Florida:** Volusia County added sexual orientation and gender identity as forbidden grounds for discrimination. The largest city in Volusia County is Daytona Beach.

**Hawaii:** The state amended its human rights law to add gender identity or expression as forbidden grounds of discrimination.

**Illinois:** Evansville amended its civil rights ordinance to include sexual orientation and gender identity.

**Maryland:** Howard County amended its anti-discrimination law to add gender identity to the list of forbidden grounds. The measure already prohibited sexual orientation discrimination.

**Massachusetts:** Governor Deval Patrick issued an executive order banning discrimination based on gender identity or expression in state executive branch employment, and the state enacted a law adding gender identity to the state's law against discrimination, but carved out coverage of public accommodations due to concerns about public restroom use.

**Missouri:** The City of Clayton added sexual orientation and gender identity to its anti-discrimination law. The City of Columbia, which already prohibited sexual orientation discrimination, added gender identity to its law.

**Nevada:** The state amended its human rights law to ban discrimination based on gender identity or expression.

**Oklahoma:** Oklahoma City's City Council adopted a measure banning sexual orientation discrimination in city employment.

**Pennsylvania:** The Philadelphia City Council enacted a revised Human Rights Law that encompasses sexual orientation, gender identity, HIV status, marital status, and familial status, and recognizes the concept of non-marital life partnership. In light of the failure of the Pennsylvania legislature to act on proposals to ban sexual orientation discrimination through state legislation, Equality Pennsylvania has encouraged enactment of local ordinances, and has succeeded in securing passage in about two dozen local government units around the state by the end of 2011.

**South Carolina:** Richland County acted to ban sexual orientation and gender identity discrimination in county employment, as well as public accommodations and housing.

**Tennessee:** The state enacted a law that will prohibit counties and municipalities from forbidding discrimination on grounds that are not included in the state's antidiscrimination law. Since the state does not prohibit sexual orientation or gender identity discrimination, local laws that do so are rendered ineffective. The measure was passed in response to the city of Nashville's legislative activities.

**Texas:** Dallas County Commission added sexual orientation and gender identity or expression to the county's non-discrimination code.

## **ii. Workplace Cases**

**California:** *San Diego Unified School District v Commission on Professional Competence* (Lampedusa), 194 Cal.App. 4th 1454, 124 Cal.Rptr.3d 320 (April 4, 2011) (ordering the dismissal of a gay teacher who placed explicit advertisement for sex, including graphic pictures of himself, on Craigslist; posting of the ad is evidence of his unfitness to be a teacher).

**California:** *Crump v City of Los Angeles*, No. BC428491 (Cal. Super. Ct., May 19, 2011) (BNA Daily Labor Report, 98 DLR A-7, May 20, 2011; LA Times online, May 19, 2011) (jury award of \$1.1 million to Los Angeles police officer who experienced retaliation in the form of a transfer to a less desirable post after he reported being harassed by a supervisor because he is gay)

**Illinois:** *Matthews v Wal-Mart Stores*, 417 Fed.Appx. 552 (7th Cir., March 31, 2011) (Wal-Mart did not violate an employee's right to freedom of religion by terminating her employment after she violated the company's anti-discrimination policy when she made religiously motivated, anti-gay comments to a gay employee)

**Maine:** *Russell v. ExpressJet Airlines Inc.*, 2011 ME 123 (Maine Supreme Jud. Ct., Dec. 6, 2011) (upholding \$500,000 verdict in sexual orientation discrimination case for wrongful denial of promotion, finding that applying for promotion would have been futile in light of active discouragement by members of management).

**New Jersey:** *In re Matter of Delgado*, 2010 WL 4977101 (N.J.App.Div., Dec. 9, 2010) (unpublished opinion) (affirming lower court's finding that demotion of a corrections officer was appropriate due to his statements to a lesbian subordinate, which the court held constituted sexual orientation discrimination and sexual harassment)

**New Jersey:** *Miller v Pfizer, Inc.*, 2011 WL 3273620 (D.N.J., July 28, 2011) (unpublished opinion) (granting summary judgment to employer on religious discrimination claim brought by former supervisor, a born-again Christian, who was terminated due to discriminatory [anti-gay] remarks

he made to other employees; finding that plaintiff failed to establish that other employees who are not born-again Christians “were treated better than him” and that he did not offer any evidence to rebut defendant’s assertion that his termination was for a non-discriminatory reason)

**New Jersey:** *Pagan v Gonzalez*, 430 Fed.Appx. 170 (3rd Cir., June 9, 2011) (Title VII claim by lesbian employee was based on sexual orientation, not sex, and thus was not actionable).

**New York:** *Asche v New York City Board of Education*, 927 N.Y.S.2d 836 (N.Y.Sup.Ct., June 28, 2011) (vacating labor arbitrator’s six month suspension of an openly gay high school librarian for allegedly touching students in an inappropriate, but non-sexual, manner, as the decision was held by the court to be “shocking to one’s sense of fairness” because a female heterosexual librarian engaged in the same type of behavior was never disciplined).

**Oregon:** *Dawson v Entek International*, 630 F.3d 928 (9th Cir., Jan. 10, 2011) (a gay man terminated after reporting sexual orientation discrimination does not have an actionable claim under Title VII based on sex discrimination, but does have a claim under Title VII’s anti-retaliation provision because his termination took place two days after he filed the complaint)

**South Carolina:** *EEOC v. Cromer Food Services, Inc.*, 414 Fed.Appx. 602 (4th Cir., March 3, 2011) (a vending machine attendant who was harassed by two hospital employees for being gay during his shift could sue vending machine company for sexual harassment under Title VII, even though the two men are not employed by the vending machine company).

**Tennessee:** *Gilbert v Country Music Association*, 432 Fed.Appx. 516 (6th Cir., Aug. 2, 2011) (not selected for publication in the Federal Reporter) (gay man who suffered discrimination in job referrals by union after he complained about harassment by other workers may bring breach of duty of fair representation claim against union under National Labor Relations Act).

**Washington:** *Federal Way School District No. 210 v Vinson*, 261 P.3d 145 (Wash., Sept. 29, 2011) (gay teacher who was terminated after getting into a verbal confrontation with a former student in a restaurant was discharged without sufficient cause; school district had no right under statutory law to review the hearing officer’s decision in favor of the teacher).

**Washington:** *Mills v Western Washington University*, 170 Wash.2d 903, 246 P.3d 1254 (Feb. 3, 2011) (University did not violate a professor’s state constitutional rights by suspending him following a closed hearing for discriminatory comments he made to co-workers based on gender and sexual orientation)

**Military:** *Collins v. United States*, No. 10-778C (U.S.Ct.Fed.Cl., Oct. 18, 2011) (Court of Claims refused to dismiss Equal Protection action challenging discriminatory separation pay practices of the Defense Department for personnel who were discharged under the DADT policy).

### **iii. Other Discrimination Cases**

**Florida:** *Rodriguez v. Alpha Institute of South Florida*, 2011 WL 5103950 (S.D. Fla., October 27, 2011) (Title IX, prohibiting sex discrimination in educational institutions that receive federal funds, does not apply to a claim of hostile environment harassment by a gay student harassed due to his sexual orientation).

**Washington:** *Apilado v North American Gay Amateur Athletic Alliance*, 2011 WL 2148816 (W.D.Wash., May 31, 2011), 2011 WL 5563206 (W.D. Wash., Nov. 10, 2011) (Defendant administrator



of Gay Softball World Series is an expressive association that can set rules limiting the number of non-gay members on competing softball teams. Case in which a San Francisco team was disqualified for having too many non-gay members was set for trial on factual issues concerning enforcement of the rule, but was settled before trial could be held).

#### **K. Asylum, Withholding of Removal, Convention Against Torture Cases, Deportation of Undocumented Aliens**

The major development in this area, flowing from the Obama Administration's decision not to defend Section 3 of DOMA in the courts, is a reorientation of deportation policy to focus on criminals, under which enforcement officials may exercise discretion based on family ties in the United States to suspend deportations. A second development that may bear fruit in the future flows from the President's December instruction to federal agencies concerning LGBT human rights issues, which mentioned asylum for LGBT refugees.

*Alcota, Matter of* (Imm. Ct.) (Gay City News, March 22, 2011) (in Manhattan, an IJ adjourned deportation hearings for an Argentine lesbian, Alcota, who is married to a U.S. Citizen, allowing for the couple to proceed with an immediate relative petition in order to have Alcota recognized as the spouse of a U.S. Citizen and therefore be given permanent residency status).

*Doe, Matter of*, Doc. No. 11072631 (BIA, July 14, 2011) (aila.org, July 26, 2011) (reversing the Immigration Judge's denial of asylum to a gay, HIV-positive man after determining that learning that one is HIV-positive is a changed circumstance that tolls the requirement that asylum claims be filed within one year of arriving in the U.S.).

*Dorman, Matter of Paul Wilson*, 25 I&N Dec. 485 (A.G., April 26, 2011), Interim Decision 3712 (May 5, 2011) (Attorney General Holder vacated and remanded BIA decision denying immigration petition filed by same-sex couple on behalf of the Irish national partner with directions to determine if, absent DOMA, the couple's civil union renders the foreign national partner a 'spouse' under the INA).

*Izquierdo v Attorney General*, 2011 WL 3701276 (3rd Cir., Aug. 24, 2011) (unpublished decision) (designated not precedential) (remanding the BIA's denial of a gay Peruvian man's petition to reopen his removal proceedings, holding that the BIA's determination that his asylum claim should continue to be denied was "flawed" as the court applied the legal standard applicable to withholding of removal rather than the standard applied in asylum petitions)

*Jaramillo-Mesa v U.S. Attorney General*, 405 Fed.Appx. 449 (11th Cir., Dec. 20, 2010) (not selected for publication in the Federal Reporter) (affirming the denial of asylum in the case of a gay HIV+ Colombian man, who feared returning to Colombia because of his participation in a gay rights group, based on the court's determination that the petitioner's testimony was not credible due to inconsistencies and that there is insufficient evidence that he will suffer future persecution in Colombia).

*Lopez-Amador v Holder*, 649 F.3d 880 (8th Cir., Aug. 15, 2011) (affirmed BIA's denial of Venezuelan lesbian's petition for asylum based on her sexual orientation and political opinion, finding that she failed to establish that she had experienced official persecution on these grounds).

*Lui v Holder*, No:2:11-CV-01267-SVW (C.D.Cal., Sept. 28, 2011) (in the case of a U.S. Citizen who filed a family-based immigration petition on behalf of his Indonesian husband, the court relied on old 9th Circuit ruling in *Adams v. Howerton* and refused to recognize the couple's same-sex marriage



for immigration purposes, dismissing the case without prejudice; counsel for the “Bipartisan Legal Advisory Committee” of the House of Representatives, which intervened to defend against a challenge to Section 3 of DOMA incorporated into the case, appealed seeking dismissal with prejudice, while plaintiff appeals seeking a reversal).

*Martinez, Matter of* (MetroWeekly, March 9, 2011) (ICE released El Salvadorian man who is married to a U.S. Citizen same-sex partner from detention under an Order of Supervision while his Motion to Reopen Proceedings and Motion for Emergency Stay of Removal are pending in addition to an immediate relative petition filed on his behalf by his spouse).

*Moe Tin-U v Holder*, 414 Fed.Appx. 21 (9th Cir., Jan. 31, 2011) (upholding BIA’s denial of asylum to Burmese man for his failure to establish a likelihood of future persecution based on his political opinion and sexual orientation).

*Velandia, Matter of Henry* (New York Times, May 7, 2011) (in reaction to Attorney General Holder’s remand of *Matter of Dorman*, Immigration Judge Riefkohl suspended the deportation of a gay Venezuelan national who is married to a U.S. citizen, awaiting clearer direction from the Obama administration on whether same-sex couples under some circumstances will be recognized for immigration benefits) (chief counsel of Newark office of ICE announced that the deportation case has been closed (Trenton Times, July 1, 2011))

#### **L. Defamation (also see Part N, below)**

*Yonaty v Mincolla*, 31 Misc.3d 1238, 2011 WL 2237847 (N.Y. Sup. Ct., Broome Co., June 8, 2011) (in the case of a man whose girlfriend broke up with him after an acquaintance informed her that he was gay, court applied the New York Appellate Division precedent that the imputation of homosexuality constitutes defamation *per se*)

#### **M. Transgender Law (includes foreign developments)**

See Part J(1), above, for jurisdictions that have added gender identity or expression to their anti-discrimination laws or policies.

California adopted legislation eliminating any requirement for surgical alteration as a pre-requisite to changing gender designation on birth certificates; a doctor’s certification of treatment will suffice.

*AB v Western Australia*, 2011 HCA 42, 2011 W L 4583843 (Oct. 6, 2011) (High Court of Australia rules that hysterectomy and phalloplasty are not required for a legal change of gender designation from female to male).

*Action on Decision*, IRB No. 2011-47 (Internal Revenue Service, Nov. 11, 2011), announcing IRS will acquiesce in the Tax Court’s ruling in *O’Donnabhain v. Commissioner*, 134 T.C. 34 (2010), which held that medical expenses of gender reassignment procedures are deductible medical expenses under the Internal Revenue Code, and not merely non-deductible cosmetic treatments.

*Araguz, Estate of Thomas Trevin, III*, No. 44575 (329th Dist.Ct., Wharton Co., Tex., May 26, 2011) (holding that a male-to-female transsexual seeking death benefits of her husband, a firefighter, is not entitled to the benefits as she was born a man and therefore was not in a valid marriage with the decedent under Texas law).

*Battista v Clarke*, 645 F.3d 449 (1st Cir., May 20, 2011) (affirming the District Court’s decision requiring Massachusetts officials to provide hormone therapy and female clothing to a transgender detainee at the state’s Treatment Center for Sexually Dangerous Persons)

*Cassar v Malta* (Malta Constitutional Court, May 23, 2011) (holding that a male-to-female transsexual cannot marry a man).

*Doe v. Germany* (Ger., Jan. 28, 2011) (Wockner International News, #876, Feb. 7, 2011) (holding by the Constitutional Court of Germany that forcing transgender individuals to undergo sterilization or gender reassignment surgery before being recognized as a member of the desired sex is unconstitutional)

*Fields v Smith*, 653 F.3d 550 (7th Cir., Aug. 5, 2011) (Wisconsin statute barring state prisons from providing inmates with hormone therapy as treatment for Gender Identity Disorder is unconstitutional on its face and as applied under the 8th Amendment's prohibition on cruel and unusual punishment)

*Fitzsimmons v Universal Taxi Dispatch, Inc.* (Ill. Human Rights Comm'n, Sept. 12, 2011) (Windy City Times, Sept. 13, 2011) (award of \$104,711 in damages to a transsexual employee who brought a discrimination claim against her former employer, asserting that her supervisor called her a "freak" and that she was required to pay for repairs to her cab which are normally paid for by the company, not individual drivers)

*Hafiz, In re* (High Ct., E. Terengganu, Malay.) (Daily Pak Banker, July 19, 2011) (a male-to-female transsexual who has undergone sex reassignment surgery may not change the sex on her national identity card, holding that sex is determined at birth and is therefore unchangeable).

*Hannon v First Direct Logistics* (Ireland, Equality Tribunal) (Advocate.com, quoting Independent.ie, April 21, 2011) (granting an award of 35,000 Euros to a transsexual woman whose employer ordered her to not use the women's restrooms, to dress as a man for meetings, and to work at home as her presence in the office "created a bad atmosphere").

*Louis v Bledsoe*, 2011 WL 2938128 (3rd Cir., July 22, 2011) (unpublished decision) (affirming lower court's denial of inmate's petition to be placed in a cell alone as he fears that he will be sexually assaulted by other prisoners as he is transgender; the inmate, who had been removed to a safer part of the prison following sexual abuse by his cellmate, failed to show the irreparable harm needed to qualify for preliminary injunctive relief).

*Stevens v State* (Cal.Ct.App, 1st Dist., Sept. 21, 2011) (affirming the denial of a male-to-female transsexual inmate's request for sex reassignment surgery and that she be transferred to a women's prison, finding that she is secure in her present location in a men's prison as she is housed in a single cell).

*Wilson v Phoenix House*, 2011 WL 3273179 (S.D.N.Y., Aug. 1, 2011) (unpublished decision) (a transgender inmate may proceed with her claim that an in-patient substance abuse treatment center discriminated against her in violation of the New York Human Rights Law and the Equal Protection Clause of the 14th Amendment by not allowing her to participate in the support groups consisting of members of her preferred gender).

## **N. Freedom of Anti-Gay Expression (Culture Wars Cases)**

*Keeton v. Anderson-Wiley*, 2011 Westlaw 6275932 (U.S.Ct.App., 11th Cir. Dec. 16, 2011) (rejecting 1st Amendment claim against state university's professional counseling graduate program by anti-gay student who was dismissed for refusing to comply with American Counseling Association standards of non-discrimination on the basis of sexual orientation and gender identity).

*Marcavage et al. v. City of Chicago*, 2011 WL 4552529 (7th Cir., Oct. 4, 2011) (granting summary judgment to City of Chicago on most claims brought by picketers challenging time, place and manner regulation of their picketing activity against the Gay Games being held in Chicago in 2006).

*Phelps-Roper v. City of Manchester*, 658 F.3d 813 (8th Cir., Oct. 5, 2011), petition for rehearing en banc granted, December 7, 2011 (holding that funeral picketing regulations in Manchester, Missouri, were unduly broad, in a challenge brought by Westboro Baptist Church, which seeks to engage in anti-gay picketing at funerals).

*Snyder v. Phelps*, 131 S.Ct. 1207 (March 2, 2011) (see above, under Supreme Court).

*Zamecnik v Indian Prairie School District #204*, 636 F.3d 874 (7th Cir., March 1, 2011) (affirming summary judgment against the defendant school district and enjoining the school from prohibiting students from wearing t-shirts in school that urge people to “Be Happy, Not Gay,” as the peaceful display of the t-shirts is protected by the First Amendment)

## **N. HIV/AIDS Legal Developments**

*Alliance for Open Society International, Inc. v United States Agency for International Development*, 651 F.3d 218 (2nd Cir., July 6, 2011) (the condition for distributing federal funds appropriated under the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 which requires recipient organizations to have an express policy against prostitution is an unconstitutional condition on the receipt of federal funds)

*Boyer v. Belleque*, 659 F.3d 957 (U.S.Ct.App., 9<sup>th</sup> Cir., Oct. 28, 2011) (affirming denial of habeas corpus petition of HIV+ man convicted in Oregon courts of attempted aggravated murder for having unprotected anal sex with teenage boys).

*Canal Side Care Manor v. Pennsylvania Human Relations Commission*, 30 A.3d 568 (Pa. Commonwealth Ct., Oct. 20, 2011) (affirming discrimination ruling against residential facility that denied services to a person living with HIV).

*Cash v Smith*, 231 F.3d 1301 (11th Cir., Nov. 1, 2000) (HIV-related medical information voluntarily disclosed to an employer outside of a medical examination is not protected by confidentiality requirements of the Americans with Disabilities Act).

*D.M.B.T. v M.A.T.*, 2011 WL 1880372 (La.Ct.App., 2nd Cir., May 18, 2011) (granting the mother’s petition requesting that her ex-husband, who is HIV+, only have supervised visits with their children, finding that he does not take the proper precautions to ensure that he does not transmit the virus to the children).

*EEOC v C.R. England, Inc.*, 644 F.3d 1028 (10th Cir., May 3, 2011) (employee voluntarily disclosed to his employer his HIV status, and such disclosure outside of a medical examination is not protected by confidentiality under the Americans with Disabilities Act).

*Farber v Jefferys*, 2011 WL 5248207 (N.Y.Sup.Ct., N.Y. Co., Nov. 2, 2011) (opinion will not appear in a printed volume) (granting summary judgment to gay activist who had been sued for defamation by HIV-denialist journalist whom he had branded a “liar”).

*Goodrich v Long Island Rail Road Company*, 654 F.3d 190 (2nd Cir., Aug. 15, 2011) (railroad employee asserting he suffered emotional distress when a co-worker publicly disclosed his HIV+ status does not have a valid claim for intentional infliction of emotional distress under the Federal Employers’

Liability Act because his claim failed to satisfy the zone of danger test, as he was in no physical danger)

*Hammer, In the Matter of*, --- S.E.2d ---, 2011 WL 5922900 (S.C., Nov. 28, 2011) (upholding disciplinary action, including a six month suspension from legal practice, for an attorney who asked a witness during a deposition improper questions about the witnesses' sexual orientation and HIV status, and when the witness could not recall something the lawyer asked [sarcastically?] if he had Alzheimer's Disease)

*Haynes v AT&T Mobility, LLC*, 2011 WL 532218 (M.D.Pa., Feb. 8, 2011) (unpublished decision) (granting the defendant employer summary judgment in the case of former employee who asserted that the company did not make accommodations for his HIV status by transferring him to a new position as he requested, finding that the plaintiff did not establish that he was the best person qualified for the position)

*Hedgepeth v Whitman Walker Clinic and Mary Fanning, M.D.*, 22 A.3d 789 (D.C. Ct.App., June 30, 2011) (man who was misdiagnosed as HIV+ has sufficient evidence to establish a claim of negligent infliction of emotional distress, even though he suffered no physical harm due to the negligence, because clinic had an obligation in caring for the man's emotional well-being).

*Kiyutin v Russia*, Application No. 2700/10 (ECHR, March 10, 2011) (finding that Russia violated the European Convention on Human Rights when it denied a resident permit to an Uzbeki HIV+ man based only on the man's HIV status).

*Leavitt v Correctional Medical Services, Inc.*, 645 F.3d 484 (1st Cir., June 29, 2011) (in suit brought by HIV+ prison inmate who was allegedly deprived of health care, the court affirmed the lower court's grant of summary judgment on behalf of two of the defendants, but allowed the case against defendant Alfred Cichon, a physician assistant responsible for health care at the jail, to go forward, as there is evidence that Cichon may have been deliberately indifferent to the inmate's medical needs in order to save the health care provider, with whom he is a shareholder, money).

*State v Rick* (Minn. Dist. Ct., Minneapolis, Oct. 7, 2011) (convicting HIV+ man of first degree assault for engaging in unprotected sex with another man whom he had informed about his HIV status; the other man sued after learning that he had seroconverted).

## **O. Executive and Administrative Policy Changes by the Obama Administration**

**White House** – The President issued a proclamation titled “Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses” that specifically referenced sexual orientation and gender identity. The President also instructed all U.S. agencies that conduct activities overseas to seek opportunities to further the human rights of LGBT people, including encouraging the repeal of laws against consensual sodomy. \* \* \* The President issued a National Adoption Month proclamation that called for non-discrimination based on sexual orientation or marital status in the process of adoption.

**Department of Defense** – The Department issued a guidance document on September 20, accompanying the implementation of the DADT Repeal Act, listing various DoD benefits and policies that may be available to same-sex partners of military personnel. DoD faces litigation over denial of various economic benefits provided for spouses of military personnel due to DOMA, but has tried to work around DOMA for a variety of policies and benefits that do not require spousal status.

***Department of Justice's About-Face on Section 3 of DOMA*** – see above under Most Important Developments.

***Department of Health and Human Services*** – The Centers for Medicaid and Medicare Services issued a memorandum titled “Re: Same Sex Partners and Medicaid Liens, Transfers of Assets, and Estate Recovery” suggesting to states circumstances in which they can recognize same-sex partners for purposes of the Medicaid Program. \* \* \* The Department announced plans for the National Health Interview Survey to incorporate questions about sexual orientation beginning in 2013. \* \* \* The Department issued a guidance document on September 7 to assist in enforcement of new rules protecting the rights of hospital patients to designate visitors, including same-sex partners, and to require respect for advance treatment directives, and sent a letter to health care institutions about the requirement that those receiving Medicaid and Medicare reimbursements (i.e., all of them) to comply. \* \* \* The Social Security Administration announced it will discontinue the practice of “outing” transsexuals to their employers, which was happening as a result of a program to detect social security fraud by matching numbers with gender markers.

***Department of Homeland Security*** – Immigration and Customs Enforcement – ICE issued policy directives providing that deportation proceedings of undocumented aliens be governed by a rule of discretion that would focus on deporting serious criminals and avoid deportations that would break up families. Although the operative documents do not mention same-sex couples, agency spokespeople indicated an intention to avoid breaking up same-sex couples through deportations, and there were a few cases during 2011 where such discretion appears to have been exercised.

***Department of Housing & Urban Development*** – Published proposed regulations on sexual orientation and gender identity discrimination in housing, adopted policies requiring housing project grant recipients to incorporate non-discrimination language into their contracts, and established a webpage with resources for people who encounter housing discrimination based on sexual orientation or gender identity.

***Department of Labor*** – Amended its anti-discrimination policy to include gender identity or expression.

***Department of State*** – Proposed modifying the form to apply for birth certificates for children born overseas to U.S. citizens so that, in appropriate circumstances, same-sex couples can apply for such certificates and both be listed as parents; published guidelines for changes of gender designation on passports that authorizes issuing new passports based on name-change orders or a doctor's certification of treatment or evaluation for gender-related medical reasons. \* \* \*

The U.S. Agency for International Development, which administers federal financial assistance for development projects overseas, issued an executive message on October 11 strongly encouraging companies with which it contracts to extend their non-discrimination policies to include sexual orientation. USAID has also adopted a definition of sex discrimination under its internal policies that includes gender identity discrimination.

***General Services Administration*** – The General Services Administration published a final rule adding new definitions of “dependent,” “domestic partner,” and “domestic partnership” and “immediate family” to regulations pertaining to travel and relocation allowances for same-sex domestic partners of federal employees. See 76 Fed. Reg. 59,914.

***Internal Revenue Service*** – While continuing to take the position that lawfully contracted same-sex marriages cannot be recognized for federal tax purposes due to DOMA, the IRS issued an



informal letter ruling that Illinois different-sex civil union partners should be treated as spouses for purposes of federal tax law, because the Illinois Civil Union Act treats them as spouses for purposes of state tax law and DOMA does not bar recognition of different-sex relationships. Knowledgeable tax lawyers expressed doubt about relying on this opinion.

**Office of Personnel Management** – Proposed a rule on March 3 (76 Fed. Reg. 11684) under which federal employees' same-sex domestic partners would be presumed to have an insurable interest in the continued life of the employee for purposes of entitlement to a survivor's annuity. In July, OPM proposed various regulations that would modify various policies to take into account same-sex partners of federal employees in various contexts without formally recognizing same-sex marriages (which would violate DOMA). The workaround seems to be to generally expand functional family/dependent definitions without premising eligibility on the establishment of an actual legal relationship.

**U.S. Bureau of Prisons** – The Bureau announced a new policy that federal inmates diagnosed with Gender Identity Disorder will not be denied treatment solely on the ground that they were not receiving treatment prior to incarceration, reversing a longstanding policy against initiating treatment during incarceration. The new policy was announced in memoranda issued by the Bureau's Medical Director in May and June.

## **P. Miscellaneous Developments on Legal and Political Rights—Foreign & International**

**United Nations** – The Human Rights Council of the United Nations voted 23-19 with 3 abstentions in favor of the organization's first resolution in support of LGBT human rights on June 17. In December, the Council released its first report on LGBT human rights, compiled in response to the June 17 resolution.

**Organization of American States** – At its 41st General, the member countries of the Organization of American states unanimously approved a resolution titled "Human Rights, Sexual Orientation, and Gender Identity," which condemns discrimination, urges countries to adopt measures against discrimination, and condemned acts of violence against members of sexual minorities.

**Australia** - *In re Matter of Baby Doe* (N.S.W., Austl.) (ABC Premium News, Aug. 17, 2011; News.com.au, Aug. 17, 2011) (in the case of a man who donated his sperm to a lesbian couple who have since separated, the court held that the lesbian co-parent of the child may substitute her name for his on the child's birth certificate)

**Australia** – The federal government announced new guidelines to end discrimination against transgender individuals in gender designations on passports.

**Australia: Re William and Jane**, BC 2010090570 (Austl., Dec. 6, 2010) (approving the adoption petition by male same-sex couple to adopt their two foster children, the first such adoption under the Adoption Amendment (Same Sex Couples) Act 2010)

**Canada** - *In the Matter of Marriage Commissioners Appointed Under the Marriage Act 1995*, S.S. 1995, c. M-4.1, 2011 SKCA 3 (Canada, Saskatchewan Court of Appeal, Jan. 10, 2011) (finding unconstitutional a law that would allow marriage commissioners with religious objections to same-sex marriage to refuse to perform such marriages).

**Costa Rica** - *Urbina* (Supreme Court of Costa Rica, 2011 WLNR 20980104 [blog posting] (Oct. 13, 2011) (holding that gay prisoners are entitled to visits from same-sex partners).



**Germany** - Römer v Freie und Hansestadt Hamburg, Case C-147/08 (ECJ, Grand Chamber, May 10, 2011) (advising to German courts that the city of Hamburg is likely violating European law by granting higher pensions to city workers who are married than those who are in same-sex registered partnerships)

**Nepal** - In re the Treatment of LGBT Community (Sup. Ct., Nepal) (AFP, Jan. 9, 2010) (order extending equal treatment to transgendered, lesbian, bisexual and gay people; in response, the country is adding a third option under gender to the census report for transgendered individuals)

**Slovenia** - Slovenia adopted a new Family Code that provided some recognition and support for LGB families, but faced organized opposition and a threatened repeal initiative.

**South Africa** - South African Human Rights Commission v Qwelane (Equality Ct. Johannesburg, S.Afr., May 31, 2011) (holding that an article and cartoon authored by the defendant, a former columnist, which denounced homosexuality does constitute hate speech)

**South Africa** - In the Ex Parte Matter Between WH, UVS, LG, BJS, Case No. 29936/11 (North Gauteng High Court, Pretoria, Republic of South Africa, Sept. 27, 2011) (first decision approving a surrogacy contract between a gay male couple and a woman under Section 295 of the Children's Act 38 of 2006).

**South Korea** - South Korea's Constitutional Court ruled on March 31, voting 5-4, that the military can ban homosexual conduct even though the nation's laws governing civilians do not impose criminal penalties for such conduct.

**Thailand** - Natee Teerarotchanapong v Municipality of Chiang Mai (Chiang Mai Admin. Ct., Thai.) (Nation, Aug. 10, 2011) (in suit brought by a LGBT rights activist, the court held that the municipality acted unlawfully when it prohibited gay people from participating in a 2010 parade as the decision violated the country's constitutional ban on discrimination)

**Uganda** - Jacquelin v Rolling Stone, 2011 WLNR 237497 (Uganda H.C., Jan. 3, 2011) (High Court in Kampala held that the printing of the names by a Ugandan publication Rolling Stone (not related to the U.S. magazine) violated constitutional rights to life and privacy and awarded damages to the three plaintiffs who were among the people whose names had been printed and ordered an injunction against further such publication)

**United Kingdom** - Health Ministers in Britain, Scotland and Wales have agreed to change blood donation rules so as no longer to totally exclude gay men who have not been celibate since the 1970s. Under the new rule, gay men who test HIV-negative will be deferred as donors only if they have engaged in sexual activity within 12 months prior to the proposed blood donation.

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# Transgender In Law

**Mia Yamamoto**

**Law Offices of Mia F. Yamamoto**

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*Yamamoto shares her experiences as a transgender attorney and explores the personal and professional ramifications of making the physical transition to match her gender identity.*

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## **I. My Family: Japanese Americans in Los Angeles**

I was born on September 20<sup>th</sup>, 1943, in my family's second year of captivity. My parents and their three sons had been rounded up, taken from East Los Angeles, and transported by train to Poston, Arizona, where they were held in indefinite confinement during WWII. My family was from Hawaii, descended from the first group allowed to legally emigrate from Japan. In 1885, their ship, the "City of Tokyo", landed in Hanalei Bay, Kauai, where they went to work as cane cutters and taro farmers. My dad came out to Los Angeles sometime in the 1920's to attend Loyola Law School. My mother, who had graduated from a St. Francis Nursing College, left Hawaii and came to Los Angeles to do her internship at the General Hospital (today known as the University of Southern California Medical Center). They married and had my three older brothers.

My dad had a law practice in Japanese Town by the corner of 1<sup>st</sup> and San Pedro Streets, practicing in the racially-segregated bar, before the war broke out and my family was taken, along with the entire Japanese American community, to internment camps. After they let us out, we lived for a short while on a farm in Orange; however, the community there was so hostile towards Japanese people returning from camp that we moved back to East Los Angeles.

I was still an infant during these times; so I have no recollection of any of this. I learned, primarily from my mother, that my older brothers had had their bikes vandalized and stolen; and that they had to fight their way home through the white kids every day. At some point, the Mexican American kids got tired of seeing this and started jumping in on my brothers' side to even the odds.

Knowing this helped me to understand my family's close affinity to East Los Angeles and the Mexican American community, as well as my mother's fluent Spanish and her community-renowned tamales. It also explained the violence that my brothers embraced as a reflexive response to the world in those days. It explained their friendships and associations with the Mexican American gang members from our neighborhood. It was an attitude which was condoned by my mother herself, possibly because she believed that boys had to learn how to fight. To their credit, they did teach me that. They also taught me about sibling hierarchy and the power of violence in the assertion of control.

Fortunately for me, my sister was born a little more than a year after me. I was finally blessed with a sibling with whom I could actually identify. She and I used to refer to my older brothers as the "brutes" because they would beat up on us when they weren't beating up on each other. They used to bully us when they weren't bullying each other. The oldest would bully the next oldest; the next oldest would bully the third oldest; and all of them would bully the rest of us. I refused to bully my sister or my younger brother, who came along after my sister.

My sister taught me that we didn't need to control each other and we certainly didn't need to hurt each other. She and I played together, something my brothers seemed to disdain as if it was beneath



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them to treat younger siblings as equals. The differences between boys and girls were becoming more and more evident just as I was becoming more and more convinced that I was not on the same side of that divide as my brothers. In fact, I couldn't find another boy anywhere who felt anything like I did.

I can actually remember the moment when the terrible reality of my birth gender dawned on me. It was when my sister and I were in the bathtub facing each other, making waves with our legs in order to subject our toy boats to stormy seas. We took a look at each other's bodies and realized, to our horror, that I was turning into one of "them." This was one of my first recollections of childhood.

## II. Schooling

I attended kindergarten at the Rowan Avenue School and subsequently entered the first grade at Maryknoll Elementary School, which was located just east of Japanese Town and just west of the Los Angeles River. This was a Catholic parochial school specifically for Japanese kids, taught primarily by a missionary order of nuns known as the Maryknoll nuns. I believe they considered this elementary school an extension of their missionary work in Japan as well as in other foreign countries.

In any event, this confluence of Japanese American and Roman Catholic cultures created a uniquely rigid set of expectations, values and virtues. Conformity to established modes of expression and behavior was strictly enforced. This included gender conformity. This conformity, which pervaded Roman Catholic dogma, history and mythology, was present in equal measure in the rest of society, particularly in the patriarchal Japanese American community. Roles and rituals would amount to requirements in a myriad of ways, and it was impossible to ignore, much less defy, any of this. Attempting to comply with these expectations, however, was a source of great distress and discomfort to me. I hated being a boy. I used to fantasize about waking up in the morning and discovering that my gender had been changed. I used to pray for this.

I was in the 4<sup>th</sup> grade when, in 1952, every newspaper in Los Angeles reported that an ex-WWII G.I. by the name of George Jorgensen had returned from Denmark after having had sex change surgery and adopting the name Christine. It was an electrifying epiphany. For the first time in my life, I learned that there was someone else like me. I stared at the headlines and the photographs. I read and



In 1952, every newspaper in Los Angeles reported that an ex-WWII G.I. by the name of George Jorgensen had returned from Denmark after having had sex change surgery and adopting the name Christine. It was an electrifying epiphany. For the first time in my life, I learned that there was someone else like me.

re-read the article several times. I took the article to my mother who was ironing clothes at the time. I told her that I was like Christine. She took the paper and, as she read the article, she looked at me with the saddest look and started crying. She never explained why, but I understood. It clearly upset her that I felt this way; and that was enough for me to suppress what I was feeling and thinking. As time went on, I witnessed reports of Christine Jorgensen's transition being treated with disgust and disdain by society, the media, and by my peers. It was very clear how the rest of the world felt about changing one's gender. It went way beyond mere disapproval. I buried my feelings as deeply as I could while striving to achieve a façade of normalcy which would shield that part of me from my parents and from the world.

I felt there was no place for me where I grew up; not if I was to be what I felt I was. I was an unmotivated and below-average student. My older brothers, on the other hand, were academically gifted, especially in math and science. Not surprisingly, they all went on to advanced degrees in engineering, physics and biochemistry, respectively. In class, I was hyperactive, distracted, depressed and constantly dreaming of being anyplace else. At Maryknoll, they used to seat us by our class standings, with the student with the highest grades sitting in the first seat of the first row and the student with the lowest grades in the last seat of the last row. This arrangement provided me with my earliest childhood friends, from there in the back row. We were completely noncompetitive in school, unlike our more accomplished classmates.

Like any other kid, I wanted to be accepted, hopefully even popular, but that never happened. Throughout my time at Maryknoll, I can remember surviving grade after grade with my issues and my confusion, usually hanging around with the bad kids. When I turned 12, my father died suddenly. I can still remember that great sadness that I saw my mother going through. I decided to try to suppress my own feelings and soldier on in order to help her. I got a job selling papers on the corner of

Olympic and Union and, when I saved up enough to buy a bicycle, I used it to deliver newspapers through the Pico-Union and Westlake Districts.

I started at Cathedral High School, continuing my Catholic education, in 1957. I shared a locker with my first African American friend, Columbus McAlpin, whom I had actually met earlier at a religious retreat over the summer before we started high school. Columbus was an outstanding all-league, multi-sport athlete and the smartest person I ever met. He was both book-smart and street-smart. His grandmother owned a general store on the corner of 12<sup>th</sup> and Central, just south of downtown Los Angeles which we would visit after school.

He introduced me to this most amazing corner of the community. Across 12<sup>th</sup> Street there was a liquor store with men hanging around outside, talking, laughing and sometimes arguing. I got to meet African American ministers, musicians, undertakers, bookies and pimps, all of whom had larger-than-life personalities—at least compared to the quieter and more subtle styles of expression I was used to in the Japanese American community. I also got to experience the different styles of worship and praise in African American churches, as well as the ways that the police would treat people in the African American community.

We had another classmate, Ricardo Cruz, who was the brainy rebel of our freshman class. Both were close friends through my high school years. Columbus and Ricardo were the first of my classmates to openly embrace the Civil Rights movement which was just coming to prominence outside of the South.<sup>1</sup>

It was around this time that I started seriously doubting and eventually rejecting my Catholicism. I was turning more towards the arts, especially poetry and music. I was chosen for the glee club in my senior year and I discovered how much I enjoyed the harmony and the camaraderie of collaboration. Still, even though I found people with whom I had things in common, I never found anyone who felt anything like I did about myself. I could never escape the discomfort and despair that came from my gender issues. No matter how much I tried to suppress and ignore this consciousness, it would continue to rise up and, like some evil force growing inside of me, turn me into the freak I saw myself to be. It was during this time that I first started contemplating suicide.

I graduated high school with the kinds of grades that precluded admission to any four-year college. I had stopped thinking about my future long before then. I didn't see much point to college for that reason; however, having nothing better to do, I enrolled at Los Angeles City College, probably because that's what my friends were doing. I lasted exactly two semesters before I flunked out with all Fs. I just signed up for classes and then blew them off. I was a remorseless failure, destined for an early demise.

### III. Adrift After Graduation

I went out and got a full-time job working as a grocery bagger at the Ralph's supermarket on La Brea and 3<sup>rd</sup> Street. It was a great job. I had always worked, at least through high school, but I hadn't had a job that I enjoyed like this. I worked at two gas stations and was fired from both, probably because of my surly attitude. In my last year of high school, I got a full-time job at a place called "San

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1. Columbus would later turn down a football scholarship to UCLA so he could concentrate on his studies in order to achieve his dream of becoming a doctor. He would go on to a distinguished career as the Chief of Pediatric Surgery at Cedars/Sinai Hospital after serving in the pediatric surgery departments of many local medical centers. Ricardo Cruz would go on to a stellar career as a civil rights lawyer, first organizing the *Catolicos por La Raza* (which confronted the Catholic Church over its neglect of the Mexican American community in favor of white communities), then, after his admission to the bar, organizing and leading the *Abogados de Aztlan* (an early group of activist Mexican American lawyers devoted to the advancement of their community through direct action and advocacy).



Lorenzo Florists” which was a Japanese American-owned company in the industrial area just east of downtown. I had to start at 11:00 PM and got off at 7:00 AM, in time to hop on the bus and make it to my first class at Cathedral. It was weird sleeping after school and working while everybody else was sleeping. Plus, work with flowers sounds pretty easy but it involved unloading truckloads of ice-filled containers wherein the flowers, particularly the roses, were shipped. I was not strong enough to keep up with the other workers and I was eventually laid off.

I loved working at Ralph’s. We had a union, Retail Clerks Local 770. It was my first experience with organized labor. After a few months, I got promoted from grocery bagger to stock clerk, and my first assignment was to stock the Kosher aisle. This was very significant in this particular store, which was situated in a heavily Jewish neighborhood; we had to be sensitive to the religious requirements and rituals that went into their cuisine. I had many Jewish co-workers and I learned about both their religion and their history (about which I had known very little outside of the biblical references which are a part of most Christian liturgy). When I got to meet their families, I concluded that Japanese American culture and Jewish American culture were, in some respects, identical. I came to same realization whenever I went home to the families of my African American and Mexican American friends; however, in those instances, I simply attributed it to our shared religion. I’ve maintained my curiosity about outside cultures to this day.

It took a little over a year after flunking out and working full-time at Ralph’s before I decided to re-enroll at Los Angeles City College, which agreed to accept me on academic probation. I continued to work part-time at Ralph’s while I gave school another try. I think I figured that if it didn’t work out this time, it just wasn’t meant to be, and I could continue on with a career in the grocery industry.

I returned to the ruins of my academic career on probation with a 0.0 grade point average, calculated from the 30 units’ worth of F grades that I had accumulated by the time I was kicked out. My academic probation counselor told me that it would take a full year of getting all As to get me back to a C average. He counseled me not to worry about getting all the way back any time soon; and he advised me to try a major that was not too challenging like, for instance, bookkeeping.

I went back to school, actually attended classes and started to study. I started hanging around with a group of students who were serious about their classes and I started spending time studying with them. I started getting As in my classes. My friends started looking at me differently. I was turning into a successful student. And, although many aspects of my life were on the upswing at that time, my emotional life was still in a state of depression that I couldn’t seem to shake off.

I started studying the religions of the world. I immersed myself in books, music and art. My grades continued to get better and, after I graduated from City College, I transferred to Cal State College of Los Angeles in Monterey Park where I graduated in 1966 with a Bachelor’s Degree in English and Government. While I was enrolled there, I spent most of my free time in the Psychology section of the Cal State Los Angeles library. This led me to the UCLA medical school library and every other library I could find that could provide me with information about transvestites and transsexuals. I believed that, if I could find a cause, I could find a cure. I studied hundreds of case histories which documented the diagnosis of gender dysphoria; however, I never could find a program of treatment, medication, or counseling that could quell my discomfort. It was starting to feel like torture.

#### **IV. The Selective Service: An “Honorable Way Out?”**

After my graduation, I decided to enter military service. At that time, the Vietnam War was being fought on the other side of the world, and many of my classmates and peers were concerned about the draft.



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I, on the other hand, was looking for an honorable way out of this life. Honor had a lot to do with it. I saw suicide as a coward's way out. However, if I died in combat my family would have nothing to be ashamed of. The Japanese American community had been imprisoned for the duration of World War II; however, numerous members of the community had served in the U.S. Army and the Military Intelligence Service during the war and had distinguished themselves. Many Japanese Americans felt that these individuals' extraordinary devotion to duty in the face of war was enough to prove the Japanese American community's loyalty to the United States. I spoke to my mother about this and she made it clear that this tradition of service and loyalty demanded the same willingness to self-sacrifice as her generation.

Her generation also had a rigid perspective on the necessity of violence. She used to tell me that, if she ever heard of me running from a fight, then I would have to fight my older brothers when I got home. She told me the same thing about being a soldier. She told me she would rather see me come home dead than to see me come home a coward. So, I went down to my local Draft Board the very next day and volunteered. I would spend the next two years in the Army.

I remember going through my physical at the Armed Forces Examination and Entrance Station on Los Angeles Street before stepping forward and taking the oath "to defend the constitution against all enemies, foreign and domestic." I then boarded a bus to Fort Ord, near Monterey, California, in September of 1966.

Basic Combat Training, the eight-week initiation into the United States Army, was an unpleasant ordeal for any uncoordinated, un-athletic individual. Especially one like me, who couldn't run very far or very fast or even throw grenades far enough to not be a danger to anyone nearby. I actually only graduated from Basic Training because my friend Wesley Mitamura threw grenades for me and even ran the mile in my stead. We changed shirts during the testing and got away with it because even though Wesley and I didn't look anything alike, the cadre couldn't tell Asians apart very well, so we passed for each other during the tests without question.

Everyone in my unit got orders to report for Advanced Infantry Training except for me. I was instead assigned for OJT (On the Job Training) as a Clerk for the Secretary General Staff of the 5<sup>th</sup> Army Headquarters, located in downtown Chicago at the corner of Hyde Park and Lakeshore Drive.

Although I can't really say that I enjoyed being in the Army, I did fall in love with the city of Chicago because of its beautiful architecture and skyline, its proximity to Lake Michigan, the Chicago River, and especially the warm-hearted citizens of the city who were so amazingly friendly and generous. I was also fortunate to have a couple of relatives who had moved there from Hawaii. I got to spend time with their families and even spent the weekends with them whenever I got a weekend pass. My uncles were both Army veterans, and they went out of their way to welcome me into their homes and to make my time there easier. I worked for Colonel Paul Baldy, one of the nicest people I could ever have hoped to work for and get to know. Near the end of my time there, the 5<sup>th</sup> Army Headquarters was relocated to Fort Sheridan in Northern Illinois. I wasn't there very long before I got my orders to report to the Oakland Reception Depot for transportation to Vietnam. I got one last 30-day leave and spent that time partying with my friends back in Los Angeles before my deployment overseas.

## V. Vietnam, 1967–68

I landed at Bien Hoa Air Base in September of 1967 and was initially assigned to the Replacement Depot of the 1<sup>st</sup> Cavalry Division at Anh Khe. I spent two weeks there before I was reassigned to the Replacement Depot of the 4<sup>th</sup> Infantry Division Headquarters at Ia Drang in the Central Highlands near Pleiku. This was actually a huge landing zone which was the result of leveling the top of a promontory known as "Dragon Mountain." This was to be my home for the duration of my time there.

I arrived in the middle of the monsoon season, which brings torrential rains day and night. While we waited to be assigned out of the Replacement Depot, we were required to pull patrol duty along with the other replacement soldiers. Because I already had rank (Spec-4) from my time stateside, I was designated a Squad Leader and assigned a small squad of teenage draftees. We took part in the troop movements going back and forth through the area of operations and had to sleep in the rain in muddy foxholes every night; but it was a bonding experience like none other. Years later, I was amazed to remember that I would have died for any one of my men without hesitation, just as I knew they would for me. They were the sweetest kids, and were all just teenagers. They looked up to me because I was older and had been to college. I would have done anything to get them home safely. The bonding of soldiers is something that is very unique and impossible to explain out of context.



I was starting to realize that I would  
probably survive the war, so I decided to  
apply to law school.

I finally got my permanent assignment to the 4<sup>th</sup> Admin Company, first to the Adjutant General's Office and then to the Awards and Decorations Section of the Personnel Division. My first assignment there was to process Purple Hearts. This was February 1968, during the "Tet Cease Fire," which evolved into the "Tet Offensive of 1968," and which marked an escalation of the struggle from the North Vietnamese Army and the Viet Cong. Some of the fiercest fighting of the war took place during this period. I would sit by a teletype which sent in the names of the casualties in order to process those names for the awarding of Purple Hearts. It was there that I learned that one of my former squad members had been killed by frag and another had been seriously wounded in the same attack. I cried when I saw their names come through on the teletype. It still brings me to tears when I remember them.

My final assignment was Combat Infantryman's Badges and Air Medals. Because of my degree in English, I was chosen to draft the citations that accompanied the awards. By that time, I was starting to realize that I would probably survive the war, so I decided to apply to law school. I applied to Hastings in San Francisco, UCLA in Los Angeles, and Loyola in Los Angeles, mostly because my father had attended Loyola Law School and I wanted to continue his legacy. Unfortunately, I never heard back from Loyola but fortunately I received an early acceptance from UCLA.

My return date was scheduled for September 8, 1968, but I got out a little earlier in order to attend law school. I flew out of Cam Ranh Bay and landed at SeaTac Airport where I was assigned to the Replacement Depot at Fort Lewis, Washington (the home of the 4<sup>th</sup> Infantry Division). After a few days assigned there (where they actually marched us into a lecture on the benefits of re-enlistment), I finally got my orders to muster out and fly back to LA.

## **VI. Law School: A New Beginning**

UCLA Law School and the UCLA campus in general was not a warm and welcoming place for Vietnam veterans. I actually experienced this when I first arrived at the Los Angeles Airport in uniform carrying my duffel bag and walking through the terminal. That's where I got my first hostile looks from complete strangers. I remember thinking that it must have been like that for my family to come back from camp and try to re-integrate into the community. I got a lot of that attitude when I returned to school. However, as it turns out, there were a few other ex-servicemen in my first-year class and I used to spend my lunch hour with them, so I wasn't entirely isolated. I actually hated the war as much, if not more, than any other student on campus, even though most of the people I met had trouble believing that.

I eventually got to meet and started hanging out with a few of my Asian American classmates. Oddly enough, there were probably 6 or 7 Asian Pacific students in that first-year class. There had never before been more than 2 in any UCLA law school class before us.

In those days, the anti-war movement was in full bloom, especially on college campuses. The Civil Rights movement was still forging ahead as it had been before, during and after the war. Ethnic studies, African American, Mexican American and even Asian American studies were beginning to take root and grow on college campuses, including UCLA. I discovered that, even in the grip of my gender discomfort, I could somehow find meaning in my life through a career in law. This was an important revelation for me, and provided the motivation to keep me going through this time.

In my second year, UCLA Law School admitted only 2 Asian Pacific American students. It appeared that our population in law school was going backwards. I started going around talking to the other Asian Pacific American law students about forming an organization which would advocate

for our community's inclusion in UCLA Law School. With the help of the late Joyce Yoshioka, Jim Uyeda, Glen Osajima, Shunji Asari and John Mayeda, we formed what was to later become known as the Asian and Pacific Islander Law Student Association, and we demanded Asian Pacific inclusion in the UCLA Law School Minority Program as well as Asian Pacific law professors and Asian Pacific legal curriculum. We were encouraged and supported by the La Raza Law Students and Black Law Students, who actually offered to give us a few of their slots in the Minority Program if UCLA tried to stonewall our entry into that program. Their offer of help gave us the confidence we needed to march into the Dean's Office with our demands. We got 2 slots in the Minority Program: Harvey Horikawa and the late Anthony Imada. We didn't get professors for many years thereafter and I don't think we ever got Asian Pacific American curriculum.

It had always been a dream of mine to be a part of the great Civil Rights movement and this law student organization seemed like the perfect way to join in. My dad had been a member of the National Association for the Advancement of Colored People (NAACP) because Japanese Americans were designated as colored people in those days. Also, the American Civil Liberties Union (ACLU), especially the California chapters, had fought against the internment camps on behalf of my community. They stood alone except for the Quakers, opposing our imprisonment. Moreover, when we got out of camp, the only law firm that would hire a Japanese American attorney was the ACLU law firm of Wirin and Okrand. They gave my dad a job and helped get him back on his feet after we were released from custody. Many years later, I found out that A.L. Wirin actually loaned my dad the money to purchase the house we lived in when we returned to East Los Angeles. I am a card-carrying die-hard member of the ACLU.

It was during this time that I got active in the anti-war movement, usually either marching with Vietnam Veterans Against the War or with the Asian Americans Against the War contingents. I started volunteering with an underground paper which targeted the Asian Pacific American community. It was called the "Gidra" and we published it out of a storefront on Jefferson near Crenshaw Blvd. Through them, I got to know the Asian American film students in the Ethno-Communications Program of the UCLA Film School. We used to hang out together at the Asian Studies Center in Campbell Hall. Some of them would go on to form Visual Communications, the media organization of the Los Angeles Asian Pacific American community today.

## VII. Public Defense

When I graduated law school I wanted to get a job working for the poor. I never liked the preference for the rich that was entrenched in the law. However, I did no interviews and made no applications for a job until I passed the bar. I wanted to work at the Legal Aid Foundation of Los Angeles (LAFLA) in order to practice poverty law. I applied to work there and was told that they didn't have any openings. So, I volunteered there while I waited for a vacancy to come up. In the meantime, I worked in Century City for a firm that practiced family law. I was relieved to escape when I finally got my job as a Staff Attorney at LAFLA. I loved the idea of serving the poor but the actual practice bored me to death. Plus, after a couple of years, they started to make us carry family law cases. I realized that I hated divorces and I especially hated divorce lawyers. I started thinking that I should go back to school to teach English. English teachers had always been an inspiration to me, from Brother Patrick at Cathedral to Professors Peter Marin and Judith Eisenstein at Cal State. They taught me about how the art of writing was the art of thinking. I'll never forget the lessons I learned from them. But then, as it turned out, my legal career was rescued by the Office of the Public Defender.

I applied for the Public Defender's Office on a whim. I could never before see myself practicing criminal defense. It seemed anomalous for me to give my best to the worst people in society. How-

ever, I had seen the great work of the late Joyce Yoshioka, and I was totally inspired to do what she was doing. I went to the interview and I was confronted by two interviewers: one was Mark Horton from the Public Defenders and another man (I forgot his name) from the District Attorney's Office. I introduced myself to Mark Horton and asked him what this other man was doing there. I refused to shake the other man's hand when he extended it. I was pretty rude to him (which I now regret). Horton explained to me that they were both there to see which office, if any, wanted to hire me. I made it clear that I would never work for the District Attorney. Mark Horton became my first mentor in the Office but he passed away shortly after I was hired.

I started work with the Public Defenders in March of 1974, and I found my place in the profession. I found the same poor people, whom I had been representing at Legal Aid, in the custody tank of the Criminal Courts Building. I was working for the same clients as at Legal Aid but with different legal problems. It was the most amazing time to be working in the criminal courts of Los Angeles with legendary trial lawyers all over the place trying high-profile cases and operating at the highest levels of the practice. I was lucky to be surrounded, in the Public Defender's Office, by some of the brightest, most creative and committed lawyers I have ever met. I was so proud to be a part of it.

### VIII. Discovering Community Activism

I have to admit that I lost touch with my Asian Pacific American community while I was immersed in the practice of criminal defense. For 10 years, while I worked as a deputy public defender, community was never very far back in my mind; but I was still trying to come to grips with my own gender issues. It's hard to describe this phenomenon. It has been said that gender dysphoria is a condition that you are born with, fight back against your whole life, but which wins in the end.

I had begun therapy shortly after I graduated from law school, passed the bar, and got my first job; when I could afford it. I went through a number of therapists, the earliest ones suggesting that I was suffering from post-traumatic stress disorder. However, I eventually found my way to a therapist



I spent countless hours in the futile quest to understand how I got to be this way. What was most disturbing was to discover the underground community of similarly situated individuals in therapy groups and on the streets. I found most of the material about transgender people in porno shops, and most of the examples in Female Impersonator shows and drag bars.



who specialized in gender identity disorder. I spent almost a year with him, but, when he advised me that my gender issues dictated that I should undergo sex-change surgery, I fired him. I was looking for a cure and he wasn't giving me one. It probably wasn't until about 20 years and several therapists later that I started to realize that he was actually right. However, that realization made it worse, especially when I thought about the way such an extreme measure would be received by my friends, family and profession. I was determined to find another option.

During this time, I had been practicing and playing music, performing solo acoustic in bars, pubs and other public places, using the music as my outlet for my personal frustrations. I had been following a band called "Prairie Fire" which played country rock. My friend Don Randolph played bass for them, and I tried to get to their performances whenever I could. When they broke up, Don asked me to sing lead for a new band he was forming with his violin player, Jeff Wells. At the time, I had been taking electric guitar lessons from my teacher, Chuck Horan, and I asked him to join along with me. This was the core of "Use a Guitar, Go To Prison" which played professionally on the streets of Los Angeles, as well as up and down California, for the next 25 years until my transition in 2005.

I left the Public Defender's Office in 1984, and I drifted for a number of months trying to find myself with all the forces that I felt working on me. I spent more time researching in the medical and psychological journals of every library I could find. By this time, there was an entire body of literature devoted to the issue of gender identity disorder; however, no matter where I looked, I could find neither a cause nor a cure. I spent countless hours in the futile quest to understand how I got to be this way. What was most disturbing was to discover the underground community of similarly-situated individuals in therapy groups and on the streets. I found most of the material about transgender people in porno shops, and most of the examples in Female Impersonator shows and drag bars. Cross-dressing, in these media, was seen as highly sexualized or simply bizarre and shocking entertainment. Moreover, my work in the Public Defender's Office took me to some dark corners of the underclass where groups of transsexual women lived, often engaged in sex work or other equally desperate means of survival on the streets. The people I met had been severely hardened by the experience. I could feel myself losing hope for any kind of a future.

Almost a year after leaving the Office, a couple of my friends asked me to help them in a case and I went into a partnership with them. I was now in private practice and I decided to re-involve myself in the community through the Japanese American Bar Association. I had originally resisted joining



I continued to hold off on transition because I was obsessed with my duty to my clients and to my community organizations. I was willing to lose everything else I had, but I felt I could not let my clients or any other people who were counting on me down.

JABA because I wanted to hold out for a pan-Asian bar association. That year, they elected a Korean American, Howard Halm, to lead JABA; so I decided it was time for me to join. I found my vehicle for community activism through bar association involvement, something I have embraced ever since.

JABA's "Asian Concerns Committee" had been formed to address the concerns of law students who felt that JABA was not sufficiently connected to the social justice and human rights issues which they believed had more significance than the self-empowerment goals that had brought JABA into existence. The lawyers and students from this committee wanted to organize in order to defend the California Supreme Court justices who had been targeted by the right wing because of their perceived opposition to the death penalty. I became a member of the Asian Concerns Committee and joined their campaign to support Chief Justice Rose Elizabeth Bird, Justice Cruz Reynoso and Justice Joseph Grodin. The Asian Concerns Committee had been formed by JABA; however, this campaign brought in young lawyers from the other 3 Asian Pacific American bar associations: the Korean American Bar Association (KABA), Southern California Chinese Lawyers Association (SCCLA) and Philippine American Bar Association (PABA). All four bar associations formed a joint committee based around the original Asian Concerns Committee to advocate on behalf of those Justices.

We didn't win that battle, but we identified each other as allies and went on to organize around social justice and civil rights issues that had been traditionally avoided by bar associations because they went beyond their original conception as trade associations. When the Asian Concerns Committee became a joint committee, the idea of a truly Pan-Asian bar association was rising and, though it would take another ten years to achieve, the Asian Pacific American Bar Association (APABA) was eventually formed in 2000. It has continued its mission of inclusion ever since. APABA has since affiliated the Asian Pacific American Women Lawyers Alliance, South Asian Bar Association (India, Pakistan and Bangladesh) and provided a forum for Thai, Vietnamese, Burmese, and other Southeast Asian lawyers, while providing clinics and workshops in the Cambodian and Indonesian communities.

## **IX. My Mother**

My mother died in 1985. I was devastated by this loss. It was far worse than losing my father whom I barely knew. My mother was my great role model, my conscience and my inspiration. She was a linguist, constantly learning and becoming fluent in many languages. She was an amazing musician, playing guitar, saxophone and ukulele. After my father died, she actually performed and traveled with a band of gay men, something she hid from my homophobic brothers because she didn't want to upset them. She taught Polynesian dance, including hula; and she used to win ballroom dancing contests into her 70's. She studied Japanese brush painting and flower arranging well into her 60's and 70's, producing some fantastic art. She was the friendliest woman I had ever known and had more friends than anyone I knew. My own friends were dazzled by her personality. She meant the world to me. Losing her was one of the worst experiences of my life. I vowed to continue her legacy of compassion and generosity. Her passing left a huge hole in my life, which nothing could ever fill.

## **X. The Creation of the MCBA**

On March 16<sup>th</sup>, 1991, a Korean American shopkeeper named Soon Ja Du shot and killed a 16-year old African American girl named Latasha Harlins, an incident that was captured on the store surveillance video and broadcast widely on television. The shooting was preceded by a fight between the two of them over a bottle of orange juice that Soon Ja Du mistakenly thought Latasha was shoplifting; but the media never showed the preceding fight, just the shooting.

The African American community was in an uproar. I was part of a group of civil rights lawyers who met with representatives of the John M. Langston Bar Association, the Black Women Lawyers (who, between them, represented the African American legal community of Los Angeles) and Korean American Bar Association; and it was decided that we had to get together to go out to the community and see if we could reduce rising tensions between African Americans and Korean Americans in South Los Angeles.

From this first meeting, the Multi-Cultural Bar Alliance was formed, initially as an African American and Korean American coalition. Rapidly thereafter, all of the Asian Pacific American bar associations, the Mexican American Bar Association, Women Lawyers Association of Los Angeles, and Lawyers for Human Rights (now known as the Lesbian and Gay Lawyers Association) joined. We organized panels and sent multi-racial groups of lawyers out to the schools and churches to demonstrate our unity. We initiated a campaign to show that both the African American and Korean American communities had many interests in common and were facing a common oppression.

However, in April of 1992, the police officers who had been charged in the highly-publicized beating of Rodney King were found “not guilty” by a state court jury, and the Los Angeles riots of 1992 began. While we were not successful in the mission of defusing racial tension and preventing violence, we were able to again identify our allies and organize the communities which had been traditionally excluded from the mainstream of the legal profession. We had created a coalition by which we could advocate for justice on a broader scale. The Multi-Cultural Bar Alliance has continued to add even more outsiders, recently including the Arab American Bar Association, South Asian Bar Association, Iranian American Bar Association and Armenian American Lawyers. The MCBA has adopted three core goals: Marriage Equality, Affirmative Action and Justice for Immigrants. These campaigns and this coalition continue to this day.

## **XI. Becoming Whole**

Through these years, I continued to cope with a depression that was becoming increasingly more unbearable as time went on. I learned, through my therapy, that gender dysphoria becomes progressively more insistent as we age. My condition was getting worse the longer I lived. I started to realize that my transition was not just a lifelong fantasy. If I were to continue living, it would become an inescapable imperative—truly a matter of do or die. Still, I continued to hold off on transition because I was obsessed with my duty to my clients and to my community organizations. I was willing to lose everything else I had, but I felt I could not let my clients or any other people who were counting on me down.

Despite all of that, I knew that I didn’t want to die without having made the effort to become a woman. I started researching on the Internet and I discovered people all over the world who were like me. I located a transgender lawyer in Maryland who advised me to expect the loss of my friends, family, clients and professional associations if and when I went through transition. That didn’t really bother me as much as it probably should have. I began electrolysis and started taking female hormones in preparation for my surgery. I researched physicians relentlessly until I identified one in Thailand who I felt would be the best. After a year of correspondence with his office, I signed up for surgery.

In 2003, I began by notifying my family members one by one. Almost everyone was shocked by the revelation; however, almost everyone accepted my decision, all except my second oldest brother who informed me that he would rather see me dead and who has refused to talk to me ever since. Next, I informed my clients, one by one, that I was going to be changing my gender, and, understanding that

this would be a problem, I offered to find a good lawyer to take my place. Many of my clients were charged with serious offenses; one was charged with a special circumstance death penalty murder. Without hesitation, every client refused the offer to substitute another lawyer, and chose to continue with me. I sent letters to the judges and prosecutors who were assigned to my cases, notifying them of my gender change and soliciting advice regarding whatever problems they felt this would create. I wanted to make sure my transition would not prejudice my clients in any way. I got no response. Then, after the Daily Journal (the local legal publication) ran a front-page article about my transition, I was ready to start coming to court dressed as a woman.

I had spent a great deal of time thinking about what I was about to do, essentially bracing myself for whatever negativity I would have to face; so I was completely unprepared for the warm welcome I received everywhere I went, in courtrooms, police stations, and jails. My professional associations reacted similarly. I was not universally well-received, but the few negative reactions I got were only significant in comparison to the overwhelming expressions of love and support which I did get.

Later that year, I traveled to Thailand for facial feminization surgery (rhinoplasty and blepharoplasty); and, in 2005, I went back to Thailand for the actual gender reassignment surgery (vaginoplasty).<sup>2</sup> I awoke from my surgery on Thanksgiving Day, November 23<sup>rd</sup>, 2005, with the most profound feeling of relief I have ever known.

## **XII. Liberation**

I look forward to celebrating the 10<sup>th</sup> anniversary of my transition next year. Looking back, they have been the happiest and most fulfilling years of my life. One of my goals for my transition was to continue being in every group, participating in every activity, and continuing every relationship I had before my transition. Not all of my relationships survived my transition, but the ones I needed to care about and cherish did. In the wake of my transition, I continue to practice criminal defense; and the rest of my life has continued on, in most ways, just as it always has before.

I just completed my term as the president of the Asian Pacific American Women Lawyers Alliance. My activism and involvement in women's issues and communities of color has continued, except with a little more emphasis on LGBT advocacy and education. Almost everything is the same except it all feels so much better. I could not possibly be more thankful to be living in a time and place where such liberation is possible.

Moreover, I am fully aware of how much difference the Civil Rights movement has made in my life and in the world around me. It gave me a sense of purpose, which, in turn, provided me with the motive I needed during times of crisis in order to hang on to life and keep going. And, ultimately, it allowed many people, especially oppressed people and including people like me, to find freedom and inclusion. I have been given the chance to advocate and wage campaigns on behalf of others; and, in so doing, bring whole communities who have been living in the shadows into the light. I have been given so much more from the Civil Rights movement than a reason to stay alive. I have been given a platform from which to advocate for the human rights of everyone, including transgender people, in the long struggle for social justice.

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<sup>2</sup> Rhinoplasty is the surgical alteration, reconstruction, or creation of the nose; blepharoplasty is the surgical alteration of the eyelids; and vaginoplasty is the surgical reconstruction, alteration, or creation of the female sexual organs.

# The Other: How Bias Against Gender Nonconformers Impedes Inclusion of LGBT Legal Professionals

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*Gender non-conformity is not uncommon in the LGBTQ community. But in the legal profession, where many LGBTQ lawyers and judges do not feel comfortable being open about their identity, implicit biases toward gender non-conforming persons acts to impede their inclusion as diverse individuals. Johnson examines and explains how biases against gender non-conforming lawyers often plays out, for straight as well as LGBTQ lawyers, and strategies that gender non-conformers may want to consider and debate.*

## I. Introduction

During an event hosted by a Chicago-based black LGBTQ community<sup>1</sup> organization, Chicago residents discussed their experience with migration and immigration to the United States. The facilitator requested that attendees, seated in a very large semicircle, introduce themselves by name and to tell the group how they wanted to be addressed in terms of gender. Some women stated they preferred feminine pronouns; some men stated they preferred masculine pronouns. Most attendees stated they had no real preference regarding gender notation, but only required that they not be identified solely on the basis of their name. There was one attendee who was born male but respectfully requested that feminine pronouns be utilized. Another, born female, preferred to be referred to as male. Still yet, one individual said she was female though many people mistake her for male, and this does not bother her. She was content being referred to as male or female. The resounding effect of this exercise was to provide a venue for attendees to express their individuality, to assert their identity, to utilize their voices to build a collective acknowledgment of their existence. It was a powerful introduction.

This article will explore gender non-conformity of LGBTQ individuals and how implicit biases towards such gender non-conforming persons impede full inclusion of diverse persons in the legal profession. It will utilize case law and research regarding implicit bias and explicit acts of discrimination to illustrate that the legal profession is not immune to overt or covert discrimination, or explicit or implicit bias against gender-nonconforming attorneys. While this article will deal specifically with LGBTQ person, such negative treatment affects gender-nonconforming individuals regardless of sexuality. Bias and discrimination impacts the aggressive female lawyer seeking partnership (see e.g., *Price Waterhouse v. Hopkins* discussed below) and the male lawyer who is perceived as too effeminate. It affects the woman who does not enjoy wearing high heels and makeup and the man who prefers musical theater over professional football games.

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1. Affinity Community Services is a Chicago-based social justice organization that works with and on behalf of black LGBTQ communities, queer youth, and allies to identify emergent needs, create safe spaces, develop leaders, and bridge communities through collective analysis and action for social justice, freedom, and human rights. For more information, see <http://affinity95.org/acscontent/>.



Part I of this article will discuss how some LGBT persons do not fit neatly into gender roles. Part II will explain that while significant progress has been made regarding the inclusion of LGBT persons in the diversity and civil rights debates, more work needs to be done because there is ample evidence of continued discrimination and exclusion of lesbian and gay gender nonconformers. Part II will also include a discussion of how explicit and implicit bias impedes inclusion of gender nonconformers by identifying the real world consequences of gender-nonconformity bias. Finally, Part III will propose solutions to overcoming biases against gender nonconformity and for moving towards full inclusion.

## II. Obscuring the Boundaries of Gender Presentation

Identity is not monolithic<sup>2</sup> nor is there an essential<sup>3</sup> experience or expression of identity. Identities are manifested in a variety of ways, and these manifestations—the outward display of identity—sometimes overlap. Identity reveals itself as concentric circles, blending spheres and blurring lines. Everyone has a presentation of self that conveys messages to others, whether deliberate or unintentional. This presentation of self occurs regardless of sexual preference.<sup>4</sup> It is essential; it is the “oldest human longing.”

Whether it is the married white male partner at the large law firm who displays family photographs of his wife, two children, and cocker spaniel, or it is the single twenty-something African American female recent law school graduate who wears neckties and men’s boots on the weekend but make-up and high heels to the office Monday through Friday, self presentation is imperative to both. The culture of the law firm, and of the society in which both live, however, welcomes the presentation of the nuclear family more easily than it does the presentation of the weekend gender-nonconforming young black lesbian.

### A. Gender Presentation, Generally

Gender is socially constructed and relational.<sup>5</sup> An individual’s sex refers to his or her biology—the structure and function of the reproductive organs,<sup>6</sup> while gender “is the societal expectation of what it means to be male or female . . . gender refers to the physical appearance and mannerisms of an individual.”<sup>7</sup> Although gender nonconformance is present in heterosexual men and women, and society is hard on “butch” women and effeminate men regardless of sexual orientation,<sup>8</sup> it is important to frame this discussion in terms of homosexuality because gender nonconformity cannot be disaggregated from homosexuality or the assumption of homosexuality. Indeed, “[i]n the case of sexual orientation, a person is not the victim of discrimination because co-workers know the person’s sexual preference, rather it is because they exhibit differing, non-conforming traits and mannerisms. These deviations lead people to assume that gender nonconformity is a mark of homosexuality.” Sexual orientation may be measured by identity or behavior; thus, identity becomes the salient characteristic by which sexual orientation is measured.<sup>9</sup>

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2. See, e.g., Elvia R. Arriola, *Gendered Inequality*, in *THE CUTTING EDGE: CRITICAL RACE THEORY* 322–324 (Richard Delgado & Jean Stefancic eds., 2000).

3. For a discussion of essentialism and intersectionality, the ideas that there is no “essence” to an entire population’s experience with multiple forms of oppression and that, instead, identities and forms of stigma intersect, see Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 *BERKELEY WOMEN’S L.J.* 16, 16–22, 24–30 (1995).

4. Mignon R. Moore, *Lipstick or Timberlands? Meanings of Gender Presentation in Black Lesbian Communities*, 32 *SIGNS: J. OF WOMEN IN CULTURE AND SOC.* 113, 114 (2006).

5. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 10 (1990) (stating that gender is socially constructed and often defined “relative to the constructed relations in which it is determined”).

6. Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 *U.S.F. L. REV.* 1, 15 (2009); citing *THE OXFORD ENGLISH DICTIONARY* 107 (2d ed. 1989).

7. Weinberg, *supra* note 6, at 2.

8. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 *U. MIAMI L. REV.* 511, 620 (1992).

9. M.V. Lee Badgett, *Employment and Sexual Orientation: Disclosure and Discrimination in the Workplace*, in *SEXUAL IDENTITY ON THE JOB: ISSUES AND SERVICES* 22, 35 (Allen L. Ellis & Ellen D.B. Riggle eds. 1996).



## B. Gender Presentation among Black Lesbians

Black lesbian communities always had categories of gender presentation, though the names of the categories have shifted. Where there were two main categories of gender presentation among black lesbians—*butch* and *femme*—black lesbians shifted away from the “*butch*” category. One of the goals of this article is to promote awareness and dialogue of gender identity and expression among various communities. This article is by no means exhaustive of categories and manifestations of gender identity; rather, it is illustrative. Further, in accordance with the notion that identity is not monolithic and that there is no essential experience of gays and lesbians, the discussion that follows of black lesbians is not the entire story. It is a snapshot into the complexity of identity expression, which, hopefully, will lead to improved inclusion of diverse attorneys.

Sociologist Mignon Moore of UCLA studied black lesbian communities in New York City. As a result of her research, she conceived of three contemporary categories of black lesbians: *femme/feminine*, “*gender-blender*,” and *transgressive*. *Femme* or *feminine* black lesbians were observed to have presented wearing dresses or skirts, form-fitting jeans, tops that are low cut or that show cleavage, makeup, jewelry, and accessories such as a purse or high-heeled shoes that display a sense of femininity. *Gender-blenders* combine both feminine and masculine aspects in their presentation to create a unique look. They are related to, but distinct from androgynous gender displays. “They usually wear certain men’s clothing like pants or shoes, combined with something less masculine like a form-fitting shirt or a little makeup. Sometimes their clothes are not specifically men’s clothes but are tailored, conservative women’s items worn in a less feminine style.” To emphasize the point that gender nonconformity is not exclusively a gay or lesbian trait, *gender-blenders* are not necessarily lesbians because there are so many styles of dress among women. “When among heterosexuals they resemble tomboys or straight women who are not very feminine. It is mainly in the context of a lesbian environment that the gendered identity of *gender-blenders* become apparent.” *Transgressive* women literally “transgress notions of femininity;” they present a masculine gender display and often believe they should also present an assertive, dominant personality, though in reality, in their intimate relationships, they present more emotional or “*girly*” characteristics.<sup>10</sup>

This research illustrates the importance of not only open and outward performance of identity, it also demonstrates the need for a more inclusive work environment in the legal community due to the risks associated with presenting a gender-nonconforming identity. Black lesbians with a nonfeminine presentation of self “have always been the face of lesbian identity, bearing the brunt of hostility and misunderstanding for the group.”<sup>11</sup> Moreover, particularly as it relates to the legal community, there

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10. In addition to the gender identity terms discussed above, it is important that the reader develop an understanding of other key terms associated with sexual orientation and gender identity. The Human Rights Campaign website lists several relevant definitions, some of which are enumerated here. “Sexual orientation” refers to an individual’s “physical and/or emotional attraction to the same and/or opposite gender.” Sexual orientation is distinct from gender identity and expression. “Gender identity” refers to “a person’s innate, deeply felt psychological identification as male or female, which may or may not correspond to the person’s body or designated sex at birth.” “Gender expression” encompasses “all of the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, grooming, mannerisms, speech patterns and social interactions.” “Transgender” covers a broad range of people “who experience and/or express their gender differently from what most people expect” either by expressing a gender that is different from the designated sex at birth or physically changing their sex. The term includes transsexual, cross-dressers or otherwise gender-nonconforming individuals. “Transsexual” refers to a person who “has changed, or is in the process of changing, his or her physical and/or legal sex to conform to his or her internal sense of gender identity.” It also describes people who do not undergo medical treatment, but still identify and live their lives full-time as a member of the gender designated at birth. HUMAN RIGHTS CAMPAIGN, SEXUAL ORIENTATION AND GENDER IDENTITY: TERMINOLOGY AND DEFINITIONS, <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Aug. 15, 2012). Finally, “androgynous” means having both masculine and feminine characteristics, neither of which predominates in appearances. See, e.g., DICTIONARY.COM, *Androgynous*, <http://dictionary.reference.com/browse/androgynous> (last visited Aug. 15, 2012).

11. Moore, *supra* note 4, at 117.

is a fear of being labeled as “other.” Gender identity includes not just a presentation of masculine, feminine, or both, but is also a product of “raced cultural norms.”<sup>12</sup> In the context of black lesbians, when black lesbians adopt these raced cultural norms of lesbianism, such as in the case of transgressives and gender-blenders,

[T]hey run the risk of confirming negative stereotypes about black women’s sexuality and subject themselves to dangerous confrontations with a larger society that devalues any raced expression of sexuality but particularly denounces and denigrates images of masculinity in black women. Transgressive presentations of self also reify stereotypes of black women as mannish and are particularly threatening to the male possession of masculinity. Thus, women who dress in a transgressive or gender-blending style may be reluctant to admit publicly that they have a nonfeminine presentation of self. As a result of their gender display, many face hostility from conformists in mainstream society, including middle-class black lesbians.<sup>13</sup>

Prof. Moore further explains “admitting a nonfeminine gender display categorizes [black lesbians] as ‘other’ in yet another way by confirming pejorative conceptualizations of the black bulldagger and other stereotypes of black female sexuality.”<sup>14</sup> The risks inherent in nonconforming gender displays lead to a lack of assimilation in society as well as within the legal profession. This becomes clear when we see the lack of transgressive black lesbian attorneys, particularly in large law firm settings.

Employees negotiate identity in the workplace and even compromise aspects of their identity in the workplace.<sup>15</sup> This is true for the shy lawyer who is happiest at work when he stays in this office, puts his head down and dives into his work;<sup>16</sup> this employee knows that his firm values collegiality, and that in order to advance to partnership, he needs to appear more collegial. Thus, the employee compromises his happiness and comfort by attending happy hour with his colleagues and by attending the firm’s social events. This is also true for the black lesbian lawyer who also compromises her identity as “gender-blender” by wearing make-up to the office more often than she is comfortable wearing, or by keeping a pair of heels at her desk that she wears around the office, despite her sincere dislike of and discomfort with wearing heels. The difference, however, between the shy attorney and the gender non-conforming attorney is that presenting gender nonconformity has the potential, and the reality, of producing greater consequences than does presenting shyness. Since gender nonconformance and sexual orientation are inextricably linked, the danger of presenting “anti-gender” is that sexual orientation has a capacity to “motivate judgments about and conduct toward others.”<sup>17</sup> Oftentimes, these judgments and conduct have been resoundingly negative.

## II. Bias Against Gender-Nonconforming LGBT Men and Women

### A. Implicit Bias

The consequences of presenting gender-nonconforming behavior can be examined via implicit and explicit bias. First, and most dangerous to inclusion, is implicit biases which are “discriminatory biases based on implicit attitudes or implicit stereotypes.”<sup>18</sup> They can produce behavior that “di-

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12. *Id.* at 130.

13. *Id.*

14. *Id.* at 131.

15. Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1263–66 (2000).

16. *Id.*

17. Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 1392 (2010).

18. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (providing a general overview of implicit bias research and arguing that race implicit bias has a discriminatory effect on African Americans).

verges from a person's avowed or endorsed beliefs or principles."<sup>19</sup> When considering the relationships of groups, implicit biases may reflect beliefs about typical group attributes (that is, stereotypes) and affective responses to group members (that is, prejudice).<sup>20</sup> The Implicit Association Test ("IAT") measures implicit bias. Scores from the IAT "reveal implicit or unconscious bias" and "participants' implicit associations ... predict socially and organizationally significant behaviors, including employment, medical, and voting decisions."<sup>21</sup> As John Jost and his coauthors summarize, the IAT gauges differences in how easy or difficult it is for people to associate individual exemplars of various social categories (whites vs. blacks, rich vs. poor, gay vs. straight, and so on) with abstract words and categories that have evaluative implications (e.g., good vs. bad, pleasant vs. unpleasant). Thus, people who are faster to categorize the faces or names of whites when they are paired with positive (vs. negative) stimuli and, conversely, the faces or names of blacks when they are paired with negative (vs. positive) stimuli, are theorized to have internalized a stronger preference for whites relative to blacks, compared to people who respond more equivalently across different category-valence pairings (or in the opposite direction).<sup>22</sup>

Implicit bias is dangerous because "people rely on it when it is inappropriate to do so."<sup>23</sup> For instance, though the overwhelming majority of judges agree that it is inappropriate to be influenced by race, gender, or attractiveness of parties, "even the most egalitarian among us may harbor invidious mental associations."<sup>24</sup> As one research study showed, "most white adults are more likely to associate African Americans than white Americans with violence, and most Americans are more likely to associate women with family life than with professional careers."<sup>25</sup> This is important because such implicit biases impede opportunities for African Americans, women, and in this case, gender-nonconforming and LGBT individuals.

Implicit bias is significant because it has been shown to predict behavior in the real world, and has been shown to have real effects on peoples' lives. Professor Jerry Kang of UCLA Law School has written extensively on the role of implicit bias in the courts, and has provided significant tools for identifying and combating the effects of implicit bias. He explains that we have implicit social cognitions that guide our thinking about social categories and that some of these underlying cognitions include stereotypes (traits that we associate with a category) and attitudes (overall, evaluative feelings that are positive or negative).<sup>26</sup> There are various ways in which implicit bias has real world effects.<sup>27</sup> Implicit bias predicts:

- The rate of callback interviews;
- Awkward body language which could influence whether people feel they are being treated fairly or courteously;
- How we read the friendliness of facial expressions;

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19. *Id.*

20. Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1363 (2010).

21. See John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RESEARCH IN ORG. BEHAVIOR 39 (2009).

22. *Id.* at 45.

23. Chris Guthrie et al., *Blinking On The Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5 (2007); see also Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 539 (2008) ("Nearly 83% of heterosexuals have manifested implicit bias in favor of straight people over gays and lesbians.")

24. Guthrie et al., *supra* note 23, at 31.

25. See Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 974-75 (2006).

26. Jerry Kang, *Implicit Bias: A Primer for Courts* 1 (Aug. 2009), [http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit\\_3\\_kang.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf).

27. *Id.* at 4.

- More negative evaluations of ambiguous actions by an African American, which could influence decisionmaking in hard cases;
- More negative evaluations of women who are confident, aggressive, and/or ambitious in certain hiring conditions.

Moreover, the IAT reveals pervasive reaction time differences “in every country tested, in the direction of consistent with the general social hierarchies: German over Turk (in Germany), Japanese over Korean (for Japanese), white over black, men over women (on the stereotype of ‘career’ versus ‘family’), light-skinned over dark-skinned, youth over elderly, straight over gay, etc.”<sup>28</sup>

While several studies have been conducted concerning implicit bias based upon race and gender, I did not find any empirical research regarding implicit bias against gender-nonconforming persons nor of the experience of gender-nonconforming non-transgender employees in the workplace. The lack of data and research on the subject by no means implies that the issue is moot. Rather, real world experiences of bias towards gender nonconformers, as seen in sex stereotyping cases arising under Title VII of the Civil Rights Act of 1964, proves the contrary.<sup>29</sup>

## B. Explicit Bias

Employment discrimination cases involving sex stereotyping and gender-nonconforming plaintiffs provide valuable insight into how gender stereotyping presents discouraging obstacles to LGBT nonconformers. For example, in *Price Waterhouse v. Hopkins*,<sup>30</sup> Ann Hopkins was denied promotion in her accounting firm where women were severely underrepresented in the partnership. In Hopkins’ promotion review, one partner described her as “macho,” and another suggested that she “over-compensated for being a woman.” She was also told to “take a course at charm school.” The partner who informed Hopkins that she would not advance to partnership also told her she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” The Court found that some of the negative reaction to Hopkins’s personality was motivated by sex stereotypes. *Hopkins* highlights the point above: that gender nonconformity, while acutely related to LGBT inclusion, is also relevant to men and women generally, regardless of sexual orientation.

There are various cases discussing sex stereotyping in the context of LGBT persons. See e.g., *Love v. Motiva Enterprises*, 2008 U.S. Dist. LEXIS 69978, 30–31 (E.D. La. Sept. 16, 2008) (explaining that sex stereotyping claims “arise almost invariably in situations where the plaintiff is homosexual and is discriminated against as a result of his or her failure to meet gender stereotypes, and always in situations where the plaintiff exhibited characteristics that were not consistent with his or her biological sex.”); *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 580–83 (7th Cir. 1996) (recognizing Title VII same-sex sexual harassment claim for sexual stereotyping when plaintiff was harassed because he wore an earring; holding that a man who is harassed because “his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex”); and *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (reversing judgment against plaintiff because he proved he was harassed because of sex when his coworkers referred to him in female terms and ridiculed his allegedly female mannerisms).

28. *Id.* at 3.

29. See also *U People*, a documentary film of the making of Hanifah Walidah’s music video “Make a Move” during which black lesbians candidly discuss sexuality and diversity within the black lesbian community. One of the subjects discusses how, as a feminine black lesbian, she is not as concerned with workplace stereotypes or discrimination because she does not present as LGBT, unlike her more masculine-appearing black lesbian counterparts. LogoTV, *U People*, <http://www.logotv.com/video/u-people/1604443/playlist.jhtml> (last visited Aug. 15, 2012).

30. 490 U.S. 228, 231–33 (1989).

These cases show why it is important to foster a work environment that supports gender expression: legal professionals who do not satisfy the expectations of masculinity and femininity are at risk of discrimination, harassment, or discomfort when being themselves in the workplace. All of these risks negatively affect retention and advancement of LGBT lawyers and prevents some from joining legal organizations they fear will not accept their gender expression. In the alternative, where gender-nonconforming legal professionals choose to “pass” and thus present their gender in ways that conform to their legal environment and to social gender norms, then the costs of remaining invisible become high. Passing can lead to “higher absenteeism or job turnover and the energies involved in passing may reduce productivity or increase stress. Moreover, the conscious effort involved in passing also means avoiding potentially awkward workplace social interactions where sexual orientation may be exposed or made express.”<sup>31</sup>

After considering the risks associated with implicit and explicit bias associated with gender-nonconforming persons, it is important to consider methods of reducing the risks in the legal profession.

### III. Addressing Gender Nonconformity Bias

Gender presentation is calculated and nonrandom.<sup>32</sup> This expression of a belief in the freedom of self should be recognized and championed by the legal profession and provides further support for why the legal profession should not stereotype, stigmatize, or discriminate against gender nonconformists. One of the goals of the profession should be to make the workplace inclusive so that gender identity and expression is not an issue.<sup>33</sup> Gay and lesbian workers should feel free to be out without having to cover aspects of their characters and personalities that are perceived as “too gay.”<sup>34</sup> Certain steps can be taken to foster a more inclusive environment for gender-nonconforming legal professionals.

1. **Deliberate more, rely on intuition less.** While intuition has led many of us to make very beneficial decisions and we have come to rely upon our instincts in some aspects of our lives, we can combat the effects of implicit bias by deliberating more and relying on intuition less. As lawyers, we do this on a daily basis when we approach a legal problem. We may have an initial answer, yet we engage in a series of checks and balances to confirm or disprove our initial answer, such as *Shepardizing* case law prior to submitting a motion or brief to the court. Similarly, senior attorneys often relay a legal concept to junior attorneys and task the junior attorney with finding case law, statutory, and secondary sources to confirm their conceptualization of the legal issues. The same deliberation can be employed to confront and dispel negative stereotypes, prejudices, and implicit and explicit biases associated with gender-nonconforming legal professionals.
2. **Become aware of personally held implicit biases and work to negate those biases.** Legal organizations may consider incorporating the IAT into diversity training so that management and attorneys are aware of the implicit biases that permeate decisionmaking. Because implicit biases are malleable, knowledge of such biases may then be used as a tool to intentionally combat them.<sup>35</sup>

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31. Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141, 194–95 (2007).

32. Moore, *supra* note 4, at 33.

33. Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales From Title VII & An Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 203 (2009).

34. See Kenji Yoshino, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

35. Greenwald, *supra* note 18, at 963.



3. **Review and, if necessary, revise your grooming and/or dress code policies** to determine whether it advances gender norms in a way that incentivizes employees to pass as gender conformers.
4. **Train legal professionals to understand the presence and extent of their reliance on implicit biases, and to identify when such reliance is risky.** We can learn to interrupt implicitly biased reactions and thought processes as they occur, “thereby allowing deliberation to intervene and modify behavior, if not actually altering underlying prejudices or attitudes.”<sup>36</sup>

#### IV. Conclusion

As one scholar saliently points out, “knowledge of minority sexuality cannot be ignored once learned.” Once learned, some non-gays (and gays alike) become uncomfortable with public discussions or reminders of a person’s gay sexual orientation.<sup>37</sup> This discomfort can be lessened by increasing awareness of gender identity expression associated with sexual orientation and by elevating knowledge of bias surrounding gender nonconformity. Inclusion of gender-nonconforming LGBT attorneys will also be improved through concerted effort, both individually and institutionally.

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36. Guthrie et al., *supra* note 23, at 38.

37. Fajer, *supra* note 8, at 587 (discussing the common complaint of discomfort with “flaunting” homosexuality).



# IILP Review 2012:

## Class and Socioeconomic Diversity and Inclusion Issues in the Legal Profession

# Lawyers and the Class System in Britain

**Carol Madison Graham**

**Former International Secretary, Bar Council of England and Wales**

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*With more American law firms establishing or expanding their presence in the United Kingdom, it behooves American lawyers interested in diversity and inclusion to understand and appreciate differences between American views on diversity and those of our British colleagues. Americans have devoted little attention to class as a facet of diversity but in the UK, it is just as compelling an issue as gender or racial diversity. Madison Graham is an American who lives in the UK and has extensive experience working with British barristers; she uses that familiarity to introduce class as a facet of diversity to her fellow Americans.*

In the film *Sense and Sensibility*, Edward Ferrers, the eldest son of a wealthy woman tells the heroine, Elinor Dashwood, that his mother is keen for Edward to distinguish himself in the Army or as a “barrister.” Although the same conversation in Jane Austen’s text contains no such specificity, Emma Thompson’s script reflects the class reality of the time. “Gentlemen” such as Edward Ferrers did not work, but if they needed or wanted a profession, the Bar was a respectable option. The church was another one. Mr. Darcy in *Pride and Prejudice* is a clergyman in the book but never in the films, perhaps betraying the prejudices of modern day scriptwriters.

Like every other profession in the UK, the law has been intertwined with class, and class itself is a very complicated concept due to the layering of modern practices over historical practices with the added dimension of people wanting to decide their own class identity. There is class as “lifestyle and income” as we would understand it in the United States. Then there is class origin; thus, a Member of Parliament was once rebuked by his working-class father when he referred to himself as “middle class.” Then there is self-class identification that may be at odds with outside perceptions. In a documentary about class, a working-class Member of Parliament was taken aback when a jobless teenager living in public housing, who had been kicked out of school at sixteen for attacking a teacher, announced that she was middle class. It is one of those paradoxes the British are trying to work through, like members of the House of Lords who possess working-class accents calling themselves middle class because they cannot bear to think of themselves as upper class—they get documentaries too.

In English history some of the most upwardly mobile people were lawyers. These were often people of modest origin for whom the law was a stepping-stone to greater social and professional heights. Thomas Cromwell, a man of humble origin later elevated to the Earl of Pembroke by Henry VIII is an example. Another is Sir Thomas More (a member of Lincoln’s Inn) whose refusal to recognize Henry VIII’s marriage to Anne Boleyn as legitimate is depicted in “A Man for All Seasons.” As the patron saint for lawyers, one could argue that he has moved beyond class, but the point is that even in a period of great class stratification, the law combined with politics could lead to high office. As high office carried with it noble rank, the lawyer in the middle ages could move from humble origins—though not too humble—to the aristocracy despite individuals inheriting the class of their ancestors.

In the nineteenth century, class relationships and definitions became more complicated with the growth of what Americans would call the “middle class”—formerly referred to as the “middle classes” by the British. The reason for the plural is the bewildering diversity in profession, lifestyle, and income for a group of people who were, until the mid nineteenth century, relatively insignificant in numbers and wealth. To simplify a tremendously complicated issue, the two classes of reference were the “upper class” and “working (not lower) class.” They were considered to have their own traditional culture in terms of vocabulary, food, music, sports, dress, and habits. British costume dramas have made most of us familiar with the world of the upper class through the early twentieth century. But apart from their accents, the working class is more of a mystery. For those not in service (that is servants), the main feature of the working class was large-scale employment in a single key industry such as mining or factories. Interestingly, the working class retained their class title even when they became “unemployed” for generations because factories closed or industries died. Many British people use “working class” even for people on welfare because being working class is also about culture. Before I moved to Britain, I thought class snobbery was exclusively an upper class phenomenon. It isn’t. Former Deputy Prime Minister John Prescott (working-class origin) is typical in singling out the working class as having “values.” And while the working and upper classes had their issues with each other, the class they both despised was the middle class, which, as the newest class, did not have the track record in terms of class habits and origin.

The middle class was seen as an “in-between” rather than a real class: people who thought they were better than the working class without the history to give them that right. As far as the upper class was concerned the middle class had an inferior culture. But most importantly the middle class was seen as ambitious. Both the working and upper classes—who tended to stay in their classes and take pride in it—despised the idea that the middle was not satisfied with their condition. They were climbers! That is very much a traditional view but it is also a recent one. Today in 2012, people who might have spoken of themselves as upper class are now identifying themselves as middle class and former members of the working class are doing the same. But even when I first came to Britain sixteen years ago, the term “middle class” was still one of mainly disdain. They were snobs without right to be snobbish—mere social climbers. So I have seen the shift to greater middle class identification in my time here. The downside? Now when the Deputy Prime Minister—who is a millionaire—criticizes privilege, he targets the “middle class.”

In *A Tale of Two Cities*, Charles Dickens (who was a junior clerk in a law firm before turning to journalism) chooses a lawyer to make a point about the ambitious middle class or perhaps about ambitious middle class lawyers through his characterization of Sydney Carton’s boss. His name is “Stryver.” Why is Stryver a barrister and not a solicitor? Well for one thing Dickens needs him to be prominent in court, and in the UK, the courtroom is traditionally the barrister’s domain. But Dickens is perhaps making a class point in that for most of their history solicitors have remained solicitors whereas the “striving” barrister might become a judge.

Every society has professions that are considered more prestigious than others. Britain, with its historical class system, has this in spades. The medical profession is a great example. In Britain surgeons do not use the title “Dr.,” because in the middle ages they received their training through apprenticeships rather than at university. So a male surgeon is “Mr.,” which perhaps carries a reverse snobbery, because today surgeons are more prestigious than doctors.

Similarly, there is no doubt that throughout most of its history the Bar was more prestigious than the solicitor profession and carried with it the hallmarks of the upper class. First of all, as a profession the Bar is older, and in Britain age is everything—hence the prejudice towards the middle class. Solicitors, on the other hand, are a combination of two legal professions: solicitors

who dealt with landed estates and attorneys who did court work. Whereas the Inns of Court where barristers are literally called to the bar originated in the middle ages, the Law Society, which admits and regulates solicitors, is much younger dating from the early nineteenth century. Then, of course, barristers were the preferred candidates for judgeships, because they were courtroom lawyers and legal experts. Solicitors now also have high court rights, but centuries of judges appointed from the ranks of barristers made that progression very difficult. Finally, like a powerful lord, the Bar has its landed estates in the form of the splendid Inns of Court. These were given to the barristers by Henry VIII when he confiscated religious buildings including those that belonged to the Templars, thus the names of two Inns of Court—the Inner Temple and the Middle Temple. Finally, there is an anomaly regarding how barristers are paid that reminds me of traditional upper class values; that is, being wealthy without having to think about money. Barristers are not paid by their clients but by the solicitors they work with who pass along the fee.

The solicitor profession is also a fascinating one. Today, it is obviously as respectable as the Bar in class terms—the Law Society is responsible for that. There are ten times the number of solicitors today as barristers, so it is fair guess that in the past they were also more numerous. Solicitors dealt with clients on many more levels than barristers and handled their client's money as well, which gave unscrupulous members of a larger profession plenty of opportunities to defraud clients. Without sufficient regulation the profession was sullied by “pettifoggers and vipers”—lawyers with underhand practices. The Law Society was founded in 1825 to hold members to a standard. With the demise of the powerful landed aristocracy after the wars and the rise of the professional middle class, solicitors gained in prestige and in wealth. Barristers share overheads but not fees, whereas solicitors are in partnerships. The wealthiest lawyers in the UK are solicitors, and because solicitors in large and small firms have the same structure, class differences in the profession are mainly seen in lifestyle choice. The barrister profession has, however, had to work harder in accommodating class differences within the profession.

For example, barristers are meant to be independent practitioners, but the government employs some barristers. Despite their very prominent and responsible positions, “employed barristers” as they are known were not, until recently, as prestigious as self-employed barristers. They are also a minority in the bar—only one-fifth of barristers are employed barristers. This has impacted diversity within the profession. Barristers only earn if they are working, so any absence means they



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are not paid—including, of course, women on maternity leave. The employed bar therefore offers a certain amount of financial security. A recent survey reveals 46.2% of women barristers are in the employed bar while 31.5% are sole practitioners. The bar has worked hard to reduce the snobbery toward the employed bar over the years beginning with bringing some of their most powerful members into the running of the Inns by making them “benchers.” More important for changing the class bias of the profession has been the issue of payment to “pupils” or trainee barristers during their periods of apprenticeship known as a pupillage. In the past, pupils were unpaid. This effectively barred anyone without an independent income from joining. Eventually, some chambers began paying, while others did not. Although it has been a contentious issue within the bar, all pupillages are now paid, and the Bar Standards Board has set a minimum wage. So slowly, inexorably over the years, the class distinction between solicitors and barristers have become flatter, and the professions themselves have sought to smooth out class differences in keeping with wider trends in British society towards equality.

However, one of the odd things about Britain is the maintenance of class customs as traditional even when they are in opposition to current reality. An example of this is the Queens Speech in which she lays out the policy of “her government.” The speech takes place in the House of Lords. So the lords, who are the less powerful house of parliament, are sitting grandly in their robes and crowns, while the Prime Minister and cabinet, whose policies are being read out, are standing behind a barrier listening in. Similarly, although solicitors and barristers are now equal in class terms, there are still those little traditions that betray the former situation!

When I was international secretary for the Bar, I once set up a lunch meeting with Philip, one of the younger barristers with whom I worked and a senior solicitor who happened to be president of a European law association. Philip suggested that we all meet at an Inn of Court. Since he and I used to have our meetings at lunch there, I made reservations for three and informed the solicitor of the arrangement. But when I informed Philip, he told me that solicitors were not allowed to eat there. (He had meant meet outside the inn and then go to a restaurant.) “But I have taken all kinds of foreign lawyers there for lunch!” I protested. “They’re foreigners!” he explained with a laugh. “Don’t worry,” he continued calmly, “he knows he can’t eat there so he won’t expect it.” And sure enough Philip was right. I changed the reservation to a nearby restaurant and the only one who found it odd was me.



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## About the Authors



### Nicole Nehama Auerbach

Nicole Nehama Auerbach is one of the founding members of Valorem Law Group ([www.valoremllaw.com](http://www.valoremllaw.com)), a business litigation firm formed in January 2008 with a focus on providing alternative billing arrangements to clients. Nicole handles commercial litigation matters in federal and state courts around the country. She also represents clients in arbitrations, mediations, appellate work and provides “second opinions” to clients facing key strategic issues in lawsuits. Prior to forming Valorem, she practiced for nearly 15 years in the Chicago office of Katten Muchin Rosenman, where she was a partner in the litigation department.

In 2010, Nicole was named “One of the Top 50 Women Lawyers in Illinois” by Illinois SuperLawyers magazine. Nicole was named one of “Forty Illinois Attorneys Under 40 to Watch” by the Law Bulletin Publishing Company in 2005. While skilled in all facets of litigation, she believes two things set her apart —her creativity, which she routinely brings to bear to resolve cases favorably, and her strategic skills. Nicole believes that there is no dispute that cannot be successfully resolved as long as the parties are open to creative resolution rather than the conventional “way-we-have-always-done-it-before” type of approach.

In addition to her substantive work, she is committed to working on issues that impact women attorneys. In 2004, Nicole co-founded Katten’s Women’s Leadership Forum and in 2008, founded the Coalition of Women’s Initiatives in Law ([www.thewomenscoalition.com](http://www.thewomenscoalition.com)), an organization made up of member firms and in-house counsel who work collectively to facilitate the advancement of women lawyers. She is a former President of the Coalition, the only organization of its type in the country, and currently sits on its Board. Nicole is also a member of the Advisory Board of the Institute for Inclusion in the Legal Profession and a fellow-elect of the College of Law Practice Management. Nicole was one of the featured contributors to the American Bar Association’s publication: *The Road to Independence: 101 Women’s Journeys to Starting Their Own Law Firms*. In addition, she devotes time to pro bono work, helping unaccompanied children seeking asylum navigate the U.S. immigrant justice system.



### **Lawrene R. Baca**

Lawrence Baca, a Pawnee Indian, is a former Deputy Director of the Office of Tribal Justice, United States Department of Justice. During his 32 years with the Department he also served as a Senior Trial Attorney in the Civil Rights Division.

A 1976 graduate of Harvard Law School, Baca was one of the first American Indians to graduate from Harvard. He was the first American Indian ever hired through the Department of Justice's Honor Law Program. In 1973, Baca received his Bachelor of Arts Degree in "American Indian History and Culture" from the University of California, Santa Barbara, where he also taught two courses on Indian issues during his senior year. In 1974, while attending law school, he was a Harvard Teaching Fellow at Harvard University and, in 1976, he taught a course entitled "Perspectives On The Historical Development of American Indian Policy and Law" at the Harvard University Extension School. He was an Adjunct Professorial Lecturer teaching Federal Indian Law at American University Washington College of Law in 2004 and 2005. He initiated the course in Federal Indian Law at Howard University School of Law in 2007.

Mr. Baca is a former president of the Federal Bar Association and has also served as Chairman of the ABA Commission on Racial and Ethnic Diversity in the Profession. He has also been elected President of the National Native American Bar Association three times.



### **Kevin Brown**

Professor Brown is the Richard S Melvin Professor of Law at Indiana University Maurer School of Law and the Emeritus Director of the Hudson & Holland Scholars Program at Indiana University-Bloomington. Brown has been a member of the faculty of the Law School since 1987. He was also the Director of the Hudson & Holland Scholars Program from August 2004 to August 2008. This program recruits the high achieving underrepresented minority students to the undergraduate student body on the Bloomington campus and produces half of the black and Latino grads from campus..

Professor Brown is a 1978 graduate from the Kelley School of Business at Indiana University-Bloomington and a 1982 graduate from Yale Law School in 1982. He has been a visiting professor at the University of Texas School of Law, the University of Alabama School of Law and the University of San Diego School of Law. Professor Brown has been affiliated with universities on four different continents including in India, South Africa, Kazakhstan; and Nicaragua.

Professor Brown's research interest for the past 26 years is primarily in the area of race, law and education. Brown has published over fifty articles or comments on issues such as school desegregation, affirmative action, African-American Immersion Schools, and increasing school choice. In 2005, Carolina Academic Press published his book, *Race,*

Law and Education in the Post Desegregation Era. His current book project is entitled *Because of our Success: The Ethnic Cleansing of Ascendant Blacks from the Campuses of Selective Higher Education Institutions*. Brown has one of the original participants of both Critical Race Theory Workshops and the People of Color Conference.

Brown is also the founder of Indiana University Summer in Ghana Program. This program has sent over 150 students on a four-week journey through the Republic of Ghana. He is also the Co-President of the Founding Committee of the Dubois Academy, an effort to create an elite international boarding school in Ghana chartered by the State of Indiana for Indiana youth.



### Juan Cartagena

Juan Cartagena is a constitutional and civil rights attorney who is the President & General Counsel of LatinoJustice PRLDEF, one of the nation's leading civil rights public interest legal organizations representing Latinas and Latinos throughout the Eastern seaboard. LatinoJustice PRLDEF (formerly the Puerto Rican Legal Defense & Education Fund), established in 1972, has won landmark civil rights cases in education, housing, voting, migrant, immigrant, employment and other civil rights and has worked to increase the number of Latino lawyers in the U.S. Previously, Mr. Cartagena served as General Counsel and Vice President for Advocacy at the Community Service Society. A graduate of Dartmouth College and Columbia University School of Law, Mr. Cartagena was also a Municipal Court Judge in Hoboken, NJ and currently lectures on constitutional and civil rights issues at Rutgers University in New Brunswick.

A writer of numerous articles on constitutional and civil rights laws, Mr. Cartagena is particularly recognized for his work on the political representation of poor and marginalized communities – especially Puerto Rican and Latino communities. His constitutional law and voting rights litigation has taken him to courts in New York, New Jersey, Chicago, Philadelphia, Massachusetts and New Hampshire.

Mr. Cartagena also has experience in litigating cases on behalf of African American and Latino communities in the areas of employment rights, language rights, public education financing, environmental law, housing and access to public hospitals. At CSS he also directed its Mass Imprisonment/Reentry Initiative which focused on the effects these policies have on poor and minority communities. His most recent article in this regard ("Lost Votes, Lost Bodies, Lost Jobs: The Effects of Mass Incarceration on Latino Civic Engagement") is in *Behind Bars: Latinos/as and Prison in the United States* (Obeler, Suzanne, Ed., , Palgrave Macmillan, in press).

Mr. Cartagena lives with his family in Jersey City where he was born and raised. He is active in various community activities including cultural activities that highlight the diversity of Jersey City's neighborhoods.



### **Elizabeth Chambliss**

Elizabeth Chambliss is Professor of Law at New York Law School. She received her J.D. and Ph.D. in Sociology from the University of Wisconsin, where she also served as the Assistant Director of the Institute for Legal Studies. Before joining the faculty at New York Law School, she was the Research Director for the Program on the Legal Profession at Harvard Law School.

Professor Chambliss' research focuses on the organization and regulation of professional firms and the effects of globalization on the U.S. legal services market. Her most recent project focuses on the future of U.S. legal education, and the emergence of new organizational models for law schools in the U.S. and abroad. Professor Chambliss was one of the principal organizers of Future Ed, a year-long contest of ideas for innovation in legal education, co-hosted by New York Law School and Harvard Law School.

Before working at Harvard, Professor Chambliss taught law at the University of Texas and the University of Denver. She was attracted to New York Law School because of the law school's commitment to innovative teaching and research on the profession and the strength of its Center for Professional Values and Practice.

### **Carol Madison Graham**



Carol Madison Graham holds advanced degrees from Georgetown University in Middle East History and International Relations and began a career in international policy and educational exchange as a US diplomat. She moved to London in 1995 and worked for the Bar of England and Wales before becoming the first American, the first woman and the first member of an ethnic minority to be Executive Director of the US UK Fulbright Commission (2002-6). During that time she founded the UK Scholarship Network for heads of UK based scholarship organizations and was heavily involved in initiatives to increase diversity of institutions and students.

Carol has spoken at international conferences on a variety of educational, and cultural topics including widening access to programs, diversity and acculturation. She has spoken before the cultural committee of the European Parliament and recently at a conference for commonwealth parliamentarians held at the Scottish Parliament. She is a regular contributor of articles on study abroad and life in the UK. Her book on Coping with Anti Americanism was published in 2011 and has received outstanding reviews by students and study abroad professionals. The book helps US students to understand perspectives on the United States and positively engage with host cultures. In addition to writing and speaking Carol is currently consulting for a US University in London.

She holds several volunteer positions notably as a board member of the Marshall Scholarships, the Carnegie UK Trust and the International House Trust in London.



## Marcey Grigsby

Marcey Grigsby is the faculty publisher of the *New York Law School Law Review*, the scholarly journal of New York Law School, and teaches an academic writing course titled Legal Scholarship.

She also directs the Law Review Diversity research project, which examines gender and minority diversity among law review membership and leadership at ABA law schools nationwide.

She previously practiced corporate and securities law at Debevoise & Plimpton LLP in New York City, where she represented domestic and international companies in securities transactions and advised clients on securities law compliance, corporate governance, general corporate law, and mergers and acquisitions. She also advised non-profit organizations on business transactions and governance and regulatory matters. Professor Grigsby clerked for the Honorable Ronald Lee Gilman on the U.S. Court of Appeals for the Sixth Circuit in Memphis, TN.

Prior to entering law school, Professor Grigsby worked in interactive marketing and advertising in New York City and Warsaw, Poland.

She received her J.D., *summa cum laude*, from New York Law School in 2006. While in law school, she was editor-in-chief of the *New York Law School Law Review* and was a John Marshall Harlan scholar. In 2006, she received the Alfred L. Rose Award for Excellence, the Trustees' Prize for the Highest Average, Law Review Award for Best Note, and the Woodrow Wilson Award in Constitutional Law. She received her B.A., *summa cum laude* and Phi Beta Kappa, from Ohio Wesleyan University in 1995.

Professor Grigsby is a member of the board of directors of Brooklyn Jubilee, a non-profit organization that seeks to cultivate healthy neighborhoods in Brooklyn, New York, by creating programs for social and economic justice and providing legal assistance and education to low-income Brooklyn residents.





## E. Christopher Johnson

E. Christopher Johnson, Jr. attributes his accomplishments to a strong Christian faith, instilled in him by his parents, together with the spirit of community service consistent with Jesus' words "to whom much was given, of him much will be required." He credits his two beautiful wives, Sheryl, whose life was claimed by breast cancer in 2000, and his current wife Rhonda, who now graces his heart, as the foundations of his life. In addition, his daughter Erin, an attorney in DC, and son, Chip an advertising media buyer in New York, have and continue to make him a very proud father.

Following his graduation from the United States Military Academy at West Point in 1973, Johnson served as an Army officer in Alaska and New Jersey and was awarded the Army Commendation Medal for meritorious service. After his honorable discharge from the Army in 1978, he attended New York Law School from which he graduated with Honors in 1981.

His legal career started as an associate at a Wall Street law firm. In 1985, he left the practice of law to become a headhunter. It was with his last client, General Motors, that he made his last placement—himself—as an attorney in 1988. Accepting the role as GM's attorney handling computer law matters, he rose through the ranks as that fledgling practice flourished, to Practice Area Manager, Assistant General Counsel and ultimately, Vice President and General Counsel of GM North America, a position he held for the last seven years in a twenty year GM Career which ended with his retirement in 2008.

While at GM, Johnson championed a number of initiatives in the access to justice, access to law school and diversity arenas. His commitment in those areas led him to Thomas M. Cooley Law School, which shares this commitment, and where he currently is a law professor and director/founder of the LL.M. program in Corporate Law and Finance. He is actively involved in Cooley's high school and college pipeline programs, and its mission of access to law school. Following a 2011 mission trip to Mumbai, India, where Johnson was exposed to the ravages and enormity of human trafficking and slavery, he felt called to join the anti-human trafficking movement and leads Cooley's efforts in that area.

His service over the years mirrors all of these passions and has included service in the American Bar Association, National Bar Association, State Bar of Michigan and various local and special purpose bar associations. Of note, he currently serves in the ABA House of Delegates, as a trustee of the Michigan Bar Foundation and co-chairs the Detroit Metropolitan Bar Association Foundation. He has also chaired both ABA Africa and the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline, co-chaired the Legacy Justice Campaign for Detroit Legal Aid and Defender Association and served as a member of the Council on Legal Education Opportunity.

In the human trafficking arena, he currently serves on the Board of the Michigan Abolitionist Project, co-chair of the Community Committee of the Michigan Human Trafficking Task Force, a member of the Michigan Rescue and Restore Coalition and works with a number of governmental and non-governmental entities on this global crisis, including the U.S. Department of State's Office to Monitor and Combat Trafficking in Persons, the National Association of Attorneys General and the American Bar Association. In February of 2012, he led a statewide human trafficking awareness event which was simulcast to Cooley's four Michigan campuses and in June of 2012 published the first human trafficking article in the Michigan Bar Journal entitled "Michigan Lawyers in the Fight against Slavery" which can be found at <http://www.michbar.org/journal/pdf/pdf4article2039.pdf>.

He is the recipient of many awards for this service including the ABA Spirit of Excellence Corporate Award, the National Bar Association Clyde Bailey Award for Corporate Leadership, the State Bar of Michigan Michael Franck and Champion of Justice Awards, the Detroit Metropolitan Bar Association Champion of Justice Award and the D. Augustus Straker Bar Association Trailblazer Award. He was inducted into the National Black Law Students Association Hall of Fame in 2008.

He is also active in the community, serving as an elder and general counsel at NorthRidge Church in Plymouth, Michigan, chair of City Mission, a Detroit Christian elementary school and K-12 tutoring/mentoring program, a member of the Board of the Great Lakes Division of the American Cancer Society, immediate past chair of the Michigan United Negro College Fund Leadership Council, and served as co-chair of the Detroit 2011 West Point Leadership and Ethics Conference and will also chair this year's conference.

### **Takeia R. Johnson**



Takeia R. Johnson is a Staff Attorney for the Legal Research Division of the Illinois Appellate Court, First District. She previously litigated in the areas of labor and employment law as well as tort and insurance defense. Takeia also served as judicial law clerk to the Honorable Patricia Banks, Presiding Judge of the Elder Law and Miscellaneous Remedies Division of the Cook County Circuit Court. She has published and presented on topics related to diversity and inclusion in the legal profession, being LGBTQ in the workplace, the intersection of race, gender, and sexual orientation, as well as the state of employment law in the Seventh Circuit.

Takeia is passionate about servant leadership. She spearheaded the founding of a non-profit organization in Los Angeles which provides scholarships and mentoring to college-bound young women of African descent. She is a proud member of Delta Sigma Theta Sorority, Inc. Takeia also serves as a member of the Board of Directors for Affinity Community Services, a Chicago-based social justice organization that

works with and on behalf of Black LGBTQ communities, queer youth, and allies to identify emergent needs, create safe spaces, develop leaders, and bridge communities through collective analysis and action for social justice, freedom, and human rights. In addition to serving as a Board Member, Takeia serves on Affinity's Building Bridges Advisory Council, which is developing and preparing to distribute a survey for Black Americans and immigrants to gauge their beliefs, attitudes, and knowledge about the other, in an effort to strengthen relationships and foster collective action among these groups. Takeia is also researching the impact of immigration policy on same-sex families of color for Affinity Community Services.

Takeia received her Juris Doctor from DePaul University College of Law and also earned a Certificate in Public Interest from DePaul. She received her Bachelor of Arts degrees in Political Science and English, with Honors in English Language and Literature, from the University of Southern California.



### Jerry Kang

Jerry Kang is Professor of Law at UCLA School of Law. He is also Professor of Asian American Studies (by courtesy) at UCLA, and the inaugural Korea Times — Hankook Ilbo Chair in Korean American Studies.

Professor Jerry Kang's teaching and research interests include civil procedure, race, and communications. On race, he has focused on the nexus between implicit bias and the law, with the goal of advancing a "behavioral realism" that imports new scientific findings from the mind sciences into legal discourse and policymaking. He is also an expert on Asian American communities, and has written about hate crimes, affirmative action, the Japanese American internment, and its lessons for the "War on Terror." He is a co-author of *Race, Rights, and Reparation: The Law and the Japanese American Internment* (Aspen 2001).

On communications, Professor Kang has published on the topics of privacy, pervasive computing, mass media policy, and cyber-race (the techno-social construction of race in cyberspace). He is also the author of *Communications Law & Policy: Cases and Materials* (3rd edition Foundation 2009), a leading casebook in the field.

During law school, Professor Kang was a supervising editor of the Harvard Law Review and Special Assistant to Harvard University's Advisory Committee on Free Speech. After graduation, he clerked for Judge William A. Norris of the Ninth Circuit Court of Appeals, then worked at the National Telecommunications and Information Administration on cyberspace policy.

He joined UCLA in Fall 1995 and has been recognized for his teaching by being elected Professor of the Year in 1998; receiving the law school's Rutter Award for Excellence in Teaching in 2007; and being chosen for

the highest university-wide distinction, the University Distinguished Teaching Award (The Eby Award for the Art of Teaching) in 2010. At UCLA, he was founding co-Director of the Concentration for Critical Race Studies, the first program of its kind in American legal education. He is also founding co-Director of PULSE: Program on Understanding Law, Science, and Evidence. During 2003-05, Prof. Kang was Visiting Professor at both Harvard Law School and Georgetown Law Center.

Prof. Kang is a member of the American Law Institute, has chaired the American Association of Law School's Section on Defamation and Privacy, has served on the Board of Directors of the Electronic Privacy Information Center, and has received numerous awards including the World Technology Award for Law and the Vice President's "Hammer Award" for Reinventing Government.



### **William C. Kidder**

William C. Kidder is the Assistant Executive Vice Chancellor (i.e., Assistant Provost) at UC Riverside, which one of America's most racially diverse research universities. Mr. Kidder has authored a number of articles on higher education and affirmative action, particularly in the area of legal education. His research was cited in a dozen or so briefs in both the 2003 *Grutter v. Bollinger* case and the 2012 *Fisher v. University of Texas at Austin* cases. Mr. Kidder's latest article, "Misshaping the River: Proposition 209 and Lessons for the Fisher Case" is forthcoming in the *Journal of College and University Law* and his companion social science paper is forthcoming through the Civil Rights Project at UCLA. Mr. Kidder earned his J.D. and B.A. degrees at UC Berkeley.



### **Audrey J. Lee**

Audrey J. Lee is the Principal of Perspectiva LLC. As a negotiation and conflict management consultant, Audrey works with clients to strengthen their capacity to manage conflict and key relationships more effectively.

Audrey has extensive experience working with clients to develop their negotiation and communication skills. Her clients include The Cambridge Group, Jenner & Block LLP, the Illinois Supreme Court Commission on Professionalism, Katten Muchin Rosenman LLP, Exponent Failure Analysis Associates, Winston & Strawn LLP, and the Office of the Illinois Attorney General. As a consultant for the Commission on Professionalism of the Illinois Supreme Court, Audrey designed and facilitated interactive CLE courses in diversity, communication skills, and professionalism used by the Commission as best practices courses. She has also worked with clients to equip course presenters with the skills necessary to facilitate interactive courses and has taught several Facilitation Workshops using the Train-the-Trainer approach. In the diversity context, Audrey is partnering with the Institute for

Inclusion in the Legal Profession and the Harvard Negotiation and Mediation Clinical Program on the first coordinated study of law firm communication practices regarding diversity issues. Audrey is also a certified mediator and experienced facilitator.

In the academic realm, Audrey is an instructor for the Harvard Negotiation Institute and a Lecturer in the Department of Conflict Resolution at UMass Boston where she teaches a graduate course in Negotiation. She has also taught Negotiation as an Adjunct Professor at Northwestern University School of Law and DePaul University College of Law.

Prior to her consulting work, Audrey practiced law as an intellectual property and litigation attorney at Winston & Strawn in Chicago and Davis Polk & Wardwell in New York. Outside of her consulting practice, Audrey is active in community and professional associations. She is Past President of the Association for Conflict Resolution Chicago Chapter, founding Co-Chair of the Harvard Law School Women's Alliance of Chicago, and an amateur violist. Audrey is a graduate of Harvard College and Harvard Law School.

Audrey is based in Boston and can be reached at [audrey.lee@perspectivallc.com](mailto:audrey.lee@perspectivallc.com).



### **Arthur Leonard**

When Arthur Leonard first came to New York Law School in 1982, only one state banned discrimination based on sexual orientation, gay sex was illegal in half the country, and there were only a handful of lawyers actively litigating sexual orientation discrimination cases.

Today, he reports proudly, the situation has radically changed. "The field has expanded dramatically—the issue of sexual orientation discrimination is being litigated all over," says Professor Leonard, who has been instrumental in chronicling the legal aspects of the lesbian and gay community with his publication of the widely respected Lesbian/Gay Law Notes, which is available on the New York Law School Justice Action Center website. The only publication of its kind in the country, it is extensively cited in law review articles and books as a key source.

Using law to help win equality has been a guiding passion of Professor Leonard's since he was a 10-year-old who decided that Abraham Lincoln was his ideal. "Here was an example of someone who taught himself law, became a star attorney, and helped people. To me, he was the perfect lawyer as hero."

At Cornell, Professor Leonard majored in labor relations and was editor of the Industrial & Labor Relations Forum. He was also a student composer and bass player, but decided to attend Harvard Law School, graduating in 1977. After five years in a New York law firm, he decided to enter academic life.



“Teaching has given me an opportunity to help shape the law,” says Professor Leonard, who in 1985 wrote an influential law review article on AIDS discrimination that helped form the nation’s legal response to the AIDS epidemic. “I found I could play a more constructive role as a legal educator than as a practitioner.”

Over the past 30 years, Professor Leonard has written numerous articles on employment law, AIDS law, and lesbian and gay law. A frequent national spokesperson on sexual orientation law, and an expert on the rapidly emerging area of gay family law, he is a contributing writer for *Gay City News* (formerly *LGNY*), New York’s weekly lesbian and gay newspaper, and has written for several other lesbian and gay newspapers in New York City. He also blogs on LGBT and AIDS legal issues.

Professor Leonard has held a variety of influential and activist positions in civic and legal organizations, including trustee of Lambda Legal, trustee of the Center for Lesbian and Gay Studies at the City University of New York, chair of the Section on Gay and Lesbian Legal Issues of the Association of American Law Schools, and chair of the Sex and Law Committee of the Association of the Bar of the City of New York. He is chair of the Human Resources Committee and a trustee of the Jewish Board of Family and Children’s Services of New York.

He has testified on the New York City gay rights bill, organized forums that helped change rules on domestic partnership benefits, and helped produce oft-cited studies of the court system and legal profession that demonstrated the need for equality of opportunity and treatment for minorities.

At NYLS, he advises the LGBT student group and has been an effective advocate for change on lesbian and gay issues. In 2000, Professor Leonard was honored by the Law School at a symposium commemorating the 20th anniversary of the now-celebrated *Lesbian/Gay Law Notes*, which had begun as a typed, one-page sheet that he sent out to a handful of colleagues. In 2010, the Law School and the LGBT Law Association Foundation honored him again on the publication’s 30th anniversary.

Professor Leonard received the prestigious 2005 Dan Bradley Lifetime Achievement Award from the National Lesbian and Gay Law Association in recognition of his significant contributions to the advance of LGBT rights under the law.





### **Yara Lorenzo**

Yara Lorenzo is a law clerk to a United States Circuit Court Judge. Prior to that, she served as a law clerk to a United States District Court Judge. She received her juris doctor with honors from St. Thomas University's School of Law. While at St. Thomas she served as the Editor-in-Chief of the Intercultural Law Review. Before attending law school, Ms. Lorenzo served as a Legislative Assistant to Congresswoman Ileana Ros-Lehtinen in Washington D.C. handling half of the Congresswoman's legislative portfolio. Ms. Lorenzo received her undergraduate degree in political science and ethnic studies from Brown University.



### **John Nussbaumer**

Dean Nussbaumer is a professor at Thomas M. Cooley Law School and the Associate Dean in charge of Cooley's Auburn Hills campus. He is a 1976 honors graduate of the University of Michigan Law School.

Before joining the Thomas Cooley faculty in 1984, he served as a law clerk to former Michigan Supreme Court Chief Justice Mary S. Coleman, and as an assistant public defender for the State Appellate Defender Office. While at the Appellate Defender Office, he successfully argued cases before the Michigan Court of Appeals, the Michigan Supreme Court, the Sixth Federal Circuit Court of Appeals, and the United States Supreme Court.

Since then he has served as the Reporter for the Michigan Criminal Jury Instruction Committee, Co-Reporter for the Sixth Circuit Pattern Federal Criminal Jury Instruction Committee, Chair of the Oakland County Bar Association Diversity Committee, member of the American Bar Association Section of Legal Education Diversity Committee, and member of the ABA Council on Racial and Ethnic Diversity in the Educational Pipeline.

He currently serves as a gubernatorial appointee to and the chair of the Michigan Appellate Defender Commission, a Michigan Supreme Court appointee to the Michigan Criminal Procedure Rules Committee, Co-Chair of the State Bar of Michigan's Diversity and Inclusion Advisory Committee, Co-Chair of the Eastern District of Michigan Federal Bar Association Pro Bono Committee, member of the State Bar of Michigan Equal Access Initiative, member of the State Bar of Michigan ADR Diversity Task Force, member of the State Bar of Michigan Pro Bono Month Planning Committee, member of the Michigan Supreme Court's SOS Task Force on Self-Represented Litigants, member of the Oakland County Bar Association Inn of Court, member of the Michigan Campaign for Justice Public Defender Reform Initiative, an elected executive board member of the Federal Bar Association, and an elected board member of the Straker Bar Association.

He is a pro bono volunteer for Cooley Law School's Service-to-Soldiers and Senior Pro Bono Outreach programs, and helped then State Bar President Edward H. Pappas launch the first ever State Bar Professionalism Orientation program in May 2009 at Cooley's Auburn Hills campus.

He has written extensively on the subject of misuse and over-reliance on the LSAT in law school admissions and accreditation practices, including *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 St. John's Law Review 167 (Winter 2006), and *The Disturbing Correlation Between ABA Accreditation Review and Declining African-American Law School Enrollment*, 80 St. John's Law Review 991 (Summer 2006). His latest article, *The Door to Law School*, co-authored with Cooley Professor E. Christopher Johnson, Jr., was the lead article in the University of Massachusetts-Dartmouth Law Journal symposium issue on trends and issues in education and the law, 6 U. Mass. Roundtable Symp. L.J. 1 (2011).

He has presented his research findings on this subject at the National Bar Association's 2006 and 2007 National Conventions, the Congressional Black Caucus Foundation's 2007 Annual Legislative Conference, the American Constitution Society's 2007 National Press Club briefing, the 2009 Annual Meeting of the American Association of Law Schools, the 2009 St. John's University Ronald H. Brown Center for Civil Rights Symposium, the 2010 ABA Annual Meeting, and the 2010 National People of Color Legal Scholarship Conference. He has been quoted on this subject in the New York Times, USA Today, and Michigan Lawyers Weekly.

He has helped develop high school law-related education programs at Pontiac High School, helped launch the first ABA Council of Legal Education Opportunity College Prelaw Summer Institute in Michigan, helped launch the first Just the Beginning Foundation High School Summer Legal Institute in Michigan, and has spoken on law-related education programs at the State Bar of Michigan's 2010 and 2011 Bar Leadership Forums on Mackinac Island.

He is the recipient of the National Bar Association's 2007 Presidential Award, the ABA Council of Legal Education Opportunity 2008 Legacy Justice Academia Achievement Award, and the 2010 State Bar of Michigan Champion of Justice Award. He is one of five Cooley Law School recipient of a major State Bar of Michigan Award, following E. Christopher Johnson, Jr. (2009 Champion of Justice Award), Joan Vestrand (2008 Champion of Justice Award), and Nelson Miller (2005 John W. Cumiskey Pro Bono Award), and followed by Monica Nuckolls (2011 Champion of Justice Award).



### **Paula Pearlman**

Paula Pearlman is the Executive Director of the Disability Rights Legal Center, formerly Western Law Center for Disability Rights, a cross-disability civil rights organization. The DRLC is comprised of the Cancer Legal Resource Center, Civil Rights Litigation Program, Community Outreach Program, Education Advocacy Program, Inland Empire Program, Options Counseling and Lawyer Referral Service, Pro Bono Services and Children Benefits Access Project. Prior to her current position at the DRLC, she was the Director of Litigation and Deputy Director of Advocacy Programs. Ms. Pearlman is also an Associate Visiting Professor of Law at Loyola Law School, Los Angeles, teaching Disability Rights and Special Education law as well as litigation skills. She also teaches Special Education Law and Advocacy at Loyola Marymount University, Department of Education. Ms. Pearlman is also a litigator, with extensive experience in class action litigation in the areas of disability rights, sex discrimination and immigration law.



### **Gabriele Plickert**

Gabriele Plickert is a Research Social Scientist at the American Bar Foundation, where she leads the longitudinal and national representative *After the JD Study*. She is also the co-principal investigator of a *German-American Lawyer Study*. She received her Ph.D. in Sociology from the University of Toronto in 2008. While joining the ABF she was also a two-year research fellow at the Program on the Legal Profession at Harvard Law School, where she launched a cohort study of HLS graduates.

Her research interests include professional careers, the life course, mental health, the legal profession and the organization of work. A substantial component of Dr. Plickert's research seeks to investigate and map parallel and distinct pathways of professional careers nationally and internationally. Her worked work has been published in *Social Networks*, *Social Forces*, and the *International Journal of the Legal Profession*.

One current focus examines aspects of work and aspirations within organizations on trajectories of well-being. A second stream explores the consequences of work adversities and cultures on racial/ethnic and gender inequalities in legal and non-legal workplaces on career trajectories of young lawyers. Other current projects include comparative approaches of global practice and gender, and comparisons of legal practice and its compliance to ethical rules in cross-border work between U.S. and German lawyers.



### **E. Macey Russell**

E. Macey Russell, partner at Choate Hall & Stewart, represents financial institutions and corporations in litigation matters including disputes involving contracts, investments, securities and lending in state court, federal court and in arbitrations.

In 2007, the Governor appointed Mr. Russell to the Judicial Nominating Commission, which recommends judicial appointments at all levels throughout the Commonwealth. After serving as Vice Chairman in 2010, the Governor appointed Mr. Russell Chairman of the Commission beginning in 2011. In 2009, Massachusetts Lawyers Weekly named Mr. Russell a “Diversity Hero,” and Litigation Counsel of America named Mr. Russell to its Trial Lawyer Honorary Society composed of less than one-half of one percent of American lawyers. In 2011, the American Bar Foundation named him a Fellow, which is reserved for one third of one percent of attorneys in his jurisdiction. Also in 2011, the Boston Bar Association appointed Mr. Russell as Co-Chair of its Diversity and Inclusion Committee. The Burton Foundation and Library of Congress honored Mr. Russell with a 2011 Burton Award for excellence in legal writing for his co-authored article “Developing Great Minority Lawyers for the Next Generation.”

Since 1989, Mr. Russell has been a frequent advisor and contributor to Harvard University Law School’s Trial Advocacy Workshop. He has been appointed to serve as a member of both the Beth Israel Deaconess Medical Center Board of Overseers and the Suffolk University Board of Trustees. Mr. Russell also co-chairs the firm’s Diversity Committee and is a member of the firm’s Hiring Committee.

Mr. Russell has a BA from Trinity College and his JD from Suffolk University Law School.



### **Michael Schwartz**

Michael Schwartz, a deaf lawyer, is an associate professor of law and has been the director of the Disability Rights Clinic in the Office of Clinical Legal Education at the Syracuse University College of Law since August 2004. Schwartz received his Bachelor of Arts degree in English from Brandeis University and a Master of Arts degree in Theater Arts from Northwestern University. He then joined the National Theater of the Deaf and toured the United States as D’Artagnan in Dumas’s *The Three Musketeers*.

When his tour ended, Schwartz enrolled in New York University School of Law where he obtained his JD degree and joined the New York State Bar. His first legal position was a judicial clerkship in the chambers of Federal District Judge Vincent L. Broderick of the United States District Court for the Southern District of New York. After his clerkship, Schwartz joined the Manhattan District Attorney’s Office as an Assistant District Attorney in the Office’s Appeals Bureau and

served seven and one-half years. He then became a Trial Attorney in the Employment Litigation Section of the Civil Rights Division of the United States Department of Justice in Washington, D.C. Shortly thereafter he got married and relocated to New York City to practice law on his own for three years. During this time he was admitted to the Bars of the States of New Jersey and Connecticut.

Schwartz then joined the Civil Rights Bureau of the New York State Department of Law as an Assistant Attorney General and successfully litigated the Office's first Americans with Disabilities Act case, which established the right of a State Attorney General to bring an action under the ADA on behalf of the state's residents with disabilities. Schwartz then left the Department of Law, obtained his LL.M degree from Columbia University School of Law, and joined the faculty at the Rochester Institute of Technology in Rochester, New York for the next four years. Schwartz then joined the law faculty at Syracuse University in 2004 and received his Ph.D. degree in Education with a concentration in Disability Studies from Syracuse University in May 2006.

Michael Schwartz is a licensed pilot and certified scuba diver. He loves to read, swim, travel and play chess. He's married to Patricia Moloney, and they have a thirteen-year-old daughter, Brianna.



### **Patricia A. Shiu**

Patricia A. Shiu serves as the Director of the Office of Federal Contract Compliance Programs at the U.S. Department of Labor. She leads a staff of nearly 800 men and women around the country who are dedicated to protecting workers, promoting diversity and enforcing the law.

OFCCP was established in 1965 by presidential Executive Order 11246. Over the years, OFCCP's authority has been expanded by the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974. As amended, these three laws hold federal contractors and subcontractors to the fair and reasonable standard that they take affirmative action in employment and not discriminate on the basis of gender, race, color, religion, national origin, disability or status as a protected veteran.

Director Shiu also serves on the National Equal Pay Enforcement Task Force which has been charged by President Barack Obama with cracking down on violations of equal pay laws and fulfilling, once and for all, the promise of the 1963 Equal Pay Act. She also represents Secretary of Labor Hilda L. Solis on the federal Interagency Working Group of the White House Initiative on Asian Americans and Pacific Islanders.

Prior to joining the Obama Administration, Ms. Shiu served as Vice President for Programs at the Legal Aid Society-Employment Law Center in San Francisco. Ms. Shiu joined the Employment Law Center in 1983 as a staff attorney and spent 26 years representing workers in both



individual and class action cases focused on employment discrimination. Her cases addressed issues such as gender, race, sexual orientation, national origin, immigration, disability, domestic violence and harassment. She has also litigated wage and hour and reproductive health hazard cases.

As the Director of the Legal Aid Society's Work and Family Project, Ms. Shiu advocated for the passage of California's Family Rights Act, the Family and Medical Leave Act, and Paid Sick Leave. She also fought to expand educational access for vulnerable students under Title IX of the Civil Rights Act and disability laws.

Ms. Shiu began her legal career as an associate with Pillsbury, Madison & Sutro in San Francisco. She was the President of California Women Lawyers in 1987. In 1993, she was appointed to the Civil Rights Reviewing Authority for the Department of Education by Secretary Richard Riley. Ms. Shiu served as the Vice President of the National Employment Lawyers Association and was recognized in 2009 with the Joe Morozumi Lifetime Achievement Award. She is the 2002 recipient of the Abby J. Leibman Pursuit of Justice Award, and the Pacific Asian American Women Bay Area Coalition's "Woman Warrior Award." Ms. Shiu is a graduate of the University of California, Berkeley and the University of San Francisco School of Law.



### **Mona Mehta Stone**

Mona Stone is Of Counsel at Greenberg Traurig, where she helps individuals, small businesses, and multibillion-dollar companies resourcefully prevent and resolve commercial disputes. Serving as corporate in-house counsel early in her career exposed Mona to a vast array of business legal issues. Drawing on that experience, her extensive litigation and ADR skills have resulted in the efficient resolution of millions of dollars in claims. Mona's practice focuses on Litigation and Labor and Employment matters, and she is an accomplished author and speaker, including client training seminars. Mona is licensed in Illinois and Arizona and earned her J.D. from Tulane University School of Law in 1997.



### **Julie Suk**

Julie Suk is a leading scholar of comparative equality law. Her research has developed a transnational perspective on the theory and practice of antidiscrimination law. Her articles compare European and American approaches to a broad range of problems, including the stakes of criminal, civil, and administrative enforcement of antidiscrimination norms, the state's role in mitigating work-family conflict, the law of Holocaust denial and hate speech, constitutional limits on race-consciousness and affirmative action, and the rise of gender quotas in Europe. Her work has appeared in *Stanford Law Review*, *Columbia Law Review*, *American Journal of Comparative Law*, and other venues,



including European publications. She has also commented in the media, including the New York Times, on transatlantic legal comparisons. Last year, she chaired the Association of American Law Schools' (AALS) Section on Employment Discrimination, and is currently the Chair of the AALS Comparative Law section. She was a Jean Monnet fellow at the European University Institute in Florence and a Law and Public Affairs fellow at Princeton University. She has been a visiting professor at the University of Chicago and UCLA law schools. Before entering law teaching, she clerked for Harry T. Edwards on the U.S. Court of Appeals for the D.C. Circuit. She obtained her A.B. summa cum laude from Harvard in English and French literature, a J.D. from Yale Law School, and a D.Phil. in Politics from Oxford University, where she was a Marshall Scholar.



### Renee Turner

Renee Turner, a recent graduate of Indiana University Maurer School of Law, is a judicial law clerk to the Honorable Thomas J. Motley at the Superior Court of the District of Columbia. While in law school, Renee was a founding member and the Co-Editor-in-Chief of the *Indiana Journal of Law and Social Equality*, an Articles Editor for the *Indiana Law Journal*, a research assistant to Professor Kevin D. Brown, and a judicial extern to the Honorable Tanya Walton Pratt at the United States District Court for the Southern District of Indiana. Renee also participated in the law school's Sherman Minton Moot Court Competition, where she earned brief writing honors.

Renee, originally from Huntington Station, New York, earned a B.A. in Political Science and Art History, cum laude, from Spelman College in Atlanta, Georgia.



### Marc Willers

Marc specialises in planning and environmental law, public law and human rights. He has considerable expertise in representing claimants seeking redress for breach of their rights protected by the European Convention on Human Rights but he is also able to advise and represent those with cases before the European Court of Justice and other international tribunals.

Marc is particularly well known for his representation of Gypsies, Travellers and Roma and he has appeared in a number of the key cases for Gypsies and Travellers including *Coster v UK* (one of 4 cases heard together *Chapman v UK*), *Clarke v Tunbridge Wells DC*, *Smith v FSS and MBDC*, *R (Wilson) v First Secretary of State*, *R (O'Brien) v Basildon District Council*, *Lisa Smith v Secretary of State for Trade and Industry* and the *London Development Agency*, *McCarthy v Basildon DC* and the *Equality and Human Rights Commission v Secretary of State for the Environment Food and Rural Affairs v Meier* and he also represented the Irish Travellers that challenged the decision to evict them from the site known as Dale Farm in 2011.

Marc has also presented a number of seminars on human rights abroad: in 2003 he was instructed as an expert on the European Convention on Human Rights by the Council of Europe and travelled to Moscow to present a seminar, organised by the United Nations High Commissioner for Refugees - on the ECHR and its relevance for the protection of refugees and asylum seekers; in 2004 Marc travelled to Armenia to help conduct a five day training session organised by Interights and the Netherlands Helsinki Committee for lawyers on the application of the Convention to cases arising within their own jurisdiction; in 2007 Marc travelled back to Russia to present a human rights course in Rostov on Don for the Council of Europe; in 2008 Marc visited Tbilisi in Georgia to present a course on religious and other forms of discrimination prohibited by the Convention; in 2009 Marc attended a conference organised by the Greek Ombudsman in Athens to speak on behalf of the Council of Europe about Roma Rights and the Convention; and in 2010 Marc delivered a keynote speech at the EU's Fundamental Rights Agency conference on Roma Rights and the freedom of movement, in Vienna. Each year Marc also helps run a course held in Strasbourg on Roma Rights for the Council of Europe.

Marc is the co-editor and co-author of a book entitled *Gypsy and Traveller Law* which was first published by the Legal Action Group and the Commission for Racial Equality in 2004 (the second edition was published in 2007). Marc is also the editor of the Council of Europe's handbook for lawyers defending Roma and Travellers entitled *Ensuring access to rights for Roma and Travellers*. The role of the European Court of Human Rights. He is also one of the authors of the chapter on the rights of Gypsies and Travellers included in the book *Your Rights* published by Liberty, and is a regular contributor to Legal Action and other legal publications.

Marc is regularly involved in drafting consultation documents on proposed government policy and legislation. He is also a trustee of Friends Families and Travellers (a charity working to promote the rights of Gypsies and Travellers in the UK and a member of the European Union's Fundamental Rights Platform)



## Mia Yamamoto

Born in Poston Relocation Camp, Arizona, 1943. Graduated Cal State University, Los Angeles, B.S. Government 1966. U.S. Army, 1966 - 68, 4th Infantry Division, USARV received Army Commendation Medal, Vietnam Campaign Medal, et.al., 1967-68. UCLA School of Law, co-founded Asian Pacific Islander Law Student Association, J.D., 1971. Poverty lawyer for Legal Aid Foundation of Los Angeles, 1971 - 1974; Deputy Los Angeles County Public Defender and California State Public Defender, 1974 - 1984; Private practice since 1984.

Past President of California Attorneys for Criminal Justice, a statewide organization of 2,500 private and public defenders; past president of the Multi-Cultural Bar Alliance (coalition of minority, women's, and gay and lesbian bar associations of Los Angeles); and past president, Japanese American Bar Association. Served on the California Judicial Council Statewide Task Forces on Jury Improvement and Fairness and Access. Current boards include the Asian Pacific American Bar Association, Criminal Courts Bar Association, and International Bridges to Justice (a Human Rights group providing Due Process education to the judicial systems of China, Thailand, Vietnam and Cambodia); having previously served on the boards of the L.A. County Bar Association, Korean American Bar Association and ACLU of Southern California. Other organizations include Women Lawyers Association of Los Angeles, National Lawyers Guild, Philippine American Bar Association, and several others. She is the past president of the Asian Pacific American Woman Lawyers Alliance of Los Angeles and served on the Commission on Sexual Orientation and Gender Identity for the American Bar Association.

Classroom lectures, panel discussions and demonstrations, include the panel on "Race and Criminal Justice", George Washington University, Washington, D.C., for the 1999 President Clinton's Initiative on Race; "Cultural Defenses, Pro and Con" and "Community Law Practice" for the ABA 1999 Atlanta; "Miles to Go", ABA 2000 New York City; "Cultural Defenses" and "Lawyers in the Media" for the 1999 NAPABA Convention, Los Angeles; "Elimination of Bias" for Consumer Attorneys of California, San Francisco, 2008, and Los Angeles County Bar Association "Nuts and Bolts" (Elimination of Bias) 2008 and 2009.

She is a frequent media commentator on issues relating to criminal law and a variety of related issues primarily for: (print) LA Times, LA Daily Journal; (radio) KPFK, KPCC; (television) KCAL Channel 9, Fox Channel 11, NBC Channel 4, KCET Channel 28, (cable) MSNBC, CNN, Court TV, and other cable and foreign media.

Past honors include Awards from the Criminal Courts Bar Association of Los Angeles, Women Lawyers Association of Los Angeles, Southern California chapter of the National Lawyers Guild and the Los Angeles County Bar Association Criminal Justice Section "Criminal Defense Attorney of the Year" for 2002. Named one of the "100 Most Influential

Lawyers in California” by California Daily Journal, 2002. Named “Criminal Defense Attorney of the Year” by the Century City Bar Association in 2006. Voted “Southern California Super Lawyer” by her peers, Los Angeles Magazine, 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012. American Bar Association “Spirit of Excellence” Award 2008. National Asian Pacific American Bar Association “Trailblazers Award” 2008.

She is a recipient of the Rainbow Key Award from the City of West Hollywood (2011), “Sisters Standing Up For Love” Award from API-Equality Los Angeles (2012), The Harvey Milk Legacy Award from Christopher Street West and Los Angeles Pride (2012) and Liberty Award from Lambda Legal (2012).



### **Steven K. Yoda**

Steven K. Yoda is an attorney in the Los Angeles office of Kelley Drye & Warren LLP. He has represented clients in a wide array of complex civil and criminal matters involving securities, intellectual property, business torts, real estate, contracts, and professional malpractice. He is a graduate of Stanford University and the University of California, Berkeley (Boalt Hall) School of Law. From 2004 to 2005, he served as a law clerk to the Honorable James Ware, United States District Judge for the Northern District of California. He currently serves as vice president of the Japanese American Bar Association.



# 2012 DIVERSITY AND INCLUSION IN PRACTICE ROUND-UP

**M**any of the most interesting, promising, and meaningful diversity and inclusion initiatives come from small or local efforts; the vision and commitment of a single individual or organization; and the willingness to experiment and try something new. The Diversity and Inclusion Practice Round-Up section of the *IILP Review* is a means of collecting, compiling, reporting upon and analyzing the impact of new and updated diversity and inclusion initiatives and efforts; sharing information about how promising efforts are working; and stimulating new ideas and strategies that will result in a more diverse and inclusive legal profession.

Individuals and organizations are invited to submit information about programs and efforts that they feel merit attention by the broader legal profession in general and those active in the diversity and inclusion arena specifically. For more information about how to submit an item for the next Practice Round-Up, please visit [www.TheIILP.com](http://www.TheIILP.com).

## **Diversity and Inclusion Research, Reports and Studies**

### **American Bar Foundation's Research Group on Legal Diversity**

The American Bar Foundation has recently created the Research Group on Legal Diversity, a new initiative designed to focus on issues relating to diversity within the legal profession and other institutions of justice. This group will lead a program centered around empirical research to examine trends in diversity and the impact of diversity on legal processes and institutions. The Research Group is a community of scholars with active research agendas relating to diversity. It also aspires to be an incubator for new projects. Collaborating among participants leading to the development of proposals for original research is the main goal of the Group.

In May, 2012, the American Bar Foundation hosted the Kickoff Conference for the Research Group and nearly all of the Group's members attended and presented. Several practitioner leaders in diversity also participated. The first day's sessions were dedicated to joint sessions for practitioners and scholars and three panels were held: "Organizing for Diversity," "Beyond the Business Case," and "Globalization, Cognition, and Change." The second day's sessions were geared towards a scholarly audience and panels included "Race and Gender Inequalities in Legal Careers," "Exploring Inequalities in Law and the Legal Profession," and "New Directions in Research in Legal Careers."

**For more information about the Research Group or the next conference, please contact ABF Research Assistant Spencer Headworth at [sheadworth@abfn.org](mailto:sheadworth@abfn.org).**

### **Chicago Bar Association's Resource Guide for Persons with Disabilities**

In 1995 the Chicago Bar Association Young Lawyers Section created the Committee on Delivery of Legal Services to Persons with Disabilities. A product of this committee is the Resource Guide for Persons with Disabilities. This guide provides general information on organizations that help persons with disabilities.

The CBA-YLS employs eight lawyers to follow up with each of the organizations to make certain they are still in existence and to confirm address, phone number and website information. The CBA-YLS funds this committee and their publication.

**If you are interested in learning more about the Resource Guide, contact Jenni Bertolino at (312) 554-2031 or at [jbortolino@chicagobar.org](mailto:jbortolino@chicagobar.org).**



## McDermott Will & Emery's 2011 *Social Responsibility Report*

McDermott's *Social Responsibility Report* is intended to show how McDermott demonstrates some of its important core values such as working to increase diversity in the Firm and broader legal profession, providing pro bono legal services to the disadvantaged, volunteering in the community, advising and serving non-profit organization, giving to philanthropic and charitable causes, and promoting environmental sustainability.

In 2010, the Firm's Co-Chairs conceived the report as a way to tell remarkable stories of these core values "in action" while consolidating relevant information for other purposes including client pitches, employee recruiting and retention, and reporting.

Since the Firm communicates its relevant accomplishments throughout the year via press releases, internal messages, and other means, it is easier for them to compile the yearly report. Each December, a working group meets to review the past 12 months' major achievements and identify the most compelling examples for inclusion in the Report. Over the following months, existing content is edited and supplemental information is gathered through interviews with those involved.

In addition to the time spent by a group of eight lawyers and staff members, the Firm incurred costs totaling more than \$25,000 to complete the Report. However, an internal budget was the source of most of the funding.

McDermott's internal organizational tracking systems, coupled with formal structures and dedicated leadership have proven essential to making this reporting system efficient and effective. Additionally, organizations that do not have the same level of internal resources to compile information might need to rely on a substantial amount of external support. However, there are many benefits that McDermott has seen as a result of the *Social Responsibility Report*. The Firm has gained greater external visibility of their initiatives designed to give back to the community and profession, spurred addition opportunities to team with clients and prospective clients on related efforts, and created a greater awareness of, and engagement with, these core values amongst its lawyers and staff.

**Lydia R.B. Kelly, Chair of the Diversity & Inclusion Committee, is available to provide more information on the *Social Responsibility Report*. She can be reached at (312) 984-6470 or at [lkelley@mwe.com](mailto:lkelley@mwe.com).**

## Washington State Bar Association's Membership Study

The Washington State Bar Association (WSBA) launched a Membership Study in early 2011, to gain an accurate image of the legal profession's composition as well as to understand why attorneys leave the legal field. The four goals of the study were to gather reliable demographic and career-related data about the WSBA membership, initiate an exploration of the characteristics and work experiences of diverse segments of the membership, explore pattern of professional transitions among the WSBA membership, and establish a statistically reliable database that can act as a benchmark for understanding membership trends, a guide to policy and program planning, and a baseline for use in future program evaluations.

The WSBA Membership Study Team, which consisted of 7 members, was chosen to ensure that the study met a broad cross-section of institutional needs. The Membership Study Team selected a research and evaluation firm to conduct the study. In order to build a statistically reliable database of the professional experiences and perceptions of the WSBA members, a multi-method research

strategy was employed. The first phase involved an online random survey that targeted a random sample of ten percent of the entire WSBA membership, which included former members who exited the membership within the past five years. This phase utilized sound sampling techniques to ensure results were reliable and valid for purposes of generalizing. If selectees did not have an e-mail address, print surveys were sent to them. The second phase utilized a series of online focus groups, focusing on selected themes and drawing from diverse segments of membership. These confidential interactive discussions added qualitative depth to the Study's findings. The final phase was executed with an open survey that was offered to all WSBA members. Although the results of this survey are not statistically representative of WSBA membership as a whole, they did provide valuable qualitative information, feedback, and recommendations.

The Membership Survey achieved the four primary goals, and the resulting database offers a versatile and statistically reliable outline for the leadership of WSBA in setting future policies and program priorities.

**For more information, visit the Washington State Bar Association website at [www.wsba.org](http://www.wsba.org) or contact K. Joy Eckwood at (206) 733-5952 or [joye@wsba.org](mailto:joye@wsba.org).**

### **Feminist Judgments: From Theory to Practice**

Feminist legal scholarship has grown within universities and in some sectors of legal practice; however, it has not always had an impact upon the judiciary or judicial thinking. There has been little opportunity to apply feminist knowledge in practice, and in decisions of individual cases. *Feminist Judgments: From Theory to Practice*, edited by Rosemary Hunter, Clare McGlynn and Erika Rackley, fills in this gap; a group of British feminist legal scholars write the 'missing' feminist judgments in key cases. The cases in this book are significant decisions in English law across a broad spectrum of substantive areas. The cases originate from a variety of levels but are primarily opinions of the Court of Appeal or the House of Lords. Each case is accompanied by a commentary which renders the judgment accessible to a non-specialist audience. The commentary explains the original decision, its background and doctrinal significance, the issues it raises, and how the feminist judgment deals with them differently.

**For further information, please visit the Feminist Judgments website at <http://www.feministjudgments.org.uk>**

### **Diversity and Inclusion Pipeline, Scholarship and Bar Preparation Programs**

#### **Archer & Greiner's Diversity Scholarship Programs**

According to Archer & Greiner, diversity enriches the relationship within the firm, creating a workplace environment that embraces differences in perspectives and culture, and optimizing the firm's ability to attract and develop talented professionals.

One way that Archer & Greiner fosters diversity within the legal profession and within their firm is with the Archer & Greiner-Temple Law School-City of Philadelphia Law Department Scholarship Program. This program provides two diverse students from Temple Law School with a \$7,500 scholarship along with an opportunity to work as a paid associate at Archer & Greiner and at the City of Philadelphia Law Department.

Archer & Greiner has also established a scholarship program for minority law students at Rutgers University School of Law-Camden. This program was one of the first of its kind in the nation.

The students who win this scholarship receive an annual stipend towards their tuition. In addition, eligible scholarship recipients, as determined by Rutgers, receive an offer of employment in Archer & Greiner's Summer Associate Program for the summer following their second year of law school.

These two programs allow diverse law students to not only receive scholarships that help allay tuition costs, but provide them with practical, hands on legal experience that enhances their resumes for future employers.

**For more information, contact Carlton L. Johnson at [cjohnson@archerlaw.com](mailto:cjohnson@archerlaw.com) or (215) 279-9696.**

### **Minority Legal Education Resources (MLER) Bar Process Management Program**

Minority Legal Education Resources, Inc.'s Bar Process Management program primarily serves its mission of increasing diversity in the legal profession by hosting a semi-annual Bar Process Management course in the Chicagoland area for law students sitting for the Illinois Bar examination. The Bar Process Management program employs a holistic approach to taking the Bar exam by focusing on the development of the students' writing and analytical skills, and giving students the necessary tools to help them effectively study, manage stress, and understand how to balance their other real world obligations while studying for the Bar exam.

During the six to seven week Bar Process Management program, students are initially taught the curriculum in a daylong workshop. Then they participate in weekly teaching and learning activities with a group of tutors, who are trained volunteer attorneys, who reinforce the curriculum and help the students to holistically manage the study process for the Bar exam. The students are regularly assessed and given individual feedback about their writing abilities. In addition, they participate in weekly exams and an all day simulated essay exam to practice the core principle of the program.

MLER receives a significant portion of its funding from various donors while receiving a portion from students who enroll in the Bar Process Management program. While the program does not employ staff, the board of directors of MLER provides administrative support and performs various administrative and operational tasks as necessary to effectively deliver the program. A majority of the individuals involved in this program are volunteers, many of whom are alumni of the program.

Despite the challenges of raising funds and recruiting volunteers, students who participate in the program are given valuable writing skills that will see them through their legal careers. They are also given direct support by program tutors as they prepare for the Bar exam. The board of directors recruits students from under-represented backgrounds and students at a higher risk of failing the Bar exam. Students enrolled in the program tend to pass the Bar at a rate equal to or higher than the state average.

**For more information on Bar Process Management, contact Chipo Nyambuya at (773) 299-8476 or [mлерprogram@gmail.com](mailto:mлерprogram@gmail.com)**

### **Phillips Lytle LLP "Peace Out"- Diversity Pipeline Program**

In 2011, Phillips Lytle LLP introduced an innovative diversity pipeline program entitled "Peace Out." The graphic used to identify and brand Phillips Lytle's pipeline program is a peace symbol. Each arm of the peace symbol represents a principle of practice for students to learn and embrace – problem, knowledge, and solution. Through "Peace Out," teams of Phillips Lytle lawyers lead

interactive sessions with middle schools students in Buffalo, Rochester and New York City. The “Peace Out” program engages students in role playing, as they explore problem solving and dispute resolution in a scripted legal controversy. The Firm attorneys developed a wide variety of classroom exercises where students have the opportunity to organize legal positions and ultimately make and judge a courtroom argument, engage in negotiations on behalf of a client’s interests, or participate as an advocate in arbitration. Part of what makes “Peace Out” so innovative and effective is that the exercises were designed to include subject matter that students readily connect with, such as copyright and trademark disputes adapted from actual controversies and sport and entertainment problems.

In addition to Firm attorneys conducting “Peace Out” programs, the Firm’s Summer Associates are given the opportunity to participate as well. Even as law students, they can begin giving back to their community and supporting diversity in the profession. Since so many of the Firm’s attorneys take part in this program that there is little to no cost in running such a program.

This program has been extremely successful. The feedback from students, teachers and Firm attorneys who have participated in “Peace Out” has been strong. “Peace Out” has been invited to return to the classrooms where it has previously been conducted, and interest in the program has grown. This program has also opened the eyes of many students who recognize that a successful career in law can take many forms.

**For more information, contact: Kathryn M. Gibbons at [KGibbons@phillipslytle.com](mailto:KGibbons@phillipslytle.com) or (716) 847-5469.**

### **Society of American Law Teachers “B.A. to J.D. Pipeline Project”**

The Society of American Law Teachers (SALT), an organization committed to help pre law advisors understand how important they are to the overall goal of diversifying the legal profession, has launched the “B.A. to J.D. Pipeline Project”. This project assists pre law advisors to better identify and counsel college students of color to make educated decisions about law schools. In November, 2011, about fifty individuals involved in SALT launched the Project with a successful program, “Opening Doors: Making Diversity Matter in Law School Admissions,” that provided the latest research evidencing the lack of diversity in the legal profession, “stereotype threat,” pipeline programs, and pre law counseling techniques.

In order to have an effective program, SALT had to ask a regional law school to host the day-long event and then invited other law schools in the area to co-sponsor the program. Next, SALT contacted the presidents of the community, and public and private colleges and universities to support the professional development of their pre law advisors by accommodating their attendance at the program. In addition, bar administrators, law schools deans and admissions officers, and pre law advisors from the regional pre law advisors association were invited to attend as well. Finally, scholars were hired to present the latest research on issues that can assist pre law advisors become better advocated on behalf of minority students. The 2011 program cost about \$20,000; however, future programs were estimated to cost \$15,000.

**There is another program that SALT has scheduled on February 15, 2012 at American University Washington College of Law. If you would like additional information on this program, contact Professor Solangel Maldonado, from the Seton Hall University School of Law, at (973) 642-8830 or [Solangel.Maldonado@SHU.edu](mailto:Solangel.Maldonado@SHU.edu).**

## Sidley Prelaw Scholars Initiative

In 2006, Sidley Austin LLP created the Sidley Prelaw Scholars Initiative. Designed to address the decline in minority enrollment in U.S. law schools, this program provides financial support and guidance to as many as thirty six racially and ethnically diverse college junior and seniors who have an interest in attending law school, demonstrate academic promise, and have financial needs that inhibit their legal aspirations annually. Students from across the country complete an application that includes documentation of their academic success, financial need and leadership skills, as well as a personal statement about their desire to study law.

Sidley Scholars receive an initial award to pay tuition of a Law School Admissions Test (LSAT) preparatory course, registrations fees for the LSAT, and application fees for up to seven accredited law schools. After completing the LSAT preparatory course and law school applications, scholars receive an additional scholarship award during their last year of college. Upon their request, scholars can also receive coaching on law school application preparations and mentoring by Sidley Austin LLP's lawyers and staff.

The summer before law school matriculation, Sidley Scholars from the previous year's application cycle are invited to Sidley's home office in Chicago, Illinois, for an intensive two-day orientation to the traditional first year law school courses and law school life. This orientation is taught by Sidley partners and associations, judges, academics, and in-house counsel from Sidley's cliental. In addition, Scholars tour the federal courthouse in Chicago and meet with members of the bench. They hear from successful racially diverse attorneys about diversity and inclusion in the legal profession.

For the past two and a half years, successful Sidley Prelaw Scholars have been entering the legal profession. Sidley Austin LLP is proud to have welcomed over 150 Sidley Scholars into the program since its inception.

**For more information, contact Sarah "Sally" Olson at [sarah.olson@sidley.com](mailto:sarah.olson@sidley.com).**

## Law School Initiatives

### Northwestern University School of Law's Disability Advocacy Group

A group of 1Ls and 2Ls at Northwestern University School of Law have established a disability rights organization for students, the Northwestern Disability Law Society (DLS). After a series of exploratory meeting in the fall, DLS wrote a constitution, elected officers and was officially recognized by Northwestern Student Bar Association as a new student group during the first month of the 2011 spring semester. By the semester's end, DLS had expanded its active membership to more than a dozen students and held its first event.

As an officially recognized group for diverse students, DLS will have a set budget to put on full events in the fall to raise awareness about disability rights and challenges faced by legal professionals with disabilities. DLS's mission is to provide a support network for Chicago-area law students with disabilities while educating all law students about the opportunities available to lawyers interested in advocating for the rights of people with disabilities.

**For more information, contact DLS Co-President Greg Oguss at [g-oguss2013@nlaw.northwestern.edu](mailto:g-oguss2013@nlaw.northwestern.edu) or DLS Faculty Advisor Kathleen Dillon Narko at [k-narko@law.northwestern.edu](mailto:k-narko@law.northwestern.edu).**



## Law Firm and Corporate Law Department Initiatives

### Dykema Gossett PLLC Diversity Staffing Report and Report on Shared Billing Credit

Dykema, a national law firm with over 400 professionals, conducted two innovated studies in 2011 to advance diversity and inclusion within the firm. The first study was a diversity staffing analysis, “Diversity Staffing Report: 2009-2010.” They then conducted a shared billing credit study and prepared a report titled “Report on Shared Billing Credit: 2009-2010.”

The purpose of the diversity staffing analysis was to assess whether female attorneys and attorneys of color were getting as much work as their white male counterparts. The diversity staffing study compared the average billable hours of racially diverse associate attorneys to the general pool of associate attorneys, which was adjusted for part-time and reduced schedule associate attorneys and those that worked a reduced schedule due to maternity or other family leave, to ascertain whether diverse attorneys were receiving their proportionate share of the firm’s work. Dykema controlled for diversity of geography and practice group. All of the firm’s 100 associates were taken into consideration in the diversity staffing analysis.

The purpose of the shared billing credit study was to ascertain whether attorneys were sharing their billing credit under the firm’s shared credit policy, who was sharing, how much they were sharing and with whom they were sharing. The firm’s shared billing policy promotes sharing under certain circumstances and has provided all of its attorneys with guidelines for making appropriate shared billing determinations under a variety of common circumstances. Since the policy’s inception over five years ago, the firm desired to measure how it is being interpreted by the firm’s billing attorneys; concentrating on whether sharing is happening proportionally or not.

Dykema recognizes that hours worked and receipt of shared billing credit are two factors of great importance to the firm’s sustained diversity success because they impact not only short term attorney compensation but also long term career success. The firm analyzed the billings of the top twenty five attorneys for 2009 and 2010. The study looked at: (1) the identity of the top billing attorneys; (2) what percentage of their billings they shared with others in terms of hours and monetary value; and (3) with whom they shared billing credit. Then the study examined whether billings shared were shared proportionally with the gender and diversity composition of the firm. To do so Dykema performed the same analysis with the top seven female billing attorneys and the top three minority billing attorneys to ascertain whether the manner in which those attorneys shared billings varied significantly from the top twenty five, the vast majority of whom are white males. Dykema was mindful that these latter comparisons would provide limited insight because these two groups had significantly fewer billings to share and thus would necessarily share less of their own billing credit. The shared billing study focused on the statistics of all of the firms’ approximately 200 partners.

These studies did not incur any exceptional costs as they were handled by in-house employees in the human resources and accounting departments under the direction and oversight of Heidi Naasko, the firm’s Pro Bono and Diversity Counsel. In order to perform the shared billing study, the firm had to merge HR data with billing statistics to create a compilation of raw data which proved to be time consuming and difficult. These studies took over several months to complete and required substantial work hours from those involved.

These studies have benefited Dykema in multiple ways. First, the studies have enhanced the firm’s ability to measure and thus raise awareness around the effectiveness of the diversity efforts. Since the reports were analyzed by the Diversity Committee and the firm’s Executive Board, which has sparked numerous discussions and action plans. These discussions have created opportuni-



ties for change and improvements of weaknesses identified within the reports. Finally the data compilation and collection processes used to generate the initial reports can be easily replicated so the firm can continuously monitor these statistics in the years to come. In fact, Dykema's Diversity Counsel has already produced updated data to the firm's shared billing credit study, a process that has been extremely simplified since the initial project began.

**For more information, contact Heidi Naasko at [hnaassko@dykema.com](mailto:hnaassko@dykema.com) or (734) 214-7710.**

### **Mentoring Initiatives At Sullivan & Cromwell LLP**

Sullivan & Cromwell is committed to helping its lawyers evolve into trusted advisors for clients and achieve a positive work-life balance. Understanding that effective mentors and advisors are an invaluable resource for growth and development is why S&C have developed the Mentoring Program. This program encompasses all members of S&C beginning with Summer Associates and continuing through the junior partner level. The Firm provides both formal and informal opportunities for mentoring relationships to develop. Some informal opportunities include the "Partner Perspectives Series" and the "Women @ S&C Lunch Program."

**For more information, contact Tracy Richelle High, [hight@sullcrom.com](mailto:hight@sullcrom.com), or Kelly J. Smith, [smithkj@sullcrom.com](mailto:smithkj@sullcrom.com).**

### **Project HOLA!**

In 2010, GE Capital Americas (GECA) Legal Department has formed Project HOLA! (Having Outside Lawyer Advisors) as a forum for GECA lawyers to collaborate with GECA's outside counsel to promote the retention and advancement of diverse lawyers among GECA's legal providers. The objective of HOLA! is to provide the participating diverse outside counsel members with increased networking opportunities, business and exposure within GECA and to gain insight from outside HOLA! Counsels on how GECA can help foster their careers.

Over a cycle, of approximately eighteen months, GECA invites fifteen diverse nominees from various law firms to join HOLA! as its advisors. An important component to this program's success is the commitment from the business line general counsels to be actively involved in promoting the advancement of the HOLA! nominees within GECA, including hiring these external lawyers for GECA's matters.

Also critical to the success of HOLA! is the internal structure of GECA. There are three subcommittees that enhance the program. The Buddy Subcommittee assigns internal committee members with outside counsel members. As buddies, the GECA lawyers act as liaisons for outside counsel members, engage business line general counsels, make introductions, coordinate training and keep a line of communication open between GECA and the outside counsel member and his/her law firm. The second subcommittee is the Metrics Subcommittee. This subcommittee tracks and summarizes touch points with outside counsel members and alumni. Finally, the Planning Subcommittee organizes GECA meetings with outside counsel members, and sets the agenda for quarterly teleconferences and in-person meetings.

Project HOLA! is managed from existing resources and has required no capital expenditures for GECA. HOLA! continues to adapt its methods and scope as the program matures. The program

initially focused on increasing racial and ethnic minority diversity in GECA's outside counsel and assisting diverse associates and partners to grow their practices and develop their careers by committing meaningful amount of work to these individuals. As HOLA! has broadened its scope to include sexual orientation and gender diversity, targeting groups that have traditionally been underrepresented in the law firm setting. In addition, GECA is expanding its outside counsel membership to lawyers from minority and women-owned law firms. The program is growing within General Electric Company and HOLA! has been highlighted at the GE Legal Diversity Conference and similar programs have been adopted across GE.

For more information on Project HOLA! please contact any of the internal committee leaders or the program champion.

**2012 Internal Committee Leaders- Patricia Dietz ([Patricia.Dietz1@ge.com](mailto:Patricia.Dietz1@ge.com) or (480) 563-6607)**

**Jennifer Guerard ([Jennifer.Guerard@ge.com](mailto:Jennifer.Guerard@ge.com) or (416) 842-1743)**

**Project HOLA! Champion- Barbara Gould ([Barbara.Gould@ge.com](mailto:Barbara.Gould@ge.com) or (203) 956-4377)**

## **Bar Association and Not-for-Profit Organization Initiatives**

### **American Bar Association's Communication Access Real-Time Captioning**

The American Bar Association Center for Continuing Legal Education is revolutionizing webinar captioning. Initially ABA-CLE did not offer webinar captioning until they received a call from a member who wanted to know if the ABA-CLE offered captioning for webinars or teleconferences. Once the ABA-CLE realized that they were not fully servicing their member base they began investigating the various services offered, and settled on a full-service vendor that provides both live captioning and Communication Access Real-Time Captioning (CART) at a minimal cost. The ABA-CLE programs are accessible for only \$115 per hour per program, and in most cases the cost of one registration will cover the CART fee.

Earlier this year, the ABA offered a series of CLE programs including "A Practitioner's Guide to Disability Awareness" and "A Beginner's Guide to the Americans with Disabilities Act" as webinars using the new CART technology. These programs were interactive and allowed participants who are both sight and hearing impaired to participate in the webinar. The CART provider logs into the webinar and in a separate window the end-user is able to personalize font size and color for the webinar text, and is able to change the resolution of images.

The CART technology affords impaired attorneys the same access as non-impaired attorneys. Everyone has the ability to view the slides and video presentations, ask questions, and receive answers from the faculty in real-time. Additionally, the participants can access a transcript of the program.

The use of CART technology has garnered very positive feedback from ABA groups and members. Many ABA entities are following the lead, by using CART technology as a standard part of their webinars. Additionally, ABA-CLE will discuss the use of CART technology for state and local bar associations during the Association for Continuing Legal Education (ACLEA) Annual Meeting in Denver, Colorado.

**For more information, contact Daniel Becker [Daniel.Becker@americanbar.org](mailto:Daniel.Becker@americanbar.org) or Yolanda Muhammad [Yolanda.Muhammad@americanbar.org](mailto:Yolanda.Muhammad@americanbar.org).**

## The American Bar Association Young Lawyers Division's "The Next Steps" Challenge

In April 2010, the American Bar Association Presidential Initiative Commission on Diversity released *Diversity in the Legal Profession: The Next Steps*. This report is a culmination of a two-year effort to study the state of diversity in the legal profession. The report provides practical recommendations for advancing diversity in a variety of legal settings including law schools, corporate law departments, the judiciary and many more. In order to make the most of the wealth of the report's information, the American Bar Association Young Lawyers Division (ABA YLD) formulated The Next Steps Challenge. The purpose of The Next Steps Challenge is to encourage young lawyer organizations to increase diversity in the pipeline to the legal profession by adopting one of the many recommendations from the report. Sub-grants were to be awarded to the top two affiliate projects or programs.

July 2011, YLD affiliate leaders around the country received a letter announcing The Next Steps Challenge, along with a copy of the *Diversity in the Legal Profession: The Next Steps* report. The letter asked YLD affiliates to consider the findings and recommendations of the report and to undertake projects and programming focused on increasing diversity within the legal profession. The ABA YLD further explained The Next Steps Challenge at the YLD's 2011 Fall Conference in Seattle, where the YLD hosted a panel discussion highlighting pipeline programs from across the country. This discussion was designed to give affiliates ideas on how to increase the "diversity pipeline" in their local communities. After the Conference, participants identified recommendations they wanted to address, proposed activities, desired outcome, target audience, and desired number of young lawyer participants. In January 2012, participants submitted progress reports on program implementations, which included the program dates, format and other pertinent information. All programs were to be completely implemented by March 16, 2012. Finally, at the end of March, participants submitted a final report giving activity dates, outcomes, audience member numbers, young lawyer participant numbers, and a proposed plan for expansion.

A panel of judges selected four finalists to be introduced during the YLD's 2012 Spring Conference in Nashville, Tennessee. The finalists and sub-grant recipients were announced at the start of the Plenary & Town Hall Meeting on May 4, 2012. First place went to the North Carolina Bar Association Young Lawyers Section for its "Legal LINK" project. This affiliate presented four one-hour sessions to 10<sup>th</sup> grade students chosen by their Social Studies teachers at a high school in Durham, North Carolina. Each session featured speakers as well as a Question & Answer session, and covered one letter of the "LINK" acronym: Leadership, Information, Networking and Knowledge. The leadership program included interactive discussion on leading in the classroom by example. The information program focused on the law school admissions process and what qualities admission officials are looking for in prospective law students. The networking program was a luncheon with a simulated speed-networking session where students rotated every ten minutes and spoke to a variety of legal professionals. The knowledge program included a discussion with bar association leadership about what the law is, and what lawyers do.

Second place went to the Arkansas Bar Association Young Lawyers Section for its project titled "College Road Tour" in which the Young Lawyers Section partnered with two historically Black colleges and universities to present a panel, "What I Wish I Knew Before Law School." Panelists discussed how to get admitted to and succeed in law school, along with a Question & Answer session. This event was so successful that one college invited the YLS to come back and teach a legal writing workshop.

Approximately 7 attorneys from the ABA YLD were involved in the implementation and guiding of the Challenge through its inaugural year. However, hundreds of lawyers, law students and

judges were involved in the participants' projects. The Next Steps Challenges benefited from having two paid ABA YLD staff work for approximately 15 hours combined. The sub-grant awards totaled \$3,000.

The benefits of The Next Steps Challenge included: the awareness of the *Diversity in the Legal Profession: The Next Steps* report, increased diversity programming by young lawyers and, perhaps, more students of color and economically disadvantaged students considering law as a viable profession for them. Also, during a special hour-long showcase at the Spring Conference in Nashville, all finalists presented their respective programs in detail and were able to share their best practices with affiliates from around the globe. The only obstacle that could occur when trying to replicate the Next Steps Challenge may be acquiring the funding for the sub-grants.

**The Next Steps Challenge is set to run for at least another year, and deadlines will be announced shortly. For more information, Contact the YLD'S Diversity Director, Myra L. McKenzie at [myra.mckenzie@walmartlegal.com](mailto:myra.mckenzie@walmartlegal.com) or (479) 277-2710 or contact the YLD's Affiliate Director, Sarah Sharp Theophilus at [Sarah.Theophilus@va.gov](mailto:Sarah.Theophilus@va.gov) or (605) 941-0212.**

### **Oregon State Bar Association's Convocation on Equality**

The Oregon State Bar Diversity Section organized the 2011 Convocation on Equality. The state-wide conference drew 400 attendees and was sponsored by seven specialty bars, thirty one law firms, and four corporate organizations. The Convocation offered three program tracks: the first addressed the concerns of attorneys seeking to improve their practical skills; the second focused on attorneys seeking to increase their knowledge of diversity and inclusion; and the third on legal employers seeking to promote diversity efforts in the work place.

The third track was specifically designed for Oregon employers as the employers worked for months to create a draft manual outlining their best practices for diversity and inclusion. Employers shared their success stories and highlighted case studies in this seventy eight page document. During the conference, attendees participated in a facilitated dialog through each of the chapters of the manual and were able to provide input and commentary. The final version of the manual will be published and distributed in 2012.

In addition to these three programs, the Convocation published a thirty page Diversity Resource guide that provided participants with the names of organizations that support the mission of diversity and inclusion. A video, "Decade of Diversity," was produced outlining the successes of the past decade in diversity and inclusion in the legal profession and the road forward.

**For more information, contact Akira Heshiki at [Akira.Heshiki@standard.com](mailto:Akira.Heshiki@standard.com).**

### **Center for Legal Inclusiveness' Step Up for Diversity Campaign**

The Center for Legal Inclusiveness developed *Step Up for Diversity: Take Action to Build an Inclusive Legal Profession* to create a national grassroots campaign to inspire attorneys to take small steps toward building a more diverse and inclusive legal profession. The *Step Up for Diversity* online campaign was born out of a focus group the Center for Legal Inclusiveness held in June 2011. As a result, the Center for Legal Inclusiveness created a list of practical action items that will help diverse and female attorneys build relationships to overcome hidden barriers and create a more diverse legal profession overall.

In order to attract broad geographic attorney participation, an online campaign was created using web-based tools and plug-ins that allow attorneys to take simple steps to promote diversity and to also record these steps through an online tracking tool. Three groups of attorneys were identified as primary targets for the *Step Up for Diversity* campaign: corporate counsel, managing/supervising attorneys in private and public practice, and a catch-all category for “other” attorneys.

Individual attorneys register on the *Step Up for Diversity* website ([www.StepUpforDiversity.org](http://www.StepUpforDiversity.org)), log in to review possible actions, and report their individual actions. In addition, CLI collects the reported data and compiles the information to create attorney profiles and summaries, which in turn spurs greater participation.

The primary cost of creating and maintain the *Step Up for Diversity* initiative is staff time, which took about 160 hours to launch the program and 5 hours per month to maintain. Other funding was donated in order to provide hosting, website design, data collection tools and legal advice.

There are more than four dozen attorneys from across the country participating in the *Step Up for Diversity* program and have completed hundreds of action items to help diverse and female attorneys build relationships to overcome hidden barriers and help create inclusive workplaces. The most common difficult for this project is getting the attention and follow-through of busy legal professionals.

**If you would like more information about the *Step Up for Diversity* program or have questions, contact Andrea Juarez at (303) 607-3870 or [ajuarez@legalinclusiveness.org](mailto:ajuarez@legalinclusiveness.org).**

### **The Indianapolis Bar Association Diversity Job Fair**

In 2007, a Committee composed of IndyBar attorneys and student members convened to create the inaugural Diversity Job Fair. The Committee collected and organized contact information from the Professional and Career Services departments of Indiana, regional and national law schools. This resulted in the Job Fair’s contact list of more than 125 law schools across the United States that receive and publicize information about the Diversity Job Fair. The Committee also talked to representatives from other job fairs to get an idea of how one is suppose to be conducted. Finally, the IndyBar staff received training on Symplicity software, a software program that utilized to offer online registration for students and employers as well as developing final lists of interviews for employers and law students.

The IndyBar Diversity Job Fair increases the scope of traditional diversity efforts because it engages legal employers around a shared value of diversifying the legal community and providing law students with the opportunity to network and interview with a variety of legal employers. The initial Fair in 2008 enrolled 17 employers, with 55 students participating this has increased to 24 employers and nearly 80 students participating for the 2011 Fair. In addition to overall growth in participation, the 2011 job fair resulted in positive outcomes with dozen of employment offers extended and with 20% of the job offers accepted by students. Over the years the employer base has expanded to now include large law firms, mid-sized firms, boutique specialty firms, public interest organization, in-house positions with corporations and the United States District Courts.

In order to have a successful job fair, the IndyBar Job Fair coordinator must spend about 250 hours per year assisting the Committee’s work, coordinating the registered employers, marketing the event, communicating with students and law schools, managing the interviewing process through Symplicity and planning and executing the onsite logistics.

When compared to other job fairs, the Indianapolis Bar Association Diversity Job Fair differentiates itself by offering extra benefits and networking opportunities, such as networking events with attorneys and judges held the evening before the Fair, a scholarship giveaway to an interviewing student, keynote lunch events in between the morning and afternoon interviews, resume review during the Fair, an hour workshop titled “What to Expect from an Indianapolis Summer Internship,” information about the IndyBar’s Bar Review course.

The expenses for the Diversity Job Fair range from \$25,000 to \$35,000 based on participation. Students only pay their travel expenses, while employers pay a registration fee to participate that covers their interviewing attorney’s attendance at the networking reception and lunch, as well as the cost of the interview suite. Sponsorships offset costs for marketing, Symplicity software fees, signage, reduced registration fees for small firms and government employers, costs associated with student participation and the salary of the staff employee. One of the difficulties of conducting the Job Fair is the cost and gaining employer support.

**For more information about the IndyBar Diversity Job Fair, contact Brita Horvath at [Brita.horvath@faegrebd.com](mailto:Brita.horvath@faegrebd.com) or (317) 237-8298.**





# Institute for Inclusion in the Legal Profession

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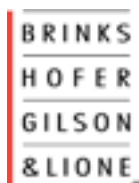


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