The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms

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Diversity eludes the most prestigious legal employers—the federal judiciary, academia, and elite law firms—despite enlightened scholarship diagnosing the quandaries of workplace equity in professional settings. While recruitment efforts stream attorneys of color into the lower ranks of corporate law firms, management and the legal profession still grapple with the obstacles that adversely affect the employment relationship between senior attorneys and minority associates. In addressing this problem, I examine the uncharted intersection between two bodies of legal scholarship: workplace equity theory and the institutional analyses of law firm diversity.

The primary data collection method for this study consists of personal interviews with diversity personnel, partners, and associates at three large law firms. Based on this data, the Article sets forth an associate evaluation process meant to repair the internal systems of corporate law firms that stymie the training and mentoring functions central to individual professional development and firm growth. Cross-cultural mentoring relationships, especially between persons from different racial and/or ethnic backgrounds, are fraught with opportunities for misunderstanding. A firm's deficiency in these in building quality relationships prevents the organization from recognizing the capacity of individual attorneys and harms both the associate and the law firm. The proposed review attempts to remedy this deficiency by closing the gap between firm expectations and associate performance, by facilitating an exchange of information meant to eliminate reliance on stereotypes and structural bias. The theories of transformative mediation and workplace equity are combined to resolve individual conflict, reveal systemic problems, and build a repository of data.

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In the law firm context, antidiscrimination law applies most directly to recruitment and promotion practices. The probationary period between these distinctive steps in an associate's career fall within a space not readily susceptible to Title VII, the federal accountability mechanism enacted to deter unlawful discrimination. However, if pertinent information regarding the experiences of minority associates flows throughout the profession, then the effort to create a diverse firm not only gains sustainability but also benefits from the expertise and inherent accountability pressures emanating from a professional norm of workplace equity.

"Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity . . . ."
- Justice Sandra Day O'Connor,
Grutter v. Bollinger, 539 U.S. 306, 332 (2003)

I.
INTRODUCTION

The following narrative reflects anecdotes from several interviews conducted in order to understand the experiences of racial and ethnic minorities in large law firms.

Jordan returned home after the first day of work with an unexpected story to tell: no one prepared for her arrival. This reality proved especially worrisome after she witnessed one associate talking on the telephone with his assigned mentor at every break during orientation; and her lunch conversation with another entering associate and two senior attorneys revolved around her peer's quick immersion into a major case. Jordan pondered having no work and no response after three days of calling her assigned mentor. She spent the following week working on a short memo and contacting litigation partners. Despite the litigation manager's assurances that getting "into the pipeline" takes time, Jordan felt like a bug scurrying under the heated lamp of a microscope.

No one offered more than cryptic advice during her critical transition stages. At a counseling session, in response to lagging hours, the administrative partner cited one example of how his office neighbor believed that Jordan did not understand the "magnitude of a case." When Jordan questioned the negative feedback, the partner was embarrassed to learn that his neighbor had never revealed his dissatisfaction. The litigation manager, appearing slightly uncomfortable, had also been made privy to the unfavorable assessment. Jordan asked for clarification but received no response. How did such a simple question silence two top-flight litigation partners? She then asked whether they received any other complaints about her work product. The administrative partner responded, "nothing else more than rumor." The litigation manager contributed, "Well Jordan, someone spoke to me, but I can't remember who it was. I will let you know when I get back to my office." She never heard anything more on the subject. As for work assignments, Jordan's mentor advised that, "in this game, you need to make buddies. Then when work comes up, people will remember their buddy

Jordan and ring your bell." This suggestion provided little help for an already frustrating situation. Jordan knocked on multiple doors each month, but received no responses. At her annual review, she received similarly obscure advice to show more "fire in the belly."

One partner, who tried above all others to empathize, initiated a conversation with Jordan by sharing the rampant depression rate among first-year associates. He then asked, "How are you doing?" In Jordan's opinion, she was not suffering from depression but something more akin to anxiety. With few substantive assignments and no guidance on getting better work, she worried about her future in the firm. No one understood her situation, and those who did had little influence over her situation.

Whom could Jordan trust to give honest, comprehensible advice? At a complete loss for direction, she skimmed the entire attorney directory for someone that looked like her, another black female. She happened across the biography of the only black female partner in the entire firm. The potential ally practiced in a different office, but she responded amicably to Jordan's plea for help. This partner offered candid insight. She shared her isolation as a young associate in the early nineties and struggle to ascend the firm's hierarchy, a journey that already seemed intolerable to Jordan within less than a year. Unexpectedly, in the process of offering guidance, the partner solidified Jordan's resolve to escape the firm. Jordan felt unsure as to whether the partner's strand of determination deserved praise or criticism. Shortly after this conversation, Jordan left the firm.

Jordan's story depicts many of the issues plaguing retention efforts in large law firms. Her mentor's belated entrance, months after her arrival, is just one symptom of the broken system. The lack of concrete advice regarding how to attain quality work assignments and critical feedback is another. The most fundamental feature of the broken system is a recruitment record void of successful minority retention.

This Article examines the unexplored intersection between workplace equity theory and institutional analyses of diversity in corporate law firms. Although the scholarship on law firm diversity provides institutional analyses explaining the disproportionate attrition rates of racial and ethnic minority associates, the literature in this area has not offered a comprehensive proposal for dismantling the patterns of structural bias that adversely affect these associates.

Professor Susan Sturm defines workplace equity as "a condition, a complex system, a set of relationships and structures that foster on-going reflection about and responses to unfairness and exclusion."[1] These relational issues may be resolved internally by "systems [that] develop the information and capacity necessary to understand the nature of the problem,

1. Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 290 (2002) [hereinafter Sturm, *Workplace Equity*].

respond at the appropriate organizational level to remedy it, and learn from previous problem-solving efforts."[2]

This Article considers the principles of workplace equity theory as applied to the corporate law firm. Part II reviews the statistics on diversity in large law firms and the institutional analyses of the minority associate experience. Part III summarizes the data collected through interviews with diversity personnel, partners, and associates at three large law firms. Such interviews provide a mechanism to collect "personalized, reflective, and complex data about the experiences of lawyers."[3] This section includes attorney responses disclosing how their firm's diversity program operates and their impressions of the firm's initiative to recruit and retain minorities and the overall effectiveness of the program.

Part IV details an associate evaluation process that incorporates lessons from transformative mediation theory.[4] In conceding the limits of mediation, Professor Carrie Menkel-Meadow states that "'transformative' mediation is possible (and indeed desirable)—but only if we define our terms more clearly, state our goals more modestly and inclusively, and remain sensitive to the social and political situations and institutions in which we do our work."[5] This Part discusses Title VII's deficiencies in addressing the systemic problems present in law firms and how cultural norms specific to the law firm context deter associates from relying on Title VII as a remedy. I argue that alternative dispute resolution provides a more reasonable approach to building an equitable law firm that maximizes the employment relationship between minority associates and the firm. This Part also reviews the United States Postal Office's efforts to develop an employment mediation program in response to a class action discrimination lawsuit. Moving beyond the individual dispute, this Part further analyzes recent research on alternative dispute resolution in the employment discrimination context, which supports incorporating mediation as a pathway to workplace equity.

Part V critiques the diversity programs at the law firms participating in this project. I explain why associate evaluations are an appropriate intervention point for realizing workplace equity in law firms. I then situate the

2. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 479 (2001) [hereinafter Sturm, *Second Generation Employment Discrimination*].

3. Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from The Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 187 (2004).

4. During the transformative mediation process, a mediator should "encourage disputants to recognize and empower each other in their responses to conflict." This approach attempts refining how the participant internalizes and reacts to social conflict. Transformative mediation also seeks to restore relationships while simultaneously improving the individual. Dr. Brian Jarrett, *The Future of Mediation: A Sociological Perspective*, 2009 J. DISP. RESOL. 49, 55 (2009).

5. Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 239 (1995); *also available in* MEDIATION: THEORY, POLICY AND PRACTICE 111-136 (Carrie Menkel-Meadow ed., 2001).

central role of diversity managers and consultants, as opposed to diversity committees, in executing innovative programs. Part VI examines the need for monitoring and accountability measures at the organizational and professional levels. This Part incorporates interview responses as illustrative examples of the weak accountability systems at law firms. Finally, Part VII discusses how the profession may establish an equity norm able to extinguish the need for diversity initiatives in the future.

II.
TESTING THE VIRTUE OF PATIENCE: THE CURRENT STATE OF AFFAIRS IN LAW FIRM DIVERSITY

A disconnect persists between the expectations of senior attorneys and the actual performance of minority associates. Race serves as a distraction and deceptive magnifier of stereotypes arising from either conscious or subconscious bias. Accordingly, the procedures surrounding associate evaluations and mentoring—two factors inextricably linked to realizing one's goals—and the imbedded effect of bias need immediate attention.

Nancy Fraser describes inequality as the "misrecognition" of group status.[6] Misrecognition "arises when institutions structure interaction according to cultural norms that impede parity of participation," which results from "institutionalized patterns of cultural value" in whose construction minority groups have not equally participated.[7] As attorneys work through the law firm apprenticeship model, they internalize the cultural norms unique to their work environment and the profession, sometimes without recognizing that external controls influence their independent judgment.[8] Even though law firms are not the guardians of minority associate careers, management should take responsibility for policies and practices grounded in the exclusionary culture of past generations.

Law firm culture today resembles in important ways the law firm culture in place when Congress passed antidiscrimination laws. And to understand the slow improvements in diversity at corporate law firms, one must acknowledge the high institutionalization of the employment practices now

6. Nancy Fraser, *Recognition as Justice?: A Proposal for Avoiding Philosophical Schizophrenia*, *in* LAW, JUSTICE, AND POWER: BETWEEN REASON AND WILL 139 (Sinkwan Cheng ed., 2004).

7. *Id.* at 142, 144. Jennifer Gordon and R.A. Lenhardt also define equality in terms of participation, suggesting the need for individuals and groups to have "genuine participation in the larger political, social, economic, and cultural community," but proposing that a group's "status complicate[s] the full achievement of citizenship in this sense." Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2494-95 (2007).

8. Laura Empson, *Your Partnership: Surviving and Thriving in a Changing World: The Special Nature of Partnership*, *in* MANAGING THE MODERN LAW FIRM: NEW CHALLENGES, NEW PERSPECTIVES 10, 16 (Laura Empson ed., 2007); *see also* Jean E. Wallace, *Corporatist Control and Organizational Commitment Among Professionals: The Case of Lawyers Working in Law Firms*, 73 SOC. FORCES 811, 813-14 (1995) (arguing that firms build loyalty to the organization through "normative and symbolic inducements, rather than through coercive or utilitarian means").

recognized as adverse to the advancement of minority attorneys. Institutionalization seen as a "history-dependent process" brings to bear the challenges confronting diversity advocates.[9] The most-esteemed corporate law firms of yester-year employed a small collection of white males from elite law schools. This discrete group shared many cultural similarities, including educational background, race, and social status.[10] The demographic composition of the firm was viewed as indicative of the firm's work product; and firms culled business from corporate leaders sharing a similar background.[11] The meritocracy hoped for in today's law firm may have been a reality in the homogenous Wall Street law firms of over fifty years ago. Nevertheless, these elite white males established the normative behavior and procedures practiced in the modern law firm. The need to "fit in" ranked alongside billable hours and client development as a requisite attribute for partnership consideration.[12] Arguably, this meritocracy loses legitimacy in today's heterogeneous workplace plagued with institutional barriers due to the firm's persistence to carry on in the same manner introduced during a different era. To reinforce the firm's discriminatory practices, the American Bar Association also failed to integrate the professional organization until nearly four years after the passage of antidiscrimination laws. Yet this exact same history accounts for the prestige held by the most elite corporate law firms—an ability to weather the turning tides of this country's economy and adapt to globalization along with ever changing business practices.[13]

Today, more minority students are entering large law firms after graduation. The firm is a treacherous workplace for any associate, regardless of color, race, or national origin, but the alarming attrition rates for minority associates, compared with attrition rates for non-minorities, demonstrate a special problem. An internal breakdown in corporate law firms impedes the training functions central to individual professional development and firm growth. The following section briefly reviews statistics conveying the dismal retention rates and discontentment among minority associates in large law firms that results partly from the systemic challenges addressed in this Article.

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9. Walter Powell, *Expanding the Scope of Institutional Analysis*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, 183, 195 (Paul DiMaggio, Walter Powell, eds., 1991) ("Organizational fields are created at different times and under distinctive circumstances; thus they evolve according to divergent trajectories and at varying speeds.")

10. David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1563 n.65 (2004) [hereinafter Wilkins, *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*].

11. *Id.* at 1563 n.66.

12. *Id.*

13. DiMaggio & Powell, *supra* note 9 at 72 ("By identifying a top firm through professional organizations and placing the firm as a picking ground for top positions—society indirectly legitimizes the organizational structure and operating procedures of the central organization.")

Currently, racial and ethnic minorities are more proportionately represented at the summer associate and associate levels than at the partner level.[14] The number of minority partners across the country has barely increased, from 4.63 percent in 2005 to 5.0 percent in 2006,[15] and only 1.48 percent of partners working in major law firms are minority women.[16] In a national survey published in 2000, over 50 percent of minority associates claim to leave their firms within the first three years, and two-thirds leave within the first four years of practice, as compared to an overall associate attrition rate of 43 percent after three years in practice and 55.6 percent after four years in practice, respectively.[17] Before their sixth year, 64.4 percent of female associates belonging to a racial or ethnic minority group left their law firm as compared to 54.9 percent of all women.[18] Most notably, more than 85 percent of minority female attorneys leave the firm before reaching their seventh year as compared to an overall attrition rate of 74.6 percent.[19] Based on these statistics, an observer may conclude that recruitment solves only a portion of the law firm diversity puzzle.

Law firms that retain a proportionate number of minority attorneys have the ability to maximize the employment relationship by nurturing the associate's potential to become an effective, well-trained attorney. A representative number of minority senior associates and partners also signals to new recruits that the firm provides upward mobility for attorneys of color.[20] Many law firms, however, have yet to communicate this commitment to racial and ethnic minority associates. In fact, when asked whether women and minorities had the same opportunity to move up the ranks as their white male counterparts, among white lawyers (male and female), 78 percent perceived that women and minorities enjoyed equality of opportunity (or bet-

14. Press Release, National Association for Law Placement, Partnership at Law Firms Elusive for Minority Women—Overall, Women and Minorities Continue to Make Small Gains (Nov. 8, 2006), http://www.nalp.org/2006partnershipelusiveforminoritywomen [hereinafter Partnership at Law Firms Elusive for Minority Women] ("Women account for 44.33% of associates, minorities for 16.72% of associates, and minority women for 9.16% of associates. Each group lags in their representation by 3 to 5 percentage points compared to the population of recent law school graduates. . . . With an increase from 22.85% in 2005 to 23.05% in 2006, minority representation in summer programs slightly exceeded their representation among law students for the second year in a row.").

15. National Association for Law Placement, *Percentage of Women and Minorities at Law Firms up Slightly for 2006*, Oct., 12, 2006, http://www.nalp.org/2006octpercentageofwomenandminorities (last visited Mar. 27, 2009).

16. Partnership at Law Firms Elusive for Minority Women, *supra* note 14.

17. ELIZABETH CHAMBLISS, ABA COMM. ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 11 tbl.23 (2000).

18. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DIVERSITY IN LAW FIRMS 10 (2003), http://www.eeoc.gov/stats/reports/diversitylaw/index.html (last visited Mar. 27, 2009).

19. CHAMBLISS, *supra* note 17, at 11 tbl.23.

20. Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter's Legacy*, 25 LAW & SOC. INQUIRY 41, 63 (2000) (concluding that the number of minorities in the partnership of an organization affected the distribution of rewards to minority associates throughout the organization).

ter), but only 44 percent of black lawyers [held] the same perception."[21] Increasing the number of minority associates and partners generates the systemic adjustments necessary to "change the criteria by which minorities are evaluated by both majority and minority group members."[22]

According to one study's preliminary findings, minority law students perceive that large firms set the entrance bar lower than the retention bar.[23] These same students assumed that once associated with a law firm, building relationships and accessing professional development would prove more difficult because of their race or ethnicity.[24] Law firm success depends greatly on the ability to develop informal relationships with senior associates and partners.[25] Minority associates understand this and also express their awareness of negative stereotypes that have persisted in corporate law firms long before their arrival and serve to undermine their future potential.[26] The perceived advantages of their white peers include the ability to excel in technical legal skills, fit into the dominant work culture, and connect with mentors.[27]

Research on associate evaluations corroborates the perceptions revealed in the study above. The ABA's study, *Visible Invisibility*, has found that "close to one-third of women of color in the survey (31 percent) said that they have had at least one unfair performance evaluation, as did 25 percent of white women and 21 percent of men of color. Less than 1 percent of white men reported ever receiving an unfair performance evaluation."[28] In her dissertation, "Gender Matters, Race Matters: A Qualitative Study of Gender & Race Dynamics in Law Firms," Aravinda Reeves re-

21. JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 113 (2005).

22. *Id.* (concluding that "senior-level minorities tread the path for younger racial and ethnic minority associates").

23. David B. Wilkins & G. Mitu Gulati, *What Law Students Think They Know About Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students*, 69 U. CIN. L. REV. 1213, 1248 (2001) [hereinafter Wilkins & Gulati, *What Law Students Think They Know about Elite Law Firms*].

24. *Id.* at 1248.

25. Wilkins, *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, *supra* note 10, at 1614 ("The[se] goods, however, are all mediated through personal relationships—relationships that are structured not just by race, but by class, mutual interest, economic advantage, and downright luck. Lawyers who understand this essential truth, and therefore refuse to buy into the myth permeating elite law firms that hard work will automatically be rewarded, are more likely to succeed in building the kinds of relationships required for advancement").

26. ARAVINDA N. REEVES, GENDER MATTERS, RACE MATTERS: A QUALITATIVE ANALYSIS OF GENDER & RACE DYNAMICS IN LAW FIRMS 226-29 (June 2001) (unpublished Ph.D. dissertation, Northwestern University) (on file with Law Library, University of California, Berkeley).

27. Wilkins & Gulati, *What Law Students Think They Know about Elite Law Firms*, *supra* note 23, at 1243.

28. AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 26 (2006) [hereinafter VISIBLE INVISIBILITY]. A study conducted by the NALP Foundation showed that minority associates felt as though their non-minority peers received more internal recognition and monetary compensation either through a raise or bonus, and were more often advanced by title or level based on performance evaluations. REEVES, *supra* note 26, at 104.

ports that black attorneys consistently battle two stereotypes relevant to performance evaluations: "general incompetence and substandard writing skills."[29] Minority associates also suspect that after receiving performance evaluations, they were less likely than their non-minority peers to receive challenging work.[30]

In their seminal piece, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, David B. Wilkins and G. Mitu Gulati explain how organizational features unique to elite law firms adversely affect black attorneys.[31] First, the large number of associates, as compared to partners and associates groomed for partnership, allows firms to invest scarce training resources into average white associates, but still at a level higher than that invested into average black associates, without any economic harm to the firm. Second, once aware of this imbalance, black attorneys over-invest in either avoiding negative judgments from senior attorneys or they focus on conveying the positive signals of a superstar associate, such as performing advanced legal work. In executing these strategies, it becomes difficult for a black associate to learn the skills necessary to ascend the firm hierarchy.

In *Reconceiving the Tournament of Lawyers*, Wilkins and Gulati expose the tension between law firm management retaining associates marked for partnership and motivating other associates to work diligently under little supervision.[32] According to the authors, top-tier attorneys receive better work, training, supervision, and mentors–all the ingredients necessary for an associate's promotion to partnership.[33] Associates not marked for partnership perform mundane tasks such as document review and drafting legal memoranda. Attorneys on this tier either leave the firm, attempt to elevate their status, or work toward building non-firm specific skills that may help

29. REEVES, *supra* note 26, at 237.

30. *Id.*

31. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CAL. L. REV. 493, 499, 530-42 (1996) [hereinafter Wilkins & Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?*] (stating that these organizational characteristics include (1) the large attorney pool attracted by high salaries; (2) the high partner to attorney ratio maintained at most big firms; and (3) the tracking system used to train associates for partnership).

32. David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998) [hereinafter Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*]. The longer an associate remains at a law firm, the more valuable this associate becomes to the organization. Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 577 (1989) (arguing that during the apprenticeship period of being an associate, the firm learns "which associates can be trusted, which are adept at what types of work, which can deal directly with clients, and the like," thus the associate requires less supervision and can handle more complicated tasks).

33. Wilkins & Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?*, *supra* note 31, at 539-40.

them attain another position.[34] Under this scenario, neither the law firm nor the associate reaps the full benefits of the employment relationship. Associates miss the opportunity to improve their legal skills and law firms fail to fully employ those associates who remain on board.

In discussing organizational reforms implemented by firms, such as formal training, assignments, and evaluations, Wilkins and Gulati suggest that these programs are "unlikely to rectify the most important problems" confronting minority associates.[35] The transaction costs incurred to recruit, train, and eventually replace minority associates who leave the firm after their first three to four years outweigh the costs of investing resources in an effective diversity program. For most employers, replacement costs equal nearly twice the employee's salary and this figure does not include the lowered morale of other associates, the increase in training costs for senior level associates, and the prospective costs of recruiting competitive associates with the potential to draw a strong client base. Further, as law firms continue to recruit more racial and ethnic minority attorneys, the cost to replace these attorneys constitutes an unnecessary expense. Law firms should channel the money wasted on ineffective diversity programs and minority attorney replacements toward building a program modeled for reaching long-term diversity goals.

III.
BEHIND THE SCENES: AN INSIDER'S VIEW ON LAW FIRM DIVERSITY PROGRAMS

An institutional commitment, management support, diversity trainings, and gathering information on the firm's diversity history are the first steps in building an equitable law firm. To feed the employment relationship, firm management must develop a process for translating the lessons of formal training into day-to-day practice.

A. Law Firms Use Different Approaches to Diversity

First I identified three large law firms that are known for their diversity efforts.[36] I then conducted interviews with partners, associates, and diversity personnel involved in the diversity programs at each firm. Throughout this Article, I quote excerpts from these conversations as illustrations of the obstacles and triumphs associated with progressive diversity policies. The

34. *Id.* at 567. Similarly, in a subsequent article, Wilkins and Gulati assert that minority associates not destined to partnership who remain at the firm do so "to keep their high wages, protect their reputational bonds, or acquire general (as opposed to firm-specific or relational) capital." Wilkins & Gulati, *Reconceiving the Tournament of Lawyers, supra* note 32, at 1650.

35. Wilkins & Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?, supra* note 31, at 592.

36. I identified the three law firms studied in this project by relying upon the assessments of legal associations, trade journals, and law reviews.

efforts by the three law firms examined for this project demonstrate the complexity of firm-wide reform and shed light on how other firms can make systemic changes to their programs.

Each diversity initiative requires organizational changes in order to increase retention rates. For example, Firm A appointed a full-time professional to oversee the firm's diversity initiative. Firm B and Firm C manage their diversity programs through partner committees. Firm B stands on its reputation of sustaining a strong diversity initiative over the past several years, setting an exemplary standard. Firm C pushed for improvements in the firm's diversity program within the last few years and already ranks highly as a leader in diversity. Whereas Firms A and B identified reliable strategies to combat the symptoms of traditional programs, Firm C struggled to overcome beginner challenges and improve its initiatives.

B. Diversity Personnel, Partners, and Associates Speak Out on Diversity

Diversity programs require management and firm leaders to revise organizational practices in a manner that positively affects the experience of all employees and strengthens the law firm. A diversity committee member at Firm A explains:

> [W]hat makes us different from other firms is that ours has a lot of meat to it. It is more an institutional program than a theoretical one. . . . Our program, I think, is institutional in the respect that we truly believe and the firm management truly believes that if a firm is going to continue to grow and survive, [then] it must make some adjustments to the way business is done. I think this is very true in our case.[37]

The chief diversity officer at Firm A adds:

> [Diversity] is intrinsic; it is inextricably interwoven into the fabric of the law firm, and it is very important. If diversity is simply an add-on to the law firm, it will never get the kind of support or movement that is necessary for the law firm to move from being a diversity spectator to a diversity player.[38]

The committee member and diversity officer's statements reflect a holistic approach to achieving an equitable workplace for all employees, which includes changes in the firm's day-to-day operations. A junior partner explains that the most valuable element of Firm B's diversity program is that the diversity initiative has the support of management:

> [W]hen you have a program that is not supported by management, it puts you in the position where all minority attorneys together [are] trying to work it out, [with] no way to translate goals and aspirations into improving results at the firm. . . . [It is a] key attribute of having a successful diversity

37. Interview with Member of Diversity Committee of Firm A, in Dallas, Tex. (Mar. 22, 2006).

38. Interview with Chief Diversity Officer of Firm A, in Pittsburgh, Pa. (Feb. 14, 2006).

> program. Absent management buy-in, unless the firm has minority partners that are rainmakers, it is difficult to make any progress.[39]

The situation unfolding at Firm C illustrates the importance of management support. At Firm C, senior associates mentor younger associates by taking them to lunch, checking their workload, and providing advice when necessary. One of these associates also attends a weekly meeting with the diversity committee chair and keeps in contact with the diversity consultant. At one point, this associate expressed her frustration with the firm, finding that diversity is "moving slowly, not as quickly as needed. A lot of attorneys don't take [diversity] as seriously because the firm is so slow to move on it. They say it's important, but actions on implementation give a different vibe to attorneys."[40] Her colleague at another office observes that firm management "needs to do a better job of advancing diversity within its ranks. I'm not sure what the committee is doing for diversity because there is a disconnect between reality and action by the committee."[41] These associate comments paint a picture much different from the leaders involved with the initiatives at Firms A and B. Management's inability to implement effective diversity initiatives casts doubt on their commitment to diversity in their attorney pool.

A first year associate at Firm C described the firm's affinity group as "dead in the water" and then considered whether "this results from a lack of supervision."[42] He concluded, "It is tough to run [a diversity program] in a firm environment, where folks are trying to make clients, bill hours, and do the work."[43] At present, Firm C depends solely on the associate committee and the fortitude of individual associates to bring forward diversity-related issues to designated partners and associates.[44] A senior associate describes the committee as "a gripe situation, not necessarily a constructive, creative thinking session."[45] At Firm B, one associate expresses a similar concern:

> [M]any things fall on deaf ears. Formal committees that address the issues involve lots of complaints and chatter, and even when an associate leaves, the issues go unaddressed. The firm may hire someone to replace them, but there's only room for so many people on certain committees. And they are not necessarily people that have challenges that other associates are having. Lots of discontentment and dissatisfaction does not [resonate with] those

39. Telephone Interview with Jr. Partner of Firm B, in Washington, D.C. (June 27, 2006).

40. Telephone Interview with Sr. Associate of Firm C, in Washington, D.C. (Jan. 23, 2006).

41. Telephone Interview with Sr. Associate of Firm C, in San Francisco, Cal. (July 13, 2006).

42. Telephone Interview with Associate of Firm C, in Washington D.C. (June 9, 2006).

43. *Id.*

44. At Firm C, associates and partners wanting to communicate are not at a complete loss, but the expression of diversity concerns is achieved on a more informal basis. Certain associates and the chairman of the diversity committee have an ongoing relationship with the diversity consultant. In this way, the associates and partner can relay the matter of concern to the firm's diversity expert and consider ways to resolve the situation.

45. Telephone Interview with Sr. Associate of Firm C, in San Francisco, Cal., *supra* note 41.

> people. They are only the upper crust of those doing well . . . who don't want to make waves because they are in the position to make partner.[46]

In an effort to move away from diversity and associate committees, Firm A hired a full-time diversity officer to develop a new approach to diversity initiatives. Firm A's experience with its chief diversity officer brings to light the attributes of this position. Firm A charged its chief diversity officer with a two-part mission: first, serve as "a change agent in terms of the culture within the law firm"; and second, serve as a "change agent in the legal profession."[47] With respect to the first goal, the chief diversity officer strove to acquire, promote, and maintain diversity "firm-wide and firm-deep."[48] The firm also appointed their chief diversity officer to the management committee, and he attends every policy-making decision and major discussion. He reports directly to the chair of the management committee, holds the authority to recruit attorneys at all levels, and implements programs to recruit a more diverse attorney workforce. He does not keep billable hours, like partners and associates serving on diversity committee members, but instead sets benchmarks based on defined goals.

Organizational changes require that management understands the firm's successes and failures with past diversity initiatives. To acquire this knowledge, diversity advocates must garner the trust of attorneys of color. For example, upon his arrival at Firm A, the chief diversity officer constructed a survey for minority associates in order to gauge their thoughts on the diversity program. After receiving no responses, he realized that a lack of trust stood between him and minority associate participation. Once assured of confidentiality, however, associates responded to the survey and changes were made to the mentor program. The chief diversity officer found it "difficult to get people to speak about diversity . . . It is still a hot button topic. There are still contrary views . . . the way I've gone about getting people to talk to me candidly and honestly is a very labor-intensive method of one-on-one. I'm literally always going to every single office trying to meet with all 1,000 lawyers."[49] He realized, "[I] can't change everyone's mind, but I am giving people the opportunity to give me the feedback and pushback that they have about diversity."[50] Through both approaches, associate concerns make their way up the chain to management for assessment and resolution.

In addition to management support and data, diversity initiatives thrive on involvement from senior attorneys. For any comprehensive diversity initiative focused on creating an inclusive workplace, mentoring is an essential element and a challenge for diversity advocates. In corporate law firms,

46. Telephone Interview with Associate of Firm B, in Washington, D.C. (July 18, 2006).
47. Interview with Chief Diversity Officer of Firm A, in Pittsburgh, Pa., *supra* note 38.
48. *Id.*
49. *Id.*
50. *Id.*

the number of minority partners is disproportionate to the number of minority associates.[51] One senior associate at Firm C commented skeptically, "In terms of diversity, [I'm] not sure who could mentor me because very few other minority partners or associates are in the office—diversity is nonexistent."[52] For this reason, majority group members at the partnership level must get involved in the effort to mentor minority associates.

Mentorship programs are in need of change, specifically, for the benefit of minority senior associates seeking promotion to partnership. A fourth year associate explains:

> [Firm B] cares about diversity and associates generally, but once you hit the senior level, I've noticed the most dramatic drop off because people aren't able to help in terms of guidance toward good assignments. You might know that things are not right, but a minority partner may tell you that's just the way that it is. While some are being told that, others are not and it's made clear that some people should not be doing certain types of work. People have left the firm because they felt like no one was looking out for them and because they were not able to open a substantive dialogue.[53]

A junior partner at the same firm comments:

> [Having a minority partner as a mentor] is very useful, but not as critical as having a good mentor in your practice area that has enough business to support you for partnership. The ideal circumstance is having someone that can take you the full distance. The advantage of a book of business is that if you are able to develop a [partner-associate] relationship that is more than transactional, you can get good assignments that are good for your career without having to advocate to someone else that you should have more opportunities.[54]

These sentiments on mentorship reiterate the race-neutral principle that retention requires senior attorneys to earnestly focus on developing an associate's legal and interpersonal skills. Minority associates encounter roadblocks when attempting to build these relationships with majority group members, and diversity initiatives cannot improve without addressing this issue. The chief diversity officer at Firm A identified ineffective mentoring as one of the primary reasons why attorneys of color were "coming in and revolving back out." One partner described the law firm environment frankly:

> [It is] very competitive, very cut throat, and almost survival of the fittest . . . most of the people that have partners and senior associates working closely

51. Press Release, National Association for Law Placement, Women and Attorneys of Color Continue to Make Small Gains at Large Law Firms (Nov. 17, 2005), http://www.nalp.org/2003womenandattorneysofcolor.

52. Telephone Interview with Sr. Associate of Firm C, in San Francisco, Cal., *supra* note 41.

53. Telephone Interview with Associate of Firm B, in Washington, D.C., *supra* note 46 (July 18, 2006).

54. Telephone Interview with Jr. Partner of Firm B, in Washington, D.C., *supra* note 39.

> with them and teaching them the ropes, so to speak, are the ones that will succeed. . . . [O]ther people are left to dangle.[55]

This same partner observes, on the organizational level, that "If you don't have [a mentoring] process built in, you're not going to have a successful retention rate because people are going to be unhappy."[56] In the chief diversity officer's opinion:

> If you go to a law firm that does not have a strong mentoring program and you are not totally self-sufficient, you may be in trouble within two years. Oftentimes you are in trouble within two years and you do not even know it. Mentoring is the ability to give both developmental guidance and critical feedback for growth . . . a program needs to nurture and guide new associates through the maze and the political process of a law firm.[57]

As mentioned above, in an effort to improve its current program over previous models, Firm A conducted surveys asking minority associates to comment on the existing mentoring system. The law firm determined that every associate recognized mentorship as an essential ingredient to their success, mentors needed a book of business, mentors should take an ownership interest in an associate's success, associates believed the firm's mentor program was ineffective, and firm management could not force partners to mentor associates.[58] In response to these results, the firm held a cross-cultural mentoring session for all partners and attorneys. Typical training engaged attorneys and staff in conversations such as appreciating various interpersonal styles and the effects of different perspectives or subconscious perceptions in the workplace. At Firm A, both partners and associates sat in on the training and exchanged feedback. The chief diversity officer recalls how "partners got a revelation . . . There is a different breed of student coming to law firms in the twenty-first century than those who came in the twentieth century . . . and you need a different type of partner to mentor this associate than was the case in previous years."[59]

Most associates are lukewarm about the utility of diversity training. For example, mandatory diversity sessions at Firm C received mixed reviews. One associate commented that diversity training is not perfect because the "guy talks at you for three hours"; however, the session "serves as a springboard" and shows that the firm is "on the right track."[60] Firm B uses diversity consultants to gather information and provide advice for coping with the law firm environment. At Firm B, every associate interviewed mentioned the diversity retreat as one of the highlights of the diversity program, where attorneys were able to voice their concerns on issues unique to

55. Interview with Member of Diversity Committee of Firm A, in Dallas, Tex., *supra* note 37.
56. *Id.*
57. Interview with Chief Diversity Officer of Firm A, in Pittsburgh, Pa., *supra* note 38.
58. *Id.*
59. *Id.*
60. Telephone Interview with Associate of Firm C, in Washington, D.C., *supra* note 42 (June 9, 2006).

minority associates. At the diversity retreat, Firm B makes time for associates to "honestly, and anonymously (if desired) express grievances and talk through different issues."[61] Whereas diversity efforts may begin with an analysis of the firm's diversity history, gathering information from current associates, and trainings, minority retention will not come about through these steps alone.

IV.
A UNITED FRONT: TITLE VII, MEDIATION, AND WORKPLACE EQUITY

A. An Overview of the Proposed Interactive Evaluation Process

This Part suggests mediation-inspired modifications to the associate evaluation process and explains why alternative dispute resolution provides a more effective avenue than Title VII litigation in addressing the professional development issues unique to law firms. I propose that if law firms begin to incorporate the transformative mediation theory, this will encourage discussion between associates and partners in the event of a negative performance review.[62] Firm management implements an evaluation rubric that combines objective and subjective categories to account for the unique contributions of partners and associates. However, by opting for mediated sessions, law firms can fill a void on the subjective side of associate evaluations.[63] A mediation-inspired program allows management to acknowledge equity issues deemed irrelevant under the law but present at the firm.

In considering law firm evaluations and structural bias, the commonplace definition of conflict may not come to mind. The typical mediation process involves a third-party neutral and two opponents attempting to re-

61. Telephone Interview with Jr. Partner of Firm B, in Washington, D.C., *supra* note 39.

62. John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOTIATION L. REV. 137, 186 (2000) (asserting that "preservation and rehabilitation of relationships is often cited as one of the distinctive potential advantages of mediation as compared with other disputing methods").

63. Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 755 (1997) (suggesting that norm-advocating mediation methods are suitable for situations that "require application of a normative framework, but present gray areas within that framework for negotiation"). Both psychological research and legal scholarship fully explore the pathways for cognitive bias, stereotypes, and aversive racist attitudes to flourish in professional organizations. Jerry Kang, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1084-85 (2007); Tristen Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659 (2003) [hereinafter Green, *Targeting Workplace Context*]; Devon W. Carbardo & Mitu Gulati, *Discrimination and Inequality Emerging Issues: Working Identity*, 85 CORNELL L. REV. 1259, 1262, 1270 (2000); William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120, 122 (2000); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 747-48 (2005). Psychological studies also suggest that victims of institutional bias may not recognize the existence of discrimination. Faye J. Crosby & Aaarti Iyer et al., *Affirmative Action: Psychological Data and the Policy Debates*, 58 AM. PSYCHOL. 93, 103-04 (2003).

solve a concrete disagreement. The evaluation process proposed here involves the associate and senior attorney working to resolve their individual conflict, but the diversity officer uses his expertise to address larger issues not apparent on the surface and effect long-term changes in firm practices. In law firms, an undetected conflict could manifest through poor work product, work assignments beneath the associate's skill level, and low billable hours. Interactive evaluations would reveal whether the issue springs from a systemic problem, the partner acting within the constraints of the firm's institutional culture, or complications on the associate's behalf.[64] The firm should establish confidentiality procedures shielding information from use in subsequent litigation proceedings.

An interactive evaluation process uses an institutional representative and outside neutral to (1) relate the knowledge gained from formal trainings and (2) control biases on the organizational and individual levels that affect the employment relationship between minority associates and firms. The process does not automatically assume that a partner suffers from subconscious biases. Instead, via an established institutional practice, the diversity officer intervenes to critically review the situation. Diversity and sensitivity trainings provide a foundation for diversity managers and consultants to broach these taboo topics. When the opportunity arises, diversity managers should communicate the firm's equitable norms to partners demonstrating blind acquiescence to the status quo or partners exhibiting signs of implicit bias against a minority associate.[65] In sum, law firms should use an interactive evaluation process as an extension to diversity programs in order to incorporate broader equity goals and reach nonrestrictive solutions.

Here is a sketch of Firm A's current evaluation process:

Each associate receives a mid-year progress report on skill development. At the end of the year the firm conducts formal associate evaluations.

64. For example, the diversity officer and the consultant must be careful to detect attribution biases in mediating an associate's interest. Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 302 (2006) (explaining how "attribution biases" cause a stalemate in mediation because "when acts of others harm us, we are more likely to conclude that 'they' are bad people who have acted with malice or indifference . . . . [whereas] when we are the harmdoer we are more likely to believe, on average, that our actions are responses to unalterable situational constraints"); Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 22-23 (2007) (asserting four matrices of institutional problem-solving addressed in the ombudsmen office based on whether the dispute necessitates an individual or institutional intervention).

65. *See supra* note 63 and accompanying text; *see also* Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Without Law*, 74 WASH. U. L.Q. 47, 56 (1996) (asserting that "[i]nstead of law, free-standing normative standards govern in mediation, and parties actually affected by a dispute decide what factors should influence the efforts to resolve that dispute."); Wilkins & Gulati, *What Law Students Think They Know about Elite Law Firms*, *supra* note 23, at 1248. In The NALP Foundation study of associate evaluations, minority associates identified statements regarding bias in the evaluation process as accurate at a much greater rate than non-minority associates. THE NALP FOUNDATION, HOW ASSOCIATE EVALUATIONS MEASURE UP: A NATIONAL STUDY OF ASSOCIATE PERFORMANCE ASSESSMENTS 88 (2006) [hereinafter HOW ASSOCIATE EVALUATIONS MEASURE UP].

Along with the annual formal review, each associate writes a plan regarding their skill and professional aspirations for the coming year. The associate and a partner jointly review the plan, which serves as a reference point for the associate's progress. In the democratic spirit of checks and balances, associates are also given the opportunity to *evaluate the evaluator* by reporting on a partner's performance to the associate development committee.

The diversity officer's most important role as an intermediary starts whenever an associate hits a stumbling block in their professional development. Firm A's chief diversity officer believes that the "first sign of trouble is not getting enough work because of the informal rumor mill among partners." If, for example, an associate's evaluation reveals that he/she failed to meet the billable hours requirement as a result of a negative work experience, Firm A's chief diversity officer intervenes. First, he speaks with the associate and partner evaluator on an individual basis to assess the circumstances surrounding the negative evaluation. Second, he supports the associate by seeking out work assignments from other partners. Next, if necessary, the chief diversity officer mediates a conversation between the associate and partner to overcome the stalemate that triggered the breakdown in their professional relationship. Finally, the chief diversity officer determines whether or not the associate needs additional assistance with a particular skill set.

Firm A's program demonstrates the immediate results of using an intermediary to advocate on behalf of minority associates. Law firms achieve systemic reform through the diversity manager, a consultant or, as is the case with Firm A, a chief diversity officer. Their roles require that they critically analyze the evaluation process over time and propose policies designed to address the question of why minority associates are not thriving in the law firm environment.[66] Instead of blindly evaluating a candidate, nonminority partners and associates need to understand why the associate failed to meet a specified performance measure. The shift in emphasis away from coercing a resolution aligns with the law firm reality that no one can aptly coerce a partner to work with an associate. Moreover, depending on the situation, the diversity manager may require the partner and associate to part ways, a feasible option in a big law firm. Thus, the diversity manager's best aspiration may be to empower the associate through the process and help both parties locate the reason behind the collapse in their professional

66. *See* Sturm & Gadlin, *supra* note 64, at 17 (explaining how "ombuds offices typically combine individual conflict resolution with some responsibility for identifying complaint patterns and trends and providing 'upward feedback' to the organizational leadership about systemic problems"); *see also* SIGISMUND HUFF ET AL., WHEN FIRMS CHANGE DIRECTION 65 (2000) ("If these [proposed policies] appear promising and require relatively small adjustments, [firms] will find ways to accommodate them within the bounds of current cognitive, social, and political frameworks."); Sturm & Gadlin, *supra* note 64, at 14 ("Systems change requires that information about systemic problems come from stakeholders operating at the points of breakdown, where changes in practice are most needed.").

relationship.[67] By providing a setting whereby to discuss their differences and the option of ending their professional relationship, the diversity manager overcomes a major hurdle in law firm culture—persistent miscommunication during and after the evaluation process—and addresses negative experiences before they result in partners choosing other associates for their assignments.[68]

An interactive evaluation process also allows for critical feedback time. In the law firm workplace, time is a scarce commodity; both partners and associates covet the time spent on non-billable hour activities. These time pressures work against partners and associates sitting down to discuss performance issues. Instead, based on the disproportional partner-to-associate ratio, it is much easier for a partner to simply move on to the next entry-level associate, rather than "waste" time on developing one associate.[69] A formal evaluation process involving the option to discuss issues with the evaluator ensures that at least once or twice a year, associates receive feedback.

The interactive evaluation process serves as an institutional mentoring experience for racial and ethnic minorities unable to develop imperative relationships with majority partners and senior associates. An associate's perceived legal ability in the first two to three years of practice greatly affects his or her ability to move up in the law firm hierarchy.[70] Although a constructive review may prove less effective at the senior associate and partner level, younger associates gain valuable insights on professional development in their formative years and are therefore able to rectify performance issues and restore relationships. In other words, this process seeks to remedy the problem of weak cross-cultural communications and create an equitable law firm environment.

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67. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 12 (1994) (stating that in the transformative mediation style, the mediator focuses on "empowering parties to define issues and decide settlement terms for themselves and on helping parties to better understand one another's perspectives."); *see also* Lon Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

68. Some have suggested that the positive results of mediation—parties discussing their problems to reach a solution—also support the democratic process. Menkel-Meadow, *supra* note 5, at 240. Green, *Targeting Workplace Context*, *supra* note 63, at 712-13; *see also* Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 HAMLINE L. REV. 261, 272-73 (1998) (discussing institutional conflict cultures that are adverse to settling disputes, including time pressures and a culture of silence with no formal dispute resolution procedures).

69. Gourlay & Soderquist, *supra* note 68, at 263; *see also* Wilkins & Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?*, *supra* note 31, at 521-23 (discussing the high partner to associate ratio and its negative effects on mentoring).

70. Robert H. Frank, *Winner-Take-All Markets and Wage Discrimination*, *in* THE NEW INSTITUTIONALISM IN SOCIOLOGY 208, 215 (Mary C. Britton & Victor Nee eds., 1998) (noting that "success in the early rounds of the tournament for these positions is *necessary* for success in the later rounds" and explaining how the cumulatively adverse affects of being passed over in the tournament system deprive associates of the opportunity to compete on the next level).

B. *Remedying Structural Bias: Contemporary Title VII Litigation*

Congress enacted Title VII as an attempt to place black Americans on economic parity with white Americans through the elimination of discriminatory employment practices.[71] While civil rights leaders secured the passage of anti-discrimination laws and enjoyed some success in enforcing these statutes, prejudice and discrimination transformed into hidden barriers, ones that cannot be redressed through the conventional means of legislative and judicial activism. Within this context, Title VII has failed to create an equitable law firm environment. Institutionally conscious revisions of Title VII or a shift in the judicial interpretation of Title VII are least likely to provide the reforms needed to improve minority associate retention rates.[72]

Moreover, "the implicit contract governing associate promotion is not enforceable by formal legal methods."[73] The firm's promotion track requires an associate to work within the firm for seven to ten years before discovering whether she will become partner.[74] The skills desired in junior partners are not easily defined in objective terms.[75] The firm's partners base their evaluation of an associate's legal skills and personal attributes on the firm's subjective assessment model. Thus, although Title VII is most relevant at the recruitment, promotion, and termination stages in professional workplaces, it remains difficult to prove adverse employment actions within a large law firm. And, even if discrimination claims are successful, the remedy is not likely to address the source of the problem.

The difficulty of pursuing a successful law firm discrimination case under Title VII is illustrated by the experience of Lawrence Mungin, a black male who entered private practice with the goal of attaining partnership through hard work. In the end, Mungin filed suit against his employer, a corporate law firm, claiming that race discrimination prevented his promotion to partnership.[76] The resulting trial demonstrated the difficulty of bringing these types of claims. For example, the trial judge excluded evidence about events that were pertinent to understanding subtle discrimina-

71. H.R. REP. NO. 88-914, (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

72. Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 75 U. CIN. L. REV. 87, 94 (2006).

73. Gilson & Mnookin, *supra* note 32, at 579.

74. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 5 (1991).

75. Gilson and Mnookin suggest, however, that as the requirements for partnership become more objective, the degree of subjectivity involved in promotion decisions also declines. Gilson & Mnookin, *supra* note 32, at 567, 571-72, 578-79, 588; *see also* GALANTER & PALAY, *supra* note *74, at 100 (arguing that a large pool of inexperienced attorneys to assume entry-level positions is one of the key ingredients of the big law firm and firms eventually judge these associates on their legal skills and human capital).*

76. PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999) (detailing Mungin's story).

tory acts within the firm.[77] First, the judge prevented Mungin from testifying about a then-ongoing discrimination lawsuit filed by a black female attorney against the same former employer.[78] Next, the trial judge limited Mungin's testimony to exclude any discussion regarding the negative experiences of two black attorneys that were recruited by Mungin as potential hires for the firm. These attorneys had expressed their concerns about race prejudice at the firm. However, when Mungin's counsel called the attorneys to personally attest to their impressions of the firm, the trial judge limited their questioning because "he wouldn't tolerate general aspersions about the firm's difficulties with blacks."[79] Finally, while Mungin described his personal role on the minority recruitment committee, the judge sustained an objection to his perspective that, "I believe I took more of a leadership role . . . since I was black, the *token*—the *token* on the committee and in the office."[80] The law firm's previous experiences with minorities, the stigmatization felt by current associates with respect to committee assignments, and its inability to recruit minority associates, all reflect a need for improvement.

A court's ability to consider evidence regarding a firm's efforts to remove systemic hurdles to discrimination aligns with the public policy purpose of Title VII legislation. According to some districts, trial courts have broad discretion to impose a remedy for Title VII violations that serves the interests of the aggrieved party and the public. The Fifth Circuit has held:

> The trial judge in a Title VII case bears a special responsibility in the public interest to resolve the employment dispute, for once the judicial machinery has been set in train, the proceeding takes on a public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee.[81]

Even though courts may require an employer to establish new practices that benefit the entire workforce, filing a lawsuit frustrates an associate's career in the private sector.[82] In a study of Chicago lawyers, Aravinda

77. *Id.* at 186-87; *see also* Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583 (arguing that Title VII's "doctrinal paradigm and its focus on unearthing discriminatory motive often diverts attention from problems posed by workplace structures and practices, thus foreclosing the best solutions.").

78. BARRETT, *supra* note 76, at 187.

79. *Id.* at 208.

80. *Id.* at 187-88.

81. Hutchings v. United States Indus., Inc., 428 F.2d 303, 311 (5th Cir. 1970); *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) ("In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."); Thomas v. Washington County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990); Perryman v. Johnson Prods. Co., Inc., 698 F.2d 1138, 1146 (11th Cir. 1983).

82. Professor Tristin Green argues that the settlement agreement in Butler v. Home Depot, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996), involving claims of race and gender discrimination, and similar class actions demonstrate a pathway "of making antidiscrimination enforcement litigation relevant to some of the more subtle forms of discrimination common in the modern workplace." Green, *Targeting Workplace Context*, *supra* note 63, at 688. She also observes, however, in contrast to class action

Reeves found that minority attorneys prefer to either not address instances of race discrimination or to speak directly with the associate or partner causing unrest.[83] An associate's reluctance to report discrimination seems natural in light of the law firms' work environment and its dependence on subjective evaluations and relationship building as the keys to promotion. However, this reluctance to address discrimination prevents minority associates from later disputing performance evaluations, even when evaluations are perceived as unfair due to racial or gender bias. In the Visible Invisibility study, one respondent stated:

> You certainly don't want to become bitter, so you acquiesce somewhat. You don't want to be seen as difficult so you don't refuse assignments, you don't say I'm not dealing with this person or whatever, because then you're [perceived as] not being a team player, you're [perceived as] not motivated, angry.[84]

The mediated evaluation program proposed in this Article includes three features that are preferable in any healthy and mutually beneficial employment relationship: it relieves associates of the pressure to initiate conversations regarding constructive criticism with supervisors and mentors, opens communication lines, and facilitates monitoring participation and holding senior attorneys accountable. For these reasons, I argue that an evaluation process based on a mediation model is the first step in addressing the complaints of aggrieved minority associates.

A transformative evaluation program suits the loosely jointed and individualistic nature of law firms. The proposed changes also allow for the remediation process to accommodate differing levels of tolerance for diversity initiatives, as held by majority group members, and differing levels of sensitivity toward bias, as held by minority group members.

The Civil Rights Movement, which sought to overcome the established norm of racial separation, and Title VII, which prohibited racial discrimination in the workplace, did not address the emerging discrimination within law firms. In fact, Title VII cut the communal cord that once connected minorities through a shared experience of overt race prejudice.[85] Psychological research supports the more refined notion that minority group mem-

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lawsuits brought immediately after the enactment of Title VII, these more recent actions are typically settled before the court adjudicates the matter, which may undermine the public interest goal of Title VII's remedial scheme. *Id.*, at 715-17; *see also* Sturm, *Second Generation Employment Discrimination*, *supra* note 2, at 509-19 (describing the Home Depot litigation and subsequent reforms aimed at eliminating discrimination within the company).

83. REEVES, *supra* note 26, at 277-79 (arguing that an associate's desire to not violate informal group norms informs the decision to avoid "trilateral actions," which involve redressing the problem of discrimination through the courts).

84. VISIBLE INVISIBILITY, *supra* note 28

85. *See* Yifat Bitton, *The Limits of Equality and the Virtues of Discrimination*, 2006 MICH. ST. L. REV. 593, 614-15 (discussing the divergent socio-political views held by blacks during the formal equality era); *see also* Kimberle' Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1383-84 (1988) (referring to this

bers have varying perceptions of latent race discrimination, and diversity programs should accommodate these differences.

When entering unfamiliar institutions with a historical background of racial exclusion and marginalization, some racial and ethnic minorities exhibit a high sensitivity to adverse social cues when perceived as based on their group identity.[86] Status-based rejection activated through institutional relationships differs from personal rejection. Psychologists define status-based rejection as "a cognitive affective processing dynamic whereby people anxiously expect, readily perceive, and intensely react to rejection in situations in which rejection is possible." Over extended periods of time, minorities with a high sensitivity to status-based rejection experience difficulty forming relationships with people belonging to the "high-status group." Persons in the high-status group are perceived to embody, and thus control, the "norms, standards, and culture" of the institution. On one hand, the study suggests that minority group members may "harness [their sensitivities] as a key component of a culturally taught self-regulatory mechanism that fosters successful coping in domains dominated by members of the majority group." Conversely, well-qualified minorities may fail the fitness test due to high-sensitivity to the institutional barriers existent in a law firm and thus, these associates under perform during the first few years of practice.

An associate experiencing high status-based sensitivity may overreact to the institutional biases prevalent throughout the law firm structure, which will inhibit his chances to develop the relationships necessary to improve his professional skill set. Moreover, an associate experiencing low status-based sensitivity may overlook potentially harmful social cues indicative of institutional biases. Even if one recognizes negative racial cues, not every minority associate will adopt behaviors that may hinder their success in the firm. This research demonstrates the various attitudes among minority group members toward diversity initiatives and the need to construct a flexible program able to address hidden issues.

C. Alternative Dispute Resolution & Workplace Equity Theory

The following section discusses a government mediation program to resolve discrimination in the workplace, and research that connects individual conflicts to organizational policies designed to bring about long-term reforms. The United States Postal Service ("Postal Service") established an

differing of ideas as the "loss of collectivity" among African Americans when upper-class and assimilationist group members parted ways from the status identity after the civil rights movement).

86. Rodolfo Mendoza-Denton et al., *Sensitivity to Status-Based Rejection: Implications for African American Students' College Experience*, 83 J. PERSONALITY & SOC. PSYCHOL. 896 (2002); Katherine J. Reynolds et al., *Social Identity and Self-Categorization Theories' Contribution to Understanding Identification, Salience and Diversity in Teams and Organizations*, *in* IDENTITY ISSUES IN GROUPS 279, 292 (Jeffrey T. Polzer ed., 2003).

employee mediation program entitled "The Resolve Employment Disputes Reach Equitable Solutions Swiftly" (REDRESS). Through this program, employees have the option of submitting any dispute arising under federal antidiscrimination laws for mediation.[87] If an employee chooses mediation, supervisors are required to participate. In creating the program, the Postal Service experimented with different mediation models and program policies. For example, program coordinators tested the effectiveness of distributive mediation as compared to a transformative mediation approach and whether to use outside neutral mediators or inside mediators.[88] The Postal Service chose to follow the transformative model described below:

> The *transformative* model of mediation . . . does not have settlement as its objective. . . . Empowerment entails a sense of personal control and autonomy engendering the self-confidence necessary for disputants to take responsibility for addressing their own conflict. Recognition entails achieving a new understanding of the other disputant's views, motives, goals, or actions and somehow acknowledging this change. Recognition can take the form of statements acknowledging the legitimacy of the other participant's concerns or judgments, and it can result in an apology.[89]

The Postal Service measured the program's success through levels of employee participation. In line with well-documented research on the importance of procedural justice, participant satisfaction has remained particularly high since the program's inception. Professor Lisa Bingham attributes sustained interest in the program to (1) how mediation gives employees "an opportunity to present their views" and "participate in the process," and (2) to their overall treatment during the process, specifically with regards to "respectfulness, impartiality, fairness, and performance . . . ."[90] According to participants, the mediator more often than not helped the parties communicate their goals and understand their contrasting viewpoints.

Furthermore, supervisors reported an organizational benefit as a result of the program. They felt better equipped to handle future employment disputes before they reached the mediation stage. Bingham concludes, "[O]ver the long term, [the Postal Service] will build conflict management capacity in[to] the workforce."[91] An expanded evaluation process within the law firm strives for similar results: to align the expectations of partners with those of associates in regard to work performance and to foster open communication before complaints reach the formal mediation procedure.

Recent research on alternative dispute resolution in employment settings extracts data from individual disputes in an attempt to identify and

87. LISA B. BINGHAM, MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE, HUMAN CAPITAL MANAGEMENT SERIES 5 (Oct. 2003), http://www.businessofgovernment.org/pdfs/Bingham_Report.pdf (last visited March 21, 2009).

88. *Id.* at 13-15, 19-20.

89. *Id.* at 13.

90. *Id.* at 23.

91. *Id.* at 15.

resolve larger, organizational issues. Although Sturm and Gadlin refer to racial inequities as a recurring systemic problem, the authors caution against viewing alternative dispute resolution programs as the cure-all for the challenges posed by discrimination. They suggest that an individual, as opposed to systemic intervention, is needed when a conflict stems from structural bias and the intermediary has "unsuccessfully attempted a systemic intervention."[92] The authors describe a sword and shield scenario:

> Sometimes the structural analysis is helpful in enabling individuals to depersonalize their problems and to find ways to work around the dynamics of management and race in their particular context. Sometimes identifying the structural problems only deepens the sense of frustration about the inability to respond.[93]

In certain instances, the ombudsmen office analyzed by Sturm and Gadlin identified organizational practices as a "co-conspirator" in perpetuating inequities. For these situations, instead of focusing on the individual conflict, the intermediary focused on reframing the underlying issue, resolving conflicts, and improving future relations.[94] Similar to the ombudsmen office, a full-time diversity manager guides partners, associates, and associate evaluation committees through the process of resolving work-related issues.[95] The Postal Service's employment mediation program and the ombudsmen work provide examples of how alternative dispute resolution allows institutions to not only resolve individual conflicts, but these interventions when done properly improve the work environment through redefining the approach to resolving conflicts.

V.
A CRITIQUE OF LAW FIRM DIVERSITY REFORM EFFORTS

The next section critiques the diversity programs studied during this project and demonstrates how the proposed changes to the evaluation process may result in a more productive employment relationship between law

92. The authors use the example of a minority employee receiving a poor work evaluation to visualize the difficulties in addressing structural problems involving race through a systemic intervention. They suggest that systemic problems involving race, gender, disability, age, and national origin recur because the groups share common problems and persons in these categories have legal remedies at their disposal. *Id.* at 20, 30; *see also* Equal Employment Opportunity Comm'n v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002) (holding that partners of retirement age bringing an age discrimination lawsuit should be considered employees of the law firm despite their partnership status, because the small, unelected, and self-perpetuating executive committee which could fire them, promote them, demote them, raise their pay, lower their pay, and so forth rendered the partners defenseless).

93. Sturm & Gadlin, *supra* note 64, at 30.

94. According to Sturm and Gadlin, although tailored to a particular work group, such solutions qualify as a successful intervention because work group dynamics vary and "solutions generated often need to be tailored to a particular micro-culture within the larger organization." *Id.* at 31.

95. *See id.* at 10 ("Ombuds offices typically combine individual conflict resolution with some responsibility for identifying complaint patterns and trends and providing upward feedback to the organizational leadership about systemic problems").

firms and minority associates. During a preliminary interview for this project, I received a bleak answer to a straightforward question: How can law firms better retain minority women? The diversity committee chairman of a state bar association answered, "I do not know. It is an intractable problem." Is retention a difficult problem? Yes. Is retention an intractable problem? No. Still, the traditional diversity program misses the retention benchmark, because the problem and the solution emanate from organizational structures left wholly intact despite anti-discrimination efforts and after the implementation of passive, superficial initiatives. Most modern-day diversity programs focus on sensitivity training, formal mentoring, community outreach, recruitment, and marketing the firm's diversity initiatives to clients. These activities, however, are merely tangential to the retention of attorneys of color.[96] As a result, corporate law firms recruit a representative number of entry-level minority associates but struggle to retain and promote to partnership these same associates.[97] The legal profession and law firms must dismantle deep-seated institutional barriers and seek equitable participation for minority attorneys. This will require change at the organizational and professional levels within the corporate legal market.[98]

A. *Make Me, Break Me: Reevaluating the Value of Associate Evaluations*

This Article identifies the associate evaluation process as a prime opportunity for intervention on behalf of an associate's interests. According to law firm management, three important functions associate evaluations serve are: (1) to provide positive feedback and encouragement to associates; (2) to assess the training and development needs of associates; and (3) to improve associate performance.[99] Most large firms designate an associ-

96. Evaluations are "perfunctory" and "vague" despite the time and effort dedicated to the review process on an annual basis. Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, *supra* note 32, at 1601.

97. The NYC Bar conducted its first diversity benchmarking study in November of 2004. This study measured the number of minority associates in the entering class of 2003 as compared to the number of minority associates hired in previous years and still remaining at the firm: black associates composed 6.8% of 2003 hires and 4.2% of associates hired in 1996 remaining at the firm; Hispanic associates—3.9% and 2.9% respectively; Asian and Pacific Islander associates—14.9% and 11.8% respectively; white associates—73.1% and 80.9% respectively. The studies show that time alone will not reconcile the disparate retention statistics. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BENCHMARKING STUDY: A REPORT TO SIGNATORY LAW FIRMS 3-4, 14 (2005) [hereinafter DIVERSITY BENCHMARKING STUDY], http://www.abanet.org/minorities/docs/2004BenchmarkingReport.pdf (last visited Mar. 23, 2009).

98. Sturm, *Second Generation Employment Discrimination*, *supra* note 2 and accompanying text; Sturm, *Workplace Equity*, *supra* note 1, at 290-91.

99. HOW ASSOCIATE EVALUATIONS MEASURE UP, *supra* note 65, at 23.

ate evaluation committee to recommend an evaluation procedure and process.[100]

The firms participating in this project, however, never mention bridging the duties of the diversity officer or committee to the responsibilities of the associate evaluation committee. As firms move away from informal management models toward a more formal division of labor, they must remain wary of bureaucratic traps, such as rigidly delineated committees.[101] As a practical matter, the professional development and mentoring functions assigned to diversity personnel are directly related to associate evaluations. At present, diversity functions are subordinate to the associate evaluation committee and divorced from the goals of the diversity committee or officer. These two arms of the firm—the evaluation and diversity committees—must work together beyond the proposed interactive evaluation process in developing measurement instruments and improving the training procedures for evaluating associates.

Law firms have failed to implement a checks-and-balances system to minimize dissatisfaction among minority associates. First, only a small percentage of associate evaluation committees conduct anonymous evaluations of associates' written work product.[102] Moreover, only fifty-four percent of large firms train supervising attorneys on how to evaluate associates.[103] Second, as for the informal feedback needed to do well on an annual review, approximately twenty percent of minority associates report receiving no constructive criticism on assignments.[104] Third, a NALP study found that while almost seventy percent of firms reported having an appeals process to contest evaluations, nearly the same percentage of associates reported having no appeals process to contest their evaluations.[105] Finally, reciprocity is overlooked in the evaluation process. Only forty per cent of large firms provide associates with the opportunity to evaluate their supervising attorneys. Within that group, approximately fifty-nine percent of associates reported having engaged in the process, and of these associates, ninety-two percent reported no change and only five percent reported a change for the better in their relationship with the supervising attorney.[106] These statistics demonstrate the disadvantage that minority associates be-

100. *Id.* at 31-34.

101. Charles Heckscher and Nathaniel Foote describe two characteristics of a bureaucracy that inhibit organizational change: a "norm of deference," which entails subordinates not questioning the decisions of superior employees; a "norm of autonomy," wherein "each player is supposed to be left alone within a defined sphere, and with dedicated resources, to do a defined job." Charles Heckscher & Nathaniel Foote, *The Strategic Fitness Process and the Creation of Collaborative Community*, *in* THE FIRM AS A COLLABORATIVE COMMUNITY: RECONSTRUCTING TRUST IN THE KNOWLEDGE ECONOMY 479, 482 (Charles Heckscher & Paul S. Adler eds., 2006).

102. HOW ASSOCIATE EVALUATIONS MEASURE UP, *supra* note 65, at 26.

103. *Id.* at 47.

104. *Id.* at 56.

105. *Id.* at 108.

106. *Id.* at 74.

lieve exists in the evaluation process due to lack of mentorship and the need for an evaluation process that encourages communication.

Wilkins and Gulati hypothesize that corporate law firms purposely "keep the evaluations of associates in their first few years vague and generally upbeat" to maintain high-productivity levels among associates on the "paperwork" track.[107] Law firms also suppress information regarding the type of work assignments distributed to associates on the partnership training track and provide additional encouragement below the radar.[108] Keeping evaluations vague and withholding assignment distribution rosters are two factors that conflict with the stated goals of performance evaluations. More importantly, these practices allow for cultural norms adverse to minority associate interests to persist undetected. The discontentment expressed by minority associates in cited studies, and the firm's documented oversight in providing substantive feedback (informally or formally), demonstrates the need to address this feature of the minority associate experience.

Under an interactive evaluation process, a diversity manager and consultant strive to provide the associate with an influential and neutral actor that understands his or her position and works within the organization as a support network.[109] Associates voice concerns through a formal venue, which minimizes the risk of being labeled a troublemaker for interrupting the status quo.[110] On the other hand, partners need to communicate their expectations to associates, either voluntarily or through the interactive evaluation process. In terms of procedural justice, whether or not a negative performance evaluation remains on record is less relevant to the employment relationship once the associate appreciates the law firm's attempt to handle the situation fairly.[111]

107. Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, *supra* note 32, at 1672.

108. *Id.* at 1671-72 (arguing that this approach to candidly encouraging associates on the training track helps retain the favored associates deemed partnership material).

109. *See* Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004); Gourlay & Soderquist, *supra* note 68, at 276 (stating that an effective implementation of a mediation program must incorporate stakeholders' interest, participation, and support, along with sufficient knowledge and skills by the participants).

110. Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 172 (2002) (arguing that disputants affirm "the perception of fairness is linked to having a meaningful opportunity to tell one's story, to feeling that the mediator considers the story, and to being treated with dignity and in an even-handed manner.").

111. *See* Welsh, *supra* note 109, at 629.

B. *Breaking News in Law Firm Management: Diversity Managers (Not Another Committee) Spread the Message and Ensure Execution*

As law firms continue to grow, management committees more frequently resort to creating additional administrative positions.[112] For the past five years, Firm A and other firms across the country have hired diversity professionals from outside the firm to supplement the duties of diversity committees.[113] Competitive candidates for these positions must boast the following credentials: the attorney chosen as Firm A's first chief diversity officer came to the table with varied experiences in government, academia, and the private sector, not to mention a wealth of networks.[114] The diversity officer's position, if carefully defined as the catalyst for structural reform, symbolically—though maybe not in practice—institutionalizes the firm's reinvigorated efforts to support minority associates.[115] Although a partner or senior associate may possess the skills necessary to fulfill the diversity officer's role, the firm should opt for a third-party administrator dedicated to sustaining the position's contributions to the structural future of the firm.[116]

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112. In a study of ethics advisors, Professors Chambliss and Wilkins reported that firm partners designated to handle ethics issues felt overburdened and unable to ensure that attorneys brought forward ethical concerns. On the other hand, law firms hiring full-time, compensated ethics advisors created space for this position to involve establishing preemptive strategies and opening vital lines of communication. Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 574, 580 (Fall/Winter 2002); HEINZ ET AL., *supra* note 21, at 107-08, 293; *see also* Empson, *supra* note 8, at 16; Royston Greenwood, *Your Ethics: Redefining Professionalism? The Impact of Management Change*, *in* MANAGING THE MODERN LAW FIRM: NEW CHALLENGES, NEW PERSPECTIVES 190 (Laura Empson ed., 2007) (observing the shift from a traditional model of informal decision-making to a more bureaucratic, hierarchical control system as firms grow larger and add more partners, including full-time managers dependent but separate from the full partnership model of management); *see also* Robert L. Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, 6 AM. B. FOUND. RES. J. 95, 118-19, 129 (1981) (noting that law firm leadership at one time "lack[ed] the clear-cut structure and lines of authority of major corporations and large professional organizations" but is becoming more refined and inclusive of professional administrators as firm size increases); GALANTER & PALAY, *supra* note 74, at 52.

113. For example, Foley & Lardner retained the services of a professional development specialist already working in the firm for the role of diversity manager. Between the years of 2005 and 2006 the firm observed reduced attrition rates at the associate level and an increased number of women and ethnic minorities promoted to the partnership level. Institute of Management and Administration, *Foley & Lardner: A Strategy to Accelerate Diversity in the Firm's Partnership Ranks*, L. OFF. MGMT. & ADMIN. REP., Sept. 2007, at 1.

114. Sturm & Gadlin, *supra* note 64, at 47 (describing the importance of the Ombudsman Office Director's credentials prior to entering the position at the NIH); *see also* Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515, 1561 (2006).

115. *See* Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 324 (2006) [hereinafter Sturm, *The Architecture of Inclusion*].

116. *See* Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 83, 86 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (arguing that transmission, maintenance, and resistance to change contribute to cultural persistence in organizations).

Firm A's hands-on approach—using an organizational representative as a resource for minority associates—may prove more effective in the long run than the traditional diversity committee model.[117] At present, the destabilization of work groups in the modern firm structure strengthens the influence of central management committees and non-practicing administrators.[118] Without a representative on the central management committee, diversity programs will not take root. In a survey of law firm diversity programs, at least ninety per cent of firms assigned the following duties to their diversity program coordinator: develop and promote diversity goals and strategies; implement long term and short term strategies; monitor objectives and strategies; promote awareness of diversity issues in management, operations, and governance; develop programs that foster an environment of inclusiveness and support for all lawyers so as to encourage retention; ensure firm support of law school minority organizations and national minority bar associations; manage external outreach programs; collaborate with corporate clients regarding diversity initiatives; and work with the recruiting committee.[119] Only five out of seventy-two survey respondents, however, reported that the individual responsible for the diversity program, the program coordinator, served on the firm's governing or central committee.[120] The law firm that excludes the diversity manager from its executive committee, which reviews, revises, and approves firm policies and procedures, is at an immediate disadvantage in executing the organizational reforms necessary to improve the experience of racial and ethnic minority attorneys.

If the firm provides no other recourse or path through which to discuss, identify, and systematically address diversity issues, save for affinity groups and associate committees, then it is not possible to bring these issues to the attention of the firm's leadership. In many firms, affinity groups work to bring minority group members, such as black, Hispanic, and women associates, together in one forum. Affinity groups are valuable to the extent that associates and partners air their concerns in a presumptively non-threaten-

117. Chambliss, *The Professionalization of Law Firm In-House Counsel, supra* note 114, at 1553 (finding that firm in-house counsel gain authority through "internal marketing based on factors such as deference to the client, personality, and fit.").

118. Although law firms appear to be self-governing partnerships, in larger firms, the partners with the most profitable clients typically hold the greatest influence. HEINZ ET AL., *supra* note *21, at* 109-10; Nelson, *supra* note 112, at 118 (observing that law firm members' roles arise from "ambiguous origins, operate with considerable informality, and for the most part, do not exclusively occupy a lawyer's time"); GALANTER & PALAY, *supra* note 74, at 53. Law firm work groups are not always stable; instead, some work groups rearrange themselves from one transaction to another. In a stable work group, social norms arise to order work ethic, assignment distribution, and varying personalities, which are specific to the group dynamic. HEINZ ET AL., *supra* note 21, at 304-06.

119. ALTMAN WEIL, INC., RESULTS [OF] "FLASH" SURVEY ON DIVERSITY MANAGER POSITION IN LARGE LAW FIRMS 10 (Sept. 2005), http://www.altmanweil.com/dir_docs/resource/63dbd224-13ac-44bf-83f8-b3bfb6547966_document.pdf (last visited Mar. 26, 2009).

120. *Id.* at 6.

ing environment, similar to diversity retreats or consultations with a designated diversity professional.[121] Even though informal networks are keys to success within law firms, they do not provide a basis for evaluating the firm's diversity weaknesses and making the appropriate adjustments. With the addition of a diversity manager, however, affinity groups get the advantage of an institutionalized link to management.

Many firms also have a general associates committee. Associates at Firms B and C expressed concerns regarding the effectiveness of these committees and their ability to appropriately handle diversity issues. Two practical considerations undercut the probability that associate committees will address the issues confronting minority associates. First, these committees are typically composed of associates uninterested in weeding out or giving serious consideration to controversial issues. These associates are also hesitant to question institutional practices established and approved by the current partnership. Second, a minority associate willing to express concerns about diversity to the associate committee or management takes the risk of being misrepresented as a troublemaker, one that does not 'fit in' with the firm's culture. Firm B attempts to counteract this and other effects of associate committees through diversity retreats, where minority associate concerns are readily addressed. Strong diversity initiatives share in common the ability to discuss the challenges unique to minority associates without associates feeling threatened, and the associates know an influential actor will seriously consider the matter.

C. Diversity Consultants: Educate, Activate, and Advocate

Based on an analytical study of the firm's hiring, retention, and promotion patterns, diversity consultants provide an array of services, ranging from sensitivity seminars to strategic diversity plans.[122] The study of diversity programs conducted for this project shows how each firm uses diversity consultants in a variety of ways, some more effectively than others. Firm A used diversity consultants to study the mentoring program and then hired a consulting group to lead cross-cultural mentorship trainings in response to the surveys. The chief diversity officer at Firm A only resorts to the assistance of diversity consultants every two to three years. In between formal trainings, the diversity officer's two professional development staff members help him, among other things, monitor the mentorship program. On the opposite extreme, Firm C maintains regular contact with their diversity

121. HUFF ET AL., *supra* note 66, at 66 ("In fact, the group context can begin to amplify rather than suppress individual concerns."); *id.* at 62-63 ("[I]ndividual interpretations are moderated by interaction with others, and consensus on advantageous activities is often the desired outcome of group argument, negotiation, and exchange.").

122. Patrick Lynch & Elaine Arabatzis, *Recruiting Diverse Attorneys: Some Firms Are Partnering with Law School Programs and Hiring Full-Time Diversity Professionals*, NAT'L L.J., April 28, 2005, at R1.

consultant, but few partners or associates take advantage of the services he has to offer. Firm B only uses consultants for isolated diversity events, such as town hall meetings and retreats.

Diversity trainings serve to educate partners and associates, but fail to provide any incentive to implement the encouraged practices.[123] Professor Diane Vaughn describes program interventions, like diversity trainings, as focused solely on individual conduct, meaning that programs produce an incomplete understanding of institutional behaviors because "[these strategies] leave the social context untouched, tending to systematically reproduce misconduct."[124] An expanded evaluation process, however, allows the diversity officer and participating parties to explore the complex factors giving rise to structural barriers and resulting in attrition problems. The mediation-inspired evaluation procedure also allows for the open acknowledgement and validation of concerns.

With respect to representing minority group interests, associates may perceive that the diversity manager favors the organization or partner's interests, similar to the risk of caucusing in formal mediation.[125] In order to address this misconception, consultants should utilize both group and individual settings to help attorneys of color overcome the obstacles arising from their status membership and bring a heightened awareness of their concerns to all attorneys. Thus, consultants can prove most helpful, and bring forth institutional reform, when diversity trainings for the majority group are only one component of the solution: the eradication of structural barriers.

One challenge for diversity officers stems from how a firm moves from gathering information to the implementation of new policies and practices. The diversity retreat implemented by Firm B and the hands-on approach of Firm A's diversity officer provide a platform for learning what minority associates are thinking and where the firm can improve on its diversity efforts. At least once a year, each of these firms is able to assess the relationship between minority associates and partners in an environment accommodating candid conversation. Undoubtedly, gathering information requires the cooperation of both sides. Whereas management must facilitate the opportunity for associates to talk, associates must also do their part by

123. Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 LAW & SOC'Y REV. 23, 34-37 (discussing the ineptness of a decontextualized rational choice model for institutionalized behaviors stemming from common solutions, which in time become "institutionalized, remembered, and passed on as the rules, rituals, and values of the group"). *See also supra* note 96 and accompanying text.

124. Vaughan, *supra* note 123, at 34.

125. *See* Stephen B. Goldberg, *Mediating the Deal: How to Maximize Value by Enlisting a Neutral's Help at and Around the Bargaining Table*, 24 ALTERNATIVES TO HIGH COST LITIG. 147, 149 (International Institute for Conflict Prevention & Resolution), Oct. 2008 (discussing the advantages of the intraorganizational facilitator also mediating the impending negotiations between independent organizations, which may outweigh the risks intuitively inherent in this double role).

taking advantage of the forums provided. The mediation process opens the lines of communication for associates, elevates their position to that of empowered participants with the ability to determine their own careers, and bolsters the firm's progress toward achieving a more equitable workplace.[126]

VI.
THE PATHOLOGY OF PLURALISM: MONITORING AND HOLDING PARTICIPANTS ACCOUNTABLE ON TWO LEVELS—THE ORGANIZATION AND THE PROFESSION

The ability to monitor the progress of a diversity program and hold participants accountable is essential to whether or not structural reforms will yield intended results.[127] The responsibility to develop sustainability, monitoring, and accountability procedures, however, need not rest solely on the shoulders of law firms. Implementing a concerted monitoring and accountability regime that looks beyond the law firm as an independent organization and extends to the profession as a whole, including law schools, in-house counsel, and bar associations, will produce the continuity necessary for these programs to succeed. The data on dismal retention rates can combat complacency and ignite movement on a separate level.[128]

Diversity advocates need a unified strategic plan. The goal is to avoid fractured visions of what diversity efforts entail and to prevent a schism between corporate law firms that do service diversity-conscious clients and establish offices in particular regions in order to foster diversity, and those that do not.[129] As a self-regulating profession, a more effective route to diversity presents itself through the creation of a strong, non-adversarial governance regime that focuses on the promotion-to-partnership phase. Traditionally, law schools, bar associations, and corporations have served as the checks-and-balances on whether private law firms have adequately addressed diversity.[130] Hopefully, the resurgence of diversity as a priority,

126. Heckscher & Foote, *supra* note 101, at 486.

127. *See* Sturm, *The Architecture of Inclusion*, *supra* note 115, at 327 (arguing that "the public intermediary role could be played by a far wider range of institutions, including other government agencies, accrediting bodies, monitoring bodies, professional associations, and foundations. In some situations, these organizations are in a position to build institutional capacity, pool information, and leverage accountability and change.").

128. *See* D.J. GALLIGAN, LAW IN MODERN SOCIETY 183 (2007) (arguing that social relations are regulated by social conventions and understanding, independent of law).

129. Professor Crosby explains that equal opportunity "requires nothing of an organization—no plans, no monitoring system, no remedial actions" and focuses on individual discriminating actors. But "affirmative action requires that an organization be proactive" and elevates requisite reforms to the systems level. Faye J. Crosby, *Understanding Affirmative Action*, BASIC AND APPLIED SOC. PSYCHOL. 13, 18 (1994).

130. *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 63, 64, 75 (Walter W. Powell & Paul J. DiMaggio eds., 1991); Walter W. Powell,

prompted through external and internal pressures, will breakdown homogeneity in diversity programs and lead to a heterogeneous future for law firms, sustained through experimentalism in diversity practices.[131]

A. *Monitoring the Firm's Progress*

Data collection not only informs institutional change, but also, it helps sustain a progressive program in its infancy.[132] According to Sturm, workplace intermediaries need to "gather information that identifies and explains problematic patterns in order to prompt the development of accountability systems and to promote collaboration with internal and external stakeholders to sustain on-going change."[133] Associate feedback from an expanded evaluation process and mentoring program serves to provide diversity committees and diversity officers with suggestions for change legitimized by qualitative and quantitative data tracked over time.[134]

Currently, the costs of monitoring a diversity program do not fit into a firm's profit structure.[135] Large law firms cannot afford to closely monitor associates because lawyers work in teams, legal work requires time-intensive research and professional judgment, and attorneys work under short

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Expanding the Scope of Institutional Analysis, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 183, 188 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (explaining how professions "construct and legitimate organizational goals, standardize and distribute resources . . . and develop and maintain systems of bureaucratic control. . . . ").

131. *See* Powell, *supra* note *130, at* 194-96; HUFF ET AL., *supra* note 66, at 69 (arguing that insufficient incremental change prompts groups to experiment the utility of increasingly "more dramatic alternatives").

132. HUFF ET AL., *supra* note 66, at 84 ("In the interim, those who are most enthusiastic about the new strategy act as if the strategy were achieving its potential, while even those who are not convinced often allow a period for evidence to accumulate."); Jack Knight & Jean Ensminger, *Conflict Over Changing Social Norms: Bargaining, Ideology, and Enforcement*, *in* THE NEW INSTITUTIONALISM IN SOCIOLOGY 105, 121 (Mary C. Brinton & Victor Nee eds., 1998) (offering that "a long time lag between the change in the norm and the realization of the costs and benefits of that change" and "decentralized versus centralized enforcement" may affect enforcement of institutional reforms). Data constitutes an objective source of support for the initiation and sustainability of the firm's efforts. HUFF ET AL., *supra* note 66, at 66-68, 74 ("Because astute supporters also recognize that exit, negative voice and underperformance by the dissatisfied can increase, it is wise to quickly devise new structures, routines, and control procedures."); Fraser, *supra* note 6, at 151 ("Unanswered questions require new data, which often must be sought from people not encountered in day-to-day task performance"); Sturm, *Second Generation Employment Discrimination*, *supra* note 2, *at 479 ("Responsive employers have instituted internal systems for preventing and remedying problems stemming from complex workplace relationships. . . . These pathbreaking organizations demonstrate that internal dispute resolution and problem-solving systems can be robust, if they are designed to provide for accountability and effectiveness").*

133. Sturm, *Workplace Equity*, *supra* note 1, at 291.

134. Heckscher & Foote, *supra* note 101, at 492 (asserting that the process of using an information gathering process to promote institutional reforms builds an "ethic of contribution"); *see also* Sturm, *The Architecture of Inclusion*, *supra* note 115, at 293.

135. The growth of large law firms makes monitoring young attorneys during their associate years all the more difficult for partners due to (1) high leverage; (2) decrease in the quality of new recruits; and (3) an increased likelihood for evaluation mistakes of the less capable and top ranking associates. Gilson & Mnookin, *supra* note 32, at 567, 590. Gathering information and monitoring performance constitute high transactional costs to law firm management. GALANTER & PALAY, *supra* note 74, at 93.

deadlines.[136] Moreover, clients do not pay firms to discuss office politics, to provide constructive feedback on assignments, or to give insight on client development. For these reasons, it is unusual to have a firm that monitors the success of its diversity and mentorship programs, distribution of work assignments, and client contact. The accumulated effects only surface when minority associates consider leaving the firm and at promotion time.[137]

Firms A and B have established monitoring as a priority in their diversity initiatives. Firm B monitors the employment relationship of minority associates through its Retention, Advancement, and Development Committee of the Minority Attorney Program. At Firm A, the diversity initiative considers qualitative and quantitative measures. For example, their chief diversity officer reports to the management committee on a quarterly basis; to the diversity committee monthly; and weekly to the chair of the management committee. Additionally, diversity statistics are reported each quarter by every office's administrative partner to the central management committee. As further explained by a diversity committee member, Firm A has reached its diversity goals if:

> [A]t the end of the day, partners and associates feel a part of the team . . . numbers are very telling too, you can't have a good diversity program and say, 'Unfortunately, we have not been able to recruit' . . . [A] true measure would be the success [and number] of those lawyers . . . within the firm.[138]

At Firm A, the diversity initiative considers qualitative and quantitative measures. Firms are not alone in collecting data on diversity. The American Bar Association's ("ABA") Commission on Racial and Ethnic Diversity in the Profession publishes the Miles to Go Report, and more recently, the ABA's Commission on Women in the Profession published a study of minority women entitled, Visible Invisibility: Women of Color in the Law Firms. These studies report on the demographics of the legal profession using qualitative survey data and focus group responses.

Local bar associations across the nation also conduct studies. For example, both the Bar Association of San Francisco ("BASF") and the Association of the Bar of the City of New York ("NYC Bar") implemented citywide diversity initiatives based on the statistical results of qualitative and quantitative data gathered from local firms. The BASF conducted a "Goals and Timetables for Minority Hiring and Advancement" benchmarking study at various sized law firms.[139] A study published by the NYC Bar corroborates the BASF's observation that minority representation in enter-

136. Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, *supra* note 32, at 1599-1600.

137. Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 694 (1997) (arguing that "differential access to work and training eventually produces differences in ability . . . [which] matter when it comes time for promotion.").

138. Interview with Member of Diversity Committee of Firm A, in Dallas, Tex., *supra* note 37.

139. BAR ASSOCIATION OF SAN FRANCISCO, GOALS AND TIMETABLES FOR MINORITY HIRING AND ADVANCEMENT 1-2 (2005), http://www.sfbar.org/forms/diversity/diversity_report_2005.pdf (last visited Mar. 23, 2009).

ing classes has outpaced the percentage of minorities at the senior associate and partnership levels.[140] More importantly, the studies show that simply waiting for these new associates' promotion will not reconcile retention rates.

The National Association for Law Placement ("NALP") regularly publishes statistics and press releases on law firm diversity.[141] The NALP Foundation also conducts qualitative survey studies on special issues of interest in the profession, including attrition rates and associate evaluations, and commissioned a longitudinal study of careers in the profession.[142] The University of Michigan Law School and Harvard Law School also track the careers of minority graduates.[143] These studies provide a repository of qualitative and quantitative data that can guide organizational reforms. An interactive evaluation process, implemented as a coordinated effort, would also provide annual updates on qualitative insights that can supplement this bank of statistical data. The question then becomes: what can law firms and the profession do to ensure action on the diversity issue?

All of the above – data collection, program implementation, and result monitoring – may prove futile without accountability. Not only is there a possibility for subtle discriminatory patterns to emerge, but even more blatant acts of discrimination may occur in the absence of an accountability structure. In the strictest form, experts suggest that organizations make an "explicit evaluation of managers and supervisors on their contributions to an organization's EEO [equal employment opportunity] goals," or connect one's involvement with promoting diversity to their compensation.[144] Regardless of the selected approach, retention efforts hinge on a "fit between the organizational culture and the system of accountability."[145] The collective group of law firm management, the diversity officer and the diversity and evaluation committees, must incorporate internal enforcement methods in order to keep one another dedicated to their roles in the diversity initiative.[146]

140. DIVERSITY BENCHMARKING STUDY, *supra* note *97, at 8, 14.*

141. *See* The National Association for Law Placement Home Page, http://www.nalp.org (last visited Mar. 23, 2009).

142. *Id.*

143. ELIZABETH CHAMBLISS, A.B.A., MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 23, 254 (2004).

144. Bielby, *supra* note 63.

145. *Id.*

146. *See* Knight & Ensminger, *supra* note 132, at 109 ("The success of reform efforts will depend in large part on the ability of such groups to establish and maintain these alternative enforcement mechanisms.").

B. How Will Firms Hold Attorneys Accountable?

1. Organizational Challenges to Accountability

Diversity and associate evaluation committees, relieved of extraneous obligations and with the support of the central executive committee, can hold partners accountable for participating in a robust evaluation process. The accountability systems built into the diversity programs studied for this project were not sufficient to produce firm-wide participation. More often than not, interview questions regarding accountability inspired a moment of silence from respondents. A partner at Firm B admitted that the program had "no accountability for a flailing mentor, nothing institutionalized" but within the minority groups exist an informal accountability system where minority partners "take stock of how people are doing and take steps to ensure that [associates] meet their goals."[147] A second-year associate at this firm notes that the program will "continue [as is], as long as key people in power . . . continue."[148]

One form of accountability identified by Firm A is the need to build a strong firm with the best legal talent on the market. Every associate entering the firm is assigned an associate and partner mentor, but once partners are paired with a mentee, the system provides minimal incentives or accountability to ensure a mentor's performance. Partners volunteer to act as mentors, often persuaded by an appeal to the firm's core value of "intergenerational excellence." It was expressed to partners that "the firm's core value was intergenerational excellence and as a result of that core value every partner was expected to mentor. So if you did not mentor it was looked upon as you not upholding your family responsibility."[149] If unsatisfied with one's mentor, an associate may request a reassignment from either the recruitment or mentor coordinator. Therefore, even within Firm A's elaborate initiative, it is the associate who risks fracturing a partner relationship in order to find another, more attentive mentor.

Intergenerational excellence, as an incentive for a continued commitment to diversity initiatives, pales in comparison to the establishment of more formal structures that hold senior associate and partner mentors accountable. On the other hand, applying the general goal of firm-wide excellence to drive a diversity program could at best maintain the status quo or at worst reinforce the discriminatory practices already in place. Moreover, the incentive of intergenerational excellence relies upon someone taking an interest in the future success of an organization, a condition that may or may not ever affect an attorney's interest, especially in the modern era of lateral movement.

147. Telephone Interview with Jr. Partner of Firm B, in Washington, D.C., *supra* note 39.

148. Telephone Interview with Associate of Firm B, in Washington, D.C., *supra* note 46.

149. Interview with Chief Diversity Officer of Firm A, in Pittsburgh, Pa., *supra* note 38.

One "in the works" program involved the development of an accountability system that mirrors the accountability check implemented by some corporate clients: tracking the distribution of work assignments. The ability to track such information, in light of sophisticated billing software, is now possible. This enforcement measure, basing one's compensation on the ability to provide opportunities for minority associates, strengthens the ideal of intergenerational excellence.

Given that the members of the evaluation committee and the diversity committee are dispersed throughout the firm based on geography, departments, and hierarchy, they are the most advantageously positioned bodies capable of fulfilling the accountability functions of large firms.[150] In a typical diversity program, the diversity committee either supports the diversity manager's position or assumes these duties along with their billable-hours requirement. The diversity committee coordinates all aspects of the program, externally and internally, from recruitment to retention, outreach programs, and trainings. Realistically, it is not possible to expect that partners, already acting as supervisors, client managers, and mentors, will add on accountability to their roster of responsibilities. Thus, the program modifications discussed in this Article streamline the committee's duties, making those members, responsible for one element of institutional reform: accountability. For their part, the diversity manager and consultants assist diversity committee members with the development of minority associate programs. In structuring an accountability system, a heterogeneous diversity committee may negotiate varying institutional interests and collaborate with the associate evaluation committee to perform their newfound responsibilities.

Even as law firms begin to institutionalize the interactive evaluation process, negative performance evaluations and partner-associate disagreements will persist. However, partners and associates can resolve work issues informally, prior to the evaluation season as the principles of open communication take root in the firm's culture.[151] While the long-term goal is to transform the relations between minority associates and senior attorneys, the firm must continuously ensure participation in the program in order to realize more permanent institutional reforms. The Postal Service uses participation rates in defined districts as a measure of success for its mediation program. According to Bingham, this "create[s] an incentive structure for program administrators to become champions of the process and maintain a fair, credible, and responsive process that will, in turn, at-

150. *See* Vaughan, *supra* note 123, at 50 (arguing that "structural secrecy" grows with the size of the organization through division of labor and to overcome this problem, organizations must revamp the lines of authority and information flow).

151. *See* Stephen B. Goldberg, *How Interest-Based, Grievance Mediation Performs Over the Long Term*, 59 DISP. RESOL. J. 8 (Nov. 2004-Jan. 2005); BINGHAM, *supra* note 87, at 15.

tract employees to the program."[152] In the law firm context, any attempt to circumvent the process in bad faith can be detected through objective measures, such as billable hours or assessing skills through anonymous writing samples and similar skills metrics. Firms can also compare evaluations for a particular associate and search for inconsistencies. None of the large firms in the United States use compensation as an incentive for partners and associates to complete associate evaluations.[153] Despite the inherent challenges to encourage participation on the part of minority associates that seek to maintain productive relationships, the confidentiality procedures established for performance evaluations should attach to protect the professional interests of participants, and should adopt a congratulatory attitude for participants supporting the firm's diversity mission.

2. *It Is Not a Solo Mission: Institutional Challenges to Accountability*

Corporations serve an influential role in promoting law firm diversity.[154] Unfortunately, on the professional level, corporate management and corporate general counsel reflect poorly on the diversity scale.[155] These financial powerhouses receive the brunt of impatient scowls from clients insisting, "Just get it done." In response to these sentiments, Firm A's chief diversity officer observes, "I need to have some power, and what would give me power is if general counsels of large corporations were to say that we're [hiring your firm] because of the chief diversity officer. That's power. That's what this kind of position needs, both authority and power."[156] The diversity officer goes on to say,

> [T]he strongest hope for accountability—corporations saying that they will only work with diverse law firms—has yet to be seen. When corporations award law firms with progressive diversity programs by sending over greater volumes of work, this gives "credibility" to diversity advocates inside the firm. It's difficult to ask partners to invest money in the hiring of new diverse associates at any level when "there's no work" from institutional clients.

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152. BINGHAM, *supra* note 87, at 29.

153. HOW ASSOCIATE EVALUATIONS MEASURE UP, *supra* note 65, at 46-47.

154. Large law firms dominate the business law practice and the earnings from business clients. Between 1975 and 1995, the yearly income tripled for attorneys at firms of one hundred or more attorneys. HEINZ ET AL., *supra* note *21, at 99; see also* Galanter & Palay, *supra* note 74, at 40-41 (observing the growth of legal services commanded by corporate clients during the periods of 1967-1982 and 1972-1987); Marc Galanter, *"Old and in the Way": The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1088 (1999).

155. Since the 1980s, as corporate in-house legal departments expanded, these departments have exerted more control over law firms in the way of budgets, supervision of cases, and requesting more reporting. GALANTER & PALAY, *supra* note 74, at 50.

156. Interview with Chief Diversity Officer of Firm A, in Pittsburgh, Pa., *supra* note 38.

In short, the chief diversity officer is waiting for corporate America to put some teeth into their claims that legal service providers need to staff minority attorneys on their cases.

A partner at Firm A observes:

> [The firm] is already in a good position. The next level that will be critical for developing strong diversity results is client development. As time progresses, businesses rely more on free agency . . . [There is] pressure on associates to demonstrate the ability to develop business in the future, and if they don't have that indicia, then they will not make partner and the firm will get someone else with a client book. Institutionally, [minority associates] are not looked upon as good business developers. [Helping associates] develop business earlier in their careers will make us more successful in keeping associates beyond the first years.[157]

Undoubtedly, corporate clients must take responsibility for supporting the economic feasibility of diversity programs. In a survey of 862 general counsel and 135 law firm attorneys, respondents ranked law firm diversity programs as one of the least important factors in choosing a law firm.[158] In 2005, less than half of the *AmLaw 200* firms employed a diversity manager, and of these managers, only fifty percent are employed full-time in a diversity manager position.[159] Law firms have different expectations of each corporate client and firm management must interface firm policies with diversity procedures either imposed or undervalued by corporate clients. Some corporations endeavor to encourage law firm diversity through coercive tactics eerily similar to unconstitutional quota systems.[160] Other corporations search for diversity using equal opportunity tactics, even if they prove ineffective.[161] A collaborative corporate approach, seeking to locate common interests between internal and external stakeholders, is more likely to foment diversity efforts capable of producing consistent results.

Accordingly, the legal profession needs to reassess law firms' incentives regarding diversity. For example, the legal profession can pool resources and combine the influential reserves of law schools, corporations,

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157. Telephone interview with Jr. Partner of Firm A, in Washington, D.C. (June 27, 2006).

158. Mary Swanton, *18th Annual Survey of General Counsel: Survey Snapshots*, INSIDE COUNSEL, July 2007, at 55.

159. Mauricia Velasquez & Kelly Burrello, *Best Diversity Practices in Law Firms*, 53 PRAC. LAW. 11, Feb. 2007, at 12.

160. Wal-Mart's general counsel requires the top one hundred firms servicing its company to assign at least one attorney of color and one woman as one of five relationship attorneys for its business. In a June 2005 letter, its associate general counsel threatened to "end or limit relationships with law firms who fail to demonstrate a meaningful interest to the importance of diversity." Merideth Hobbs, *Wal-Mart Demands Diversity in Law Firms*, FULTON COUNTY DAILY REP., July 6, 2005.

161. Whereas Wal-Mart, Del Monte, and Pitney Bowes examine the firms' numbers in determining whether to hire a firm, Cox Communications' general counsel weighs in against quantitative benchmarks. Cox General Counsel James Hatcher solicits diversity information through interviews in firm meetings. He reasons that his qualitative approach focuses on "inclusiveness" as opposed to "diversity," because seeking firms with diversity "as part of the culture" avoids breeding a new competition of white men against women and minorities. *Id.*

law firms, and bar associations to positively affect the diversity outlook within private practice. These efforts entail more than corporations' coercive financial incentives and law firms' opportunistic gravitation toward diversity in order to satisfy the client's demands. The initiative detailed below, Diversity in Practice, builds on the common ground between nineteen Fortune 500 companies and law firms in the Minneapolis/St. Paul area to address the client development obstacles to firm diversity.[162]

Diversity in Practice, a non-profit organization located in Minneapolis, has engaged local law firms and twelve major corporations in its efforts to increase retention rates at firms. Unlike the carrot and stick tactic of firing law firms struggling to achieve diversity, Diversity in Practice used corporate and law firm profits to fund its diversity initiatives, ranging from recruitment goals to retention efforts. One local judge states, "[O]n an individualized basis, the legal community has tried to address the issue of reaching out, and retention, and promotion. But what we have lacked in the past is a collective effort to pull resources together so that we can really approach diversity in a systematic way."[163] Diversity in Practice's mission to involve attorneys from all sectors of the legal profession in building diversity provides a model for other geographic areas.

Specific to retention and promotion, Diversity in Practice seeks to open new pathways, as opposed to threatening firms, to meet diversity benchmarks. For example, the organization hosts structured networking opportunities for senior associates and partners of color. Their goal is to increase the number of minority partners "with the type of clout that only comes with a book of business." The organization also hosts speakers and social events arranged for minority associates and corporate members to share best practices with firms. In terms of professional development, the organization believes that corporations have a vested interest in minority attorneys given that they typically recruit in-house counsel from law firms. Finally, to complement its diversity efforts, Diversity in Practice works in conjunction with eight local minority bar associations, four Minnesota law schools, and other state bars. The organization also supports a web site about the Twin Cities legal market.

Diversity in Practice addresses diversity issues beyond the individual and organizational level. This collective effort reframes stakeholder interests in a creative, practical fashion and avoids adversarial blame-games. A diversity manager's institutional position as the link between management, partners, associates, and the external community through programs like Diversity in Practice helps bring to fruition the requisites for systemic change.

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162. Minority Corporate Counsel Association, *Twin Cities Diversity in Practice: Law Firms and Business Forge a New Diversity Approach in Minneapolis/St. Paul*, DIVERSITY & THE BAR, Sept./Oct. 2007, http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1573 (last visited Mar. 28, 2009).

163. *Id.*

As the goals and measures of an equitable law firm are implemented within the local community and at the organizational and professional levels, the outlook for diversity strengthens. Internally, law firms must continually experiment with new practices and gather information on these efforts. Externally, organizations similar to Diversity in Practice can serve as a neutral ground for corporations, law firms, law schools, and bar associations to brainstorm diversity initiatives, disseminate new information, and advocate for effective policies.[164]

VII.
BLOWING OUT CANDLES (ONE BY ONE) AT THE DIVERSITY VIGIL

A. The Normative Argument for Law Firm Diversity

One academic observes, "Corporate law [firm] jobs sit atop both the income and status hierarchies of the bar and serve as a gateway to prominent positions in government, business, and civil society."[165] This statement explains why racial and ethnic minority groups strive to diversify corporate law firms and encourage promotion to partnership. As the U.S. population shifts demographically, the upper echelons of society need to invite participation from minority group members.[166] Whereas the individual associate making a six-digit salary is an unsympathetic victim, the greater effects upon minority group status accentuate the urgency of this problem.

The structural barriers created by law firms affect some minority associates in unconscionable ways, especially given the firm's touted meritocratic and professional values.[167] In her recent work, Susan Sturm explains how institutional citizenship combines the "democratic values of

164. Most importantly, institutional reform under this formula is an ever-evolving endeavor that must continually address the obstacles to workplace equity. Sturm, *Workplace Equity*, *supra* note 1, at 291.

165. Wilkins, *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, *supra* note 25, at 1600. According to a Chicago partner, "[c]orporations and government have come to benefit from the crucible that success in a law firm represents, and use law firm partnership as a proxy for intelligence, imagination, and perseverance and other leadership qualities . . . ." J. Cunyon Gordon, *Painting by Numbers: And, Um, Let's Have a Black Lawyer Sit at Our Table*, 71 FORDHAM L. REV. 1257, 1266 (2003).

166. Alex Johnson argued, over a decade ago, that diversity in large law firms would reflect ideally, at a minimum, the number of racial and ethnic minority attorneys graduating from law schools. "If lawyers do not make significant progress to hire and promote minorities proportionate with their representation in the profession, lawyers run the risk of losing the prestige—the relative preference—associated with becoming a member of this noble profession." Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1062 (1997).

167. *See* Nelson, *supra* note 112, at 122 (arguing that merit is an "organizational tradition" in law firms despite the inherent complications stemming from subjective evaluation systems); *see also* GALANTER & PALAY, *supra* note 74, at 73 (asserting that the mystique once beholden to the legal profession no longer exists due to the information age).

participation and voice by insisting on creating the conditions enabling people of all races and genders to realize their capabilities as they understand them."[168] When entering unfamiliar institutions that have a history of racial exclusion and marginalization, some racial and ethnic minorities exhibit a high sensitivity to adverse social cues when perceived as based on their group identity.[169] Psychologists define status-based rejection as "a cognitive affective processing dynamic whereby people anxiously expect, readily perceive, and intensely react to rejection in situations in which rejection is possible." Over extended periods of time, minorities with a high sensitivity to status-based rejection experience difficulty forming relationships with people belonging to the "high-status group." Persons in the high-status group are perceived as embodying, and thus controlling, the "norms, standards, and culture" of the institution. As a result, well-qualified minorities impacted by a high sensitivity to institutional barriers, under-perform during the first few years of practice.

Status-based rejection manifests in three ways: isolation, blending, and finding consolation with one's identity group.[170] First, for every stereotype not positively aligned with the firm's institutional norms, an attorney of color must overcome invisible hurdles and blend their identity with that of the established culture. Second, the burden of conforming one's identity to a work culture predicated on white maleness means twice the effort for racial and ethnic minority associates. The time and energy expended to "perform identity" is a form of discrimination unknown to those inside the dominant identity group. Law firms resistant to implementing effective reforms risk isolating the most talented racial and ethnic minority associates. Instead, the firm retains associates with a high tolerance for structural bias, but not necessarily the most promising legal minds. Third, not everyone abandons the profession after departing from a big law firm. A significant number of racial and ethnic minority attorneys practice in small groups or with the government.[171] In reality, many associates have no interest in re-

168. Sturm, *The Architecture of Inclusion*, *supra* note 115, at 324.

169. *See generally* Mendoza-Denton et al., *supra* note 86; Reynolds et al., *supra* note 86, at 292.

170. Legal scholars and social scientists have documented these affects on minority employees working in professional environments. *See* Mendoza-Denton et al., *supra* note 86, at 915; Carbardo & Gulati, *supra* note 63, at 1270; *see also* Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

171. Fewer minority law school graduates enter private practice than non-minority graduates do, although the numbers are increasing; instead, minority graduates are more likely than non-minorities to enter government positions and public interest organizations. NATIONAL ASSOCIATION FOR LAW PLACEMENT, EMPLOYMENT PATTERNS—1982-2004 (2006), http://www.nalp.org/2006junemploymentpatterns (last visited Mar. 15, 2009) [hereinafter EMPLOYMENT PATTERNS]. Nearly one-third of attorneys of color and women leave law firms to become an in-house counsel in a corporate legal department. VISIBLE INVISIBILITY, *supra* note 28, at 30 ("Most women of color, men of color, and white in the survey who left law firms became in-house attorneys in a corporate legal department (31%, 33%, and 36%, respectively).")

maining at the law firm through the partnership promotion stage.[172] This Article does not venture to rank the relative prestige attached to practicing in one legal environment over another, but the advantages of ascending through a large firm must not be an unattainable dream for minorities choosing this path.

B. The Reputational Theory of Deterrence as Applied to Law Firm Diversity

Discriminating against gifted or average minority candidates can work against the reputation of firms seeking to attract exceptional minority candidates. As discussed above, law firms overlook average minority candidates without suffering any financial repercussions due to the large number of associates in the attorney pool. Professor Robert Frank suggests that a damaged public reputation deters law firms from discriminating against attorneys of color.[173] Although reputational deterrence does not solve the systemic problems within law firms, this theory serves as an incentive for law firms to rethink employment practices.

Scholars dispute whether this form of accountability prevents unjust behavior in the promotion-to-partnership phase.[174] Today, diversity issues receive a large amount of publicity, which results in a heightened public awareness beyond the legal profession. For example, on an annual basis, the Dallas Morning News runs an above-the-fold special report on the diversity scores for the city's largest law firms.[175] A group of students from Stanford University recently published a diversity report card based on NALP's statistical reports. These students were featured on a popular legal

172. Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, *supra* note 32, at 1606; VISIBLE INVISIBILITY, *supra* note 28, at 35.

173. Professors Frank and Wilkins argue that firms can overlook average minority associates without feeling an economic impact from the discriminatory practice. However, to lose the most talented minority associates based on an inadequate diversity program and inability to institute equity norms in the workplace presents a different problem. Frank, *supra* note 70, at 217 ("If discrimination is to be viable under competition it must be confined to the marginal members of the entering class. Yet social forces might mitigate against this strategy. Thus, the candidates with the strongest credentials might be reluctant to join a firm that discriminated against relatively less-qualified women and minorities. The extent to which such social forces might constrain discrimination remains an empirical question."). *But see* Gilson & Mnookin, *supra* note 32, at 579-80 (suggesting that a reputation model may not be sufficient in order to ensure that firms treat associates fairly at the time of promotion. This regulation method could fail because promotion does not involve a repeat transaction, and the model requires that "past breaches of the implicit contract be effectively communicated to those who will deal with the breaching party in the future." In the firm context, a neutral party is not in the position to adequately monitor the firm's evaluation of an associate's performance).

174. Wilkins and Gulati argue that "to the extent that existing associates have difficulty detecting whether firms are behaving opportunistically, law students, whom Galanter and Palay rely on to boycott firms who fail to fulfill their partnership commitments, are likely to be even less well informed." Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, *supra* note 32, at 1625.

175. *See, e.g.*, Sheryl Hall, *Law Firms Remain White Bastions*, THE DALLAS MORNING NEWS, Nov. 11, 2007, http://www.dallasnews.com/sharedcontent/dws/bus/columnists/chall/stories/DN-Hall_11bus.ART.State.Edition1.356c41f.html (last visited Mar. 15, 2009).

blog and released their results at a press conference.[176] These public acts demonstrate why, even though a reputational model may not deter other negative firm practices, diversity is a priority in our society.

C. *The Profession's Obligation of "Defending Liberty, Pursuing Justice"*

Finally, the public's nostalgia with respect to the legal profession has shifted to revere a time when lawyers defended social justice.[177] No conflicts exist between diversity efforts and the need to secure a top-quality attorney pool. Instead, law firms lose when they are unable to exploit the full capacity of individual attorneys. The institutional reforms proposed in this Article facilitate a win-win situation by maximizing gains from the employment relationship between law firms and minority associates.

In the Visible Invisibility study commissioned by the ABA, "attorneys . . . were asked how important it was to them to increase the racial and gender diversity in law firms. Eighty-seven percent of women attorneys of color, fifty-eight percent of men of color, sixty-one percent of white women, and twenty-seven percent of white men felt strongly that law firms should increase racial diversity."[178] Thus, white male attorneys can speak about social justice to the public as representatives of the profession, but they cannot act upon those ideals because an equitable workplace threatens their advantage.[179] From a Critical Race Theory perspective, Alex Johnson argues that a law firm's inability to increase diversity may affect the profession's public reputation.[180] Johnson asserts that dominant group members hold a dual commitment: to the profession and to identity-based interests.[181]

Law firm diversity is compatible, nonetheless, with economic and social justice goals. Professor Royston Greenwood argues that professional behaviors are shaped through four "agents of socialization," including educational institutions, professional associations, clients, and employment organizations. Each agent subscribes to one of two definitions of professionalism: expert and trustee. According to Greenwood, clients promote the expert definition, professional associations and law schools promote the trustee definition, and law firms combine these two definitions. "On the one hand, they are commercial entities seeking business success.

176. *See* Law Students Building a Better Legal Profession, http://www.betterlegalprofession.org/ (last visited March 15, 2009).

177. Galanter, *supra* note 154, at 1110-11 (asserting that the "perceived lack of devotion to justice" hurts the profession's reputation in the public eye).

178. VISIBLE INVISIBILITY, *supra* note 28, at 19.

179. "An individual's membership and allegiance to one group may be trumped or negated by the membership in another group, although this individual's dual membership status does not have the effect of negating the subordinate's group membership and identification." *Id.* at 1031-32.

180. *Id.* at 1011.

181. Johnson, Jr., *supra* note 166, at 1039.

On the other hand, they are, supposedly, professional-friendly environments, nurturing the ideals of trusteeship."[182] Economic arguments attempt to exploit the firm's goal of increasing profitability; however, the public interest goals thought to inhere throughout the profession clearly support the need to address diversity concerns regardless of whether an economic justification exists for these changes.[183]

VIII.
CONCLUSION

Diversity in the legal profession will continue to improve at a slow pace unless large law firms recognize the structural barriers within their organizations. In today's global market, large law firms need to recruit and retain the best legal talent. The standards for excellence need not change, but the process used to identify and nurture excellence merits re-examination. The problem is not confined to the actions of law firms and corporations, but extends to the entire legal profession. Law schools, law firms, corporations, and bar associations form the institutional layers that give the legal profession capacity to reform effectively.

The traditional law firm approach, focusing on recruitment and mandatory diversity training, cannot fix the retention problem. Instead, law firms need to conduct a particularized analysis of the organization to detect latent discriminatory patterns. These inequitable practices stem from stereotypes and cognitive biases that are allowed to manifest through discretionary and informal structures that distribute work and professional-development opportunities. Resolving the retention issue will require using information gathering to inform a transformative process that never stops evolving: communication, data, activation, and collaboration.

Grutter v. Bollinger sanctions race-conscious preferences at one of the nation's elite law schools. However, the Supreme Court's holding provides no segue for the implementation of race-conscious policies that are needed in the post-law school employment context. With regard to the well-intentioned arguments of colorblindness asserted during the Civil Rights Movement, advocates can now reflect with dismay on how, in today's jurisprudence, this rallying cry proves under-inclusive of excluded groups or unduly narrow to allay unforeseen snares.

182. Greenwood, *supra* note 112, at 193. The rules and regulations developed within the firm, however, often reflect the behavioral norms of the profession at large. Wallace, *supra* note 8, at 820 (arguing that "the external system of control serves as a foundation for the more specific rules internal to professional bureaucracies.").

183. The business case for diversity in large law firms fails to account for the business landscape requiring the services of diverse attorneys. Europe and Asia are the areas of new business most sought after by American large law firms. In minority communities, individuals and small business are not usually able to afford the legal services of large corporate firms. David B. Wilkins, *Your People, Valuing Diversity: Some Cautionary Lessons from the American Experience*, *in* MANAGING THE MODERN LAW FIRM: NEW CHALLENGES, NEW PERSPECTIVES 37, 60-61 (Laura Empson ed., 2007).

In order to accomplish systemic change, the law must be viewed as merely delineating the contours of a comprehensive framework designed to facilitate an equitable workplace. One associate greatly appreciated the diversity efforts at Firm B because the program provided a safety net in the event that formalized firm processes did not work in his favor. To gain access to work assignments, he relied on his assignment partner, but he also received work from those partners involved in the diversity program. He appreciated the advice of his assigned mentor, but learned about unique challenges through the relationship formed with his minority program mentor. He does not feel trapped because the firm established a mechanism to voice concerns. Most importantly, as he continues to develop his relationship with the firm, the program will continue to adjust and meet the next generation of concerns.

The Court's waxing and waning toward race-conscious remedies, however, presents an inconvenient detour from the final destination: workplace equity. At this juncture, psychological, sociological, management, and legal research concerning the factors hindering minority success in professional environments provide invaluable insight to crafting alternative measures for achieving diversity. Accordingly, in conjunction with pressing the courts for a more amenable application of Title VII, advocates can use this interdisciplinary knowledge to institute race-neutral reforms aimed at combating the institutional barriers that inhibit minority group ascension.