

## COLLOQUIUM

### FOREWORD: DIVERSITY IN THE LEGAL PROFESSION: A COMPARATIVE PERSPECTIVE

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In principle, the legal profession in the United States and United Kingdom is deeply committed to diversity and inclusion. In practice, it lags behind. This colloquium explores what stands in the way. Leading scholars from both countries look at the gap between aspirations and achievement, and suggest some concrete strategies for change.

The facts are frustratingly familiar. Women and lawyers of color remain underrepresented at the top and overrepresented at the bottom of the legal profession.<sup>1</sup> A cottage industry of research attempts to explain such inequalities.<sup>2</sup> Primary explanations include:

- Organizational cultures that do not support diversity;<sup>3</sup>
- Unconscious and concealed biases;<sup>4</sup>

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1. For the United Kingdom, see, for example, Julie Ashdown, *Shaping Diversity and Inclusion Policy with Research*, 83 FORDHAM L. REV. 2249, 2252 (2015); Hilary Sommerlad, *The “Social Magic” of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession*, 83 FORDHAM L. REV. 2325, 2330–32 (2015). For the United States, see, for example, Russell G. Pearce, Eli Wald & Swethaa Ballakrishnen, *Difference Blindness Vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2410 (2015); Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 FORDHAM L. REV. 2483, 2483–84 (2015).

2. For examples, see sources cited in ABA, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS (2010); ABA COMM’N ON WOMEN & THE LEGAL PROFESSION, VISIBLE INVISIBILITY (2012); DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS (forthcoming 2015); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041 (2011); Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011); David Wilkins & Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996).

3. See, e.g., Ashdown, *supra* note 1; Pearce, Wald & Ballakrishnen, *supra* note 1.

- Extended hours and resistance to flexible work schedules;<sup>5</sup> and
- Lack of access to mentors, sponsors, choice assignments, and business networks.<sup>6</sup>

The contributions to this colloquium offer further insights into these patterns of exclusion and the responses that might address them.

#### THE U.K. PERSPECTIVE

The colloquium begins with an essay by Julie Ashdown, head of Corporate Responsibility, Equality and Diversity, for the Law Society of England and Wales.<sup>7</sup> Ashdown reviews the research commissioned by the Society over the last twenty years and the initiatives that have resulted from that research. Her essay explores the effect of those initiatives and the challenges that remain. The research suggests that increasing numbers of women and minorities are studying law and doing well at it but then struggling to get training contracts and work as a solicitor.<sup>8</sup> Those who succeed and enter private practice “face significant challenges in reaching partner level.”<sup>9</sup> One promising response has been the Diversity and Inclusion Charter, established by the Law Society in 2009. Its purpose is to promote diversity by helping signatories measure their procedures against a set of best practice standards and by providing opportunities to share advice with colleagues across the profession. To date over 450 practices have signed the Charter, representing more than a third of solicitors in private practice.<sup>10</sup> To make further progress, the Society sees its role as including lobbying with law firms on specific issues, such as flexible work or equal pay; signposting good practices; measuring advances; profiling role models; and providing practical support on relevant issues such as blind recruitment.<sup>11</sup> Through such efforts, the Society hopes to partner with solicitors in promoting a more inclusive profession.

Savita Kumra looks at diversity management strategies of large U.K. law firms, including the Law Society’s Diversity and Inclusion Charter, and concludes that such efforts have not achieved their stated goals.<sup>12</sup> These strategies, such as public commitments to the issue, diversity committees,

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4. See, e.g., Rhode, *supra* note 2, at 1050–53; Kevin Woodson, *Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms*, 83 FORDHAM L. REV. 2557, 2560 (2015); Devon W. Carbado, Patrick Rock & Valerie Purdie-Vaughns, *Concealed Biases* (2015) (unpublished manuscript) (on file with author).

5. See, e.g., Ashdown, *supra* note 1; Savita Kumra, *Busy Doing Nothing: An Exploration of the Disconnect Between Gender Equity Issues Faced by Large Law firms in the United Kingdom and the Diversity Management Initiatives Devised to Address Them*, 83 FORDHAM L. REV. 2277, 2282 (2015); Rhode, *supra* note 2, at 1056–58.

6. See, e.g., Ashdown, *supra* note 1; Kumra, *supra* note 5, at 2281–82; Pearce, Wald & Ballakrishnen, *supra* note 1, at 2423; Rhode, *supra* note 2, at 1053–56; Wilkins & Gulati, *supra* note 2.

7. Ashdown, *supra* note 1.

8. *Id.* at 2260–61.

9. *Id.* at 2261.

10. *Id.* at 2266.

11. *Id.* at 2264–71.

12. Kumra, *supra* note 5.

formal mentoring programs, flexible or reduced schedule options, and participation in high profile diversity events, have given the appearance of addressing the challenge of inclusion. But they have brought little actual progress. Thus firms are “busy doing nothing.”<sup>13</sup> It is, for example, not enough for firms to establish formal work/life policies if women know that taking advantage of them will negatively affect career prospects.<sup>14</sup> To make significant progress, Kumra argues that more firms have to want to change in significant ways and to invest the effort in devising more effective strategies.<sup>15</sup>

Steven Vaughan is similarly critical of efforts to achieve diversity in U.K. law firms. Vaughan explores the justifications for and impact of the 2011 rule of the English Legal Services Board requiring the collection and publication of data on workforce diversity.<sup>16</sup> He maintains that the rule was unnecessary, that it was “set up to fail,” that it has been poorly operationalized, and that its symbolic impact has been mixed.<sup>17</sup> More specifically, Vaughan argues that there is little evidence from the fields of corporate social responsibility and corporate governance to suggest that reporting rules have significant impact, and there is little reason to believe that clients will hold firms accountable for their diversity performance.<sup>18</sup> He also faults the Legal Services Board for drafting requirements lacking in “statistical sophistication” and for failing to do anything significant with the data that they have gathered.<sup>19</sup> As a consequence, there has been little significant change in the behavior of law firms traceable to the rule.<sup>20</sup>

Hillary Sommerlad challenges conventional definitions of merit within the English legal profession.<sup>21</sup> She argues that “conceptualizations of merit and professionalism are rooted in the contemporary system of social stratification.”<sup>22</sup> Merit performs its “social magic” in legitimating professional hierarchies by presenting itself as a disinterested objective standard. Thus conceived, merit places responsibility for exclusion from upper level positions on those excluded—their presumed lack of capabilities and commitment.<sup>23</sup> As a consequence, merit serves to “deflect criticism of the slow progress toward diversity.”<sup>24</sup> Sommerlad’s thesis calls

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13. *Id.* at 2278.

14. *Id.* at 2286.

15. *Id.* at 2293–99. For examples, see Rhode, *supra* note 2, at 1072–77; Rhode & Ricca, *supra* note 1, at 2501–06.

16. See Steven Vaughan, *Going Public: Diversity Disclosures by Large U.K. Law Firms*, 83 *FORDHAM L. REV.* 2301 (2015).

17. *Id.* at 2301–02, 2308–21.

18. *Id.* at 2315–17.

19. *Id.* at 2302.

20. *Id.* at 2317–21.

21. Sommerlad, *supra* note 1.

22. *Id.* at 2327.

23. *Id.* at 2333.

24. *Id.* at 2325. For a similar argument, see Deborah L. Rhode, *Myths of Meritocracy*, 65 *FORDHAM L. REV.* 585 (1996).

into question the efficacy of blind recruitment strategies advocated by, among others, the Law Society.<sup>25</sup>

Lisa Webley looks at how broader changes in the regulation of the English legal profession relate to diversity.<sup>26</sup> As she notes, “New types of legal businesses are emerging, and law graduates—who previously had not found a place within the regulated admitted legal profession—appear to be entering new facets of the legal marketplace.”<sup>27</sup> However, as noted by other contributions to this colloquium, the upper echelons of the profession remain stratified by class, race, ethnicity, and gender. The bar’s main professional bodies have been “more inclined to encourage measures that aim to raise the aspirations of [underrepresented groups] to attend elite law schools rather than to challenge the prevailing view that elite schooling necessarily indicates lawyer excellence.”<sup>28</sup> However, the Legal Services Board has a mandate to encourage a diverse legal profession, and it has indicated that if professional bodies do not achieve progress in promoting diversity, it may intervene.

Jonathan Ashong-Lampthey’s essay explores how black lawyers use developmental relationships to enhance their careers in the face of disadvantage.<sup>29</sup> In the essay black lawyers are identified as biculturals: individuals who have both experienced and internalized more than one culture. Ashong-Lampthey acknowledges that the bicultural experiences of these individuals are heterogeneous and suggests that these differences may influence their developmental networks.

Borrowing from the acculturation literature, bicultural identity integration (BII) is used to measure the degree to which the black lawyers saw their racial identity and workplace identity as being either compatible and integrated or oppositional and difficult to reconcile. This framework is important because it integrates research on diversity and developmental networks to illumine how minority lawyers navigate processes designed to advance their careers.

Richard Collier’s essay examines the practices of men concerning work/life balance and well-being in large transnational London law firms.<sup>30</sup> As he notes, fatherhood is rarely researched in this context; the dominant assumption is that it does not pose the same adverse career effects as motherhood.<sup>31</sup> Collier does not question this assumption, but he does note

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25. Cf. Ashdown, *supra* note 1; see also Pearce, Wald & Ballakrishnen, *supra* note 1, at 2438–55 (questioning the conventional conceptions of merit in the context of the U.S. legal profession and advocating for an integration-and-learning approach that urges bias awareness).

26. Lisa Webley, *Legal Professional De(re)regulation, Equality, and Inclusion, and the Contested Space of Professionalism Within the Legal Market in England and Wales*, 83 FORDHAM L. REV. 2349 (2015).

27. *Id.*

28. *Id.* at 2364.

29. Jonathan Ashong-Lampthey, *Bicultural Experience in the Legal Profession: A Developmental Network Approach*, 83 FORDHAM L. REV. 2369 (2015).

30. Richard Collier, *Naming Men As Men in Corporate Legal Practice: Gender and the Idea of “Virtually 24/7 Commitment” in Law*, 83 FORDHAM L. REV. 2387 (2015).

31. *Id.* at 2390.

the tension for men who wish to assume caretaking roles that do not readily mesh with the demands of life as relatively highly paid elite London lawyers. Collier invites us to rethink the way that images of “good fathers” and “good lawyers” affect the formation of professional identity.<sup>32</sup> Complex changes are taking place in men’s lives that reflect significant demographic, cultural, economic, and political shifts.<sup>33</sup> These changes need to inform our understanding of what constitutes work/life balance and well-being in the contemporary legal profession.

#### THE U.S. PERSPECTIVE

Turning the focus to the United States, Russell Pearce, Eli Wald, and Swethaa Ballakrishnen argue that, although color and difference blindness served an invaluable purpose in the first generation of antidiscrimination efforts, the current evidence of homophily and implicit bias demands a new bias awareness approach. They build on organizational behavioral literature to argue that significant progress toward diversity in large law firms requires abandoning the difference blindness approach. They note that white men continue to dominate the equity partnerships of elite law firms in the United States, at rates significantly out of proportion to their numbers in society as a whole and to their numbers in the entry classes of associates. Pearce, Wald, and Ballakrishnen argue that elite law firms must abandon the predominant difference blindness approach because, echoing Sommerlad’s argument, it is based on a flawed presumption of merit that is tied to a historical conception of an ideal worker who is white, heterosexual, and male. They implore firms to adopt instead an integration and learning approach that places the burden of bias awareness and learning on all actors and suggest ways to incorporate a relational framework to promote equality and inclusion.<sup>34</sup>

Stacy Hawkins’s contribution examines the difficulties legal employers face in implementing certain diversity programs that may be vulnerable to litigation under Title VII.<sup>35</sup> Hawkins surveys cases involving diversity decided by U.S. federal courts in the ten years since the U.S. Supreme Court’s landmark affirmative action ruling in *Grutter v. Bollinger*.<sup>36</sup> She finds that affirmative action programs involving a conscious consideration of gender, race, or ethnicity in order to achieve some identified numerical representation of women and minorities are least likely to withstand legal challenge.<sup>37</sup> By contrast, plans involving expanded outreach in recruiting efforts, or affinity groups for women and minorities, are much more likely

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32. *Id.* at 2395.

33. *Id.* at 2402.

34. Pearce, Wald & Ballakrishnen, *supra* note 1.

35. Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 *FORDHAM L. REV.* 2457 (2015).

36. *Grutter v. Bollinger*, 539 U.S. 306 (2003), upheld an affirmative action plan by the University of Michigan Law School that was narrowly tailored to achieve a compelling interest in promoting a diverse student body.

37. Hawkins, *supra* note 35, at 2474 & n.76.

to satisfy legal standards.<sup>38</sup> Ironically, the relatively high burden of proof that diverse employees must meet to establish discrimination works to the advantage of those employees when their employers defend against reverse discrimination claims.<sup>39</sup>

My essay with Lucy Ricca explores diversity through the perspective of leaders of the U.S. legal profession.<sup>40</sup> The analysis draws on interviews with managing partners of the 100 largest firms and general counsel of Fortune 100 corporations. By definition, those who agreed to participate in the survey tended to have a high commitment to diversity. Their experience illumines the most difficult challenges and the most effective responses. With respect to minorities, the greatest obstacle was the limited pool for diversity and the fierce competition for talented lawyers. With respect to women, the principle problems were a “culture that focuses heavily on hours as a metric of contribution,” and “getting everybody to buy into the issue. Not all men see that there is a need to address women’s issues. They see women partners and don’t see inhibitions.”<sup>41</sup> Some firms identified broader attitudinal problems. They specified implicit bias, “diversity fatigue,” and the difficulty of having an “honest conversation” on the issue.<sup>42</sup> To address these issues, the essay proposes a number of initiatives designed to increase accountability, address unintended biases, and improve work/family policies.<sup>43</sup>

Eli Wald proposes a “capital” framework for understanding the bargain between large law firms and their lawyers.<sup>44</sup> From this perspective, firms exchange economic capital (salary and equity interest), social capital (mentoring), and cultural capital (training) for the lawyers’ labor as well as their social, cultural, and identity capital.<sup>45</sup> Firms rely on their lawyers’ capital to make hiring, promotion, and retention decisions, and derive value from the lawyers’ capital, for example, by trading on the identity of women and minority lawyers in marketing themselves to clients and potential recruits as diverse.<sup>46</sup>

This labor-capital exchange, however, is often implicit and uninformed and therefore unjust. To make the bargain a fair one, Wald argues that firms must practice *capital transparency* by acknowledging the role that capital, and in particular, identity capital, plays in their hiring, promotion, and retention practices.<sup>47</sup> Next, because firms rely on, and benefit from, capital exchanges, they must invest in *capital infrastructure*, extending all of their lawyers an equal opportunity to cultivate the very capital—social,

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38. *Id.* at 2474–75.

39. *Id.* at 2482.

40. Rhode & Ricca, *supra* note 1.

41. *Id.* at 2493.

42. *Id.*

43. *Id.* at 2501–06.

44. Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509 (2015).

45. *Id.* at 2529–36; *see also* Pearce, Wald & Ballakrishnen, *supra* note 1.

46. Wald, *supra* note 44, at 2536.

47. *Id.* at 2540.

cultural, and identity—necessary for achieving success and equality within their top ranks.

Kevin Woodson’s analysis of the plight of black attorneys draws on sociological research to underscore the role of cultural homophily—the tendency of people to develop rapport and relationships with others on the basis of shared interests and experiences.<sup>48</sup> Given the social and cultural distance between black and white individuals in American society, Woodson argues that homophily deprives black attorneys working in predominantly white firms of equal access to relational capital. This social dynamic produces racial inequality in these firms, independently of and in addition to the harms caused by racial bias.<sup>49</sup> Drawing on interviews of lawyers in large corporate firms, Woodson traces the way that cultural distance impedes associates’ ability to develop relational capital with their colleagues. Woodson argues that “even modest advantages in access to premium assignments can cumulatively result in attorneys ending up on very different career paths.”<sup>50</sup> Mentoring and staffing practices also open the way for homophily to affect access to the kind of work and relationships that aid professional development. Awareness of these phenomena should lead firms to establish mentoring programs and monitor assignments to level the playing field for minority associates.<sup>51</sup>

#### DIVERSITY AND INCLUSION: BEYOND THE U.K. AND U.S. CONTEXT

Michele Goodwin and Alison Whelan’s essay broadens the focus of the colloquium to Latin America, and the relationship between women’s representation in political office and reproductive health. By exploring Chile and Uruguay as case studies, the essay makes clear that representation alone does not necessarily liberalize women’s rights to the extent anticipated by the public. Nor does it acknowledge the responsibility of male legislators to their constituents who seek reproductive justice. “The rule of law provides a technical basis to challenge discrimination,” Goodwin and Whelan conclude, “but without enforcement, representation, and participation in the political process, advancements in women’s equality may be marginal at best.”<sup>52</sup>

#### CONCLUSION

Taken together, these essays identify a wide gap between aspirations and achievements concerning diversity in the legal profession. Women and minorities still face substantial obstacles in attaining positions of greatest power, status, and economic reward. Yet the fact that these problems are being so thoroughly explored is testament to our partial progress. This

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48. Woodson, *supra* note 4.

49. *Id.* at 2570.

50. *Id.* at 2567.

51. *Id.* at 2572–73.

52. Michele Goodwin & Allison M. Whelan, *Reproduction and the Rule of Law in Latin America*, 83 *FORDHAM L. REV.* 2577, 2602 (2015).

colloquium reminds us of all that stands in the way and helps chart a path to a more inclusive future.