

# Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community

by Ronald M. Sandgrund, Esq., InQ.



This is the fourth article series by The Inquiring Lawyer addressing a topic that Colorado lawyers may consider often but may not discuss publicly in much depth. The topics in this column are being explored through dialogues involving lawyers, judges, law professors, law students, and law school deans, as well as entrepreneurs, journalists, business leaders, politicians, economists, sociologists, psychologists, academics, children, gadflies, and know-it-alls (myself included).

These discussions may tread on matters sometimes considered too highly regarded to be open to criticism, or even simple examination. I take full responsibility for these forays, and I recognize that I may be subject to assessment and criticism myself. (Please be gentle!) If you have an idea for one of these columns, I hope you will share it with me via e-mail at [rms.sandgrund@gmail.com](mailto:rms.sandgrund@gmail.com).

My thanks to Lauren Kingsbery for her great help with the dialogue, and to Leona Martínez for her excellent suggestions that helped shape this piece. I am grateful to the many dialogue participants willing to go on the record with their frank observations and comments. I am also thankful to those who provided me critical background information—even though they were not comfortable being quoted. Maybe, someday, their concerns will no longer endure.

*[T]hose who believe that racial preferences can help to “even the score” display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still.*

—Justice Scalia<sup>1</sup>

*Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: “I do not belong here.”*

—Justice Sotomayor<sup>2</sup>

This article series covers three topics. Part I kicked off with a discussion of implicit (unconscious) bias, asking: What is it? What does it look and sound like? How does it feel to be subject to implicit bias and what effect does it have? If implicit bias is unintentional, is it really bias? Can implicit bias be misidentified and, as a result, misconstrued? Can it be mitigated? What is the best way to react when confronted with implicit bias? We visited with some majority-minority mentors and mentees to find out what they learned from each other and how they navigated the shoals of implicit bias.

In this part II, we talk about diversity, asking whether purposefully incorporating diverse people—who may have unique perspectives simply by virtue of their race, ethnicity, and cultural upbringing—into the law office and courtroom fosters better legal thinking, improved work results, and a more socially balanced workplace. We ask how (and if) we’ll ever know when we’ve reached a proper and balanced representation—when some hypothetical magic number, which some critics refer to as quotas, has been achieved. We ask whether we can and should be satisfied if we simply create an inclusive workplace or courthouse, even if that place is not as diverse as the community surrounding it.

In the last installment, we’ll discuss inclusiveness—that is, thinking and acting in ways that make everyone feel like a valued team member. Many people automatically gravitate toward, trust,

hire, and like those similar to themselves. This is often referred to as affinity bias, which may be learned, although some claim it has a biological component.<sup>3</sup> Can an inclusive work environment help foster a more capable law practice and a legal profession that represents a broader spectrum of the community? As long as law firms and courtrooms provide an inclusive work environment, is there anything left to do if they and the judiciary still don’t look like the community they serve?

Along the way, we have heard and will hear from some who feel that many diversity efforts are misguided, not because diversity is undesirable, but because of its potentially unintended consequences, such as stigmatization, “mismatching,” and fears about the subordination of merit-based advancement to other goals. Are there inadvertent downsides in seeking to foster greater diversity in law firms, and are there alternative means of moving closer to diversity’s goals while avoiding these negative consequences? This last discussion may be uncomfortable for many of us—but everyone I spoke to agreed that only a robust dialogue can move the conversation forward. One thing the dialogue revealed is that a new paradigm—“inclusiveness”—has emerged. Inclusiveness does not expressly seek proportional representation of anyone within the legal community. Instead, it seeks to unleash all lawyers’ potential, so they can be evaluated on their actual rather than perceived merits.

## Notes

1. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 527 (1989).
2. *Schuetz v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1676 (2014).
3. See, e.g., Kristof, “Our Biased Brains,” *The New York Times* (May 7, 2015) (discussing whether racial bias is a “feature of evolution” or simply the absorption of a “social construct”); Wilson, *The Moral Sense* (The Free Press, 1993) (discussing the bonding that occurs early between mother and child, leading to an affinity by the child toward those who look like the mother).

Series Participants



**Ron Sandgrund**

Ron Sandgrund, of counsel with the Sullan Construction Defect Group of Burg Simpson Eldredge Hersh Jardine, P.C., has been a trial and appellate attorney since 1982, representing, early in his career, primarily product manufacturers, insurance companies, and small businesses, including real estate developers and

builders, and then later, representing mainly property owners and homeowner associations in construction defect, insurance coverage, and class action disputes. He is a frequent author and lecturer on these topics, as well on the practical aspects of being a lawyer. He has handled both prosecution and defense of civil rights and discrimination claims.



**Rich Baer**

Rich Baer is senior vice president and general counsel of Liberty Media Corporation and Liberty Interactive Corporation. Previously, he served as chief legal officer at UnitedHealth Group and general counsel and chief administrative officer at Qwest Communications International, Inc. Before that, he served as chair of

Sherman & Howard's litigation practice. He obtained his BA from Columbia University and his JD from Duke University. He serves on the board of the National Jewish Medical Center and on Duke Law School's Board of Visitors.



**Raven Brame**

Raven Brame is a second-year law student at the University of Colorado Law School, eyeing a career as a prosecutor. She interned at the Colorado Springs District Attorney's Office in 2015.



**S. Kato Crews**

S. Kato Crews is a partner and trial lawyer with Hoffman Crews Nies Waggener & Foster LLP. He has a wide range of experience representing entities and individuals in lawsuits and arbitrations involving business disputes, employment law claims, construction and real estate matters, and other civil conflicts. He has served as a faculty member of the National Institute for Trial Advocacy. He earned his JD from the University of Arizona, where he served on the *Arizona Law Review*. He obtained his undergraduate degree from the University of Northern Colorado (UNC), from which he received the Distinguished Young Alumni Award in 2010. He was appointed by the governor to serve a four-year term on UNC's Board of Trustees in December 2014.

He earned his JD from the University of Arizona, where he served on the *Arizona Law Review*. He obtained his undergraduate degree from the University of Northern Colorado (UNC), from which he received the Distinguished Young Alumni Award in 2010. He was appointed by the governor to serve a four-year term on UNC's Board of Trustees in December 2014.



**Franz Hardy**

Franz Hardy is a partner in the Denver office of Gordon & Rees, LLP, where he serves as chair of its national Diversity Committee. He practices in the area of complex civil litigation, and has frequently spoken and written on the issues of diversity and inclusion in the legal profession.



**Arash Jahanian**

Arash Jahanian is an attorney at Rathod | Mohamedbhai LLC. His practice includes advocating for the civil rights of employees in the workplace and individuals suffering governmental and institutional abuses of power. Before joining Rathod | Mohamedbhai, Arash was an associate in Crowell & Moring LLP's Washington, DC office and a judicial clerk for the Honorable Wiley Y. Daniel, U.S. District Court for the District of Colorado.

DC office and a judicial clerk for the Honorable Wiley Y. Daniel, U.S. District Court for the District of Colorado.



**Kenzo Kawanabe**

Kenzo Kawanabe is a partner at Davis Graham & Stubbs LLP and a trial lawyer who represents clients in a variety of matters relating to commercial disputes, mass torts, products liability, and intellectual property. Kenzo dedicates significant time to *pro bono* and community work and served as the first-ever general counsel for the

National Asian Pacific American Bar Association, as well as on the boards of the Center for Legal Inclusiveness and Colorado Legal Services, among others. He received his BA from the University of Colorado Boulder and his JD from Georgetown University. He served as a law clerk for the Honorable Mary J. Mullarkey, chief justice of the Colorado Supreme Court.



**Kevin Loughrey**

Kevin Loughrey is a lawyer and businessman, and a graduate of Colorado State University ('68) and the Bates College of Law ('72). He was in private practice in Houston and Colorado Springs for several years, and then went in-house with various mining companies, starting with Rocky Mountain Energy in 1981 and becoming general counsel for Cyprus Minerals Company in 1983, running its legal department. Kevin became general counsel for Thompson Creek Mining Company in 1997, rising to become its CEO and chair. The company went public in 2007. Kevin retired from business and legal practice in 2013.

Kevin retired from business and legal practice in 2013.



**Qusair Mohamedbhai**

Qusair Mohamedbhai is a partner at Rathod | Mohamedbhai LLC. His practice is exclusively in the areas of plaintiff's employment discrimination and constitutional civil rights litigation. He advocates for the rights of employees in the workplace and for the civil rights of all individuals against governmental and institutional abuses of

power. He is also an adjunct faculty member teaching constitutional litigation at the University of Denver Sturm College of Law.

Series Participants



**Vernā Myers**

Vernā Myers is founder and president of the Vernā Myers Company. She is an expert facilitator, a motivational speaker, and a strategic advisor. Her TED talk, “How to Overcome Our Biases? Walk Boldly Toward Them,” offers three ways any person can become an active participant in countering racial bias. She is also the

author of the best-selling books *Moving Diversity Forward: How to Move From Well-Meaning to Well-Doing* and *What If I Say the Wrong Thing? 25 Habits for Culturally Effective People*. A graduate of Harvard Law School and Barnard College (Columbia University), Vernā was the first executive director of the Boston Law Firm Group, served as deputy chief of staff for the attorney general of Massachusetts (1997–99), and practiced corporate and real estate law at Testa, Hurwitz & Thibault, LLP. Vernā has touched more than a million people through her speeches, appearances, and transformative message of power and possibility. For the last two decades, she and her consultant team have helped eradicate race, gender, ethnicity, and sexual orientation barriers at elite international law firms, Wall Street powerhouses, and the 10,000-member Fire Department of New York, with the aim of establishing a new, more productive, and just status quo.



**John Palmeri**

John Palmeri is co-managing partner of the Denver office of Gordon & Rees, LLP, where he handles complex civil litigation matters. He has tried dozens of cases to jury verdict and has argued a number of precedent-setting appeals in federal and state court. He is a member of the American College of Trial Lawyers and the

American Board of Trial Advocates.



**Neeti Pawar**

Neeti Pawar maintains a solo practice focused on mediations, appeals, and employment law investigations. Previously, she was a partner with DiManna & Jackson LLP. She’s been included in Colorado Super Lawyers’ list of “Top 50 Women Lawyers” (2012–14) and was recognized as one of Denver’s “Forty Under 40” by the

*Denver Business Journal* in 2007. She is the founding and past president of the South Asian Bar Association of Colorado. Neeti spends her nonlawyer time skiing, dancing, traveling, and espousing the virtues of slow food and a healthy lifestyle.



**Siddhartha Rathod**

Siddhartha Rathod is a partner at Rathod | Mohamedbhai LLC. His practice areas include civil rights, employment law, and criminal defense. Siddhartha was also a member of the Guantanamo Bay, Cuba *habeas* litigation team, where he represented five detainees from Yemen. Siddhartha has been a faculty member

for the National Institute of Trial Advocacy since 2011 and is adjunct faculty at the University of Colorado Law School.



**Dr. Arin Reeves**

Dr. Arin Reeves of Nextions is a prominent researcher and advisor in the areas of leadership and inclusion. Her first book, *The Next IQ*, focuses on interruption of unconscious bias, and her second book, *One Size NEVER Fits All*, focuses on gender differences in business development. Arin studied business at DePaul University’s College of Commerce, attended law school at the University of Southern California, and received her PhD in sociology from Northwestern University. You can learn more about her research and work at [www.nextions.com](http://www.nextions.com).



**Meshach Rhodes**

Meshach Rhodes is a partner in Armstrong Teasdale’s litigation practice group and an experienced litigator and advisor to senior management in all facets of complex commercial, regulatory, and telecommunications litigation. Meshach also plays a key role in the firm’s Agriculture, Food, and Health subgroup and assists

businesses in enforcement actions to ensure compliance with the Food and Drug Administration, the Federal Trade Commission, the U.S. Department of Agriculture, and other regulatory bodies. She is a graduate of Regis University, where she played collegiate basketball, and the University of Colorado Law School. Meshach serves on the Board of Trustees for Colorado Law, is chair-elect of the Center for Legal Inclusiveness, and is on the Board of Directors for the Colorado Center on Law and Policy and the Colorado Coalition for the Homeless. Meshach co-founded the Latinas First Foundation, which awards scholarships to college-bound women.



**Eli Wald**

Eli Wald is the Charles W. Delaney, Jr. professor of law at the University of Denver Sturm College of Law. A legal ethics and legal profession scholar, Eli has written on topics such as increased lawyer mobility, conflict of interests and attorney disqualification, attorney-client communications, lawyers’ fiduciary duties to

clients, the nationalization and globalization of law practice, and, most recently, the challenges facing lawyers representing clients in the emerging marijuana industry. He is a member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct, the Colorado Bar Association’s Ethics Committee, and the Colorado Chief Justice’s Commission on the Legal Profession. Before joining Denver Law, Professor Wald was a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison. He holds SJD and LLM degrees from Harvard Law School, and LLB and BA degrees from Tel-Aviv University.



Part II—Diversity



**InQuiring Lawyer:** Diversity initiatives have become such a hot-button issue that some said I should not use the term “diversity” in this article. Others view such efforts as a positive step, providing equal opportunity to those who grew up with fewer resources, less developed personal capital, and less powerful social networks—that is, less privilege. Still others view such initiatives as affording special treatment and special rights, which they argue is antithetical to our country’s founding principles. Many are concerned that the U.S. judiciary, which is roughly 80% white and male, presents self-evident dangers of bias and alienation. Some fear that by seeking to create a judiciary that simply “looks” like America, we risk dumbing down our judiciary by putting people in positions they are not competent to perform, similar to the criticisms made of affirmative action in the university setting.<sup>1</sup> Included among these criticisms is purported “mismatching”—that is, placing those who have been allegedly deprived of adequate preparation and training into positions where their risk of failure is supposedly heightened, an issue recently raised in the U.S. Supreme Court.<sup>2</sup> Another difficult question is where to draw the lines when it comes to diversity. Some want to see more African-Americans in the legal workplace, but must we then distinguish between dark-skinned and light-skinned blacks, given alleged discrimination on this basis?<sup>3</sup> What about my lawyer friends who are Mormon and have faced discrimination on that basis: should a concerted effort be made to increase Mormon diversity in Colorado law firms?

*Discussing Diversity*

**InQ:** Vernā, you are a nationally known expert on countering racial bias. I have found that just mentioning the word “diversity” can elicit a strong reaction from whomever I am talking to. How do you approach this conversation?



**Vernā Myers:** Dealing with racial bias is not about perfection, but about connection, and sometimes you have to become uncomfortable before you get comfortable.

**InQ:** Neeti, you were initially hesitant to get involved with this article—why was that?



**Neeti Pawar:** When you reached out to me as someone who may be able to share my experiences with diversity and bias in the legal profession, my first reaction was hesitation. I think my reaction is an example of how attorneys of color must navigate implicit bias in the legal profession. On its face, it seems that I would, and some may even say should, simply be honored: I was referred to you as someone in the legal profession whose opinion was worth seeking. Instead, I proceeded cautiously: What is the agenda? What is my perceived role? Am I being asked to provide opinions as a representative of all minority lawyers?

**InQ:** That’s a whole lot of worry.

**Neeti:** I wouldn’t call it “worry”—just an awareness that everyone has bias. Everyone. And most of us aren’t aware of our own biases. When you’re constantly confronted with other people’s biases, the internal questions mentioned above just become part of your thought process. You recognize that you will have to, in every new situation, overcome preconceived labels. I have to anticipate

and “undo” or neutralize the bias before I can move forward in establishing credibility. I was also concerned about how my participation as “a minority lawyer” will affect my practice. Race is such a divisive topic across the country right now—there’s not a lot of listening or self-assessment going on. If I speak candidly, will I alienate potential clients and referral sources? Will it affect my credibility with counsel and with judges in our community who may perceive me as “playing the race card,” “promoting political correctness,” or “having a chip on my shoulder”? It would be easier to politely decline, citing a heavy workload, an excuse perceived as noble by our litigation-intensive profession.

**InQ:** Well, Neeti, I am grateful you not only agreed to talk to me, but that you and others have shared these concerns with me and the readers of this dialogue. These contributions invoke a whole other level of analysis that I, as an ostensible white male lawyer, never have to parse.

*What Does Diversity Look Like?*

**InQ:** Kenzo, in your position as a partner with a large Denver law firm, what is your sense of the racial diversity of the Colorado legal community?



**Kenzo Kawanabe:** While the data need to be updated, the Colorado legal profession lags far behind society at large and other professions with regard to racial diversity. Based on 2010 U.S. Census information, Colorado lawyers, judges, and other legal professionals are over 90% white, less than 4% Hispanic, 2 to 3% African-American, 1 to 2% Asian-Pacific American, and .1% Native American. If you focus on partners in Colorado law firms listed with the National Association of Law Placement, women comprise only about 24% and attorneys of color about 6% of partnership. There is no doubt that the legal profession has a long way to go.

**InQ:** How does that compare to Colorado’s population?

**Kenzo:** Based on similar outdated Census data, Colorado’s general population is at least 30% racially diverse.

**InQ:** The most recent National Association of Law Placement report<sup>4</sup> suggests Denver does not compare favorably to other regions, lags behind the national average for partners of color, and is right at the average for firms with fewer than 100 people, as well as those with between 101 to 250 people. There appear to be 15 U.S. cities that are doing better, percentage-wise, than Denver. Of course, many of those cities are more diverse overall, which probably helps. Eli, your thoughts?



**Eli Wald:** Colorado’s largest law firms have a better gender diversity record at the partnership level than the national average. Regarding racial diversity, the picture is more complicated. While Colorado’s law firms have average national numbers, it’s important to understand the baseline used for drawing conclusions: Is the “average” racial diversity assessment based on national or regional numbers? What if African-Americans account for x% of the legal profession nationally, but only for y% in Colorado, and y is greater than x—as is the case, of course. For example, what would you say if African-Americans accounted for 10% of the legal profession nationally, 2% in Colorado, and 3% of Big Law partners in Colorado? This analysis does not apply to women lawyers, because women account for roughly 50% of the population nationally and in Colorado, and law schools graduate roughly 50% women in and

outside of Colorado, so one can compare national and Colorado gender numbers more easily.

**InQ:** Still, as Kenzo pointed out, the legal profession's numbers are pretty anemic compared to other professions.

**InQ:** Siddhartha, would you describe your small law firm as diverse?



**Siddhartha Rathod:** I would say so. We have 8 lawyers: 50% are women and 50% are minority. We have attorneys with Iranian, Indian, Portuguese, and Brazilian heritage. Our attorneys include those of the Christian, Muslim, Jewish, Hindu, and Zoroastrian faith. Furthermore, eight languages are spoken in the office.

**InQ:** Sounds like your firm is quite the outlier here in Colorado! Still, aren't there possible explanations other than bias for a lack of diversity in some firms?

**Siddhartha:** Absolutely. In the legal profession, there is a pipeline problem and a lot of competition for diverse candidates. These diverse candidates want to take opportunities where they can take leadership roles in cases and in their law firms. So they come to firms like us. We say, "You're phenomenal. You want a leading role? Great. We're here to support you in whatever way we can."



**Arash Jahanian:** I see deeper societal issues in the institutional disadvantages inherent in the pipeline. What you may have is a self-perpetuating problem. If you have people in leadership who have not had the same experience and don't understand the issues others have faced, then they might bury their heads in the sand.

**Siddhartha:** I don't think all the focus should be on big firms. They include but a fraction of all attorneys, yet big firms get all the attention. Why are we telling students they should go to big firms? Why do law schools push students to big firms? I don't think that should be the aspiration. If they want the opportunities, trial experience, one-on-one writing critique, and so on, the smaller firm is the way to go.

**InQ:** That's exactly how my former law partner and mentor, Dean Vanatta, sold me on working for his three-lawyer firm after law school. He said, "Do you want to carry someone's briefcase for six to eight years, or do you want to try cases?" I joined his firm and I was trying cases and arguing appeals within two years.

**Siddhartha:** In the Asian community, there is a huge familial push to go to the big firms. If you don't go to the big firm, some elders in the Asian community view you as not being a success. You could be very successful as an attorney general, public defender, or district attorney, or working at a small firm, but still viewed as having failed. I encourage young attorneys to question these assumptions.

### *Does Diversity in and of Itself Have Intrinsic Value?*

**InQ:** Arin, how does reducing bias and creating a more diverse and inclusive work environment make for better lawyering?



**Arin Reeves:** Let's focus on the impact of how different perspectives affect how one thinks. We each can learn so much from one another. A more diverse perspective can only help—"groupthink" kills innovation and intelligence, as does a lack of new ideas. Simply put, I think most of us recognize that we learn more from those who are different from us. The message to firms, large and small, should be: If you choose not to be inclusive, you will be less effective as lawyers.

You will have less knowledge, less experience, and less insight, and this is not in your best interests. The "business" case for diversity—attracting diverse clients—is a separate and distinct issue from diverse perspectives making you a smarter lawyer. The first is about intelligent marketing and the latter is about just plain intelligence.

**InQ:** How does reducing bias, in and of itself, make for the provision of better legal services?

**Arin:** Practicing law is about people, and getting and analyzing information that will help you persuade other people. Biases can blind one from getting to this information and being objective in the analysis.

**InQ:** Eli?

**Eli:** The business case for diversity is centered on enhancing the quality of representation: When lawyers make decisions in a diverse context, the quality of the decision is improved because diverse perspectives are reflected in the decision-making process. Moreover, to the extent that diversity results from a meritorious, level-playing field free of implicit biases, clients benefit from competitive, high-quality advice. Accordingly, some large-entity clients only hire law firms that meet certain diversity standards.

**InQ:** Rich, you have been involved in opening channels for diverse lawyers to corporate legal departments. What do you see as the value of diversity in a law firm?



**Rich Baer:** Frankly, I have struggled trying to document that diversity makes for better legal representation. I know there are studies where public companies with greater diversity on boards are purportedly more successful than companies that are not. I'm a little skeptical about that. I don't try to grapple with this issue, about whether "Is it really better?" I don't make the argument that diversity will result in better representation, because I am concerned that those who do not support diversity can dismiss it as not being grounded in evidence.

**InQ:** Kevin, are you familiar with the many studies that diversity proponents rely on to establish the benefits of having diverse employees? Kathleen Nalty's October 2014 article, "Going 'All-In' on Diversity and Inclusion," collects a number of these studies, as does *Scientific American's* September 16, 2014 article, "How Diversity Makes Us Smarter," by Katherine Phillips.



**Kevin Loughrey:** Of course, diversity proponents argue that diversity is good for organizations, good for the individuals involved, and good for society. In support of this claim, you have directed me to a number of papers found on the Center for Legal Inclusiveness's website. These papers, in turn, were generated or sponsored by Cascade, a women in business organization; the American Bar Association, a longtime diversity proponent; the Minority Corporate Counsel Association; and the Hispanic National Bar Association. Without doubting the integrity of these organizations, there was *no chance* that any of them were going to publish any study that was not going to reveal value in diversity. This bias continues in the cited studies, for example: three female corporate board members are the number needed for optimal critical mass. Who says so? The Wellesley Centers for Women. Diversity, its proponents argue, makes organizations more successful. If that is the case, and in a free market such as the United States enjoys, shouldn't diversity take care of itself? Diverse organizations will prosper; non-diverse organizations will not.

**InQ:** So you see bias in the very efforts to increase diversity in the legal community?

**Kevin:** Attempting to promote diversity, without doubt, itself involves a form of impermissible bias. Yes, it helps the individual who is the beneficiary, but it hurts the person who comes in second place. It also diminishes the incentive to do those things that should make an individual qualified for a favorable position, because those qualifications are less important as a result of diversity than they would be without it.

**InQ:** Rich, it is interesting to hear you deemphasize the value of diversity in creating a legal team to provide the best legal services.

**Rich:** I can't agree with that characterization because I think things are more complex and nuanced. I believe that diversity is important because I'm seduced by intellect. I want the smartest lawyers possible. That's all I care about. If I'm only selecting white males, then I am reducing, by 80% or more, my chances of having the smartest team. For instance, at Qwest we realized that young mothers were leaving law firms because they couldn't handle all of the demands on their time, and then they were leaving in-house jobs because they couldn't work full time, so we created a part-time process. Not because we were good people, or that we felt strongly about diversity, but because we realized their participation gave us a *competitive advantage* because we were able to tap into this very important part of the legal profession that was leaving and we were able to keep these really smart lawyers.

**InQ:** Kevin, like Rich, you've served as corporate counsel—your thoughts on the value of a diverse legal team?

**Kevin:** Probably, in most endeavors, some level of diversity is desirable. If I make a decision, it will be the best decision I can make. But if the three of us make a decision, it will probably be better—not always, but sometimes. If there is a mix of the socioeconomic strata where the decision-makers came from, including their ethnic backgrounds, that also would probably improve the chances of better decision-making. So, generally speaking, some level of diversity is desirable. What is the level of diversity, how do you achieve it, what does it include—these are the hard questions. What about liberal or conservative, Catholic or Protestant, left-handed or right-handed, attractive versus unattractive? How much diversity do you want? They all have different experiences and I don't know which is good or bad, which adds to the equation and which doesn't. But, yes, diversity is generally desirable.

**Rich:** Ron, why take on the argument of whether or not the “benefits” of diversity can be documented when we don't need to? I think we all should help those in our profession who haven't had the same advantages we've had.

**InQ:** And how can that be accomplished?

**Rich:** I think mentorship is the basis of the legal profession. I've had a million mentors, and I would never be where I am today but for their assistance. We need to pay it back. Why not pay it back to those who haven't had the network that I was blessed with just because of my socioeconomic background and race?

### Are Diverse Legal Teams Better?

**InQ:** Arash, has this diversity helped your firm's practice?

**Arash:** The value of diversity, in an employment discrimination and civil rights firm like ours, is that we have people who get what it feels like to be discriminated against. That's really important to our clients. I remember my second day at work—we had just done

mediation for a woman who was turned away from a club because she was black. Qusair and I were walking away from the mediation and he talked about the “stench of discrimination” and “getting” what that means and feels like. When you are working in a diverse environment like we have here, there is a base level understanding that comes from our racial, religious, and gender diversity.



**Qusair Mohamedbhai:** That's not to say Caucasians can't relate. One doesn't necessarily have to be of a certain race—sometimes race and poverty are synonymous. There are certainly many Caucasians who have lived in poverty, who have a very strong cultural connection with minority communities because of their socioeconomic status. And it's never a case of “just because I look like you” or “just because my life mirrors yours” I can relate to you. It's not that simple an answer.

**InQ:** How about within the firm itself—has your firm's diversity helped?

**Arash:** In any law firm, any environment, there are going to be barriers, barriers to women and minorities assuming leadership positions. People look up the chain and they see that no one looks like them. That's a problem. In a non-diverse setting, you are not going to feel welcome, you are not going to feel equal, and you are not going to feel like you have the opportunity to advance. A lot of people can talk about the value of diversity in any context, but for us, it's real and it's personal.

**InQ:** Qusair, in a Big Law firm, can diversity help improve the effectiveness of legal services in non-civil rights and non-discrimination contexts, such as corporate law, product liability, and so forth?

**Qusair:** Sorry, I never worked in a bigger firm, but I think that if the legal profession does not mirror the diversity of the community, that presents problems. Eventually lawyers run into diverse jurors of various backgrounds—racial, religious, socioeconomic—and the lawyers may be a little out of touch. They forget how other folks live, how they perceive a billion-dollar product liability issue or very, very rich property owners fighting over real estate. Having diverse attorneys can serve as a conduit into a community's heart and soul so a law firm doesn't lose touch.

**InQ:** Vernā, do you recall a specific instance where a diverse legal team probably got a better result because of its diversity?

**Vernā:** Sure. A white senior partner in an employment discrimination case told his team that he felt he could work around a particular statement that a witness made. A black associate stepped up and pointed out how badly he thought that approach would work during trial. The associate had to sensitize the partner to the statement's history and its racial implications based on her experience, an experience that the partner did not share. What was said to a black woman by a witness was “not that egregious” in the partner's eyes, but was “really bad” from the associate's standpoint, and probably from the standpoint of some on their future jury too. This situation revolved around race, but age, religion, tenure, class, and personality all inform what we see, our blind spots, and our approach to problem solving.

### Diversity and Race Capitalism

**InQ:** Qusair, from where you sit, how has the Denver legal community done as far as improving diversity within the Bar and Bench?

**Qusair:** I am concerned about such efforts if all they really represent is “race capitalism.”

**InQ:** What’s that?

**Qusair:** Race capitalism is when law firms value diversity not because of its intrinsic value, but because they believe it can help the bottom line. So, they are capitalizing off of diversity; they are capitalizing off of race.

**InQ:** Do you see a lot of that going on?

**Qusair:** Absolutely. There is a study by a University of Denver law professor that reveals that many law firms put diverse models on their websites to appear more diverse than they are because they believe the appearance of diversity is to their capitalistic benefit. But it’s not true diversity.

**InQ:** Eli, what are your thoughts on what has been described as “diversity capitalism” or “race capitalism”—that is, pursuing diversity for the supposed “wrong” reasons, not for the individual person’s merit or their skills, but so that the firm simply could populate itself with enough diversity to get accepted into the “club,” and the firm it is not looking hard at whether those diverse peoples are advancing or actually have power in the firm.

**Eli:** Diversity capitalism takes place when lawyers and law firms take advantage and benefit from facets of their personal identity, such as racial and gender identity. How should we feel about lawyers and law firms who market and benefit from their identity? For better or worse, that’s the world we live in. We can talk in the abstract about a world in which racial and gender identity do not matter. Do we live in that world? No. Everybody does it. In fact, white male lawyers have been marketing their racial (Caucasian) and gender (male) identity for years, benefiting from positive assumptions about their competence and undivided loyalty to clients, so it is a bit disingenuous to fault minority and women lawyers who benefit from identity capital for doing the same thing. But diversity capitalism can result in harm when law firms hire certain lawyers only so they can hold themselves out as diverse workplaces, while failing to extend them fair opportunities to learn, develop, and become better lawyers; to find supportive mentors; and to meaningfully compete for promotion to the partnership. So, yes, it is very undesirable if a law firm takes advantage of the racial and gender identity of its lawyers without extending the lawyers a fair opportunity to compete to become a partner.

**InQ:** So what we’re talking about are law firms walking the walk, not just talking the talk?

**Siddhartha:** Right. Shell Oil has taken a pledge to not just have minority attorneys on its law firms’ letterhead, and not just have minority attorneys assigned to their cases, but to have minority attorneys doing a major portion of its legal work. Shell put this challenge out in 2004. However, I don’t know what’s happened with the challenge since then.

**InQ:** Kevin, Siddhartha points out that some companies have agreed that they will retain law firms who will meet or try to meet certain diversity goals. What do you think about these efforts to reward law firms with a diverse workforce?

**Kevin:** I would not join such a group myself and I would discourage others from doing that because the harm done by the efforts to achieve diversity is worse than the good done by the effort to accomplish it. I think it would do nothing to improve the quality of legal services, and if it did, it wouldn’t outweigh the harm it does to the ability of companies and individuals to act freely. I believe that law firms are being coerced by social and economic

measures to achieve diversity, and absent this effort, I do not think these firms would do this on their own.

**InQ:** Eli, is it discomfoting to you that an organization would select a law firm based on its racial makeup?

**Eli:** I doubt any entity client will select a law firm solely based on its racial makeup. Corporate America is for profit. Entities hire the best lawyers they can afford, while also valuing diversity. Similarly, even though law firms value diversity, a law firm is unlikely to hire an unqualified attorney solely based on the lawyer’s racial identity.

**InQ:** Siddhartha, how do you distinguish between a legitimate effort to increase diversity in a firm because someone believes that it will provide better legal services and a better work environment versus someone who believes it will improve the bottom line simply because of the “optics” it supplies? Is there some kind of acid test that can be employed, some way someone looking from the outside in can decide whether the effort is legitimate?

**Siddhartha:** I’d start by looking at the number of minority partners, at the number of minorities assigned to big cases, at the number of minorities actually doing trial work, and at the number of minorities doing things at a responsible level. I think it’s great that companies are recognizing that having a diverse attorney pool is going to increase the bottom line. But is the company or the firm thinking: Do I just need to hire models to get that? Do I just need to hire entry level associates to get that? Do I need to focus on developing minority attorneys that can assume greater case responsibility and create a truly more diverse community within my company or firm?

**Qusair:** Our law firm walks the walk. It’s not hard to create a diverse culture. The fact that so many law firms have struggled with it for so long is just mind-blowing. It shows there are deeper entrenched institutional issues at these firms. There are a lot of big firms that have achieved diverse workplaces. There are others that just can’t. And the ones that can’t—there are reasons for that: a reluctance to open doors for minority candidates, a reluctance to give them the experience to succeed.

**InQ:** Arash, Siddhartha, and Qusair, I’ve handled both sides of discrimination cases—are you guys saying I was less able to effectively represent my clients than a lawyer who shared my client’s identity status? I’d like to think my lawyering skills were not constrained by the color of my skin or my gender.

**Siddhartha:** Of course not. We know some attorneys who came from well-to-do families, who are non-minority, who are straight men, but who have really dedicated a portion of their lives to understanding the issues that those communities struggle with, and they are phenomenal attorneys because of it. But the advantage of being a minority is that you grew up with it. You grew up with that cultural identity. For me, being first generation in this country, for others in this office being immigrants to this country, we have a cultural awareness and sensitivity that our clients appreciate. Whether it is contract work or patent or product liability, whatever it is, it all comes down to: how is a jury going to look at this? And juries are diverse. And clients are diverse. Shell Oil wants its attorneys to be racially diverse because it believes its customers are racially diverse. Everyone needs oil—everyone all over the world—so unless you have the ability to understand the client’s needs and who the client’s customers are, then you are going to miss out on a business opportunity.

**Arash:** There are white attorneys and staff at our firm who are good examples of people who are not minorities but who “get it”

because of their backgrounds and their dedication to the issues. I like to say that they speak the language. We have gotten to know the activist community, people who are out there on the streets, marching and fighting for these issues, through direct advocacy. Some of these white individuals have been out there working for these communities and fighting for these issues for years. They may very well understand some of these issues on a level I haven't thought about. In the context of this discussion, "diversity" can take on a number of meanings, including diversity of experience and perspective.

**InQ:** Meshach, can you think of an example where the diversity of a legal team contributed to a better legal work product?



**Meshach Rhodes:** I was working on a case involving a lot of plaintiffs from different countries, all Spanish-language speakers, with no minorities in the room. I became the *de facto* minority "voice." I was really junior and I thought I had no right to be doing anything other than contributing to the legal research. It was a little empowering for me at the time and I thought, well okay, I do have importance. Everyone in the room had the same answer regarding strategy. There was one attorney, however, who kept asking me about my approach and, finally, he said, "Meshach might not be the right person, but we should probably get someone more senior who speaks the language, who understands the culture." And they did—that was the right call. And they ended up changing their strategy and I know it was helpful.

### Are All Diversity Initiatives Equal?

**InQ:** Kevin, since you previously agreed that some level of diversity is advantageous, how do you get there?

**Kevin:** I think there are some things you can do. You can advertise more broadly. You can visit schools where the target group attends to encourage a wider range of applicants. Education is probably the number one aspect by which you remedy those kinds of problems. What worries me, though, is you get to the point where you disadvantage someone who doesn't belong to the group—a more talented person who is known to you does not get the job so that you can hire a less qualified person because they belong to the group that you favor. I don't see any justification for that. As I said earlier, in a free market such as the United States enjoys, shouldn't diversity take care of itself? Diverse organizations will prosper; non-diverse organizations will not. I turned on the television the other day and the NBA was on. The players were disproportionately tall, black, and exclusively male. Why did no one mention this? Why are no diversity advocates suggesting that something be done? Because those are ridiculous questions. Merit and usefulness to organizations are the reason that organizations choose, retain, and promote their members. It is done far from perfectly, but it is done. It is undoubtedly done unfairly in some cases, and at times for dishonorable reasons. To the extent that this is the case, those organizations will be punished by the market.

**InQ:** What if the market is rigged?

**Kevin:** Markets are imperfect more often than they are "rigged." Nonetheless, they still operate, and they do so more fairly than other mechanisms.

**InQ:** Eli, how do you respond to those, like Kevin, who argue that market forces adequately serve to control discrimination, and that public and private efforts at increasing diversity are misplaced?

**Eli:** The "economics of discrimination" argument essentially means that discrimination is inefficient and will therefore not take

place in competitive markets. Market forces, however, assume rational decision-makers. Implicit bias is irrational, in the sense that it is unconscious and unintentional. Without awareness and training to minimize the impact of implicit bias, market forces cannot address discrimination that results from implicit bias. For example, market proponents assume that assessment and promotion decisions are based on merit. But if implicit bias results in a system that favors white men—in terms of evaluation, mentorship, and who gets better assignments and opportunities—then the system is not meritorious and not competitive.

### Diversity and Quotas

**InQ:** Kevin, what's your beef with many of the efforts to improve diversity in the Colorado legal profession?

**Kevin:** Diversity is affirmative action for the 21st century. As affirmative action lost its appeal and was becoming less popular with the electorate, a change occurred. We were no longer encouraging, or forcing, private entities to hire members of certain groups for the benefit of those groups or individuals. We were doing so because diversity is good for all of us. This argument has the further attraction of giving legal cover to the glaring problem of affirmative action, which is clearly discriminatory, and as such, presents its proponents with legal challenges.

**InQ:** Are you saying diversity initiatives are simply disguised quotas?

**Kevin:** Yes, advocates of diversity are supporters of quotas. They will often say they are not, but that is untrue. You can't really have the conversation about diversity without talking about quotas or something so close to quotas that there is no practical difference. The starting point for the argument is that certain groups are underrepresented. How do you know? You know because there are not as many x's in some situation as there are x's in the general population. In other words, there is a quota and it is not being met. Nobody likes the idea of quotas, so everyone tries to avoid it. It is unavoidable. Once you start fixing the problem, you don't know when you are done until you have the same number of x's as are in the population or, in other words, until you have met the quota. At this point, you are not selecting individuals, you are selecting group representatives. In what area of life, where merit is a criteria, are things distributed in such mathematical proportion? What races are included? How many ethnicities? If we move to the categories that some suggest should be added, it becomes more complex. There are at least dozens of possible religions, and religion, unlike the other categories, is a matter of choice. Culture, too, has an element of choice, and they number in the hundreds, at least. Disability and sexual preference present their own issues. Taking them all into consideration, how many factors must someone take into account when making a hiring decision? What weight should each factor be given? Is a disabled, black, homosexual woman "worth" more than a Hispanic, disabled male? This discussion quickly devolves into the absurd, but it is a reality if we accept the precepts of diversity.

**InQ:** You seem to be arguing that all efforts to improve diversity in the legal community are tainted.

**Kevin:** To accept diversity initiatives is to sacrifice quality. To maximize quality, decisions should be made solely on the basis of quality. To decide on the basis of anything else is to say that quality is subservient to some other value—in this case, diversity. Some argue that there are sufficient quality applicants in every group to

allow for both quality and diversity-supporting decisions. The facts don't support this argument. If, in fact, individuals in these target groups have been unfairly discriminated against for generations and have, as a group, had poorer educational experiences, fewer opportunities, and less actual experience, how could they also have equal credentials in equal numbers as members of favored groups? They can't. If every organization, everywhere, at every time, is expected to have a membership that reflects society perfectly, it can only happen if we are willing to accept that such organizations will have lower overall quality than if diversity was not a consideration.

**InQ:** Arin, how do you respond to those who view efforts geared toward minimizing implicit bias, and thereby improving diversity, in the legal community, as simply an effort to create quotas divorced from merit?

**Arin:** Reducing bias is not the same as giving anyone an advantage. It involves correcting distortions in decision-making. I tell people, "You don't have to believe in diversity to reduce bias. It is not my job to persuade you on what you think, but it is everyone's responsibility to reduce bias." I agree with the criticisms of some diversity initiatives. Many of the skeptics of diversity and similar initiatives see holes in what is being said and done that diversity proponents cannot see, and they can be our best friends in figuring out how to create real diversity.

**InQ:** Eli, do you believe it is a fair criticism of diversity-enhancing efforts that they really are motivated, in large part, by a desire to fulfill a quota?

**Eli:** No. Well-designed diversity-enhancing efforts have nothing to do with quotas. Instead, they correct for past discrimination and present inequities, such as implicit bias. Bias awareness, a cornerstone of diversity-enhancing policies, requires that we acknowledge that the practice of law is not blind to lawyers' personal identities. Because standards of assessment, performance, and excellence tend to be implicitly biased in favor of white male heterosexual lawyers, bias awareness calls for leveling the playing field and developing yardsticks that measure objective professional performance, rather than stereotypes and biased assumptions related to lawyers' gender and race.

**InQ:** Some argue that attempts to improve diversity in the legal community diminish efforts to judge lawyers based on their competence.

**Eli:** Lawyers ought to be assessed pursuant to meritocratic standards of competence. There is no inherent conflict between competence and diversity. Those who believe otherwise are sometimes confused about the meaning of merit. Frequently, law firms try to and believe they measure merit, but instead measure social capital, such as the quality of one's relationships and connections, and cultural capital—that is, one's level of sophistication and understanding of the culture of a law firm or a law school. While law firms should measure achievement and merit, these should be evaluated fairly and accurately, avoiding metrics that actually measure things other than merit, like relationships and cultural know-how. When we talk about merit, we should make sure we are measuring it, not capital endowments.

**InQ:** Kevin, while you and diversity advocates might agree that more diversity in law firms would be a good thing, it seems that the real stumbling block in your mind is how to get us there. Is that fair?

**Kevin:** Yes. I think if there were some way to weigh the components, I might come out with a significantly lower weight on the importance of diversity than diversity advocates, but I think your statement is probably fair.

### *Navigating Non-Diverse Industries*

**InQ:** Kevin, as general counsel and CEO of some of the West's largest mining concerns, were you aware of any implicit racial or ethnic bias in your department or company?

**Kevin:** The fact of the matter is that the mining industry is primarily a white and Hispanic industry. There are very few blacks in the traditional U.S. mining industry, especially in the Western United States. I believe this is due in large measure because the population base from which the industry draws is rural America. The mines are located outside of Boise, Idaho, Reno, Nevada, and so forth, and so the applicants that it draws are generally not black, nor are the employees. If you just play the numbers game, mining has a very skewed labor force. When you did get the rare black employee, there was some explicit and probably some implicit racial bias in the rank and file, just because it was so unusual to get a black employee.

**InQ:** Do you feel that the Hispanics you refer to were able to rise as easily as Caucasians in the mining industry, or did they face additional obstacles because of their race or ethnicity due to explicit or implicit bias?

**Kevin:** You are kidding yourself if you don't think there is something there to keep any clearly defined minority group from rising quite as fast. That just happens. We tried to always talk about merit. It was known what my thoughts on the subject were—merit was the key. We had people who rose very fast, very far. But I wouldn't dismiss the fact that implicit bias played a role—it's hard to get rid of.

**InQ:** Meshach, what has been your experience in industries that are not diverse?

**Meshach:** I work for a big company in the dairy industry. I'm lead counsel and we do their regulatory work. Now, the agricultural and dairy industry is not the most diverse industry. So if you are sending someone like me to lobby in an industry that is fairly well established, and in front of folks who do not necessarily look like me, you are taking a risk because I might not be able to create those same types of relationships. And when I'm dealing with opposing counsel, often I have faced that kind of subtle attack: "So, have you ever set foot on a farm?"

**InQ:** So now we are dealing with not just implicit bias, but express bias, except it may not be bias at all, but simply part of a plan to throw one off balance?

**Meshach:** Yeah, I don't think it's necessarily motivated by race, ethnicity, and gender. I think it is a strategy to paint me as an outsider in an industry when being in the loop is incredibly important. And so I handle it in different ways. I joke a lot because I feel it makes me a little more approachable and prevents them from getting the best of me. If I show that it's not affecting me, which it probably is not, then they can keep doing it and it makes them look foolish. A colleague of mine makes a frontal assault and simply says, "That is not appropriate." What I tend to do with this particular client is to do as much groundwork as possible, research the

people I'm meeting with, find out what they like to do in their free time, and so on. When I walk in to meet with this guy with 50 years of industry experience, I can show him that I know the law, and then we can find what we have in common. When I'm in front of a jury, I do the same thing.

### *The Judiciary*

**InQ:** Vernā, I've heard from folks who say, "Sure, it would be great to have a more diverse judiciary, but judges have to earn their way onto the bench by showing competence. If our judiciary looks the way it looks based on merit, so be it." Ignoring for the moment whether the judge selection process is truly meritocratic and uninfluenced by special interests and politics, what is your view on the current state of our country's relatively non-diverse judiciary?

**Vernā:** I think there is a risk for any society where some of its most important decisions are not informed by its diverse citizens. If a class of predominantly white males makes the rules, especially since we know implicit bias exists, can that be acceptable? Also, I think that focusing on "merit" is a form of resistance to the problem. I don't think anyone who sees the downside to having a narrow class of persons wield so much power could approach the issue so simplistically. We don't expect or want such a skewed and distorted society. Folks who assume everything is "merit-based," which sounds so objective, do not see how many persons simply are not allowed to compete—in fact, many people face a form of subtle exclusion that has been embedded in our systems. Those who have the power dominate, and therefore they naturally shape the norms and set values and culture. These become barriers to those who are different, and they perpetuate the status quo—maybe not consciously, although this can be the case.

**InQ:** Are you suggesting that considering merit—or competence—is improper?

**Vernā:** It's not that simple a question. Let's start with who gets into what schools. Is that always merit-based? Let's talk about which schools we hire most from. How much of that selection process is based on preferences, comfort, family, and social networks? The problem starts early: People who are just as capable as others don't get to play the "merit" game. They are shut out for any number of reasons, including income and opportunity. If these people aren't given a fair chance to compete in the merit game, they can't compete period. Also, arguments relating to merit rest on the fiction that everyone is positioned the same from the start. They are not. Our country's legally sanctioned history of exclusion created an uneven playing field. We must look to the concept of equity—working to create fairer outcomes—if we are ever going to rectify the tilt.

### *Conclusion*

In an earlier InQ dialogue—"Does Popular Culture Influence Lawyers, Judges, and Juries?"<sup>75</sup>—I interviewed several lawyers and judges, as well as a Hollywood screenwriter and jury consultant, regarding the effect of popular culture, particularly the movies, on trial lawyers, judges, and jurors. There was not one person of color among the interviewees. Their favorite movie? *To Kill a Mockingbird*, based on Harper Lee's great novel, starring Gregory Peck as the inestimable and heroic Atticus Finch. This admiration was no doubt founded, in large part, on Atticus's virtue—a white lawyer courageously defending a black man wrongfully accused of raping

a white woman in small-town Alabama in 1930s. All agreed that Atticus Finch was what great lawyers, and great lawyering, are all about.

But then came the recent publication of Harper Lee's long lost sequel,<sup>6</sup> *Go Set a Watchman*, which revealed Atticus as a former Ku Klux Klan member and segregationist. I haven't gone back to poll the interviewees from this earlier dialogue to find out if *To Kill a Mockingbird* still tops their movie list, but why shouldn't it—a great movie is a great movie, right? Critic Alexandra Alter notes:

[Atticus's racism] is also certain to spur debate about the character of Atticus, and his moral integrity in *Mockingbird*—a staple of high school curriculums around the country—that made him a cultural icon whose influence transcended literature, inspiring generations of lawyers, teachers and social workers. . . . Some writers and literary critics see added value in a more complex, and flawed, version of Atticus. If *Mockingbird* sugarcoats racial divisions by depicting a white man as the model for justice in an unjust world, then *Watchman* may be like bitter medicine that more accurately reflects the times.<sup>7</sup>

So, one of the great icons of racial justice “turns out” to be a racist. Michiko Kakutani, another reviewer, writes:

One of the emotional through-lines in both *Mockingbird* and *Watchman* is a plea for empathy—as Atticus puts it in *Mockingbird* to Scout: “You never really understand a person until you consider things from his point of view.” The difference is that *Mockingbird* suggested that we should have compassion for outsiders like Boo and Tom Robinson, while *Watchman* asks us to have understanding for a bigot named Atticus.<sup>8</sup>

After considering this commentary, I began to wonder: What if a person of color had been included among my interviewees in “Does Popular Culture Influence Lawyers, Judges, and Juries?” Might that person have had a different opinion of Atticus and a different “greatest all-time movie” about lawyers?<sup>9</sup> Harvard law professor Randall Kennedy describes the book as one about “the nobility of the white savior.”<sup>10</sup> Fighting words, perhaps, for the fans of *To Kill a Mockingbird*, but a valuable and different perspective for sure.

## Notes

1. See, e.g., Schuck, “Assessing Affirmative Action,” 20 *National Affairs* (Summer 2014), [www.nationalaffairs.com/publications/detail/assessing-affirmative-action](http://www.nationalaffairs.com/publications/detail/assessing-affirmative-action).

2. Mismatching consists of allowing allegedly less qualified candidates entry into certain “higher tier” schools and law firms to promote diversity, possibly setting such people up to fail because they were deprived of the necessary training and education to succeed, and argues that these persons would be better served at a less selective school or firm so they can hone their skills and receive the necessary training. See, e.g., Schuck, *supra* note 1 (citing Sander and Taylor, *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* (Basic Books, 2012)). Justice Scalia echoed these concerns from the bench during the December 2015 oral argument in the affirmative action case *Fisher v. Univ. of Texas*, 570 U.S. \_\_\_\_ (2013). See Hatocollis, “With Remarks in Affirmative Action Case, Scalia Steps into ‘Mismatch’ Debate,” *The New York Times* (Dec. 10, 2015). Some scholars contend that such concerns are exaggerated, if not dead wrong, and that eliminating diversity programs would simply further disadvantage the disadvantaged. See Alon, “Scalia Was Wrong: Students Admitted Through Affirmative Action Thrive at Elite Colleges,” *The Washington Post* (Dec. 10, 2015).

3. Applebome, “Lawsuit Raises Issue of Color Bias Between Blacks” *The New York Times* (May 23, 1989).

4. See “Women and Minorities at Law Firms by Race and Ethnicity—An Update” (NALP Bulletin, May 2015), [www.nalp.org/0515research](http://www.nalp.org/0515research).

5. Sandgrund, “Does Popular Culture Influence Lawyers, Judges, and Juries?” 44 *The Colorado Lawyer* (Jan.–April, 2015).

6. *Go Set a Watchman* is said to have been written before *To Kill a Mockingbird*. However, the provenance of the book, and the author's true desire to see it published, have been hotly debated.

7. Alter, “While Some Are Shocked by ‘Go Set a Watchman,’ Others Find Nuance in a Bigoted Atticus Finch,” *The New York Times* (July 11, 2015), [www.nytimes.com/2015/07/12/books/racism-of-atticus-finch-in-go-set-a-watchman-could-alter-harper-lees-legacy.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news](http://www.nytimes.com/2015/07/12/books/racism-of-atticus-finch-in-go-set-a-watchman-could-alter-harper-lees-legacy.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news).

8. Kakutani, “Harper Lee's ‘Go Set a Watchman’ Gives Atticus Finch a Dark Side,” *The New York Times* (July 10, 2015), [www.nytimes.com/2015/07/11/books/review-harper-lees-go-set-a-watchman-gives-atticus-finch-a-dark-side.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news](http://www.nytimes.com/2015/07/11/books/review-harper-lees-go-set-a-watchman-gives-atticus-finch-a-dark-side.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news).

9. Back in 1992, law professor and ethics expert Monroe Freedman criticized Finch's character as a “passive participant” in “pervasive injustice,” comfortable with the South's Jim Crow laws. See Kennedy, “Harper Lee's ‘Go Set a Watchman,’” *The New York Times Sunday Book Review* (July 14, 2015), [www.nytimes.com/2015/07/14/books/review/harper-lees-go-set-a-watchman.html](http://www.nytimes.com/2015/07/14/books/review/harper-lees-go-set-a-watchman.html).

10. As quoted by Debra Cassens Weiss in “Law Prof's Contrarian Views About Atticus Finch are Vindicated,” *ABA Journal* (July 16, 2015). ■