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The Not-So-New Normal of the Legal Profession: Facing and Confounding the Odds

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THE NOT-SO-NEW NORMAL OF THE LEGAL PROFESSION: FACING AND CONFOUNDING THE ODDS*

THE HONORABLE BERNICE B. DONALD** AND GADSON W. PERRY***

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INTRODUCTION

As you may know, this year the Nation celebrates the 50th anniversary of the Civil Rights Act of 1964, the signature legislation of President Lyndon B. Johnson’s “Great Society” initiative, which barred unequal application of voter registration requirements, forbade discrimination in hiring

* This article was adapted from several recent speeches directed to law students. The article and the speeches are the work product of the listed authors.

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practices, and outlawed segregation in public accommodations.¹ In April, four presidents spoke at the L.B.J. Presidential Library's Civil Rights Summit in Austin, Texas to commemorate the Act and to pay special homage to the dream to which Dr. Martin Luther King, Jr. famously gave expression.² Half of that number—President Obama and former President Clinton—are lawyers. And although former Presidents Bush and Carter, as well as a number of other courageous and notable people, also spoke at the Summit, it makes sense to foreground leaders who have been lawyers, and vice versa, in this discussion about the legal profession. The twin goals of L.B.J.'s Great Society—economic opportunity and social justice—provide the framework for the discussion.³

The 50th anniversary of the Civil Rights Act provides a useful benchmark for examining the dynamics that have led to what some commentators are calling the legal profession's "new normal." As Georgetown Law professor Abe Krash observed in 2008, "[t]he social and economic structure and the culture of the profession are very different from what they were 50 years ago."⁴ As such an observation reflects, today's legal profession is not the one that existed for previous generations. Some of the differences are cosmetic; others, more substantive. Some have proven enduring; others, fleeting. In any case, a survey of the profession as it is now, textured by an understanding of the changes that have marked the past fifty years, will facilitate a better understanding of how far we have come, where we are now, and where we have yet to go. Accordingly, using the passage of the Civil Rights Act as a reference point, we will address some of the social and economic implications of the "new normal" before turning to a few strategies about how to succeed in it.

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241(1964) (codified as amended in scattered sections of 42 U.S.C.); see also *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, NAT'L ARCHIVES, <http://www.archives.gov/education/lessons/civil-rights-act/> (last visited Sept. 1, 2014).

2. See Jennifer Epstein, *Obama to Speak at Civil Rights Act Anniversary*, POLITICO (Feb. 27, 2014, 1:00 PM), <http://www.politico.com/story/2014/02/obama-to-speak-at-civil-rights-act-anniversary-104046.html>; see also Lesley Clark, *Obama to Join Three Former Presidents to Mark Civil Rights Act 50th at LBJ Library*, MCCLATCHY WASH. BUREAU (Feb. 27, 2014), <http://www.mcclatchydc.com/2014/02/27/219598/obamas-to-mark-civil-rights-act.html>.

3. See Lyndon B. Johnson, Commencement Address at the University of Michigan (May 22, 1964), available at <http://www.heritage.org/initiatives/first-principles/primary-sources/lbj-launches-the-great-society> ("The Great Society rests on abundance and liberty for all. It demands an end to poverty and racial injustice, to which we are totally committed in our time.").

4. Abe Krash, *The Changing Legal Profession*, 22 WASH. LAW. 30, 30 (2008).

I. SOCIAL JUSTICE

We begin with social justice because it is in this regard that the progress that lawyers have made—and the challenges that the legal profession still confronts—are most apparent.

A. Gender

Consider as proof of progress, for example, the fact that both Michelle Obama and Hillary Clinton, like their husbands, are lawyers. But they are the only First Ladies in U.S. history to have been lawyers.⁵ By contrast, more than half of this country's forty-four presidents—twenty-five to be exact—have been lawyers. They also all have been men. Accordingly, Mrs. Obama and Mrs. Clinton simultaneously evidence the increased opportunities available to women lawyers and would-be women lawyers as well as the challenges that continue to obstruct their progress.

The challenges are due in large part to the very thing that makes the legal profession possible: the law. In 1872, the U.S. Supreme Court ruled, in *Bradwell v. Illinois*, “that women had no constitutional right to be admitted to state bars.”⁶ That decision, the Court determined, was left to the States.⁷ Although Belle Babb Mansfield became the first woman admitted to a state bar (Iowa) in 1869,⁸ women represented a scant three percent of the legal profession nearly one hundred years later—four years prior to the passage of the Civil Rights Act—in 1960.⁹ By 1980, however, that figure had grown to eight percent.¹⁰ And today, women represent a third of all lawyers.¹¹

More positively, since 1993, women have represented nearly fifty

5. See, e.g., Katie Connolly, *Why Michelle Obama Is Not the Next Jackie O*, NEWSWEEK (Nov. 28, 2008, 7:00 PM), <http://www.newsweek.com/why-michelle-obama-not-next-jackie-o-85219> (last updated Mar. 13, 2010, 6:36 PM); *Michelle Obama*, NAT'L WOMEN'S HIST. MUSEUM, <http://www.nwhm.org/education-resources/biography/biographies/michelle-obama/> (last visited Sept. 1, 2014).

6. *History*, MS. JD, <http://ms-jd.org/about/history/> (last visited Sept. 1, 2014); see *Bradwell v. Illinois*, 83 U.S. 130, 138-39 (1872).

7. See *Bradwell*, 83 U.S. at 139.

8. *Women Lawyers and State Bar Admission*, LIBR. OF CONGRESS, http://memory.loc.gov/ammem/awhtml/awlaw3/women_lawyers.html (last visited Sept. 1, 2014).

9. *Krash*, *supra* note 4, at 39.

10. *Id.*

11. William T. Robinson, *Advancement of Women Lawyers: Barriers Must Be Removed so Female Attorneys Can Equally Participate*, A.B.A. J., (Jan. 1, 2012, 10:29 AM), http://www.abajournal.com/magazine/article/advancement_of_women_lawyers_barriers_must_be_removed_so_female_attorneys/.

percent of all law students.¹² That is considerable improvement when we consider that in 1967—three years after the Civil Rights Act was passed—women constituted less than five percent of first-year law students.¹³ Women actually are overrepresented today when it comes to securing judicial clerkships,¹⁴ which “have always been obtained disproportionately when measured by race and gender[.]”¹⁵ For example, women represented forty-six percent of the law school class of 2009 but accounted for fifty-one percent of the clerkships.¹⁶ Moreover, women of color outnumber their male peers at every court level, and white women outnumber white men at both the state and local levels.¹⁷

But there is work yet to be done. As then-ABA President Bill Robinson observed in 2012, “overt and subtle barriers continue to deny women full integration and equal participation in the practice of law.”¹⁸ For example, although women now outperform men in college and obtain more undergraduate degrees—not to mention master’s degrees and Ph.D.s—women’s law school enrollment has waned in recent years.¹⁹ And although the number of law school applicants overall has diminished since the advent of the “new normal,” fewer women than men apply to law school today.²⁰ Additionally, once they leave law school, women’s starting salaries are lower than those of men, and the salary gap increases over time.²¹ Women lawyers “often earn [seventy-five] percent or less of what male counterparts earn for doing the same job.”²² According to the National Association for Law Placement (NALP), women associates at large law firms increased from about thirty-nine percent in 1993 to forty-

12. *Women in Law in the U.S.*, CATALYST (Mar. 11, 2013), <http://www.catalyst.org/knowledge/women-law-us>.

13. Deborah Jones Merritt, *What About Women?*, INSIDE THE L. SCH. SCAM (Jan. 17, 2013, 9:18 PM), <http://insidethelawchoolscam.blogspot.com/2013/01/what-about-women.html>.

14. *A Demographic Profile of Judicial Clerks—Patterns of Disproportionality*, NAT’L ASS’N FOR L. PLACEMENT, http://www.nalp.org/nov2010_demog_clerkships (last visited Sept. 1, 2014).

15. *Id.*

16. *Id.*

17. *Id.*

18. Robinson, *supra* note 11.

19. Merritt, *supra* note 13.

20. *Id.*

21. *Id.*

22. Robinson, *supra* note 11.

six percent in 2009, only to decline each year since 2009.²³ In 2011, the National Association of Women Lawyers reported that women comprised forty-four percent of seventh-year associates, twenty-five percent of junior—or non-equity—partners, and only fifteen percent of equity partners at large law firms.²⁴ And even as equity partners, women “earn just [eighty-six] percent of what their male peers earn.”²⁵

Gender disparities persist in other areas of the profession as well. For example, only five women have served as president of the nearly half-million-member ABA²⁶—the sixth, Paulette Brown, will take office next year²⁷—and only four have served as U.S. Supreme Court Justices.²⁸ In fact, female jurists constitute just twenty-four percent of the federal judiciary and twenty-seven percent of state judiciaries.²⁹ At law schools, although women account for almost twice the number of assistant deans as men, they account for only forty-six percent of associate, vice, and deputy deans, and less than twenty-one percent of full deans.³⁰ Women also account for only one third of tenured law professors.³¹ This Nation has had

23. Press Release, Nat'l Ass'n for Law Placement, Representation of Women Among Associates Continues to Fall, Even As Minority Associates Make Gains (Dec. 13, 2012), *available at* <http://www.nalp.org/uploads/PressReleases/2012WomenandMinoritiesPressRelease.pdf>; *accord* Press Release, Nat'l Ass'n for Law Placement, Representation of Women Associates Falls for Fourth Straight Year as Minority Associates Continue to Make Gains—Women and Minority Partners Continue to Make Small Gains (Dec. 11, 2013), *available at* http://www.nalp.org/lawfirmdiversity_2013.

24. *Women in Law in the U.S.*, *supra* note 12.

25. Robinson, *supra* note 11.

26. AM. BAR ASS'N, COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN LAW 7 (2013), *available at* http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_feb2013.authcheckdam.pdf.

27. See Molly McDonough, *Next Leader Wants a “Go-To” ABA*, A.B.A. J. (Apr. 1, 2014, 7:00 AM), http://www.abajournal.com/magazine/article/next_leader_wants_a_go-to_aba/; see also Jason Collver, *Blackshear Speaker Paulette Brown Accepts the Office of ABA President-Elect*, U. OF TENN. COL. OF LAW (Feb. 21, 2014), <http://law.utk.edu/2014/02/21/blackshear-speaker-paulette-brown-accepts-the-office-of-aba-president-elect/>.

28. Mike Sacks, *Women Supreme Court Justices Celebrate 30 Years Since Court's First Female*, HUFFINGTON POST (Apr. 11, 2012, 10:15 PM), http://www.huffingtonpost.com/2012/04/11/supreme-court-women-justices_n_1419183.html.

29. AM. BAR ASS'N, *supra* note 26.

30. *Id.*

31. *History*, *supra* note 6.

only one woman U.S. Solicitor General—now-Supreme Court Justice Elena Kagan³²—and only two women U.S. Attorneys General.³³ And as of 2010, women represented less than twenty percent of Fortune 500 and Fortune 1000 General Counsel.³⁴

Accordingly, as Bill Robinson has urged, “we need to maintain an open dialog about these issues, eliminate the barriers, and create workplace environments that allow female attorneys to maximize their potential.”³⁵

B. Race

Like Mrs. Obama and Mrs. Clinton, Mr. and Mrs. Obama stand alone among their peers as the first and only U.S. President and First Lady of color in history. Of the Obama presidency, N.P.R. recently quoted civil rights leader and Congressman John Lewis as saying, “[I]t’s almost too much to believe that an African American [P]resident resides in the White House and can come and greet the participants that gather 50 years later.”³⁶ Thus, in both their official capacities and their professional capacities as lawyers, the couple occupy the space between the hard-won progress that people of color have made and the enduring challenges that lawyers of color continue to confront.

Despite the Obamas’ ascendancy, the legal profession remains one of the least racially diverse in the United States.³⁷ Consider, for example, that African Americans, who comprised six percent of college professors and more than nine percent of accountants and auditors in 2001,³⁸ comprised less than four percent of U.S. lawyers at the same time. In May of this year, the *American Lawyer* reported that African Americans currently comprise 9.8 percent of accountants and auditors, 8.5 percent of financial managers, 7.1 percent of physicians and surgeons, and only 4.2 percent of

32. Tom Goldstein, *9750 Words on Elena Kagan*, SCOTUSBLOG (May 8, 2010, 1:00 AM), <http://www.scotusblog.com/2010/05/9750-words-on-elena-kagan/>.

33. *History*, *supra* note 6.

34. *Women in Law in the U.S.*, *supra* note 12.

35. Robinson, *supra* note 11.

36. Allison Keyes, *50 Years After March on Washington, John Lewis Still Fights*, NAT’L PUB. RADIO (Aug. 27, 2013, 11:54 PM), <http://www.npr.org/2013/08/28/216259218/50-years-after-march-on-washington-john-lewis-still-fighting>.

37. Laura Nyantung Beny, *Diversity Among Elite American Law Firms: A Signal of Quality and Prestige* 3 (Feb. 24, 2007) (working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=777504.

38. *Id.*

U.S. lawyers.³⁹ Consider that for a moment: Medical school lasts a year longer than law school, and medical training, particularly for specialties like surgery, can last a full decade beyond that. Yet, African Americans are nearly twice as well represented among physicians and surgeons as among lawyers.

Like the gender disparities that mar the profession's demographics, racial disparities in the profession are traceable, in significant part, to the law itself. In the 1896 case of *Plessy v. Ferguson*,⁴⁰ the Supreme Court wove de jure discrimination into the very fabric of the Nation by pronouncing that state laws that required racial segregation were constitutional. Thurgood Marshall—who would go on to become the Nation's first African-American Supreme Court justice in 1967—mounted the first successful challenge to *Plessy*'s “separate but equal” doctrine in 1950. In *Sweatt v. Painter*,⁴¹ the Court, citing substantive inequalities in the separate law school that the state of Texas hastily had erected to keep African-American Herman Sweatt out, ordered that Sweatt be admitted to the University of Texas Law School. Four years later, in *Brown v. Board*,⁴²—the 60th anniversary of which we also celebrate this year—Marshall, Constance Baker Motley, the first African American woman federal judge, and others persuaded the Court to disavow the “separate but equal” doctrine entirely.

Despite these achievements, however, a quarter of a century later and a decade after passage of the 1964 Civil Rights Act, African Americans held only 4.2 percent of U.S. law degrees in 1975; Hispanic Americans, 2.3 percent of U.S. law degrees; and Asian Americans, 1.3 percent of U.S. law degrees.⁴³ By 1990, the combined numbers for those groups accounted for a mere 7.4 percent of U.S. lawyers and judges.⁴⁴ By 2010, the combined number reached 11.9 percent of lawyers, judges, and other magistrates; then, as with women law firm associates in 2009, the number of Black, Hispanic, and Asian American lawyers of all stripes began to decline.⁴⁵

39. Julie Triedman, *The Diversity Crisis: Big Firms' Continuing Failure*, AM. LAW. (May 29, 2014), <http://www.americanlawyer.com/id=1202656372552/The-Diversity-Crisis-Big-Firms-Continuing-Failure?slreturn=20140524103305>.

40. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

41. *Sweatt v. Painter*, 339 U.S. 629, 636 (1950).

42. *See generally* *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954).

43. Beny, *supra* note 37, at Introduction n. 2.

44. Monique R. Payne-Pikus, et al., *The Intersectionality of Race, Gender & Social Isolation in the Retention of American Lawyers in Private Law Firms*, Presentation at Second Annual Conference of the Research Group on Law and Diversity (May 11, 2013).

45. Nelson D. Schwartz & Michael Cooper, *Racial Diversity Efforts Ebb for Elite*

The National Association for Law Placement (NALP), which began accumulating statistics on minorities and women in the legal profession in 1993, reported the following in 2010:

During all the prior [seventeen] years that NALP has been compiling this information, law firms had made steady, albeit slow progress in increasing the presence of women and minorities in both the partner and associate ranks. In 2010, that slow upward trend continued for partners [but] [a]mong associates. . . minority percentages . . . dropp[ed] slightly [from 19.67 percent] to 19.53[percent][.]⁴⁶

Lest you be tempted to think this decline insignificant, consider the admonition of NALP Executive Director James Leipold: “While the actual drop in the representation . . . is quite small, the significance of the drop is of enormous importance because it represents the reversal of what had been, up until now, a constant upward trend.”⁴⁷

To a significant extent, this decline, as with the decline of women law firm associates in 2009, is attributable to the economic consequences of the “new normal,” which we will discuss shortly. At least one commentator, however, offers an explanation rooted in social issues. Abe Krash teaches courses in antitrust and trade regulation and constitutional law at the Georgetown University Law Center.⁴⁸ He is also a retired partner in the law firm of Arnold & Porter in Washington, D.C. Professor Krash graduated from the University of Chicago Law School in 1949⁴⁹ and, in 2008, contributed a piece to the *Washington Lawyer* magazine entitled, “The Changing Legal Profession.”⁵⁰ He frames the decline as follows: “There is a profound difference between the employment opportunities for black law school graduates a half century ago and the situation that prevails

Careers, Analysis Finds, N.Y. TIMES (May 27, 2013), <http://www.nytimes.com/2013/05/28/us/texas-firm-highlights-struggle-for-black-professionals.html?pagewanted=all>.

46. Press Release, Nat’l Ass’n for Law Placement, Law Firm Diversity Among Associates Erodes in 2010, at 1 (Nov. 4, 2010), *available at* <http://www.nalp.org/uploads/PressReleases/10NALPWomenMinoritiesPressRel.pdf>.

47. *Id.* at 2.

48. Abe Krash, ARNOLD & PORTER LLP, <http://www.arnoldporter.com/professionals.cfm?action=view&id=256> (last visited Sept. 1, 2014).

49. *Id.*

50. Krash, *supra* note 4.

today.”⁵¹

Now, whether it is true that the difference in employment opportunities for lawyers of color today is *profoundly* different from what it was in the 1950s and 60s is open to debate. Recall that the Supreme Court did not act to integrate a state law school until 1950 and that, as recently as 1990, Blacks, Hispanics, and Asian Americans *combined* comprised less than eight percent of U.S. lawyers and judges. It is difficult to say what the employment prospects of these few lawyers have been, but it is clear that there has been no great rush to allow more of them into the profession. What is of particular relevance to the social implications of the “new normal,” however, is the following observation from Professor Krash:

[T]here is a very troublesome aspect to the [B]lack experience in large law firms. The rate of attrition of [B]lack associates is . . . two to three times that of their [W]hite counterparts. Further, the percentage of [B]lack partners is extremely low. A significant number of [B]lack lawyers leave their law firms for jobs in the government and the corporate sector. A literature of formidable magnitude addresses these issues.⁵²

Other commentators have echoed these observations, and, as UCLA law professor Richard Sander reminds us, the heightened attrition rate is not limited to Black associates: “Similar patterns, on a less intense scale, affect Hispanics entering large firms.”⁵³ Additionally, although the odds of making partner are better for Asians than Blacks or Hispanics, their promotion rates are “still lower than promotion rates for [W]hites.”⁵⁴ According to Sander, the patterns are attributable to “aggressive racial preferences at the law school and law firm level [that] tend to undermine in some ways the careers of young attorneys and may, in the end, contribute to the continuing [W]hite dominance of large-firm partnerships.”⁵⁵ Nonwhite associates, Sander contends, are systematically hired with lower grades than their White peers, “are very often less able and, in other cases, merely perceived as being less able” than their peers,⁵⁶ and “find themselves marginalized and superfluous.”

51. *Id.* at 39.

52. *Id.*

53. Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1755 (2006).

54. *Id.* at 1806.

55. *Id.* at 1755.

56. *Id.* at 1820.

This so-called “mismatch theory” was recently espoused by Supreme Court Justice Clarence Thomas, who succeeded Justice Marshall on the High Court. In a concurring opinion in *Fisher v. University of Texas*,⁵⁷ an affirmative action case decided in June of last year, Justice Thomas expressed the idea that,

as a result of the mismatching, many [B]lacks and Hispanics . . . are placed in a position where underperformance is all but inevitable because they are less academically prepared than the [W]hite and Asian students against whom they must compete And, [mismatching] taints the accomplishments of all those who are admitted as a result of racial discrimination.⁵⁸

Focusing on African American lawyers, Professor Krash agrees that large law firms “aggressively recruit [B]lack graduates” but notes the alternative theories of other scholars, such as Mitu Gulati, who contend

that the tenure and advancement of young [B]lack lawyers are profoundly affected by stereotyped beliefs and preconceptions of partners concerning the capabilities of [B]lack associates Few [B]lacks . . . are viewed by partners as ‘superstars’ who will develop into firm leaders Black associates . . . tend to receive less training and mentoring and fewer challenging assignments and responsibilities⁵⁹

Additionally, Gulati and fellow Duke law professor James Coleman point out that, in his haste to ascribe the higher attrition rates of lawyers of color to lower qualifications, Sander fails to compare such lawyers to similarly-situated White peers:

In other words, is the [W]hite male student with low grades. . . hired by an elite law firm doing better or worse than the [B]lack student from [the same law school] with the same low grades and hired at the same firm because of [racial preferences]?⁶⁰

57. *Fisher v. Univ. of Tex. at Austin*, 133 U.S. 2411, 2431-32 (2013).

58. *Id.*

59. Krash, *supra* note 4, at 40.

60. James E. Coleman, Jr. & Mitu Gulati, *A Response to Professor Sander: Is It Really All About the Grades?*, 84 N.C. L. REV. 1823, 1825 (2006); *cf.* Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. Rev. 425, 494-95 (2014) (observing that the plaintiffs in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2422 (2013), *Grutter v.*

If merit, rather than stereotyping or discrimination, is at issue, the experiences should be similar.⁶¹ Accordingly, the failure to undertake this analysis exacerbates “the stereotyping that already undermines the success of [Black, Hispanic, and Asian] associates in elite corporate law firms” as well as in other contexts.⁶²

On a more positive note, whatever the causes for declines in law firm diversity may be, recent data compiled by NALP as of December 2013 show “that law firms have recouped the ground lost when minority associate figures fell in 2010” and there have been “very small net gains in the representation of women and minority lawyers overall.”⁶³ As usual, the data are fraught with tensions; for example, although women’s overall representation has increased, representation specifically among women law firm associates has declined for the fourth year in a row.⁶⁴ Similarly, representation of African American law firm associates has decreased for three years in a row; “the lion’s share of the increase [in associates of color] can be attributed to an increase in Asian associates.”⁶⁵ Yet it is significant that “law firms have continued to make up most, but not all, of the ground lost when diversity figures fell between 2009 and 2010.”⁶⁶

C. Women of Color

Before we turn to the economic aspects of the “new normal,” we want to say a brief word about the specific plight of women of color in the legal profession, which cannot be accounted for by reference to data addressed only to women or to people of color. As the website “Ms. J.D.” cogently expresses, and NALP data confirm,⁶⁷ whatever the statistics concerning

Bollinger, 539 U.S. 306 (2003), and *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), abrogated by *Grutter*, compared themselves only to applicants of color and not to other white applicants).

61. *Id.* at 1826.

62. *Id.* at 1825-26.

63. Press Release, Nat’l Ass’n for Law Placement, Representation of Women Associates Falls for Fourth Straight Year as Minority Associates Continue to Make Gains – Women and Minority Partners Continue to Make Small Gains 1 (Dec. 11, 2013), available at http://www.nalp.org/lawfirmdiversity_2013/.

64. *Id.* at 2.

65. *Women and Minorities at Law Firms by Race and Ethnicity—an Update*, NAT’L ASS’N FOR L. PLACEMENT, <http://www.nalp.org/0413research> (last visited Sept. 1, 2014).

66. *Id.*

67. Press Release, Nat’l Ass’n for Law Placement, *supra* note 46, at 1 (“Minority women continue to be the most dramatically under-represented group at the partnership level, a pattern that holds across all firm sizes and most jurisdictions.”).

those two groups reflect, “the statistics for women of color are even more sobering.”⁶⁸ The lone exceptions, as discussed above, are judicial clerkships, where women of color outnumber their male counterparts at every court level.⁶⁹ Women lawyers of color “comprise just [three percent] of non-equity partners and only [1.4 percent] of equity partners.”⁷⁰ *Further, eighty-six percent of women lawyers of color leave their law firms before their seventh year of practice.*⁷¹ A discussion of intersectionality theory, which explains the unique social location of women of color at the crossing of race and gender—and the unique burdens that they bear as a result—is beyond the scope of this paper. ’ But we offer the following three sources for those of you who may be interested in delving into this subject more deeply:

- (1) Monique R. Payne-Pikus et. al., *The Intersectionality of Race, Gender & Social Isolation in the Retention of American Lawyers in Private Law Firms*, Presentation at Second Annual Conference of the Research Group on Law and Diversity (May 11, 2013);
- (2) Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support between Subordinating Systems*, 71 *UMKC L. REV.* 251 (2002); and
- (3) Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139 (1989), available at <http://philpapers.org/rec/CREDTI>.

II. ECONOMIC OPPORTUNITY

The first stated and arguably foremost goal of L.B.J.’s Great Society was economic opportunity—an end to poverty.⁷² Consequently, the Civil Rights Act of 1964 provides a useful reference point for an examination of the economic aspects of the legal profession’s so-called “new normal.” This “new normal” has been framed largely, and understandably so, as an economic issue. As Professor Burk of the University of North Carolina School of Law recently observed, “Everyone agrees that job prospects for

68. *History*, *supra* note 6.

69. *A Demographic Profile of Judicial Clerks*, *supra* note 14.

70. *History*, *supra* note 6.

71. *Id.*

72. See Johnson, *supra* note 3 (“The Great Society rests on abundance and liberty for all. It demands an end to poverty and racial injustice, to which we are totally committed in our time.”).

many new law graduates have been poor for the last several years; [but] there is rather less consensus on whether, when, how, or why that may change.”⁷³ In order to answer these questions, it is first necessary to take stock of from where the profession has come.

According to data compiled by NALP for the law school class of 2012,⁷⁴ the overall employment rate for new law school graduates fell for five consecutive years beginning in 2008.⁷⁵ The drop between the classes of 2011 and 2012, however, was less than one percentage point—from 85.6 percent to 84.7 percent.⁷⁶ Additionally, starting salaries for 2012 graduates who secured employment have risen relative to those of 2011 graduates, and a higher percentage of class of 2012 graduates found jobs in private practice than in the class of 2011—50.7 percent to 49.5 percent.⁷⁷ The class of 2011, thus, appears to have been the nadir of the post-2008 recession.⁷⁸ Indeed, NALP Executive Director James Leipold has stated that he “continue[s] to believe that the [c]lass of 2011 represented the absolute bottom of the curve on the jobs front, and the results for the [c]lass of 2012 bear that out, showing, as they do, a number of improving markers.”⁷⁹

Accordingly, NALP has dubbed the employment profile of the class of 2012 a “new normal in which law firm hiring has recovered some but remains far below pre-recession highs.”⁸⁰ Given this labeling and the publication of such provocatively entitled articles as “The Last Days of Big Law”⁸¹ and “Yes, Big Law Really is Dying,”⁸² it is tempting to think that the profession has arrived at a place to which it never has been before. Even if that is true in some respects, it is patently false in others. Consider, for example, that the employment rate for the law school class of 2012 was

73. Bernard Burk, *What’s New About the New Normal: The Evolving Market for New Lawyers in the 21st Century*, 41 FLA. ST. U. L. REV. 541 (2014).

74. Press Release, Nat’l Ass’n for Law Placement, Law School Class of 2012 Finds More Jobs, Starting Salaries Rise—But Larger Size Hurts Overall Employment Rate 1 (June 20, 2013), *available at* http://www.nalp.org/classof2012_selected_pr.

75. *Id.*

76. *Id.*

77. *Id.* at 2.

78. *See id.*

79. *Id.*

80. *Id.* at 1.

81. Noam Scheiber, *The Last Days of Big Law*, NEW REPUBLIC (July 21, 2013), <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries>.

82. Noam Scheiber, *Yes, Big Law Really is Dying*, NEW REPUBLIC (July 28, 2013), <http://www.newrepublic.com/article/114065/death-big-law-firms-cant-be-ignored>.

exactly the same as that of the class of 1994 —84.7 percent.⁸³ During most of the thirty-nine years that NALP has collected employment information, law firms have accounted for roughly fifty-five to fifty-eight percent of new law graduates' employment.⁸⁴ Yet that percentage, which dipped below fifty percent in 2011, had fallen below fifty percent before, in 1975, roughly a decade after the 1964 Civil Rights Act was passed.⁸⁵ The number rebounded to 50.7 percent in 2012, and because the class of 2012 secured a higher number of jobs overall than the class of 2011 due to its larger size, "the number of law firm jobs is *up* by almost [eight percent], and is the largest number since 2009."⁸⁶

It is also important to remember that the reality of the legal profession's history is at odds with the popular conception "that the profession had been remarkably stable and cushy up until the last few years."⁸⁷ In fact, at the turn of the twentieth century, "very few law students enjoyed the prospect of paid employment upon graduation."⁸⁸ "New lawyers moved into independent practicerelied on loose affiliations with more experienced attorneys[and] overcame inexperience at the expense of their unknowing [and] unsophisticated clients."⁸⁹ Sound familiar? To remedy these circumstances, corporate law firms began to hire top law school talent and to develop their own training systems to produce, in the words of white-shoe New York law firm Cravath, Swaine & Moore, "a better lawyer faster."⁹⁰ Cravath boasted the most famous training program⁹¹ and, indeed, provided the model for the training systems and lock-step associate advancement that most large law firms today have adopted in some form or fashion.⁹²

As Professor Krash reminds us, however, in the decades leading up to the Civil Rights Act, the concept of a "large law firm" was very different

83. Press Release, Nat'l Ass'n for Law Placement, *supra* note 74, at 1.

84. *Id.* at 2.

85. *Id.*

86. *Id.* (emphasis added).

87. Scheiber, *supra* note 81.

88. William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?* A.B.A. J. (July 1, 2012, 5:20 AM), http://www.abajournal.com/magazine/article/the_pedigree_problem_are_law_school_ties_choking_the_profession/.

89. *Id.*

90. *Id.*

91. *Id.*

92. William D. Henderson, *Part II: How Most Law Firms Misapply the Cravath System*, LEGAL PROF. BLOG (July 29, 2008), http://lawprofessors.typepad.com/legal_profession/2008/07/part-ii-how-mos.html.

from what it is today:

In the late 1950s, fewer than [forty] law firms in the United States had [fifty] or more lawyers; in 1960, there were only about a dozen firms with [one hundred] or more lawyers. When I was at Yale Law School in 1950, students spoke of avoiding employment in the “legal factories” in New York; they were referring to firms of about [seventy-five to one hundred] lawyers.⁹³

A virtual guild, membership in which was restricted by law, education, custom, and various other barriers to entry, the profession “was like a club” and its practices primarily were “anticompetitive.”⁹⁴ Things began to change around 1960 as new legislation like the Civil Rights Act, more generous legal remedies such as relaxed standards for class action certification, and higher crime rates began to proliferate.⁹⁵ “There was an explosion in the volume of litigation,” and the guild broke apart and “became intensely competitive.”⁹⁶ Additionally, new areas of law, such as pension and employee benefits law, rose to prominence as governmental regulation in the form of laws like the Employee Retirement Income Security Act of 1974, or ERISA, increased.⁹⁷ Law firm size greatly increased in response to these changes,⁹⁸ and by the 1980s, “spending on legal services [had] mushroomed.”⁹⁹ Economist Noam Scheiber of the *New Republic* describes the result this way:

The share of GDP that went to lawyers increased by about two-thirds between the early [1980s] and the early [1990s]. But, thereafter, most of the structural transition to today’s global competitive economy was behind us, and the underlying demand for legal services flattened out again.¹⁰⁰

According to Scheiber, the technology bubble of the 1990s and the real estate bubble of the 2000s obscured the modest growth that otherwise would have characterized the legal industry in those decades. Consequently, the “new normal” that seemed to come from nowhere in the wake of 2008 is actually long overdue. The record highs enjoyed by the pre-2008 legal profession were themselves the anomaly rather than the

93. Krash, *supra* note 4, at 32.

94. *Id.*

95. *Id.*

96. *Id.* at 34.

97. *Id.*

98. *Id.*

99. Scheiber, *supra* note 81.

100. *Id.*

comparative lows of succeeding years. Now that the bubbles have burst, “the industry isn’t likely to grow faster than the growth rate of the overall economy.”¹⁰¹ The question, of course, is what does this mean for you?

III. SUCCESS STRATEGIES

The answer is multifaceted. First, recognition that the good old days are gone, so to speak, has prompted a more critical evaluation of law school as the training ground for new lawyers. Second, although the post-2008 recession hit the legal profession especially hard, it did not leave non-legal commercial entities, governmental bodies, or individuals, many of whom will one day be your clients, unscathed. Commercial clients in particular are increasingly cost-sensitive and unwilling to pay for new lawyers to “learn on the job.” Consequently, new law school graduates must now be equipped to do more than merely “think like lawyers” in order to succeed. Adding to the pressures facing new lawyers are low-cost alternatives to the traditional law firm associate, such as contract attorneys and online legal services providers like LegalZoom. Competing calls for *more* practical training for law students and reforms that would *lessen* the duration of law school by as much as a year further complicate matters. As you may have heard, President Obama recently weighed in on this debate in favor of reducing law school to two years.¹⁰²

There are additional considerations for new lawyers of color, such as lower average pass rates on bar exams¹⁰³ and higher average debt loads¹⁰⁴ than White peers, who are statistically more likely to enjoy long-term careers in the most financially remunerative sectors of the profession. It all sounds too overwhelming for words. But, we are happy to tell you, it is not. These are the considerations with which someone deciding *whether* to attend law school must grapple. You are here, and it is upon the here and now that you must focus.

You could, of course, opt to leave law school without completing your studies, and that likely would allow you to reduce your debt load. All else

101. *Id.*

102. Peter Lattman, *Obama Says Law School Should Be Two, Not Three, Years*, N.Y. TIMES (Aug. 23, 2013, 5:31 PM), http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/?_r=0.

103. See, e.g., *Bar Exam Standards, ‘Misapplication’ to Law Schools Offer Obstacles to Minorities Seeking to Become Lawyers, Johnson Says*, U. OF VA. SCH. OF L. (July 23, 2013), http://www.law.virginia.edu/html/news/2013_sum/johnson_qa.htm.

104. Deborah Jones Merritt, *Equal Opportunity*, INSIDE THE L. SCH. SCAM, (July 5, 2012), http://insidethelawchoolscam.blogspot.com/2012/07/equal-opportunity_05.html.

being equal, however, we tend to think it a more salutary proposition to meet an uncertain future J.D. in hand than with a fraction of one.

There is very little that you as an individual can do to alter the economy, be it of the “new normal” variety or the more common, cyclical kind. You cannot predict the specific needs of your future clients, conform your law school training to those needs, or shortcut the years of experience necessary to fully equip you to meet them. Even if you could, it would take longer than the three years that you are allotted in law school—at least for now—to do it. There are, however, several things that you can and should do with your time in law school, and we will leave you with five of them today.

1. Be Excellent.

First, be excellent. And by that we mean be intelligent, diligent, and disciplined. One of the great things about law school is that it is a place where a person can excel by the sweat of her brow. As Paul Cravath once observed:

[A] successful lawyer of affairs . . . assume[s] the fundamental qualities of good health, ordinary honesty, a sound education[,] and normal intelligence. On top of these attributes, a candidate must have character, industry[,] and intellectual thoroughness Brilliant intellectual powers are not essential.¹⁰⁵

In a recent study by U.C. Berkeley professors Marjorie Shultz and Sheldon Zedeck, LSAT scores, undergraduate grade point average, and first year law school grades “were positively correlated at statistically significant levels” with only six to eight of the twenty-six competencies that form the basis for successful lawyering.¹⁰⁶ Additionally, these factors were negatively associated with networking, serving the community, and business development in the law school alumni who were surveyed.¹⁰⁷ Most importantly, however, among the two hundred law students surveyed, “high undergraduate [grade point averages] were *positively correlated* with *no effectiveness factors* and *negatively correlated* with *practical judgment, the ability to see the world through the eyes of others, skill in developing relationships, living with integrity and honesty, and contributions of community service.*”¹⁰⁸

105. Henderson, *supra* note 92 (internal quotation marks omitted).

106. Henderson & Zahorsky, *supra* note 88.

107. *Id.*

108. *Id.* (emphasis added).

Your LSAT score has no bearing on the number of hours that you sit in the library, the number of questions that you ask your professors, the practice exams that you take, or the outlines that you prepare. The grading on law school exams may be subjective, but the amount of time that you spend preparing for them is not. Arrive early to class and stay late. Visit your professors' offices and read the supplemental materials that they reference. Form study groups with your classmates, and be sure that you know everything that they do. Canvass the students in the classes ahead of you to secure their outlines and advice.

One recent law school graduate has shared with us the schedule that he was advised to keep in law school. He tells us that, when he could adhere to it, it worked extremely well:

- (1) Stay two weekdays ahead on your daily readings and other assignments. Most professors post the first set of assignments before the semester begins, and once classes begin you will receive a syllabus. Accordingly, if classes begin on a Monday, complete those assignments the previous Thursday; complete Tuesday's assignments on Friday; complete Wednesday's assignments on Monday; complete Thursday's assignments on Tuesday; and complete Friday's assignments on Wednesday. Repeat.
- (2) Review the week's material on Saturday. Prepare your outlines, begin your notecards, or do whatever it is that you do to review. But do it each week. When exams arrive, you will be in better shape than most of your peers.
- (3) Take Sunday off. Closer to exam time, start taking practice exams.

Obviously, this schedule can be modified to meet your personal needs. But use it as a model, and you may be surprised at how well things turn out.

2. Distinguish Between Proxies and the Skills That They Represent.

Second, distinguish between proxies and the skills that they represent. High class rank and law review membership are the most commonly accepted indicators of law school excellence, as, again, the Cravath system reflects:

Cravath believed in seriousness of purpose—a man with a competent mind, adapting to practicing law . . . the 'first choice' was a 'Phi Beta Kappa man from a good college who had become

a law review editor at Harvard, Columbia[,] or Yale.¹⁰⁹

But these distinctions are proxies, not skills, and there are others—publishing articles, excelling at moot court, and working as a research or teaching assistant for law school faculty, for example—that represent the *same* skills. Employers expect new lawyers to be able to think, research, and write efficiently and effectively; the lack of practical training is a given and anticipated weakness of the present system, however loudly calls for reform may sound. Indiana University School of Law professor Bill Henderson notes that “the emphasis on credentials ha[s] a clear business purpose designed to compensate for the limitations of legal education.”¹¹⁰ To the extent that your thinking, researching, and writing skills are both evident and superior, you can compete. Devote yourself to developing them and to making them manifest upon even the most cursory review of your resume.

3. *Be Strategic.*

Third, be strategic in your selection of courses. It is true that you will prepare for the bar exam primarily by means of a bar review course. But there is no substitute for the in-depth exposure to a given subject that you can get by taking a course about it in law school. In particular, consider taking some of the more involved courses—*e.g.*, Business Organizations, Administrative Law, Secured Transactions, and Criminal Procedure—in law school, not only for purposes of bar preparation, but also for law practice. If you secure employment in or develop interests regarding particular areas of law while you are in law school, take courses in those areas as well.

Despite the deficiencies of the current model of legal education, some practical training is usually available in the form of clinics, internships, and externships. Take full advantage of these opportunities. In particular, those of you who are interested in litigation may want to invest time in your school’s moot court and mock trial offerings; and these are worthwhile pursuits for undecided students and would-be transactional lawyers as well.

Additionally, make liberal use of your law school’s career services office, and in your search for employment, think strategically about such matters as where your law school’s reputation is strongest, how objectively competitive a candidate you are, and the cost of living that you can expect. With the exception of a few truly national law schools—whose number has

109. Henderson, *supra* note 92 (internal quotations marks omitted).

110. *Id.* (emphasis added).

diminished in recent years—you generally can expect to be most competitive for employment in either (1) the city and state where you were born or have lived the longest or (2) the city, state, and region of the country in which your law school is located.

By now, most of you should be familiar with the bi-modal salary curve that illustrates starting salaries for new lawyers.¹¹¹ If not, remedy that immediately. The curve demonstrates that while a certain percentage of the class will be clustered at the high end of the spectrum and a certain percentage will be clustered at the low end, most recent law graduates end up closer to the lower end than the high. In other words, a six-figure salary, in the best of economies, is not what most new law school graduates should expect. Nor should that be the measure by which you mark success or failure. Consider, for example, that the median household income in this Country is approximately \$51,000.00 per year.

That said, do not be afraid to pursue the opportunities in which you are interested. Explore a wide variety of employment options—state and federal prosecution and defense offices, law firms of different sizes, state and federal judicial clerkships, fellowships such as the Presidential Management Fellows Program, the Department of Justice Honors Program, the NAACP Legal Defense Fund Fellowship Program, and others. The key is to be both thorough and self-aware.

You also should acquaint yourself, if you have not already, with the NALP buying power index.¹¹² The index provides an estimate of the buying power of a dollar in several major American markets.

4. Mentor & Seek Out Mentors.

Fourth, do not forget to mentor those who come within your influence—share freely with them both your mistakes and your successes—and seek out opportunities to be mentored. To the extent that lack of mentoring contributes to the higher levels of attrition among nonwhite and female associates in the legal profession, do what you can to remedy that on the front end. Cultivate mentors and maintain contact with them throughout your career.

5. Per Aspera Ad Astra.

Some say that it is best not to know the odds against you that you might seek success undeterred by them. Others say that it is better to know the

111. See *The NALP Salary Curve for the Class of 2011*, NAT'L ASS'N FOR L. PLACEMENT, http://www.nalp.org/salarycurve_classof2011 (last visited Sept. 1, 2014).

112. See *Buying Power Index Class of 2011*, NAT'L ASS'N FOR L. PLACEMENT, http://www.nalp.org/buying_power_index_class_of_2011 (last visited Sept. 1, 2014).

challenges you face that you might plan to overcome them. We fall into the latter category and, having equipped you with quite a bit of knowledge (we hope), we say to you now, *per aspera ad astra*, which means “through challenges to the stars.” After all, no discussion about the legal profession would be complete without a bit of Latin to garnish it.

Certainly there are concerns, such as Stanford Professor Claude Steele’s research on “stereotype threat,” that affirm the oft-repeated aphorism that ignorance is bliss.¹¹³ But we hold with those like Congressman William H. Gray, the former president of the United Negro College Fund who passed away earlier this year, who say that “Nothing is more powerful and liberating than knowledge.”¹¹⁴

Thank you. *Per aspera ad astra*.

113. *Claude Steele*, STAN. GRADUATE SCH. OF EDUC., <https://ed.stanford.edu/faculty/steele>.

114. RICHARD NEWMAN, *AFRICAN AMERICAN QUOTATIONS 202* (1986).