Don't Believe the Hype: Affirmative Action in Large Law Firms

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Now, almost thirty years after the implementation of Title VII of the 1964 Civil Rights Act,[1] African Americans are questioning the effectiveness of this pioneering legislation. To many African Americans, it appears that we have not achieved the goals of the Civil Rights Act. At this time of transition, we must evaluate our progress and see exactly where we have come over the almost thirty-year era of the Civil Rights Act's governance and determine the efficacy of its existence. In addition, we must find in our society the most difficult barriers to equitable progress and create pragmatic and practical approaches to break down these barriers. The whole of society must address and solve the problems of unequal opportunity if we are sincere in our quest for equality.

This article will discuss America's legal community, centering its analysis on large private law firms.[2] There is much clamoring going on about affirmative action in law firm hiring on law school campuses. Law firm resumés advertise their efforts to attract minorities, and most law students believe these advertisements. Unfortunately, we should know better than to believe everything we read. Whether as a result of benign reasons or malicious intent, large law firms find themselves at the top of the list of our nation's most egregious under-achievers in representative hiring and affirmative action implementation.[3] While many of these firms ad-

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1. Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C §§ 2000e-2000e-17 (1989 & Supp. II 1990)).

2. For the purposes of this article, "large law firms" will be defined as those law firms that employ a total of 100 attorneys or more. There are 319 such firms in the U.S. *See* NATIONAL ASSOCIATION FOR LAW PLACEMENT DIRECTORY OF LEGAL EMPLOYERS (1992). For more information on "large law firms" and what makes them different from other law offices, *see* MARC GALANTER AND THOMAS PALAY, *The Transformation of the Big Law Firm, in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION (Robert L. Nelson et al. eds., 1992) [hereinafter TRANSFORMATION OF THE BIG LAW FIRM].

3. *See* discussion *infra* part I.

vised their clients to hire a more representative group of employees, large law firms, themselves, made virtually no progress toward diversifying their own offices. Simply put, the record of the nation's largest and most prestigious law firms in hiring minority lawyers is one of continued failure.[4] The ABA Commission on Opportunities for Minorities in the Profession, among other groups, has denounced the legal community for its failure to give minority lawyers significant roles in large firms; more often than not, large law firms pay lucrative salaries and offer some of the most challenging work.[5]

Affirmative action is a difficult subject for those of us in the legal community. Debates on the topic raise issues of fairness, greed, selfishness, and guilt and tend to bring out the worst in a lot of people's personalities. On law school campuses and in law firms, alike, the debate rages on; neither proponent nor opponent listens to the other side's often very important points. In our blind adherence to the dynamics of a discussion in which we think all that must be decided is a yes or no question, both sides have lost sight of the most important issue and as a result have weakened their respective arguments. The greatest issue is what is best for society as a whole and what is the most efficient, just, and expedient method for bringing about the needed change.

The opponents of affirmative action have become utterly self-centered and fail to realize the interconnectedness of all Americans' plight. If a person is not a contributor to society, that person will surely be a detractor from it. We must not lose sight of the importance of affirmative action to the furtherance of society's advancement. Even ignoring the social justice imperatives, it is simply smart civics and economics to promote diversity through affirmative hiring. Unfortunately, selfishness has also weakened the proponents' arguments for affirmative action. Society does not owe affirmative action to African Americans, it owes affirmative action to itself. Over three-hundred years of negative action has greatly weakened our society's ability to be productive and competitive.

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4. Commentators have repeatedly encouraged law firms to hire minorities and women. Frederick H. Bates, *Firms Should Plot Strategies for Hiring Minorities*, NAT'L L.J., Sept. 26, 1988, at 16; *see* Don J. DeBenedictis, *Changing Faces: Coming To Terms with Growing Minority Populations*, 77 A.B.A. J., Apr. 1991, at 54 (an in depth discussion about why large law firms should want to hire a more diverse workforce). *See also*, Robert D. Raven, *Goal IX: Making Minority Participating in the Profession a Reality*, 75 A.B.A. J., Feb. 1989 ("Law firms must make recruitment and retention of minority lawyers a priority goal. They must apply to this goal the same intensive planning and monitoring they apply to other priorities in their practice.").

5. Frederick H. Bates and Gregory C. Whitehead, *Do Something Different*, 76 A.B.A. J., Oct. 1990, at 78, 78.

The effects of racism have damaged our internal marketplace, all but destroyed the competitiveness and efficiency of our labor force, and factored significantly into our inability to decrease the national debt. Society owes affirmative action to itself to increase market consumption and investment, to re-educate and revitalize our labor force, and to turn vast segments of our population into tax dollar contributors, rather than tax dollar dependents.

At least for lawyers, the Reagan-Bush era provided a few good things — jobs, jobs, and more jobs to be more specific. The decade of greed created an unprecedented and mind boggling growth in the population of attorneys.[6] There were legal jobs for most law students who could repeat the pledge of allegiance properly. During this time of full employment, no one really noticed or cared about affirmative action issues in large law firms. Law school graduates did not need to take note of who was getting hired where or why, because almost everyone was ending up where they wanted to be. Today, such is not the case.

The mergers and acquisitions frenzy of the eighties has come to a screeching halt and many large law firms find themselves overstaffed and overbudgeted. Large law firms, in particular, are slashing the number of projected new hires.[7] As a result, on prestigious law school campuses across America, many talented students are finding themselves starting their careers in the unemployment line. Today, law students are very concerned with who is hired, by whom, and why they think that person is being hired as opposed to themselves.

Affirmative action and the base emotions discussions of it evoke have invaded much of the curricular and non-curricular dialogue of law students across the country. For example, at the University of Minnesota Law School, many white students, faced with the potential of not being hired by the law firms of their choice, have cried foul and criticized large law firms' alleged affirmative hiring efforts.[8] It would seem that the concerns of many in the

6. Steven G. Heikens, *The Changing Legal Profession: An Introduction and Overview*, in THE LAW FIRM AS EMPLOYER 1, at 3 (Minnesota Institute of Legal Education, 1985). (Since 1960 the U.S. population has grown by an estimated 34% while during the same period lawyers grew 150%) [hereinafter LAW FIRM AS EMPLOYER].

7. Aside from a few isolated firms, this is the word that most hiring partners and on-campus interviewing attorneys have given to law school students and recent graduates. *See also* NATIONAL ASSOCIATION FOR LAW PLACEMENT DIRECTORY OF LEGAL EMPLOYERS (1992) (NALP questionnaire responses show a downward trend of new attorney hires at large law firms over the past three years.)

8. Although I can point to no published or written criticism from University of Minnesota law students, I have taken part in and witnessed many discussions in which such criticisms were evidenced. Please notice that I have said that "many" white students have made such criticism and not "all" white students. For more

white student body at the University of Minnesota are similar, if not identical, to the concerns of other white student bodies at prestigious predominantly white law schools across the country. I overheard an anonymous white student at the University of Minnesota summarize the concerns of this unhappy sub-group; he said, "first they took my spot at Harvard, now they're taking my job offers. This is totally unfair." Although not intended to, an important argument of this article should sooth this speaker's concerns greatly: affirmative action in large law firms is all but completely non-existent.

I. The African American Experience: The Need for Affirmative Hiring in Large Law Firms

The affirmative action debate has metamorphosed old liberals into new conservatives, characterizing "recent efforts to put minorities into the American mainstream as assaults on standards, on excellence, and on the rule of merit".[9] Americans have forgotten what affirmative action is all about and the social utility of its existence. "The ultimate objective of Affirmative-Action is to bring about a society in which . . . persons will be regarded as persons and discrimination . . . will be an ugly feature of history that is instructive but that is behind us."[10] Until our country meets the challenge of insuring that the distribution of success and failure within one group is at least roughly comparable to that within other groups, there will be no social peace in America.[11]

In 1985, Black males with college degrees averaged merely $110 per year more than white males with only high school diplomas.[12] A 1981 study showed that Black men constitute only 2.1%

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substantial and detailed analysis arguing against the use of affirmative action. *See* FREDERICK LYNCH, INVISIBLE VICTIMS: WHITE MALES AND THE CRISIS OF AFFIRMATIVE ACTION (1989); ROBERT FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL & LEGAL ANALYSIS (1980); RALPH ROSSUM, REVERSE DISCRIMINATION: THE CONSTITUTIONAL DEBATE (1980); BARRY GROSS, DISCRIMINATION IN REVERSE: IS TURNABOUT FAIR PLAY (1978); NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975). For an interesting discussion of the dilemma created by letting race count for something in affirmative action plans when the ultimate goal is to make race a non-factor, *see also* Gary Peller, *Frontiers of Legal Thought III: Race Consciousness*, 1990 DUKE L.J. 758.

9. JOHN C. LIVINGSTON, FAIR GAME? INEQUALITY AND AFFIRMATIVE ACTION 7 (1979) [hereinafter FAIR GAME].

10. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 403 (1978) (Blackmun, J., separate opinion) [hereinafter *Bakke*].

11. *See* U.S. DEPT. OF LABOR, OFFICE OF POLICY PLANNING AND RESEARCH, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 3 (1965).

12. FAIR GAME, *supra* note 9 at 10. *Cf.* KASARDA, URBAN CHANGE AND MINORITY OPPORTUNITIES, THE NEW URBAN REALITY 33, 57 (P. Peterson ed., 1985) (noting that

of male physicians and 3.3% of male university professors.[13] In fact, of the top ten job categories to which Black men currently belong, none is professional.[14] Black women comprise 40.4% of the nation's female clothing ironers and only 5.2% of the managers and administrators.[15] The challenge of equal opportunity has not been met and, with no surprise, we continue to see racial social unrest.[16]

Why are there so few African American attorneys? While representing approximately twelve percent of the U.S. population, Blacks make up only 2.7% of all attorneys.[17] Chattel slavery ended over one hundred years ago, and Blacks acquired the unrestricted right to vote almost thirty years ago, yet the most formidable obstacle to the attainment of complete equality has been the American legal system and the attitudes of those that create the laws.[18] For over two hundred years, America has fought and continues to fight to control and oppress the livelihood of African Americans with an intricate system of laws promulgated by lawyers and lawmakers.[19] In light of the fact that African Americans have been, historically, the adverse subjects of the American legal system, one could argue that it would seem logical that African Americans would want to fight fire with fire and gravitate toward becoming lawyers and being disproportionately represented in the legal community. African

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in 1982, 23.4% of urban black men with college degrees were unemployed, as compared to only 9.5% of urban white men with college degrees).

13. LAWRENCE E. GARY, *A Social Profile, in* BLACK MEN 21, 29 (L. Gary ed., 1981); *See also* Ronald L. TAYLOR, *The Black Worker in "Post-Industrial" Society, in* THE BLACK MALE IN AMERICA 280, 286 (D. Wilkinson & R. Taylor eds., 1977). (Almost two-thirds of employed black men work in low-status occupations, which include laborers, operators, fabricators, and the service, production, craft, and repair occupations. In contrast, only 48.6% of white men, and 29% of white women work in these fields.)

14. *See* GARY, *A Social Profile*, *supra* note 13.

15. Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 H.R. C.R.-C.L. L. REV. 503, 523-24 (1982) [hereinafter *Future of Affirmative Action*].

16. In fact, these are many of the inequities that were complained of by revolting African Americans in Los Angeles, and in black communities around the U.S., during the spring of 1992.

17. LAW FIRM AS EMPLOYER, *supra* note 6, at 11.

18. Strict textual constructionists, like Justices Scalia and Thomas, are of the mind that the Civil Rights Act itself does not call for Affirmative Action efforts.

19. *See* Isabel Wilkerson, *Facing Grim Data on Young Males, Blacks Grope for Ways to End Blight*, N.Y. TIMES, July 17, 1990, at A14. Today Black men have the greatest rate of incarceration, with one in four Black men in their twenties currently under penal sanction. David G. Savage, *1 in 4 Young Blacks in Jail or in Court Control, Study Says*, L.A. TIMES, Feb. 27, 1990, at A1. The number of Black men under judicial supervision, 609,690, is higher than the number enrolled in college, 436,000. Dorothy Gilliam, *Is This Solution Extreme?*, WASH. POST, Mar. 1, 1990, at D3. The ratio of Black to white teenage incarceration rates was 44 to 1 between 1977 and 1982, although this ratio does not reflect actual differences in crimes committed. Evan Stark, *The Myth of Black Violence*, N.Y. TIMES, July 18, 1990, at A21.

Americans, having come to the realization that one is powerless under the law without an understanding of it and the ability to affect its creation, might be expected to have a heightened interest in the law and the process by which one becomes a lawyer and lawmaker. However, as evidenced by the statistics, this is not the case.

African Americans have historically been underrepresented in the legal profession and in legal education. In 1890, the first year in which the United States Census began classifying lawyers by race, there were approximately 431 African American lawyers in the U.S. (.48%).[20] A large part of this phenomenon can be explained by the fact that, until recently, African Americans were not allowed to attend law schools[21] and, if allowed to study the law, were often not allowed to become members of the bar.[22] Even in areas of the country in which it would seem unavoidable to have a significant number of Black attorneys, the case is completely the opposite. Up until the early 1970's, the State of Mississippi had only 3 Black attorneys to serve a population of 800,000 African Americans.[23] In 1977, there were only 20 Black lawyers in Alabama and only 34 in Georgia. This same survey showed that out of 17 predominantly white southern law schools, there were only 22 first year Black law students.[24]

In 1960, there were 212,408 lawyers in America; only 1.03% of this figure was Black and .27% of this figure represented all other minorities.[25] In 1970, 1.54% of all attorneys were Black, while 1.46% were Hispanic.[26] In 1980, out of over one-half million attor-

20. Robert L. Clayton, Associate Dean, Tulane Law School, Presentation at the National Bar Association Fall Conference, Law School Enrollment of African Americans: Back to the Future, Oct. 30, 1992 [hereinafter BACK TO THE FUTURE].

21. To circumvent the discriminatory admissions policies of most predominantly white law schools, predominantly Black universities established law schools for African Americans. In 1869, Howard University opened the first such law school. In the period between 1869-1900, five other law schools were established for African Americans: Lincoln University, Walden University, Allen University, Straight University, Shaw University. Between 1900 and 1935, four more African American law schools were established. The Supreme Court of Missouri's decision in State *ex rel.* Gaines v. Canada, 113 S.W.2d 783 (Mo. 1937), followed Plessy v. Ferguson, 163 U.S. 537 (1896) and denied admission of Lloyd Gaines to the law school of the state because there was a predominantly Black law school in Missouri that he could attend. *Id.* at 790. Today four Black law schools still exist. BACK TO THE FUTURE, *supra* note 20.

22. LAW FIRM AS EMPLOYER, *supra* note 6, at 11. The American Bar Association barred Black members until 1943, and many law schools would not admit Blacks until the late 1940's. *Id.*

23. *Id.* at 12 n.74 (citing, *Making the Legal System Work: How Black Students Become Lawyers in the South*, 22 CARNEGIE QUARTERLY 3 (1974)).

24. *Id.* at 12.

25. *Id.*

26. *Id.*

neys, only 2.83% of them were Black and 1.7% of them were Hispanic.[27] In a 1986 survey of the American Bar Association's Task Force on Minorities, more than half of all law firms employed no minority associates and 78 percent had no minority partners.[28]

A look at affirmative action in large law firms in regard to associate hiring gives ample evidence of our dismal state of affairs. In the nation's 50 largest firms in 1979, only 2.4% of all associates were Black.[29] By 1980, minorities constituted almost 10% of law school graduates but still less than 3% of attorneys hired by large law firms.[30] A 1982 survey of 272 private firms in the 12 largest cities showed that out of 23,819 attorneys in the survey group, only 300 of them were Black, approximately 1.3%.[31]

The situation on the partnership level is even worse for everyone except white males. A 1979 survey of the largest 50 firms in America showed that out of 3,700 partners only 12 were Black - a mere .3%.[32] In 1982, only 4.1% of all partners in large law firms were women or persons of color — the remaining 95.9% were all white males.[33] In a different survey that same year, of 151 large law firms, 43% of all lawyers were partners, and out of 9,210 partners only 50 or .5%, were Black or Hispanic. In 1990, the number of female associates and partners grew steadily, but the same was not true of African Americans. There were only 210 Black partners in the 250 largest law firms in the country; there were only 23 African American partners at major New York firms.[34]

"The position of the [African American] today in America is the tragic, but inevitable consequence of centuries of unequal treatment . . . meaningful equality remains a distant dream for the [African American]."[35] Do persons that position themselves against affirmative-action not realize the truth of this statement? Even a cursory reading of American racial history would lead the most unsympathetic participant in the affirmative action debate to conclude that our culture has made race count for more than a matter of "superficial physiology."[36] And if they do realize the truth of the

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27. *Id.*

28. Mark Diamond, *A Trace Element in The Law*, 73 A.B.A.J., May 1987, at 46 [hereinafter *Trace Element*].

29. LAW FIRM AS EMPLOYER, *supra* note 6, Section IV at 9.

30. *Id.* at 16.

31. *Id.* at 8.

32. *Id.* at 9.

33. *Id.* at 13.

34. Rita Henley Jensen, *Minorities Didn't Share in Firm Growth*, NAT'L L.J., Feb. 19, 1990, at 28-31.

35. Regents of the University of Cal. v. Bakke, 438 U.S. 265, 396 (1978) (Marshall, J., separate opinion).

36. *Future of Affirmative Action*, *supra* note 15, at 515.

statement, why is it so troubling for anyone to accept the fact that in order to compensate for over three hundred years of "negative action" toward African Americans, that it is not only necessary but also completely just that some affirmative actions be taken to rectify this situation?

The pillars of western thought acknowledged the need for rectification (compensatory justice) and distributive justice,[37] but today many white Americans still fight these fundamental societal principles.[38] What's even more frightening is that they have convinced many African Americans to join their cause.[39] Those who oppose affirmative action do not seem to understand that the theory of social utility operates very much like a sports team. In order for

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37. ARISTOTLE, THE NICHOMACHEAN ETHICS, BOOK V (Sir William David Ross trans., 1954). Aristotle articulated the principles of rectification (compensatory justice) and distributive justice.

38. Michael H. Gottesman, *Twelve Topics to Consider Before Opting for Racial Quotas*, 79 GEO. L.J. 1737, 1740-41 (1991).

> That disadvantage is surely attributable in substantial part, perhaps entirely, to past governmental actions and policies that we today find condemnable. Blacks were enslaved, deprived of the opportunity for literacy, emancipated into a world of Jim Crow laws, and thereafter subjected to private discrimination in every facet of their daily lives. Government tolerated that private discrimination and greatly exacerbated its effects (and to some extent continues to do so) through governmental programs that built on the discriminatory status quo, for example maintaining neighborhood school systems in which predominantly black schools were markedly inferior to their predominantly white counterparts.
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> A society that discriminated by law and turned a blind eye to private discrimination might choose to do more than simply terminate those offenses, leaving its victims to compete for jobs with whatever diminished skills they may have been able to obtain. The society that inflicted or countenanced these wounds might elect to take affirmative steps to overcome the present effects of those past wrongs.

Id.

39. *See generally*, STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991). Professor Carter, the first Black tenured law professor at the Yale Law School, describes himself as a critic of affirmative action rather than an opponent. Carter's book argues that he and other Black Americans should not be ambivalent about having benefited from racial preferences and that they should openly acknowledge to themselves and to the rest of the world that they were beneficiaries of affirmative action programs. Even Carter mentions that law firms, on the whole, are far less diverse than colleges and law schools. *Id.* at 135. The main thrust of Carter's message is that it will be through strong achievement among Black Americans, by proving to themselves and others that they are fully capable of excellence in different fields, that will eliminate the need for racial preferences altogether. Carter encourages business and universities to search for candidates of color for consideration. Despite the high costs of such searches, he argues, the resulting diversity of vision and opinion would produce a net benefit. *Id.* at 66. Carter also asserts that polls show that "a plurality, and perhaps a majority, of Black Americans oppose racial preferences." The empirical evidence for his assertion is important in that it contradicts the assumption that all members of the Black community support affirmative action policies. *Id.* at 118.

society, or the team, to reach its optimum level of competitiveness, all of the subgroups of the society, or the team players, must not only be allowed to perform at their highest level of ability but also must be encouraged and developed until they reach this apex of performance. Just as in athletics, a team will only be as competitive as its weakest link. By looking at social utility from the angle of team sports, we realize how truly humorous our American society is. If American society were a baseball team, our third baseman would have his throwing hand tied behind his back, and our first baseman would have his glove hand stuck between his legs and, to paint the picture a little more accurately, the coaches would argue that this is the best way to play the game. We, as Americans, cannot seriously expect to compete with any international power until we raise the level of all of our citizens so that those groups in the most precarious positions may make serious contributions to the effort rather than subtractions from it.

Because past discrimination was aimed at minorities as groups and not as individuals, compensatory justice is now due.[40] In addition, the mere fact that some minority group members have received a quality education does not destroy the groups' entitlement to distributive justice. Opponents of affirmative action cloud their real reasons for opposition by calling compensatory and distributive justice "reverse racism" and contrary to the goals of a color blind meritocratic society.[41] The flaw in this logic is that it is incongruous for a society to base its system of benefits upon an implied assumption of equal opportunity when in reality it has effectively denied opportunity to certain groups.[42] In general, reverse racism arguments are under-analyzed. In our society it is unlikely that whites will ever feel stigmatization comparable to the members of minority groups.

Many white male law students have argued that affirmative action is unfair because it punishes them for discrimination that they never participated in by depriving them of opportunities that are rightfully theirs.[43] While present day individuals may themselves not have discriminated against others, they have accepted the benefits of a society that has. It is only because white males stand to gain so much from the effects of past discrimination that

40. *Future of Affirmative Action*, *supra* note 15, at 523-24.

41. *See generally* GEORGE GILDER, WEALTH & POVERTY 128 (Basic Book ed., 1981).

42. *Future of Affirmative Action*, *supra* note 15, at 537.

43. *See generally* NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975).

they stand to lose from affirmative action.[44] And how is it that affirmative action allegedly divests white males of what is rightfully theirs? In order to be deprived of positions, white males must first attain them; since affirmative action does not require the discharge of any white male employee, this argument is an empty one.

II. Large Law Firm Hiring Criteria Are Racially Discriminatory

To the extent that law firms continue to resist the aspirations of the increasing number of minority attorneys, the pressure to apply anti-discrimination laws to private law firms will increase.[45] Hiring criteria set up by large law firms do unfairly and disproportionately discriminate against African Americans and should be seen as conflicting with Title VII law. In private work environments, the Supreme Court has required that criteria or tests that disproportionately discriminate against discrete and insular minorities have a ground in a manifest relationship to the employment duties of the particular job.[46] The issue that large law firms confront is whether being in the top percentage of the class and a member of a law review or journal are bona fide qualifications for being a successful attorney in a large law firm.

Law firms could show a correlation of good grades to success, but such a showing would not support a bona fide qualification defense unless the cut-off level were shown to be relevant. If challenged, a law firm's attempt to use the bona fide qualification defense will be a serious uphill battle, for in fact there is no evidence that persons not measuring up to these arbitrary standards will not be as successful as those that possess the standards. Perhaps the best evidence against the bona fide qualification of the hiring criteria are the law firms themselves. A large portion of the presently employed attorneys do not measure up to their so-called

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44. *Future of Affirmative Action*, *supra* note 15, at 538-39.

45. LAW FIRM AS EMPLOYER, *supra* note 6, at 23; clearly, Title VII of the Civil Rights Act of 1964 applies to law firm employment. *See* Hishon v. King & Spalding, 467 U.S. 69 (1984). *See* Paul Zarefsky, *How The Hishon Decision Will Affect Your Firm*, 70 A.B.A. J. Sept. 1984, at 58.

46. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). In *Griggs*, the Supreme Court ruled that a facially neutral employment practice may violate Title VII, regardless of the employer's intent, if it has a significantly disparate impact. *Id.* The Court also ruled that once an employee shows that a particular employment practice disproportionately affects members of a protected class, the employer has the burden of showing that its practice has a "manifest relationship to the employment in question." *Id.* at 432. Although employers may argue that employment decisions are inherently subjective, the Supreme Court in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), stated that such decisions are subject to a disparate impact analysis.

necessary requirements, and surely these under-achievers would agree that their lack of having been a member of a journal or having been in the top percentage of their class had little or no effect on their ability to be competitive attorneys.

Membership on law reviews or other journals poses the greatest problem in regard to bona fide qualifications. Large law firms argue that membership on such publications indicates that a candidate has a stronger writing background and writing ability than do other non-journal candidates. However, this argument is easily disposed of by looking at the methods with which most journals and law reviews select their staff members. Often times, especially with law reviews, students are granted membership on the basis of their grades without any review of their writing quality. The other method of gaining acceptance to a legal journal is to petition, or "write-on" to the staff. At first glance this might seem to be stronger evidence of a staff member's stronger writing abilities but look a little deeper. At most law schools, those students that wish to petition onto journal staffs are required to perform an extensive legal writing assignment, in a hasty fashion, immediately after completing their first year exams. Having gone through the experience, I can attest that this is surely not a test of one's writing skills but is really a test of one's stamina. Hence, it is very possible that those staff members that petitioned onto the journals are not truly the best writers in the class, but only those that were crazy enough to take the time to write the petition.

And what about the issue of considering the writing experience gained from participating on a moot court as less substantial than that experience gained by being a staff member of a journal? Because of its more practical nature, the experience gained from participating in a moot court, with its brief-writing requirements, would seem to better suit practice in a large law firm. Therefore, it can be argued that journal membership does not have a manifest relationship to one's ability to write effectively and, further, does not relate to one's ability to write effectively for a large law firm. Granted, using this strict criterion does serve the purpose of making it easier for hiring administrators to weed through employment applications; however, administrative benefits are not strong enough to show a manifest relation to the employment in question.[47]

Finding a position in a large law firm has become a mere pipe dream for law students of color who are not in the upper percentage of their class and not members of a journal. Those that even at-

47. *Griggs*, 401 U.S. at 432.

tempt to apply for these positions usually experience one of two typical responses. The first response is for the large law firm representative to openly deflate the importance of their hiring criteria employed in the hiring process. Candidates are reassured that the hiring criteria are not in any way indicative of how well frosh attorneys will perform when they join the firm. Then, a few weeks later, from the very same firm, the candidate receives a rejection based upon the very same criteria that the representative said did not matter.[48] A second common response to "not-up-to-snuff" candidates of color is that the hiring criteria are, in fact, very important and that the firm of Big, Bigger and Biggest is not in the business of "lowering the bar" for any candidates.[49]

Well, hiring criteria are hiring criteria, and they pose the same obstacles for everyone, white, Black or other, right? Wrong. It is a mathematical impossibility for all persons hired by large law firms to measure up to their so-called hiring criteria. By definition of the percentages, there just are not enough people in the top 10% or 25% of the class to fill the hiring needs of all large law firms. In fact, after bids have been made for the top 10% of students at the top 20 law schools, thousands upon thousands of hiring decision are made by hundreds of law firms.[50] For the purposes of this article, large law firms have been defined as those firms that employ over

48. Part of the concern over whether Blacks will be given equal employment opportunities stems from specific incidents of discrimination by law firms when recruiting Blacks. A recent example of such a documented incident concerned a third year law student interviewing for a job in early 1989. Baker & Mackenzie, a national law firm, was interviewing students from the University of Chicago. One of the students, an African American female, was interviewed by a litigation partner. After a short period of time the interview went sour when the partner questioned her about how she got into the University of Chicago and sought her high school, college, and law school grade point averages. Then, he asked how she would react to being called a "black bitch" or "nigger" by adversaries or colleagues. Learning that the student played golf, he asked "Why don't Blacks have their own country clubs?" He answered his own question by concluding that "there aren't too many golf courses in the ghetto." Lisa Green Markoff, *Dean Suspends Baker & McKenzie from 1989-90 Campus Interviews*, NAT'L L.J., Feb. 23, 1989, at 4. These events are also discussed in Clare Ansberry & Alicia Swasy, *Minority Job Applicants Say Slurs Often Surface*, WALL ST. J., Feb. 10, 1989, at B1; Ann Hagedorn, *Law Partner's Slurs While Recruiting Generate Protest*, WALL ST. J., Feb. 2, 1989, at B8.

49. *Trace Element*, *supra* note 28, at 46. Many minority lawyers think that interviewers doubt their competence. "My friends are constantly being questioned about their qualifications, much more so than white attorneys" claims Jose Luis Morin, staff attorney with Puerto Rican Legal Defense and Education Fund in New York City. *Id.* "For instance, job interviewers review their writing samples with attitudes of disbelief that an Hispanic can write so well. I am sure these kinds of preconceptions hurt Hispanics, not to mention the pressure it places on you." Preconceived notions of ability and talent are a problem that young minority attorneys face all of the time. *Id.*

50. LAW FIRM AS EMPLOYER, *supra* note 6, section IV at 10.

100 attorneys. In the U.S., there are 319 of these large law firms.[51] If we estimate, on a low-average, that each of these firms will hire 10 new attorneys each year, we find that the large law firm group will hire approximately 3,190 new attorneys per year.[52] Now, compare this to the number of top 25% law students available from the campuses of the top 25 law schools in the nation. Roughly, the average size of a class at a top 25 law school is approximately 305 students.[53] Therefore, there are approximately 1,900 students in the top 25% of the class at the top 25 law schools.[54] Clearly, there is a discrepancy, a discrepancy of over 1,000 jobs.[55]

> [Large law] firms hire the cream of the crop. That's their right and they ought to, but after the cream of the crop has been picked, those same firms hire graduates with lesser credentials in a category where there are many Blacks and they don't hire Black candidates. Not every lawyer of those firms came from the top ten schools in the nation, scored in the upper one percent on their LSAT and wrote for the law review. They look for Blacks with those standards and when they cannot find one, they hire whites who do not meet those standard.[56]

When law firms deviate from their hiring criteria to hire sub-standard white applicants, this is viewed as a broadening of its consideration, but when there is deviation from these arbitrary criteria to hire persons of color, it is called and seen as a lowering of standards, or a "lowering of the bar."

This "now you see them, now you don't" implementation of large law firms' hiring criteria is unfortunate. However, what is more disturbing is the legal community's willingness to accept the double standard. When the proposition arises of hiring an African American without the requisite standards, the community cringes at the alleged unfairness of it all.[57] Where are these same cries of

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51. NATIONAL ASSOCIATION FOR LAW PLACEMENT DIRECTORY OF LEGAL EMPLOYERS (1992).

52. In fact, this is a low estimate. From the NALP forms it would appear that these largest firms would hire on average closer to 15 attorneys per year. But for the ease of calculation, the uncertainty of our future economy and to make a more emphatic point, let's assume the low-estimate of 10 new-hires per year.

53. This number was calculated by averaging the class sizes of the top 25 law schools with class size data coming from BARRON'S GUIDE TO LAW SCHOOLS (8th ed., 1988).

54. In 1988, at the nation's top 20 law schools only 847 students were in the top 20% of their class. *The $1,100-A-Week Summer Job: L.A. Law Clerks Even Get A Free Lunch*, L.A. TIMES, June 11, 1988, Pt. 4, at 1 (quoting Paula S. Linden, Co-Chair of the NALP Research Committee).

55. One should be reminded that this is a lower number than what it should be, considering that our estimation of new-hires was set purposefully low.

56. LAW FIRM AS EMPLOYER, *supra* note 6, section IV at 11.

57. Not to mention the evidence of discrimination between non-white and white candidates when both persons have the prerequisite credentials. One empirical study, that concerned who gets "call-back" interviews from initial on-campus inter-

foul-play when the standards are dropped for the many sons, daughters and friends of a cousins' cousin that walk in the door without the requisite marks? If the average large law firm of over 100 attorneys has between 1 and 3 African American attorneys, I can only guess that a number far greater than that was hired out of the sons, daughters and friends of a cousins' cousin category. So where is the real injustice?[58]

Unless large law firms begin to hire affirmatively or African Americans enforce Title VII protections against large law firm hiring practices, the future for African American representation will remain bleak. "The population of African American lawyers will at best remain constant, and may in fact decline in the next decade unless a significantly higher percentage of African Americans enroll and graduate from law school than was experienced in the last decade."[59] Presently there are more than 700,000 lawyers in the United States,[60] of which only 3.4% are African American.[61] Many estimate by the turn of the century, this number may reach the one million mark. There is no question that the lure of becoming a lawyer remains strong. However, Blacks have not shared in this expansion of the profession. Norman Redlich, Dean of New York University School of Law has indicated that "Minority involvement in law school has leveled off from the 1970's" and that he is "afraid [it] will go down because of the drop in enrollment in college."[62]

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views focusing on the role that race and gender played in law firm decisions, showed, as expected, that law firm interviewers do seem to discriminate against minority students in the upper seventy-five percent of their class. Minority students in the top portion of their classes had lower success rates than non-minority students, and minority students in the fifty to seventy-five percent range had less than half the success rate of non-minority students. David Eaves, I.P.L. Png & J. Mark Ramseyer, *Gender, Ethnicity and Grades: Empirical Evidence of Discrimination in Law-Firm Interviews*, 7 LAW & INEQ. J. 189, 201 (1989).

58. In setting up such a contrast, it is not my intention to address the issue of nepotism nor is it my intention to allow this peripheral issue to cloud the issue of deserving African Americans not getting hired by large law firms. The dichotomy is used merely to show, on a more gutteral level, how easy it is for those in power to "lower the bar" when such lowering benefits other members, or future members, of the existing power structure.

59. BACK TO THE FUTURE, *supra* note 20.

60. TRACE ELEMENT, supra note 28, at 46.

61. BACK TO THE FUTURE, *supra* note 20.

62. TRACE ELEMENT, *supra* note 28, at 46.

> In 1977-78, there were 5,304 African American law students enrolled in 160 of 163 ABA approved schools out of a total juris doctor enrollment of 113,080 (4.7%).
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> The doors to legal education expanded greatly during the next decade. By 1991-92, the number of ABA-approved law schools had increased to 176 and the total juris doctor enrollment had increased to 129,580 (+15%). The African American population did not, however, experience this explosive growth. The percentage of African American

After experiencing minimal gains in large law firm hiring during the late 1970's to early 1980's, large law firms have made almost no further progress. Even with significant fluctuations in the population of African American law students and attorneys, large law firm hiring of African Americans, in the last two decades, has been, at best, utterly unresponsive[63] and more than likely on the decline. A 1982 National Law Journal survey showed that 2.9% of lawyers in the nation's largest law firms were Black. A repeat survey in 1984, indicated that only 1.5% of the lawyers at the largest firms were Black — a decrease of almost 50%.

Maybe these broad based national figures do not accurately depict the hiring scenarios that African Americans face in all parts of our country. Perhaps African Americans' candidacies for large law firm positions are more successful in regions of the country where either minorities represent a majority of the population or even in regions known for their progressive social and political values. Although this might seem logical, unfortunately for African American attorneys who desire to work in large firms, associate positions are almost impossible to come by across the country.

For instance in Atlanta, even though sixty-seven percent of Atlanta's population is Black, Black lawyers suspect they make up less than 10 percent of the city's bar;[64] of this figure, not more than about two dozen are partners at Atlanta's major law firms.[65] In the Miami metropolitan area, the general population is about equally divided among Blacks, Hispanics, and whites.[66] Nevertheless, the bar is close to 80 percent white. Of the 10,000 or so lawyers in the area, 1,200 are Cuban-American and only 700 are Black.[67] According to the Chairman of the A.B.A. Minorities in the Profession Committee, there are less than 10 minority partners total in San Francisco.[68] Minnesota's minority employment is notably most egregious. In 1985, out of 1,500 lawyers from the top 25 law firms,

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law students rose by only 1.6% during the past decade to 6.3% in 1991-92, and the total population increased by only 2,845 students.

Id. The percentage of Black men aged 18 to 24 enrolled in college fell from 35.4% to 27.8% between 1976 and 1987. Bill McAllister, *To Be Young, Male and Black,; As Group's Problems Worsen, Fatalistic Attitude is Widespread*, WASH. POST, Dec. 28, 1989, at A1.

63. DeBenedictis, *supra* note 4, at 54. "There was virtually no growth in the percentage of minority lawyers at the nation's biggest firms during the 1980's, according to a *National Law Journal* survey." *Id.* Jensen, *supra* note 34, at 1; Claudia MacLachlan & Rita Henley Jensen, *Progress Glacial for Women, Minorities*, NAT'L L.J., Jan. 27, 1992, at 1.

64. DeBenedictis, *supra* note 4, at 56.

65. *Id.*

66. *Id.*

67. *Id.*

68. TRACE ELEMENT, *supra* note 28.

there were only 6 minority attorneys, which amounted to .4% of the survey.[69] In fact, twenty out of the twenty-five firms had no African Americans at all.

In light of the fact that the same hiring criteria are used by large law firms across the country, these results become less and less outrageous and, in fact, should be expected. As a result, African Americans are not even afforded the flexibility of attempting to find their desired employment in other regions of the country.

III. Identifying The Major Problems and Some Potential Solutions

The problem of having too few African American attorneys in large law firms was not created overnight nor will it be solved overnight. Even though the law firms themselves are at the root of the problem, they are not the sole obstacle to the success of Black attorneys. To understand today's African American hiring dilemma, it is necessary to look at two new factors in the equation — law schools and African American law students themselves.

Law schools must play their part in creating a more diverse legal work force. It is in law school that Blacks, Hispanics, Asian Americans, and Native Americans face their first exclusive difficulties with the profession. For the African American applicant pool to strengthen, law schools must do a better job of attracting the most qualified African Americans,[70] providing the financial assistance that these students need and ensuring that these students are equipped to compete on law school exams.

For minorities who can overcome the financial, academic, and social disincentives to law school, there is a final problem. Cecilia Espenoza, Assistant Prosecutor for Salt Lake City, has said that the best and brightest minorities that could go to the top law schools are opting for business schools instead where, it is thought, there is more money to be made.[71] Law schools must dispel the feeling held by many of our brightest minority students that promising careers cannot be had by them in the field of law.

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69. Dan Oberdorfer and Cheryl Johnson, *Law Minority Employment Stirs Debate on Law Firm Recruitment*, MINNEAPOLIS STAR. TRIB., Mar. 19, 1986, at B1.

70. "In the 1991-92 academic year, 122 of the 176 ABA-approved law schools each enrolled less than a total of 50 African American students. There were only 15 law schools that enrolled in excess of 100 African American students: Baltimore-149, Georgetown University-247, Harvard University-196, Howard University-302, Rutgers University-114, Seton Hall-149, Southern University-180, Temple-104, Texas at Austin-104, Texas Southern University-294, Tulane University-111, University of Maryland-173, University of Michigan-103, University of North Carolina-154, University of Virginia-114." BACK TO THE FUTURE, *supra* note 20.

71. TRACE ELEMENT, *supra* note 28.

At law school most minorities are under unusually high academic pressure. Clearly not all, but most African American law students come from lower socioeconomic groups with very little financial support from families, so money from the government and school is very important. However, cuts in financial aid by federal and local governments have left many minority students no choice but to work while attending law school. The amount of stress that law school itself puts upon all law students, combined with the deep and serious financial stress faced by many African American students and the additional stress of being one of a handful of persons of color on campus creates an environment not conducive for any student's success. If we are going to level the playing field for African American law students, law schools are going to have to get more involved in satisfying their financial needs. In so doing, law schools need not assume that all African American law students need financial assistance, they only need to find out who needs what. Often, law schools attempt to give minimal scholarships to all of the incoming African American students. This is a bad policy, for what results is that those that do not need any financial assistance have an unnecessary surplus and those that need a lot have a mere token of satisfaction.

Law schools must make a stronger effort to ensure that their African American students are equipped to compete on final exams. African American students, more often than not, come from backgrounds in which they are or will be the only lawyers in the family, and possibly the entire community. As a result, they are unable to get the intangible, but extremely valuable, assistance that many of their white colleagues receive from their lawyer parents, relatives, or family friends.[72] Many of my white colleagues take for granted the fact that they grew up in an environment which predisposed them to the law school experience. For the record, predisposition by no means insures success — only future hard work will — but predisposition is definitely a significant advantage. To combat this lack of legal exposure, law schools must invest in programs that will succeed in balancing the scales.

In addition, law schools must re-evaluate their grading systems to see if there are grading factors which disparately affect the performance of African American students. Law school exams are created, and most importantly, graded, by a group of professors

72. Evidence of the negative effect of this lack of exposure is found in the graduation rate of African American law students. At 75%, African American graduation rates are lower than those of Asian and Hispanic students. BACK TO THE FUTURE, *supra* note 20.

which is overwhelmingly white, predominantly male, and of relatively affluent background. There is clearly a danger of non-white's perspectives, policy points and writing styles not being accorded the same value as majority perspectives, policies and styles. Just because African Americans do not have a predisposition to the dominant style of legal thinking does not mean that our views should be excluded from our society's legal framework. Law schools must strive to ensure that the grading process does not function to limit the opportunities of minorities by devaluing perspectives formed outside of a white, middle to upper middle class upbringing.

Even if, by some divine mandate, large law firms seriously attacked the issue of underrepresentation of minorities in the workforce and seriously began attracting African American attorneys, there would still need to be a major effort aimed at countering the feelings of negative self-prophesy held by many African American law students.

> For minority law students, simple arithmetic often can reveal all they need to know about a law firm. The numbers of minority partners and associates employed by a firm are included on the information sheets compiled by the National Association of Law Placement and distributed by law school placement offices. These sheets are usually the first contact minority law students have with a firm.
>
> When a student reviews a sheet and sees binary digits — . . . 0's and 1's — he or she might have the impression that minorities are not welcome. Students frequently interpret this historic underrepresentation in large law firms as evidence that these firms still are not interested in hiring them.
>
> The bottom line is that if minority applicants are left with the impression that they "need not apply"—they won't.[73]

This prima facie evidence of discrimination has led many African American law students to experience a level of apathy and negative self-fulfilling prophesy not experienced by other law students. African American law students are often led to think that if there are only a handful of African American attorneys at the nation's top firms, either African Americans are not good enough to obtain those positions or large law firms are too determined to enforce discriminatory hiring practices for them to even consider applying to large firms. If a Black law student feels that there is no hope of obtaining a prestigious large law firm position, then it is likely that this same student will not be motivated to perform up to the standards re-

73. Bates & Whitehead, *Do Something Different*, *supra* note 5, at 80.

quired of the position, further completing the vicious cycle of a negative self-fulfilling point of view.[74]

African American law students must also shoulder much of the burden of improving their representation in large law firms. Changes for the better in society have come only on the heels and on the backs of those who have fought for them. Black law students must shake their negative feelings toward large law firms and not accept that past failures will equal future misfortune. First, Black law students must work hand in hand with law school administrators to create programs that will ensure their ability to compete on law school exams. Second, Black law students must apply to large law firms in mass. No longer can we provide large law firms with the excuse that there just are not enough African American candidates out there. Black law students that are successful in piercing the veil of large law firms must be more active in reaching back to their law schools and cultural organizations and encouraging others to follow in their footsteps. They also must apply as much pressure as possible from within the firm to get more African Americans hired. And finally, since large law firm hiring practices will not pass statutory muster, African American candidates for large law firm positions must seriously consider challenging them in court.

Conclusion

After over three hundred years of negative action toward African Americans, compensatory justice or some form of affirmative assistance is required by society to improve itself. As a result of employment discrimination, African Americans have found themselves forming a working-poor subgroup out of which most members are either employed in lower paying blue collar positions or unemployed. Without such affirmative efforts, we cannot seriously profess to believe in the principles of equality nor, on a more practical level, can we expect to compete in the global marketplace.

The legal profession remains one of the most glaring examples of America's inability to bring equality to the workforce. Out of the many different environments in which attorneys work, large law firms have a particularly egregious record of minority hiring. In fact, after experiencing minimal gains, large law firms have made

74. David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1626-27 (1991). Strauss argues that Blacks, knowing that such discrimination occurs in significant volume, will underinvest in human capital, or in other words, fail to maximize their opportunities for education and training, expecting that they would not receive a full return on greater investment. *Id.*

virtually no progress in making their workplaces more diverse. The main barrier to employment for African American attorneys who desire to work in a large law firm remains the arbitrary hiring criteria implemented by the firms themselves. Under a disparate impact Title VII analysis, these hiring criteria should be found illegal and not to have a manifest relationship to the employment sought. To change this underrepresentation, law schools and African American law students must also shoulder some of the burden.

At a time not too far off, the minority of America's population will assume the position of the majority. As a result, it will only be those firms that position themselves now, by affirmatively hiring more minority attorneys, that will be able to cope with this new structure of demand and compete efficiently.