

5-15-2017

How a Diverse Administrative Law Judge Field Fosters Longevity and Public Confidence

Judith A. Parker

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Recommended Citation

Judith A. Parker, *How a Diverse Administrative Law Judge Field Fosters Longevity and Public Confidence*, 37 J. Nat'l Ass'n Admin. L. Judiciary 1 (2017)

Available at: <https://digitalcommons.pepperdine.edu/naalj/vol37/iss1/1>

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How a Diverse Administrative Law Judge Field Fosters Longevity and Public Confidence

By Judith A. Parker*

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A group of Parsi refugees had fled to the city of Sanjan in the western province of Gujarat, now in India, in the late eighth century. The Hindu ruler of Sanjan did not want to welcome these strangers to his land. He brought the Parsi leader to meet with him and brought a pitcher brimming with milk. “This pitcher is like Sanjan—it can hold no more milk” and thus hold no newcomers. The Parsi leader, hoping to gain permission for his people to stay, countered by bringing out a cup of sugar. He slowly poured the sugar into the pitcher, not displacing even a drop of milk. He took the hand of the Hindu ruler and said, “As the sugar sweetens the milk, so too will we sweeten your lands.” And from that day forward, the Parsi are a welcome part of the Gujarat community and identity. Parsi Folklore.¹

I. INTRODUCTION

The impetus for this paper comes from my family lineage and my professional career. As a Hispanic young lawyer, I personally witnessed unconscious discrimination by people who would have been horrified to be considered bigoted. A senior partner once asked me how I learned to speak English so well. I am positive he meant no harm but rather was trying to praise my good diction. Another time, I was asked to help land an important client (a tortilla distributor) based on my involvement in the Hispanic business community. To my delight, we indeed landed the client; to my dismay, the actual work was given to a six-foot blond-haired blue-eyed male associate who resembled the oldest son of the hiring partner. Was the work deliberately steered away from me, the five-foot-four dark haired lawyer? I doubt it; after all, these people were educated, experienced, and had given me a job in the first place. I

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¹ See generally SOUTH ASIAN FOLKLORE: AN ENCYCLOPEDIA 464 (Margaret A. Mills et al. eds., 1st ed. 2002).

still believe there was no conscious intention of any discrimination. Nonetheless, it resulted in a feeling that I wasn't one of them; I doubt that a senior partner would compliment a former college quarterback on his English skills. It was only after a few years that I realized that even a highly progressive law firm in highly progressive Portland, Oregon had as many unconscious biases as those facing my Hispanic mother when she graduated from a Colorado high school. She was told that her role in life would be as a mother, so she needn't apply to any college programs. That happened four years after the Supreme Court held that Mexican-Americans were entitled to the same educational and employment opportunities as all others. Again, I am sure her guidance counselor was not prejudiced (at least not intentionally so). But, what happened to my mother in 1958 and to me in 2006 still happens today by well-meaning people. How does this unconscious bias happen? What can change it?

I have concluded that the best way to challenge that unconscious bias is for administrative law judicial offices, whether they are Central Panel or the United States Office Personnel Management (OPM), to hire and promote diversity candidates as Administrative Law Judges (ALJs). In this paper, I argue that deliberate hiring choices will foster longevity and public confidence. I take instruction from landmark judicial, legislative, and executive actions from the 1950s to the present; from the rise of businesses which have adopted diversity as more than a mere catch-word, to the sports world, which has seen implementation of the Rooney Rule² to contravene previous hiring patterns. The American Bar Association (ABA) has been urging various specialty bar organizations—including the National Association of Administrative Law Judiciary—to adopt and implement diversity actions. Doing so leads to concrete changes to our workplace. This, in turn, will foster public confidence. It will also lead to diverse ALJs remaining on the job longer and with more passion for their various tasks. A deliberate sea change in the way ALJ offices hire their peers, colleagues, and future leaders will strengthen longevity as well. This paper will

² The Rooney Rule is a policy used in the National Football League to increase diversity and encourage more inclusive hiring. See Jason Reid, *NFL's Rooney Rule should be strengthened*, WASHINGTON POST (February 19, 2011, 11:59 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/19/AR2011021903268.html>.

review the current federal OPM hiring practices, and what I think should be changed to ensure that the ALJ workforce is as diverse as possible. I will show the concrete reasons that a job applicant is told during an interview that an employer is invested in diversity, opportunity, and upward mobility, positive and long-lasting benefits result. I will also illustrate three case studies of present-day unconscious bias: first, the 2016 Malheur Refuge Occupation trial, where destruction of Native American gravesites went unpunished because the U.S. Attorney's Office did not consider Native American concerns while weighing indictment and prosecution options; second, the devastating story of racial profiling of an African-American by the Oregon Department of Justice; finally, and the story of a minority ALJ, whose experience with unconscious bias in the workplace has led to deep-seated resignation and indignation. I believe what I feel and I believe what I write below. I welcome all feedback from readers.

Diversity has evolved through the years through judicial, legislative, and executive action.

The modern history of diversity in the workplace can be found in the context of two key civil rights cases, both heard by the Supreme Court in 1954. These two cases set forth a rationale that all people are indeed created equal, which was necessary, but also anticipated future Supreme Court opinions that acknowledged that at many points in our history, diverse candidates likely were not able to get a job—or even be qualified for a job—because of the inability to access governmental programs such as education and a fair judiciary. The first case, *Brown v. Board of Education*,³ discussed the role of equality in education, while the second case, *Hernandez v. Texas*,⁴ reviewed the extent that the Fourteenth Amendment should be applied in criminal jury trials.

In *Brown v. Board of Education*,⁵ the Supreme Court unanimously overturned *Plessy v. Ferguson*⁶ and held that state laws

³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁴ *Hernandez v. Texas*, 347 U.S. 475 (1954).

⁵ *Brown*, 347 U.S. at 484.

⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

establishing separate public schools for African-American and white students were unconstitutional. The Court analyzed school segregation under the Equal Protection Clause of the Fourteenth Amendment of the Constitution and struck down the segregation statutes, ruling that de jure segregation violated the Equal Protection Clause.⁷ Seventy years later, we can see the impact of this judicial action in the increase of African-American college graduates⁸—in 1971, seventeen years after segregation was ruled unconstitutional, only eight percent of African-Americans graduated from college, and by 2000, that number had more than doubled.⁹

The Judicial Branch also heard another major case for civil rights activists: *Hernandez v. Texas*.¹⁰ This case concerned the treatment of Mexican-Americans and their legal racial classification.¹¹ Hernandez, a defendant in a homicide trial, was not permitted a jury of his peers, other Mexican-Americans; in fact, out of over six thousand jurors, no Mexican-American had ever served as a juror in the previous twenty-five years¹²—not even when the county's Mexican-American and Latin-American population was approximately forty-one percent.¹³ The High Court held that Mexican-Americans had equal protection under the Fourteenth Amendment.¹⁴ Like *Brown v. Board of Education*, a unanimous Court decided *Hernandez*. Although this case dealt with jury selection rather than education, it nonetheless expanded the scope of protection under the Fourteenth Amendment to groups other than African-Americans.

But it was not only the Judicial Branch that extended equal protection to non-white and non-male Americans. Within a decade, Congress passed two landmark legislations: The Equal Pay Act of 1963 (Equal Pay Act) and the Civil Rights Act of 1964 (Civil Rights

⁷ *Brown*, 347 U.S. at 484.

⁸ KIM M. LLOYD, MARTA TIENDA, ANNA ZAJACOVA, TRENDS IN EDUCATIONAL ACHIEVEMENT OF MINORITY STUDENTS SINCE BROWN V. BOARD OF EDUCATION 20 (2001).

⁹ *Id.*

¹⁰ *Hernandez*, 347 U.S. at 475.

¹¹ *Id.* at 477.

¹² *Id.* at 482.

¹³ *Id.* at 480 n.12.

¹⁴ *Id.* at 479.

Act). The Equal Pay Act prohibited certain employers from discriminating on the basis of sex.¹⁵ The Civil Rights Act, the following year, outlawed discrimination in the workplace on the basis of race, religion, sex, national origin, or color.¹⁶ These laws prohibited employers from firing (or refusing to hire) employees on the basis of a protected class.¹⁷ These laws had sweeping effects and are far too broad to be summarized in this paper; entire careers have been formed on the analysis of the Civil Rights Act. More importantly, the Civil Rights Act helped open employment and education opportunities. In 1973, Congress passed the Rehabilitation Act, which prohibits discrimination on the basis of disability in federal government programs, in programs receiving federal financial assistance, in employment practices of federal contractors, and most importantly, in federal employment.¹⁸ Congress passed the American with Disabilities Act (ADA) in 1990.¹⁹ The ADA prohibits discrimination on the basis of disability in the workplace.²⁰ Twenty-five years after the passage of the ADA, disabled Americans have greatly improved access to public services and have been able to obtain or retain employment despite physical limitations.²¹

Not to be outdone by the Judicial and Legislative Branches, the Executive Branch also promulgated affirmative civil rights actions. The Executive Branch, under President John F. Kennedy, implemented Executive Order 10925 on March 6, 1961.²² The President's goal was for the government to take positive action to

¹⁵ The Equal Pay Act of 1963, Pub.L. 88-38, § 3, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2012)).

¹⁶ The Civil Rights Act of 1964, ch. 21, 78 Stat. 241(codified as amended at 42 U.S.C. §§ 1981–2000h-5 (2012)).

¹⁷ *Id.*

¹⁸ Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 (2012)).

¹⁹ Americans with Disabilities Act, Pub. L. 101-336, 101 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101 (2012)).

²⁰ *Id.*

²¹ Georgina Peacock, Lisa I Iennoni, Thomas R. Harkin, *Heath Care for Americans with Disabilities—25 Years after the ADA*, 373 N. ENGL. J. MED. 10, 892 (2015).

²² Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

implement diversity. This Executive Order included a provision that government contractors take “affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, creed, color, or national origin.”²³ Executive Order 10925 was superseded by Executive Order 11246 on September 24, 1965.²⁴ This Order outright prohibits discrimination of protected classes by organizations receiving federal contracts and subcontracts.²⁵ It mandates federal contractors to have a written affirmative action plan “to ensure that applicants are employed” and placement goals for diverse employees.²⁶ President Johnson’s Executive Order remains in place and creates employment goals for federal contractors. The Executive Branch also created the Equal Employment Opportunity Commission (EEOC) in 1965.²⁷ The EEOC is charged with administrating and enforcing the Equal Pay Act and the Civil Rights Act, among others, by investigating allegations of workplace discrimination.²⁸

II. THE CURRENT STATUS OF MINORITY AND WOMEN LEGAL PROFESSIONALS IS GOOD NEWS, BUT IT COULD BE BETTER

The first African-American lawyer in the United States, Macon Bolling Allen, was admitted to the Maine bar in 1844.²⁹ He was also the first African-American to hold a judicial position in the country, becoming a Massachusetts Justice of the Peace in 1848, as well as being elected as a South Carolina probate court judge in 1874 after the Civil War.³⁰ By 2010, African-Americans compromised only

²³ 26 Fed. Reg. at 1977.

²⁴ Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965).

²⁵ 30 Fed. Reg. at 12319.

²⁶ 30 Fed. Reg. at 12319.

²⁷ 29 C.F.R. § 1614.101(a) (2017).

²⁸ *Id.*

²⁹ Nick Manos, *Allen, Macon Bolling (1816-1894)*, BLACKPAST.ORG, <http://www.blackpast.org/aah/allen-macon-bolling-1816-1894> (last visited Mar. 21, 2017).

³⁰ Curtiss Shaw Flagg, *10 People to Know During Black History Month*, CHICAGONOW, (Feb. 11, 2012, 1:23 PM), <http://www.chicagonow.com/as-i-see-it/2012/02/10-people-to-know-during-black-history-month/>.

five percent of the legal population.³¹ Unfortunately, the Minority Corporate Counsel Association reports that law firms hired fewer African-American lawyers in 2015 than in 2008.³²

The first female lawyer in the United States, Arabella Mansfield, was admitted to the Iowa bar in 1869.³³ A decade later, there were only around 200 women lawyers in the country.³⁴ This year, women make up forty-seven percent of law students.³⁵ Thirty-six percent of corporate counsel were women in 2005, a figure which jumped to forty-two percent women in 2011.³⁶ But that does not mean women are being retained or promoted at the same rates as their male peers.³⁷

Almost every other demographic group is underrepresented when compared to the percentage of the population they comprise.³⁸ Despite women and minorities making strides in the legal profession for years, white men continue to hold a disproportionate share of judicial seats compared to their share of the general population, with

³¹ *Lawyer Demographics 2015*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf (last visited June 1, 2017) [hereinafter *ABA Lawyer Demographics*].

³² *2016 Vault/MCCA Law Firm Diversity Survey Report*, MINORITY CORP. COUNS. ASS'N 10, http://archive.mcca.com/_data/global/downloads/research/reports/VaultMCCA_Survey-2016-v01.pdf (last visited Apr. 19, 2017).

³³ *Arabella Mansfield – A Commanding Presence*, LAW.JRANK.ORG., <http://law.jrank.org/pages/12251/Mansfield-Arabella-commanding-presence.html> (last visited Mar. 21, 2017).

³⁴ HEDDA GARZA, *BARRED FROM THE BAR: A HISTORY OF WOMEN AND THE LEGAL PROFESSION* 60 (1996).

³⁵ *A Current Glance at Women in the Law*, AMERICAN BAR ASSOCIATION (May 2016), http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_may2016.authcheckdam.pdf.

³⁶ Amanda Robert, *In-House: Growing Diversity Exists in Corporate Law Departments*, CHICAGO L. MAG. (July 1, 2011), <http://www.chicagolawyer.com/Archives/2011/07>.

³⁷ *Id.*

³⁸ Ciara Torres-Spelliscy, Monique Chase, Emma Greenman, Susan M Liss, *Improving Judicial Diversity*, BRENNAN CENTER FOR JUSTICE (Mar 2010), <https://www.brennancenter.org/publication/improving-judicial-diversity>.

males making up sixty-five percent of licensed lawyers in the United States.³⁹

III. OFFICES HIRING ALJs SHOULD ADOPT THE BUSINESS COMMUNITY'S PATH TO DIVERSITY

The profit-garnering Fortune 500 companies have been stressing the importance of diversity in the workplace for a few decades now. Greater profits, they scream, and lawyers dismiss that motivation out of hand. Profits need not be a concern for a government-paid administrative law judge, says the profession. But the times, they are a-changing, and today's legal communities reflect the mimesis of what all those practice management books and hiring directions urged those years ago. There are, today, practical reasons to invest in a diverse workplace—whether that workplace is a strictly business operation or more of a technical ALJ position.

The Walmart Model is an outstanding evolutionary model for diversity in a business context. The Walmart Mission is to “embed and inspire diversity and inclusion across the organization,”⁴⁰ and its Vision Statement is equally clear and straight-forward: “Walmart will unleash the power of diversity and inclusion to strengthen customer relevance, build talent capacity, and drive innovation for business solutions.”⁴¹ Walmart has emerged as a leader in diversity measures, encouraging not only its internal managers on the importance of diversity but also to others in the business community. For example, Walmart partnered with the American Bar Association in its 2010 Diversity Report.⁴²

Walmart currently pays its employees a starting hourly wage of ten dollars even though the federal base is only \$7.25 (in states where the minimum wage is higher, Walmart adopts the legal minimum

³⁹ *ABA Lawyer Demographics*, *supra* note 31, at 1.

⁴⁰ *Walmart Diversity Report 2015* at 2, WALMART, <https://cdn.corporate.walmart.com/01/8b/4e0af18a45f3a043fc85196c2cbe/2015-diversity-and-inclusion-report.pdf> (last visited Apr. 19, 2017).

⁴¹ *Id.* at 3.

⁴² *American Bar Association 2010 Diversity Report* (April 2010), AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf. [hereinafter *ABA Diversity Report*].

wage).⁴³ The megastore also insists on hiring retail staff who wish to remain at the store and possibly transition into management with a Diversity Goals Program.⁴⁴ This program gives associates five-year aspirational goals, customizes diversity and inclusion plans, and oversees placement goals for women and people of color.⁴⁵ The changes have been profound. In 2014, nearly a quarter million associates were promoted within the company.⁴⁶ Forty percent of those promotions were for people of color; fifty-four percent were women.⁴⁷

2015 Walmart Diversity Statistics

	U.S. Workforce	Percentage in U.S. workforce	Percentage in U.S. management	Corporate officers	Mentored associates
Women	784,000	57%	42%	32%	54%
People of Color	512,000	40%	30%	22%	35%

Walmart's legal team also strives for diversity in composition and hiring. When the Walmart general counsel considers hiring outside counsel, he asks a series of questions focused on revealing that firm's own commitment to diversity.⁴⁸ Walmart focuses on the diversity within the firm's partnership ranks, because "that's where the 'rubber meets the road'"⁴⁹ It recently launched a diversifying pipeline project for lawyers to work with its Latin American markets.⁵⁰ Walmart's commitment to diversity is smart, and it leads to increases of the bottom line. Besides doing the right thing, Walmart sees tangible results. First, it creates strong connections within the communities in

⁴³ *Walmart Diversity Report 2015*, *supra* note 40, at 3.

⁴⁴ *Id.* at 7.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 15.

⁴⁸ Peggy Nagae, *How General Counsel Support their CEO's Diversity Efforts*, MINORITY CORP. COUNS. ASS'N (May/June 2005), <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=712> [hereinafter Nagae].

⁴⁹ *Id.*

⁵⁰ *Walmart Diversity Report 2015*, *supra* note 40, at 10.

which it sits.⁵¹ Second, it sees dramatic retention rates; its associates tend to stay because they know they have been invested in.⁵² Third, the store is able to solve problems quickly without stagnation.⁵³ Moreover, the public sees Walmart associates as a reflection of themselves, which leads to higher profits; in three years of tracking investment into women retention, the store calculated a twenty-one percent increase in annual spending.⁵⁴ Therefore, the Walmart model results in greater productivity, higher rates of returns, and long term retention.⁵⁵

Starbucks also cares passionately about diversity.⁵⁶ Paula Boggs is an African-American female lawyer and former general counsel at Starbucks. Boggs led a team committed to ensuring that the legal teams she oversaw were equally committed to diversity, internally and externally.⁵⁷

Starbucks uses its sizable weight in the country to brew change in the external law firms with which it contracts. Starbucks reviews the hiring patterns of its outside law firms “to a ‘very high standard’” and demands that those firms commit equally to diversity.⁵⁸ Boggs has said that mentoring diverse law students and young lawyers is one of the most important factors of success for anyone in the legal profession, whether at Starbucks or not.⁵⁹ By requiring external law firms to hire and promote lawyers of color and women lawyers, Starbucks is able to turn its ideals into practical results. Those law firms, which only half-heartedly kept diverse lawyers on staff to secure the contract, would see their premiere client leave if it suspected pretextual-hiring practices. Boggs also made a significant

⁵¹ Nagae, *supra* note 48.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Walmart Diversity Report 2015*, *supra* note 40, at 22.

⁵⁵ Nagae, *supra* note 48.

⁵⁶ *Walmart Diversity Report 2015*, *supra* note 40 at 7.

⁵⁷ Roger Adler, *Starbucks GC Sees Grounds for Diversity*, THE NAT’L L. J., (June 19, 2007), <http://www.nationallawjournal.com/id=900005484005/Starbucks-GC-Sees-Grounds-for-Diversity?mcode=0&curindex=0&curpage=ALL>.

⁵⁸ *Id.*

⁵⁹ *Interview with Paula Boggs*, AM. BAR ASS’N BUS. L.TODAY (Oct. 2013), http://www.americanbar.org/publications/blt/2013/10/member_spotlight.html [hereinafter *Interview with Paula Boggs*].

difference internally at Starbucks. Half of the in-house lawyers for Starbucks are female; twenty-two percent are lawyers of color; and “a fair number” are self-identified LGBT lawyers.⁶⁰

Boggs joined the general counsels at other Fortune 500 companies, including Walmart and Century Theaters, in signing the Bell South “Diversity Statement of Principle.”⁶¹ The Fortune 500 companies, which have adopted Diversity Statement of Principle external counsel hiring model, require their external counsel to prepare annual ‘report cards’ detailing their commitment to diversity.⁶² As Boggs put it, “For beauty contests, in tie situations from a talent standpoint, if there’s little to distinguish firm A from firm B, we’ve given the business to the firm with the better diversity record.”⁶³ Other organizations have adopted the Diversity Statement of Principle or have joined industry grounds championing diversity. For example, the Leadership Council on Legal Diversity now consists of more than 250 corporate chief legal officers and law firm managing partners.⁶⁴ The Leadership Council on Legal Diversity is a 501(c)(6) not-for-profit organization led by board of directors comprised of general counsels and managing partners.⁶⁵ The National Association of Law Placement publishes the diversity hires of large law firms participating in on-campus interview programs so law students can analyze how long other diverse associates remain at participating firms.⁶⁶

IV. SOCIAL SCIENCE POSITS THAT DIVERSITY TRUMPS ABILITY

Scott Page (Page) is one of the leading social scientists in the country, mainly focused on diversity, complexity, and modeling

⁶⁰ Nagae, *supra* note 48.

⁶¹ Nagae, *supra* note 48, at 6.

⁶² *Interview with Paula Boggs, supra note 59.* at 7.

⁶³ *Id.*

⁶⁴ *Leadership Council on Legal Diversity New Member FAQ*, LEADERSHIP COUNCIL ON LEGAL DIVERSITY, <http://www.lcldnet.org/media/uploads/resource/New-Member-FAQ-11.16.16.pdf> (last visited Mar. 21, 2017).

⁶⁵ *Id.*

⁶⁶ *See* NAT. ASS’N OF L. PLACEMENT, www.nalp.org (last visited Mar. 21, 2017).

social sciences.⁶⁷ He is a professor of Complex Systems at the University of Michigan, an external faculty member at the Santa Fe Institute, and he researches how teams perform.⁶⁸ He disputes the concept that hiring diversity “lowers the bar”—to the contrary, Page (and others who follow his academic research) argues that diversity will always trump ability in a workplace.⁶⁹ Page posits that one of the problems organizations face *without* diversity is stagnation.⁷⁰ Employees who think the same way tend to continue to think the same way and do not allow for creativity or problem-solving.⁷¹ But a diverse population of employees regularly outperforms teams comprised of the best-performing employees.⁷² Those best-performing employees circle back upon themselves to create a dilemma, a lack of problem-solving diversity.⁷³ When one employee “gets stuck,” another diverse employee is there to suggest a different approach.⁷⁴ As such, the best conditions for a problem-solving group is one with high-ability *but also diverse* problem solvers.⁷⁵ That is to say, having a group of like-minded colleagues—all hired from the same university’s program and all possessing similar skills—guarantees only that the new colleagues will analyze problems the same way as the old colleagues. Without the new creative ways to solve problems, the team will be stagnant and less effective.

Another study, following Page’s lead, took his conclusion in a different direction (literally, as the task before the test subjects was to coordinate a maze).⁷⁶ Social scientists tested three groups of

⁶⁷ Scott Page, Curriculum Vitae, <http://sites.lsa.umich.edu/scottepage/wp-content/uploads/sites/344/2015/11/vita107.pdf> (last visited June 1, 2017).

⁶⁸ *Id.*

⁶⁹ SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).

⁷⁰ Hong Lu & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 NAT’L ACAD. SCI. 16385 (2004).

⁷¹ *Id.*

⁷² *Id.* at n.46.

⁷³ *Id.* at 16385.

⁷⁴ *Id.* at 16387.

⁷⁵ *Id.* at 16389.

⁷⁶ Norman Lee Johnson, *The Applied Science of Collective Intelligence: Solving the Grand Challenge Facing Humanity*, 2 SPANDA J. 97 (2014).

individuals to solve problems, singularly and collectively in groups according to ability and skill set – high performers and poor performers.⁷⁷ When the diverse group of poor performers combined their forces, they consistently found more ingenious solutions to the tasks before them.⁷⁸ As long as the performers had *some* ability to complete a task (to solve the maze), “the diverse collective solution outperformed the average individual.”⁷⁹

Thus, the assumption that only the law review editor-in-chief should be hired as an ALJ to ensure the most productive office is dispelled. The better working environment is one with a talented diverse team. That diversity will lead to greater flexibility and greater confidence in other colleagues, which in turn leads to greater longevity on the team.

This concept was explored in length (and humor) in the January 21, 2016, podcast Reply All.⁸⁰ I urge all readers of this paper to listen to Page’s interview. He shares an example that explains how diverse backgrounds bring different ways of reviewing problems, how to solve problems, and what the solutions tell us about our differences and strengths: knowledge basis, geography, personal hardship.⁸¹ The trivia is this: generally, people from different ethnic and geographic backgrounds keep their ketchup in different parts of the kitchen.⁸² If you are (not as a rule, but generally) British or African-American from the south, you are more likely to keep your ketchup in a cupboard.⁸³ If you are not British or you are not African-American from the south, you tend to keep your ketchup in the refrigerator.⁸⁴ Why does this matter? If you run out of ketchup, you are likely to grab what normally sits beside ketchup in the fridge—mustard or mayonnaise—or what normally sits beside

⁷⁷ *Id.* at 100.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ RAISING THE BAR, REPLY ALL PODCAST, Gimlet (Jan. 21, 2016), <https://gimletmedia.com/episode/52-raising-the-bar/>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

ketchup in the cupboard—malt vinegar.⁸⁵ The more diverse the backgrounds, the more paths you can imagine to solve problems—whether the problem is complex or minor—deciding where to place a condiment.⁸⁶ If you cannot imagine there would be ketchup in the pantry, for example, you cannot conceptualize that there would be a different solution.⁸⁷

At the 2016 Annual NAALJ Conference, we received tote bags with the slogan “‘ALJ’ because ‘Freaking Awesome Problem Solver’ is Not an Official Job Title.” ALJs are indeed problem solvers—and good ones at that. But as Page’s scholastic work supports, a diverse ALJ team will produce widespread creative problem solving and a stronger workforce.

V. THE ABA OFFERS MULTIPLE REASONS TO SUPPORT DIVERSITY IN THE LEGAL PROFESSION

In April 2010, the American Bar Association Presidential Initiative Commission on Diversity published “Diversity in the Legal Profession: The Next Steps.”⁸⁸ This report emphasizes the need for diversity at all levels of legal professional organizations, including administrative law judges. The initiative sets forth four different reasonings as to why diversity matters, responding to anticipated arguments against the need to increase diversity. In my opinion, the ABA was wise to do so; by buttressing its goal with four disparate reasons, it was able to look persuasive rather than reactive. Second, as discussed below, a subsequent ABA Report—coupled with a request—two years later could be easily defended on any one of these rationales. The four rationales are the Democracy Rationale, the Business Rationale, the Leadership Rationale, and the Demographic Rationale.

- Democracy Rationale.⁸⁹ The first rationale from the ABA report is based on a presumption of trust in the legal professions. This rationale states that lawyers foster the trust

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *ABA Diversity Report, supra* note 42, at 3.

⁸⁹ *Id.* at 9.

of citizens and are role models. These core values must bubble up. Ironically, this rationale strikes me as a rationale that plays up the false front of the importance of lawyers. It is a very idealistic, almost 1950s image of lawyers: Atticus Finch on an Apple phone. However, the rule of law aspect present in the democracy model does appeal to our less sanguine natures.

- Business Rationale.⁹⁰ The second rationale focuses on the benefit of diversity to the bottom line. Rationale states that a diverse workforce will be strengthened by diversity in the workforce. It is no surprise to the reader of this paper that Walmart, which I praised above, was a co-sponsor of this ABA report. The Business Rationale recognizes that it makes “good business sense to hire lawyers who reflect the diversity of citizens, clients, and customers from around the world.”⁹¹ And if current clients do not demand diversity, as does Walmart, the ABA suggests that future clients likely will. Having a similar linguistic or cultural background is not as important in this rationale as the acknowledgement that other languages and cultural norms exist.
- The Leadership Rationale.⁹² This rationale is supported by the understanding that the world is changing at a fast rate; the LGBT community, the disabled, women, and racial and ethnic minorities are now fully able to access education and public services to warrant the right to rise to leadership. Put another way, a hundred years ago, a person who needed a wheelchair would not have been able to access even primary education – now, that access is not only expected but guaranteed by law. In doing so, we must equally anticipate that they should hold leadership roles. Furthermore, as Justice Sandra Day O’Connor wrote in *Grutter v. Bollinger*⁹³ law schools “represent the training ground for a large number of our Nation’s leaders.”⁹⁴ As such, there is no reason to

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 10.

⁹³ 539 U.S. 306 (2003).

⁹⁴ *Id.* at 332.

refuse a diverse candidate the chance to seek higher office or representative leadership—but likewise there is every reason to promote diverse candidates.

- Demographic Rationale.⁹⁵ This reason to encourage diversity is based on the current demographic conditions in the United States: we as a country are getting older and more diverse. In 2008, there were 38.7 million residents aged sixty-five and older in the United States; this figure will more than double by 2050, with estimates at 88.5 million.⁹⁶ African-Americans will increase by over 24 million; the number of Hispanics and Asian-Americans will triple. These numbers might be difficult to quantify, but the ABA expects us to understand that we will be seeing a much different face of the United States and we, as a profession, should be there to support it fully.

The ABA coupled the four rationales with concrete go-forward steps for law firms, legal organizations, and hiring managers to adopt.⁹⁷ It recognized that many of us—particularly those of us who are passionate about diversity—could experience “diversity fatigue.”⁹⁸ It also acknowledged that diversity is more than simple binaries of male versus female or white versus non-white.⁹⁹ It endorsed the concept of cultural competency, which does not require each individual in a workforce to be diverse but rather that intelligent individuals who are willing to learn can expand their worldview to be more racially and culturally competent.¹⁰⁰

VI. THE ABA’S DIVERSITY ACTION PLAN INCLUDES ALJS

Following the success of the 2010 Diversity Report, the Judicial Division of the ABA approved a Diversity Action Plan at its annual

⁹⁵ *ABA Diversity Report*, *supra* note 42, at 10.

⁹⁶ *Id.*

⁹⁷ *Id.* at 35.

⁹⁸ *Id.* at 14.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 15.

meeting in 2012.¹⁰¹ The Judicial Division of the ABA created the Standing Committee on Diversity in the Judiciary (SCDJ) to build diversity within the division and six conferences, one of which is the National Conference of Administrative Law Judiciary.¹⁰² The SCDJ asks each of the conferences (and by extension the National Association of Administrative Law Judiciary and all ALJ offices) to engage in five specific tasks related to ensure diversity within the legal community.

First, it urges the conferences to “actively recruit judges and lawyers of color, women judges and lawyers, judges and lawyers with disabilities, judges and lawyers of various religious affiliations . . . [‘LGBT’] judges and lawyers, and young lawyers (as defined as admitted to practice for five years or less or under 36 years old).”¹⁰³ This echoes the suggestions of Starbucks’s general counsel Paula Boggs. It is important to plant the seeds of diversity and partnership early. “It takes work to build those relationships You also must have staying power because change will not happen overnight.”¹⁰⁴

Second, it recognizes that there is a severe lack of American Indian and Alaskan Native Nations lawyers and judges.¹⁰⁵ The second mandate expects conferences to “actively recruit judges, lawyers, and advocates (including lay judges and lay advocates) working in the judicial systems of American Indian and Alaskan Native Nations.”¹⁰⁶ As discussed below in case study three,¹⁰⁷ a failure to have a Native American viewpoint leads to a failure to consider those issues and alienates this important community.

In addition to recruiting and hiring diverse candidates, the SCDJ asks conferences to consider the working environment.¹⁰⁸ It

¹⁰¹ *American Bar Association Judicial Division Diversity Action Plan*, AM. BAR ASS’N, https://www.americanbar.org/content/dam/aba/administrative/judicial/jd_diversityplan.authcheckdam.pdf (last visited Mar. 21, 2017) [hereinafter *ABA Diversity Action Plan*].

¹⁰² *Id.*

¹⁰³ *Id.* at 2.

¹⁰⁴ Nagae, *supra* note 48, at 7.

¹⁰⁵ *ABA Diversity Action Plan*, *supra* note 101, at 2.

¹⁰⁶ *Id.*

¹⁰⁷ *See infra*, Part IX.

¹⁰⁸ *ABA Diversity Action Plan*, *supra* note 101, at 2.

encourages all subgroups and organizations to “foster an atmosphere of inclusion to assist in retaining judges and lawyers of color, judges and lawyers of various religious affiliations, women judges and lawyers, judges and lawyers with disabilities, LGBT judges and lawyers, senior and young lawyers once they have become members of the Division.”¹⁰⁹

The ABA recognizes that diversity is particularly important on the bench, including the administrative law judiciary.¹¹⁰ It seeks the participation of judges and lawyers of color, women judges and lawyers, judges and lawyers with disabilities, judges and lawyers of various religious affiliations, LGBT judges and lawyers, and young lawyers on panels, task forces, and working groups.¹¹¹ Furthermore, the Judicial Division asks its stakeholders to provide judges and lawyers of color, women judges and lawyers, judges and lawyers with disabilities, judges and lawyers of various religious affiliations, LGBT judges and lawyers, and newer judges and lawyers with opportunities and training to take on leadership roles at both the Conference and Division levels.¹¹² As seen in the third case study below, a lack of LGBT judges and candidates often makes others feel excluded.¹¹³

All Judicial Conferences’ Nominating Committees should be guided by the principles of excellence, commitment, and diversity when nominating persons for elective office.¹¹⁴ This is particularly important because judicial positions ideally reflect the people that see them on a daily basis. It can be difficult to spontaneously implement, so I will share an example of how members of the Oregon State Bar implemented a facet of the ABA Judicial Division Diversity Action Plan. The Oregon State Bar has a particularly organic method of encouraging diversity in our state and district benches. Certain specialty groups—the Oregon Hispanic Bar Association, the National Bar Association, the Oregon Women Lawyers, the Oregon Gay and Lesbian Bar Association, and the Oregon Asian Pacific American

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See infra*, Part IX.

¹¹⁴ ABA Diversity Plan Action Plan, *supra* note 101, at 39.

Bar Association—shared significant frustration when the then-governor appointed three white attorneys (one of whom was a straight male) to the Multnomah County bench in a one-month period. The circumstances of how the open seats came to be were not controversial—the governor tapped one sitting judge for a higher appellate seat and two more retired—but the ultimate selections led to a sea change in how the specialty bars operated with each other.

In Oregon circuit courts, the governor and the presiding judge of each county accepts input from the local bar.¹¹⁵ In Multnomah County, the state’s largest county, the Multnomah Bar Association Judicial Screening Committee (JSC) is made up of seventeen local attorneys and one public member who gather and analyze the credentials of judicial applicants for seated bench and pro tem appointments.¹¹⁶ After checking references, reviewing resumes, and interviewing candidates, the JSC offers a comprehensive and candid assessment of each candidate’s judgment for a seat.¹¹⁷ The JSC is not supposed to weigh anything other than the temperament of each individual candidate.¹¹⁸ Specifically, the JSC is supposed to consider whether each candidate has operated in a non-discriminatory manner in the workplace.¹¹⁹ The JSC’s quantification of each candidate is sent to both the governor and to the Multnomah County presiding judge.¹²⁰

In 2013, the JSC interviewed over fifty applicants for the three open judicial seats.¹²¹ The then-governor adopted the JSC’s recommendations and appointed three highly qualified attorneys to the bench, but none were persons of color. Unfortunately, the JSC’s failure to include diversity as a consideration for the bench—indeed,

¹¹⁵ See, e.g., http://www.mbar.org/assets/jsc_process.pdf.

¹¹⁶ *About Us*, MULTNOMAH BAR ASS’N, <https://www.mbar.org/about-us/about-us.html> (last visited June 1, 2017).

¹¹⁷ *Multnomah Bar Association Judicial Screening Process*, MULTNOMAH BAR ASS’N 6 (June 2016), https://www.mbar.org/assets/jsc_process.pdf.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1.

¹²¹ *Judges Appointed by John Kitzhaber*, BALLOTPEdia, https://ballotpedia.org/Judges_appointed_by_John_Kitzhaber (last visited Apr. 19, 2017).

the strict instructions to disregard diversity in the first place¹²²—led to an increased perception of deep-seated bias among the Multnomah Bar Association in that County. The state’s legal specialty bars¹²³ then brainstormed a way to inform the Governor and United States senators of what was important to them—by replicating the method of the JSC (checking references, interviewing candidates, and reviewing submitted materials) but with a *focus* on diversity instead of asking each candidate how he or she operated free of discrimination in the work place.¹²⁴

Now, an applicant for judicial appointment submits two application packets—one to the local county bar and the second to the Oregon Judicial Diversity Coalition (the Coalition).¹²⁵ The Coalition is now an established group that seeks to diversify the judicial bench by identifying highly-qualified minority judicial candidates to Oregon’s Governor.¹²⁶ The Coalition schedules times to meet with each candidate to pose questions of particular importance to their constituents.¹²⁷ At the end of each interview, the individual specialty group determines on its own whether or not to endorse the judicial applicant for a gubernatorial appointment or a senatorial nomination.¹²⁸ Thus, the supporting candidate might have as many as five separate letters in a packet for the Oregon Senate or the U.S. Senate, respectively. This also brings awareness to the selecting body of the importance of diversity to the bar and its constituents.

The questions presented to each candidate highlight what is relevant to the members of the Coalition. The fourth question on the application packet reads:

¹²² *Multnomah Bar Association Judicial Screening Process*, *supra* note 117, at 6.

¹²³ Disclosure: the author of this piece was, at that time, on the Oregon Hispanic Bar Association’s Board of Directors.

¹²⁴ *Oregon State Bar Judicial Vacancy Update*, OR. ST. BAR, <https://www.osbar.org/judicial/judicialvacancy.html> (last visited Dec. 14, 2016).

¹²⁵ *Id.*

¹²⁶ *Oregon Asian Pacific American Bar Association Judicial Endorsements*, OR. ASIAN PAC. AM. BAR ASS’N, <http://oapaba.org/judicial.endorsements> (last visited June 1, 2017).

¹²⁷ *Id.*

¹²⁸ *Id.*

To the extent not evident in your resume or other application materials, please describe your involvement in or with activities or issues relevant to the following minority organizations or communities, or other historically disadvantaged groups:

- a. Oregon Asian Pacific American Bar Association (OAPABA) or any of its affiliates or the APA community;
- b. Oregon Chapter of the National Bar Association (OC-NBA) or any of its affiliates or the communities served by the OC-NBA or its affiliates;
- c. OGALLA: The LGBT Bar Association of Oregon or any of its affiliates or the LGBTQ community;
- d. Oregon Hispanic Bar Association or any of its affiliates or the Hispanic/Latino community;
- e. Any other organization, community or other historically disadvantaged groups not mentioned above.¹²⁹

The fifth question reads, “To the extent not evident in your resume or other application materials, please describe your involvement in civic and community activities, and provide specific examples of the nature and degree of your involvement.”¹³⁰ The oral questions are equally calibrated to draw out each candidate’s thoughts on diversity. The Coalition is proud of the work done within the state to increase the number of diverse judges as well as the demonstration of its own commitment to diversity to the Oregon State Bar.

VII. CASE STUDY ONE: THE EXHIBIT OF @ERIOUSAQ

In August 2015, the Oregon Department of Justice (Oregon DOJ) received a new surveillance tool called Digital Stakeout, which searches social media for certain keywords published by users within

¹²⁹ *Id.*

¹³⁰ *Id.*

specific locations. The next month, an investigator at the Oregon DOJ, used Digital Stakeout to filter Twitter users based in Salem, Oregon, using the hashtag #blacklivesmatter.¹³¹ A hashtag begins with the # sign followed by keywords, used by Twitter to track keywords trending on its platform.¹³² One Twitter account, @EriousEsq, was prominent among the filtered Twitter users.¹³³ The user's feed was active and included other hashtags that called attention to his ethnicity and gender.¹³⁴ One of the images @EriousEsq used in January 2015 was that of a silhouette of a man in crosshairs.¹³⁵ The investigator concluded that the image was a clear and probable death threat to Salem police officers.¹³⁶ The investigator shared selections of the Twitter account and the image with his supervisor and others in the Oregon DOJ office.¹³⁷ The supervisor shared the same conclusion as the investigator that the tweets were troubling and that @EriousEsq was likely a threat to the safety of police officers.¹³⁸ The supervisor then spoke with the chief counsel for the department, as well as another supervisor. The chief counsel in turn recommended that the investigator prepare a "threat assessment" on the Twitter user.¹³⁹ To do so, the investigator downloaded and analyzed @EriousEsq's entire Twitter feed, which was comprised of several years' worth of political activism and commentary.¹⁴⁰

¹³¹ *Id.*

¹³² *In re CTLLI, LLC*, 528 B.R. 359, 366 (Bankr. S.D. Tex., 2015).

¹³³ *Id.*

¹³⁴ See @EriousEsq, TWITTER (Dec. 15, 2016, 3:24 PM), <https://twitter.com/EriousEsq/status/809539692441968640> ("#blackmencook" for example). @EriousEsq is a prolific social media user; posting images and quips on a regular basis. *Id.*

¹³⁵ Casey Parks, *Oregon's Top Civil Rights Lawyer Sues Attorney General Over Black Lives Matter Profiling Scandal*, THE OREGONIAN (Oct. 26, 2016), http://www.oregonlive.com/politics/index.ssf/2016/10/oregon_civil_rights_suit.html.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* However, to be fair to the supervisor, he had only heard a verbal description of the image, rather than having seen it. *Id.*

¹³⁹ *Id.*

¹⁴⁰ Johnson v. Rosenblum, No. 6:16-cv-02052, 2016 WL 6277824 (D. Or. Oct. 26, 2016).

Two weeks later, the investigator prepared and presented this ‘threat assessment’ for Oregon’s Attorney General Ellen Rosenblum.¹⁴¹ The Attorney General was outraged, but not for the reasons anticipated by those who had decided to give her the information.¹⁴² Instead, she was furious at the author of the report and his cohorts for three reasons.¹⁴³ First, the Attorney General had not authorized or condoned the Twitter investigation or an act of profiling of any kind.¹⁴⁴ Second, she was quick to realize that the image was not of an Oregon police officer about to be executed, but rather the logo of the rap group Public Enemy.¹⁴⁵ Third, the Twitter user @EriousEsq was Erious Johnson,¹⁴⁶ the Director of Civil Rights for the Office of the Attorney General.¹⁴⁷ Johnson was also a colleague of the investigator and the supervisory attorneys and reported directly to the Attorney General.¹⁴⁸ In other words, he was a colleague and peer of the men who considered him a threat and worthy of being profiled.¹⁴⁹

To her credit, Rosenblum was shocked and “deeply troubl[ed]” by the investigator’s “act of profiling.”¹⁵⁰ She apologized to Johnson publicly and vowed to “get to the bottom of this.”¹⁵¹ Tweedt later described Rosenblum as “very angry about the memo.”¹⁵²

¹⁴¹ Interestingly, Attorney General Rosenblum was the chair of the ABA Diversity Plan. *ABA Diversity Report*, *supra* note 37.

¹⁴² Parks, *supra* note 135.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See @EriousEsq, TWITTER, <https://twitter.com/EriousEsq>.

¹⁴⁷ About Us: Erious Johnson, OREGON DEPARTMENT OF JUSTICE, <http://www.doj.state.or.us/about/pages/agoffice.aspx#Johnson> (last visited Apr. 19, 2017).

¹⁴⁸ *Id.*

¹⁴⁹ Johnson v. Rosenblum, No. 6:16-cv-02052, 2016 WL 6277824 at *1 (D. Or. Oct. 26, 2016).

¹⁵⁰ Parks, *supra* note 135.

¹⁵¹ Conrad Wilson, *Oregon AG Apologizes to Profiled DOJ Employee*, OREGON PUBLIC BROADCASTING (Nov. 17, 2015, 10:27 AM), <http://www.opb.org/news/article/oregon-attorney-general-apologizes-to-profiled-doj-employee/>.

¹⁵² Carolyn D. Walker, *Investigation Report*, THE OREGONIAN (Apr. 6, 2016), http://media.oregonlive.com/politics_impact/other/investigation.pdf.

Rosenblum hired an independent lawyer, Carolyn Walker, to examine the threat assessment and the data collection itself by the Criminal Justice Division.¹⁵³ Walker's report, published in April 2016, was equally scathing.¹⁵⁴ It detailed for the public, for the first time, that the Attorney General had immediately ordered that all social media monitoring software programs be discontinued.¹⁵⁵ It also dropped a blunt bombshell on the Oregon legal community: "Once [the investigator] conducted the search, the lack of a diverse or alternative point of view regarding the import of the search results contributed to the belief that Mr. Johnson's posts constituted a potential threat to the police."¹⁵⁶ Furthermore, "[the investigator's] comments about this post, the crosshairs post and other of Mr. Johnson's posts demonstrates a possible lack of cultural awareness that may have affected his perception and led him to experience a heightened sense of concern."¹⁵⁷ Walker's report concluded, "[T]here were no reasonable grounds to believe that there was an existing threat in the Salem area at the time he conducted his search."¹⁵⁸

The Attorney General acted upon the report.¹⁵⁹ She implemented mandatory training in cultural competency and implicit bias of all Oregon DOJ employees in November 2016.¹⁶⁰ She demoted Tweedt¹⁶¹ and moved him to an office three doors down from Johnson's Salem office.¹⁶² As of October 2016, Johnson has sued

¹⁵³ Denis C. Theriault, *Black Lives Matter: Oregon Justice Department Searched Social Media Hashtags*, THE OREGONIAN (Nov. 10, 2015), http://www.oregonlive.com/politics/index.ssf/2015/11/black_lives_matter_oregon_just.html.

¹⁵⁴ Walker, *supra* note 152, at 22.

¹⁵⁵ *Id.* at 5.

¹⁵⁶ *Id.* at 6.

¹⁵⁷ *Id.* at 14.

¹⁵⁸ *Id.* at 28.

¹⁵⁹ Parks, *supra* note 135.

¹⁶⁰ *Id.*

¹⁶¹ *Oregon's Attorney General Demotes Darin Tweedt, Head of Criminal Division*, THE OREGONIAN (Jan. 22, 2016), http://www.oregonlive.com/politics/index.ssf/2016/01/oregons_attorney_general_d emot.html.

¹⁶² Nigel Jaquiss, *Oregon Department of Justice Civil Rights Chief Intends to Sue his Agency over Black Lives Matter Surveillance*, WILLAMETTE WEEK (Apr.

Rosenblum in her official capacity as well as the supervisory attorneys and the investigator, alleging that he was the victim of discriminatory employment practices.¹⁶³

In my opinion, what happened to Johnson is atypical only in its publicity. None of the first few DOJ employees had the appropriate cultural competency to understand the underlying meanings of the various hashtags, particularly the Public Enemy logo. Williams, in particular, made several assumptions, based on Johnson's race and statements, that "blacklivesmatter" must correlate to antipathy to the police and law enforcement which would result in violence. Walker's report concludes, and I agree, that the DOJ had "a lack of training on anti-racial profiling and/or anti-bias in the workplace as applied to law enforcement/support activities" as well as a "lack of racial diversity and cultural competency within the CJD that may have contributed to the situation that prompted this investigation."¹⁶⁴

VIII. CASE STUDY TWO: THE UNHAPPY ALJ

I posit that the lack of cultural competency and diversity at the Oregon DOJ is similar to the Oregon Office of Administrative Hearings (OAH). To confirm my supposition, I interviewed an ALJ who worked at OAH.¹⁶⁵ This anonymous ALJ¹⁶⁶—whom I decided to call Jessie—identifies as queer. Jessie described the panel as "overwhelmingly white and straight."¹⁶⁷ Jessie says that "at most," only a quarter of the Oregon ALJs at OAH are female. "That includes me, queer presenting as a different gender, so it could be as low as 8% who present as female." Jessie's hiring and promotion process was frustrating, based on a "bar-exam style of scoring things such as buzzwords in a cover letter." Jessie described the method of promoting ALJs as an "inadequate, semi-blind, closed-universe that

15, 2016), <http://www.wweek.com/news/2016/04/15/oregon-department-of-justice-civil-rights-chief-intends-to-sue-his-agency-over-black-lives-matter-surveillance/>.

¹⁶³ *Johnson v. Rosenblum*, 2016 WL 6277824, at *1.

¹⁶⁴ Walker, *supra* note 123, at 29–30.

¹⁶⁵ Telephone and email interviews by Judith A. Parker with Jessie, ALJ, OAH (Dec. 30, 2016, Jan. 1-3, 2017, Feb. 9, 2017).

¹⁶⁶ Because of the frank and candid sentiments expressed, I am keeping this ALJ's identity confidential.

¹⁶⁷ Telephone interview, *supra* note 165.

ignores the experience and current work of an employee in favor of a numerical value.” In its attempt to eliminate bias, the government instead impersonalizes employees to a single numeric value drawn from limited information rather than considering the employee based upon performance. Rather than being rewarded, Jessie experienced each round of hiring and promotion as an “opportunity to make an error and be ousted.”

Managerial advancement was based on giving each candidate a period of time to lead a department, then hiring whomever they think did best. The problem with this method, as explained by Jessie, is that the collective bottom-line comfort level outweighs the inherent strengths of diverse candidates. This comfort level leads to hiring practices and promotion practices that perpetually result in white males receiving positions of leadership. Diversity is not rewarded or even acknowledged. Doing so stifles the desire of diverse ALJs to remain at the job¹⁶⁸ and ALJs like Jessie perceive that there is little potential for a long-term career.

In addition to a slow spiral of lack of motivation for individuals like Jessie, a lack of diversity ALJ benches harms the public. Diversity is important because petitioners should be able to see individuals who reflect them make adjudicative decisions.¹⁶⁹ When petitioners see a person of color, a disabled person, or a woman in the role of an ALJ, it shows that there are fair employment practices. Furthermore, diversity is important at every employment level; it is not just enough to *hire* diverse ALJs, because for an ALJ—as reflected in Jessie’s experience—promotion and further education are equally as important to reflect diversity as urged by the ABA’s initiative.¹⁷⁰

If the OAH were to adopt the ABA’s initiative—and actively recruit for placement and promotion on the basis of diversity—Jessie’s situation would likely not be as bleak. The increase in problem-solving by diverse colleagues would encourage and motivate ALJs, thereby providing more stability for ALJs like Jessie.

¹⁶⁸ *ABA Diversity Action Plan*, *supra* note 101, at 5.

¹⁶⁹ *Id.* at 5.

¹⁷⁰ *Id.* at 2.

IX. CASE STUDY THREE: NO NATIVE AMERICAN REPRESENTATION
LEADS TO A LACK OF JUSTICE

At my fellowship presentation, I brought up the recent criminal trial of the Harney County occupiers. This was a significant narrative in Oregon, beginning January 2, 2016, when an armed group of government protesters occupied the federal Malheur National Wildlife Refuge for forty-one days.¹⁷¹ While the protesters were there, they videotaped themselves sitting in the refuge offices, brandishing guns, and destroying Native American artifacts. The United States Department of Justice indicted¹⁷² the occupiers on charges of conspiracy to impede federal employees,¹⁷³ possession of firearms in federal facilities,¹⁷⁴ use and carrying of firearms in relation to a crime of violence,¹⁷⁵ and theft of government property¹⁷⁶ (which was confined to stealing a government truck to drive into town). However, despite video proof showing the occupiers manhandling Native American artifacts¹⁷⁷ and bulldozing through sacred burial grounds while building a makeshift road,¹⁷⁸ and despite the Native American Graves Protection and Repatriation Act (NAGPRA),¹⁷⁹ a federal law criminalizing such behavior, the U.S.

¹⁷¹ Hal Bernton, *Jury acquits leaders of Malheur Wildlife-Refuge standoff*, THE SEATTLE TIMES (Oct. 27, 2016, 4:15 PM), <http://www.seattletimes.com/seattle-news/crime/verdict-near-in-malheur-wildlife-refuge-standoff-trial/>.

¹⁷² *United States v. Bundy*, No. 3:16-CR-00051-BR, 2016 U.S. Dist. LEXIS 36809 (D. Or. Mar. 22, 2016). See also <http://media.oregonlive.com/oregon-standoff/other/2016/03/09/SUPERSEDEDINGINDICT3916.pdf>.

¹⁷³ 18 U.S.C. § 372 (2012).

¹⁷⁴ 18 U.S.C. § 930(b) (2012).

¹⁷⁵ 18 U.S.C. § 924(c)(1)(A) (2012).

¹⁷⁶ 18 U.S.C. § 641 (2012).

¹⁷⁷ Red Power Media, *Wildlife Refuge Occupiers Rummage Through Native Artifacts*, YOUTUBE (Jan. 20, 2016), <https://www.youtube.com/watch?v=dpYhI2aCogU>.

¹⁷⁸ Kirk Siegler, *Oregon Occupation Unites Native American Tribes to Save Their Land*, NPR (Oct. 27, 2016, 7:00 PM), <http://www.npr.org/2016/10/27/499575873/oregon-occupation-unites-native-american-tribes-to-save-their-land>.

¹⁷⁹ 25 U.S.C. § 3001 (2012).

Attorney did not indict the seven main occupiers on NAGPRA violations.¹⁸⁰

The failure to indict any of the defendants with NAGPRA violations was a stunning blow to Native Americans who had been promised an archaeological field assessment by the FBI.¹⁸¹ As one Native American attorney expressed, “It made me sick to my stomach knowing the mistreatment of items that are incredibly important spiritually and religiously.”¹⁸² He continued, “As an attorney, I was disappointed but not entirely surprised. The failure to bring charges on all crimes seemed to be yet another message that our culture doesn’t matter.”¹⁸³ The failure of the U.S. Attorney’s office to charge the occupiers with NAGPRA charges offended Native Americans in Oregon, Washington, and Idaho, whether in the legal practice or not.¹⁸⁴ The compounding blow of the jury’s acquittal on all conspiracy and gun charges for the first six defendants rubbed salt in the wounds of Native peoples.¹⁸⁵ The outrage felt during the occupation,¹⁸⁶ coupled with the failure to include a NAGPRA indictment for the first round of occupiers, led the U.S. Attorney to consider internal changes in the composition of its attorneys such as hiring a more diverse staff, with the local media citing “implicit bias favoring white defendants.”¹⁸⁷

¹⁸⁰ United States v. Bundy, No. 3:16-CR-00051-BR, 2016 U.S. Dist. LEXIS 36809 (D. Or. Mar. 22, 2016).

¹⁸¹ The Oregonian/OregonLive, *FBI Statements on end of Oregon standoff*, THE OREGONIAN (Feb. 11, 2016, updated Feb. 23, 2016), http://www.oregonlive.com/oregon-standoff/2016/02/fbi_statement_on_end_of_oregon.html.

¹⁸² In-person and telephone interviews by Judith A. Parker with Tribal Official (Dec. 24, 2016, and June 2, 2017).

¹⁸³ *Id.*

¹⁸⁴ Siegler, *supra* note 178.

¹⁸⁵ *Id.*

¹⁸⁶ Ian K. Kullgren, *Burns Paiute Tribe: Militants Need to Get Off ‘Our Land,’* THE OREGONIAN (Jan. 6, 2016, updated Feb. 22, 2016), www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/burns_piaute_tribe_militants_s.html.

¹⁸⁷ Karina Brown & Nigel Jaquiss, *The Bundy Acquittal Isn’t Just Shocking—It’s Part of a Pattern of Arrogant Bungling by the U.S. Attorney for Oregon*, WILLAMETTE WEEK (Nov. 1, 2016),

If the U.S. Attorney's office had more attorneys of color or Native American attorneys¹⁸⁸ someone very likely would have pointed out that NAGPRA was an appropriate charge against the first seven defendants. It would have fostered greater trust of Oregon, Washington, and Idaho's tribal leaders who would not have felt as disrespected twice-over. Moreover, the attorney heard and acknowledged would likely want to remain working in that office.

X. RECOMMENDATION ONE: OFFICES, DIRECTORS, HIRING MANAGERS, AND THE OPM SHOULD IMPLEMENT THE ROONEY RULE

In 2002, two African-American National Football League (NFL) head coaches—Tony Dungy from the Tampa Bay Buccaneers¹⁸⁹ and Dennis Green of the Minnesota Vikings¹⁹⁰—were fired from their positions. The respective NFL franchises anticipated that any outrage would be limited to the specific fans. But rather than viewing the firings as purely performance based—Dungy had just completed a winning season while Green had nine winning seasons previously—African-American fans and the sports media across the country reacted to the firings as proof of insipid, inherent racism.¹⁹¹ Johnnie Cochran and a prominent civil rights law firm released a study examining the higher termination rates for African-American coaches, regardless of whether or not they had a winning record.¹⁹² The statistics laid out by the Cochran report quantified an unsettling practice in the NFL:

<http://www.wweek.com/news/2016/11/02/the-bundy-acquittal-isnt-just-shocking-its-part-of-a-pattern-of-arrogant-bungling-by-the-u-s-attorney-for-oregon/>.

¹⁸⁸ *ABA Diversity Action Plan*, *supra* note 101, at 2.

¹⁸⁹ Len Pasquarelli, *Bucs Fire Dungy After Another Playoff Failure*, ESPN (Jan. 14, 2002), <http://static.espn.go.com/nfl/news/2002/0114/1311487.html>.

¹⁹⁰ Chris Mortensen, *Sources: Barring Change of Heart, Owner to Fire Green*, ESPN (Jan. 4, 2002), <http://www.espn.com/chrismortensen/s/2002/0103/1305110.html>.

¹⁹¹ Mark W. Wright, *Blackout: African American Coaches Remain on the Sidelines*, 109 THE NEW CRISIS 2, 14–15 (Mar./Apr. 2002).

¹⁹² JOHNNIE L. COCHRAN, JR. & CYRUS MEHRI, BLACK COACHES IN THE NATIONAL FOOTBALL LEAGUE: SUPERIOR PERFORMANCE, INFERIOR OPPORTUNITIES (Merri & Skalet, PLLC 2002).

- African-American coaches averaged more wins than white coaches per year;
- African-American coaches averaged 2.7 more wins than white coaches in their respective first seasons;
- African-American coaches averaged 1.3 more winning games than white coaches in their respective last seasons; and
- African-American coaches led their teams to the playoffs more frequently than white coaches.¹⁹³

The fallout from the Cochran Report pushed the NFL, the country's largest sports franchise, to implement the "Rooney Rule."¹⁹⁴ Named after Dan Rooney, the current owner of the Pittsburgh Steelers, the rule requires NFL teams to interview diverse candidates for head coaching and senior football operation jobs.¹⁹⁵ Rooney was the then-chair of the league's diversity committee.¹⁹⁶ He, along with football star Kellen Winslow and NFL executive John Wooten, proposed implementing a rule to ensure that diverse coaches would be considered for (not necessarily hired for) head coaching positions.¹⁹⁷ In addition, the NFL would:

- Commit to interviewing minority candidates for each head coaching job opening (apart from teams which had previously committed to internal hiring);
- Create a coordinator/assistant head coach databank; and
- Allow assistant coaches of playoff teams to engage in early interview opportunities (rather than having to wait for the off-season).¹⁹⁸

The Rooney Rule works to combat unconscious bias—to rebut the unrecognized presumption that an owner might not recognize its own bias concerning a minority group. At present, all senior football positions within the NFL must include an interview with an ethnic

¹⁹³ *Id.*

¹⁹⁴ See Generally Brian W. Collins, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870 (2007).

¹⁹⁵ See Generally Douglas C. Proxmire, *Coaching Diversity: The Rooney Rule, Its Application and Ideas for Expansion*, AM. CONST. SOC'Y FOR L. AND POL'Y (Dec. 2008), <https://www.acslaw.org/files/Proxmire%20Issue%20Brief.pdf>.

¹⁹⁶ *Id.* at 3.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

minority.¹⁹⁹ The Rooney Rule has teeth—the league fined a team \$200,000 for failing to interview African-American candidates for a vacant head coaching position.²⁰⁰ In the past fourteen years, the Rooney Rule has seen successes as well as criticism.²⁰¹ The Rooney Rule helped increase the number of African-American assistant coaches from two in 2002 to seven four years later.²⁰² Within the first nine years of the Rooney Rule’s implementation, ten of the first-time head coaches were diverse.²⁰³ Since 2012, the picture has been bleaker; as of 2016, only three coaching staffs have at least 50% minority coaches and only one first-time head coach was a person of color.²⁰⁴ While the Rooney Rule has worked in the past, the biggest risk to earnest implementation is the sham interview system, in which a franchise does not interview anyone or, to circumvent the rule, conducts only symbolic interviews.

Other businesses have implemented their own versions of the Rooney Rule in their hiring processes. In the summer of 2015, Facebook tested the Rooney Rule in its hiring of upper-level management positions.²⁰⁵ Cities have adopted the requirement as well. The city council in Portland, Oregon, voted unanimously to require all city agencies and commissioners to interview at least one qualified minority, woman, and disabled candidate during bureau

¹⁹⁹ Jarrett Bell, *Minority snubs might lead to Rooney Rule overhaul*, USA TODAY (Jan. 18, 2013, 12:49 PM), <http://www.usatoday.com/story/sports/nfl/2013/01/18/rooney-rule-minority-hiring-coaches-general-managers/1845371/>.

²⁰⁰ Mark Maske, *Lions’ Millen is Fined \$200,000*, The Washington Post (July 23, 2003), https://www.washingtonpost.com/archive/sports/2003/07/26/lions-millen-is-fined-200000/28c20bfc-b3c4-4cf1-8d1e-28c29147dd8b/?utm_term=.983a9bc103b0

²⁰¹ Mike Sando, *Five signs NFL’s Rooney Rule isn’t working*, ESPN (July 19, 2016), http://www.espn.com/nfl/story/_/id/17103070/five-signs-nfl-rooney-rule-working.

²⁰² RICHARD LAPCHICK, BOMA EKYOR, AND HORACIO RUIZ, THE 2006 RACIAL AND GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 17, 3(2007).

²⁰³ Bell, *supra* note 199.

²⁰⁴ Sando, *supra* note 201.

²⁰⁵ Deepa Seetharaman, *Facebook is Testing the ‘Rooney Rule’ Approach to Hiring*, THE WALL STREET J. (Jun. 17, 2015, 7:39 PM), <http://blogs.wsj.com/digits/2015/06/17/facebook-testing-rooney-rule-approach-to-hiring/>.

director positions.²⁰⁶ The ordinance, called the “Charles Jordan Standard” after the city’s first African-American city commissioner, does not mandate “competitive recruitments.”²⁰⁷ Doing so requires an applicant to voluntarily disclose their race, ethnicity, gender, and disabled status.²⁰⁸ While it is true that opening the door might lead to pretext terminations, I think that great benefits will flow from such deliberate selections.

Instead of negatively inferring that diverse candidates lower the bar, hiring committees should instead consider applicants with different points of view. I do not think every ALJ needs to have written on law review; I think that every ALJ needs to have the capacity of reading and writing administrative decisions. I do not think every ALJ needs to have attended a Tier One school; I do think that every ALJ needs to have the ability to communicate with petitioners in front of him or her.

XI. RECOMMENDATION TWO: OFFICES, DIRECTORS, HIRING
MANAGERS, AND THE OPM SHOULD DELIBERATELY AND
AFFIRMATIVELY HIRE DIVERSE ALJs

In this author’s opinion, the Office of Personnel Management’s hiring practices do not reflect a strident desire to increase diversity. A federal ALJ must have minimum qualifications including seven years of experience as a licensed attorney practicing in either litigation or administrative law and passing a competitive civil service exam (the OPM’s competitive examination), while employers must take into account an applicant’s Veterans’ Preference.²⁰⁹ Those applicants who make the initial cut of the OPM test are placed on the registry, and the names of the three geographically compatible top scorers are placed on the certificate list, which is sent to the hiring

²⁰⁶ Brad Schmidt, *Portland approves Rooney Rule to tackle diversity at top*, THE OREGONIAN (Jan. 6, 2016, 4:56 PM), http://www.oregonlive.com/portland/index.ssf/2016/01/portland_approves_rooney_rule.html.

²⁰⁷ PORTLAND, OR., BHR 16.05 (2016).

²⁰⁸ Schmidt, *supra* note 206.

²⁰⁹ 5 C.F.R. § 930.201 (2017).

office from the OPM.²¹⁰ An agency filling an ALJ vacancy can either hire a candidate who is not yet an ALJ off the OPM “register” or hire a sitting ALJ from another agency.²¹¹ On the federal level, there are twelve ALJs: four are women, one is Hispanic, one is Asian, and one is African-American.²¹² This is not sufficient. I argue that to comport with the ABA’s Initiatives, OPM should aggressively recruit and then hire diversity applicants. This will bring federal ALJ numbers in line with the expectations set out by Presidents Kennedy and Johnson to take affirmative action to ensure that applicants are employed in the first place.

XII. CONCLUSION

Our government leaders have shown their desire to champion diversity, but mere changes in the law are not sufficient. The legal community and particularly the ALJ community must also change the working environment, similar to the way Fortune 500 companies have successfully done so. It is not only for “the right reasons,” but also because it will create an environment where people will want to stay. Likewise, the public will also benefit by having an administrative bench more demographically reflective of the public. Diverse ALJs will increase the ability to solve problems and increase efficiency. The act of hiring diverse applicants will sweeten the proverbial milk.

²¹⁰ *Administrative Law Judges Fact Sheet*, U.S. OFFICE OF PERS. MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=Fact-Sheet> (last visited Apr. 19, 2017).

²¹¹ *Id.*

²¹² See *Directory of Judges*, FEDERAL ENERGY REGULATORY COMMISSION (updated Mar. 1, 2017), <http://www.ferc.gov/about/offices/oaljdr/oalj-dj.asp>.