


2015

Busy Doing Nothing: An Exploration of the Disconnect Between Gender Equity Issues Faced by Large Law Firms in the United Kingdom and the Diversity Management Initiatives Devised to Address Them

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Recommended Citation

Savita Kumra, *Busy Doing Nothing: An Exploration of the Disconnect Between Gender Equity Issues Faced by Large Law Firms in the United Kingdom and the Diversity Management Initiatives Devised to Address Them*, 83 Fordham L. Rev. 2277 (2015).

Available at: <https://ir.lawnet.fordham.edu/flr/vol83/iss5/5>

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**BUSY DOING NOTHING:
AN EXPLORATION OF THE DISCONNECT
BETWEEN GENDER EQUITY ISSUES
FACED BY LARGE LAW FIRMS
IN THE UNITED KINGDOM AND
THE DIVERSITY MANAGEMENT INITIATIVES
DEvised TO ADDRESS THEM**

*Savita Kumra**

INTRODUCTION

There is little doubt that the large law firm has undergone huge transformation in the last three decades. This has been as a consequence of widespread change in practice realities, resulting in changing market dynamics, fiercer competition for clients, and alterations in career paths, where individuals have moved from a largely internal labor market structure to a “boundaryless” model. Further changes have come in the form of deregulation in respect of delivery of key lines of service and a trend toward globalization of legal practice. These changes taken together have meant that large law firms now demand more labor and have had to access sections of the labor market they previously did not. Key among these groups is women, and we have seen a massive rise in the number of women both studying and practicing law. However, this increase in diversity within law firms has not resulted in expected increased inclusion at the senior levels of the profession, where male partners continue to outnumber females by approximately four to one.

To combat this issue, law firms have resorted to diversity management to signal their cognizance of the problem and that they are taking action. However, it is clear that these diversity policies have made little impact. This Article assesses why.

The Article has three parts: the first reviews the data showing women’s increased participation in the legal sector and assesses why increased

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participation has not led to inclusion at senior levels. The main barriers are macro and micro processes of social reproduction, poor access to mentors and influential business networks, and gender bias in society at large.

In the second part, the response by large law firms is assessed. This has largely consisted of “business case” approaches to diversity management. The key characteristics of these approaches are presented, as is an overview of key practices adopted by large law firms.

In the third and final part, an assessment is made of these responses to address the issues identified in the first part. This Article finds that the responses are inadequate in scope, focus, and intention, and as such, they constitute “empty shell” approaches to equality of opportunity and diversity. The Article concludes that large law firms, rather than tackle the deep-rooted and systemic factors that combine to produce discrimination, opt instead for an approach in which they are “busy doing nothing,” appearing to tackle the issue, but leaving the status quo unchallenged and unchecked.

I. WOMEN’S PARTICIPATION IN LARGE LAW FIRMS: ONE STEP FORWARD AND TWO STEPS BACK?

In many respects, the professional services could be considered a success story with regard to the increased participation of women in their ranks. Across the professional services, we have seen increasing numbers of women entrants with notable participation rates in law, accountancy, and management consultancy. As Sharon Bolton and Daniel Muzio note: “There seems little doubt that women have made huge progress; numerically dominating areas of the labour market and entering and succeeding in previously male dominated occupations and professional groups.”¹ Thus, in the United Kingdom, a Law Society poll shows that the number of female solicitors has more than quadrupled over the past decade, and the percentage of women in the profession has more than doubled, from 15 percent in 1980 to 38 percent in 2000.² Universities also note an increase in numbers, with women comprising 51 percent of law students and the number set to increase further.³ A similar position is reported in the United States, where women comprise 49 percent of law students⁴ (compared to just 10 percent in 1970) and 41 percent of associates.⁵

However, increased participation rates have not, as would be expected, resulted in gender equality at senior levels. Figures continue to indicate

1. Sharon Bolton & Daniel Muzio, *The Paradoxical Process of Feminization in the Professions: The Case of Established, Aspiring and Semi-Professions*, 22 WORK, EMP. & SOC’Y 282, 282 (2008).

2. Dan McDougall, *Women Now Joining the Legal Profession in Record Numbers*, SCOTSMAN, Sept. 11, 2001, at 7.

3. *Id.*

4. Jonathan D. Glater, *Women Are Closer to Being Majority of Law Students*, N.Y. TIMES, Mar. 26, 2001, at A1.

5. John Eckberg, *Female Lawyers Make Their Case; Percentages Changing—Except at the Uppermost Levels*, CINCINNATI ENQUIRER, Feb. 26, 2010, at B05.

alongside increased entry of women into key areas of the professional services has come vertical stratification and horizontal segmentation.⁶ We thus see at the partner level that only 14 to 17 percent of women make partner in the “Big 4” accounting firms,⁷ and in law firms in the United Kingdom, 21 percent of women are partners, compared with 49 percent of men.⁸

In seeking to assess the factors contributing to this frequently observed and stubbornly persistent picture, Ashly Pinnington and Jörgen Sandberg provide a useful analytical framework.⁹ In their view it may be useful to consider the literature on women lawyers and diversity in light of three explanations for the disproportionately high representation of men at equity partner. These are: micro and macro processes of social reproduction, organizational restructuring in the professions, and gender discrimination in society.

A. *Micro and Macro Processes of Social Reproduction*

Law firms are complex organizational structures, reflecting and reproducing historic conceptualizations of effective work practices and effective workers. Embedded within these culturally situated models are discriminatory factors, those which determine who is and who is not “one of us.” Hilary Sommerlad indicates stratification theory is a useful concept as it enables a focus on the structural barriers that produce labor market distortions which position women and others deemed as “outsiders” worthy of inferior rewards and lower social status.¹⁰ These processes occur despite action taken or choices made on the part of “outsiders” with the consequence that gender and race stratification become embedded in work organizations and are deemed inevitable.¹¹ From this perspective, it becomes apparent that organizational structures and processes perpetuate indirect discrimination favoring the dominant organizational group, rather than applying in a fair and neutral manner to all organizational members. As Sommerlad indicates, these processes have been surfaced by key commentators. Joan Acker, for example, draws attention to the notion of

6. See generally JOHN HAGAN & FIONA KAY, *GENDER IN PRACTICE: A STUDY OF LAWYERS' LIVES* (1995); Hilary Sommerlad, *Women Solicitors in a Fractured Profession: Intersections of Gender and Professionalism in England and Wales*, 9 INT'L J. LEGAL PROF. 213 (2002); Jeffrey Evans Stake et al., *Income and Career Satisfaction in the Legal Profession: Survey Data from Indiana Law School Graduates*, 9 J. EMPIRICAL LEGAL STUD. 939 (2007).

7. Alex Spence, *Big Four Firm Juggles the Numbers to Address Lack of Diversity*, TIMES (London), Oct. 2, 2012, at 35.

8. LAW SOC'Y, *TRENDS IN THE SOLICITORS' PROFESSION: ANNUAL STATISTICAL REPORT 2009*, at 15 (2009).

9. Ashly H. Pinnington & Jörgen Sandberg, *Lawyers' Professional Careers: Increasing Women's Inclusion in the Partnership of Law Firms*, 20 GENDER, WORK & ORG. 616 (2013).

10. See generally Hilary Sommerlad, *Minorities, Merit, and Misrecognition in the Globalized Profession*, 80 FORDHAM L. REV. 2481 (2012).

11. See generally CHARLES TILLY, *DURABLE INEQUALITY* (1998).

“gendered” organizations.¹² Linda Dickens, Catherine Itzin, and Janet Newman point to the pervasiveness of these processes, arguing they are the outcome of subtle practices, processes, and discourses representing, in Rosabeth Kanter’s terms, a “shadow” structure capable of circumventing the intentions of well-considered equal opportunity initiatives.¹³

Robin Ely and Debra Meyerson explore structural gender discrimination, querying why women remain relatively powerless at work.¹⁴ They suggest it is because organizations fail to question and alter their dominant ideals of appropriate and effective ways to define and accomplish work, recognize and reward competence, and understand and interpret behavior. Workplace social practices thus tend to favor a dominant group—namely white heterosexual men—without question and often in subtle and insidious ways. These workplace social practices include formal policies and procedures, such as managerial directives, job descriptions, and performance appraisal systems.¹⁵ They also encompass “informal practices, norms, and patterns of . . . how work [should] be done”; the nature of relationships required to do the work; “the distribution of rewards and opportunities”; the way in which information is promulgated about how to advance in the organization; and crucially, “the organization’s tacit criteria for competence, commitment, and ‘fit.’”¹⁶ Many of these practices implicitly or explicitly bestow a higher value on the prototypical male, masculine identity, or masculine experience.¹⁷ Job descriptions for senior positions requiring masculine-gendered traits, such as “gravitas,” independence, and competitiveness, without due consideration to either female-gendered traits such as team working or empathy which may be equally relevant to job requirements, are one example of a formal procedure in organizations that is oppressively gendered. An example of an oppressively gendered informal practice is requiring unrestricted availability to work as evidence of one’s commitment to the organization, which can disadvantage women. Embedded within these social practices, which recognize and reward committed, hardworking employees seeking proactively to advance their own and the company’s goals, is a gender bias that reflects and maintains women’s relative disadvantage.

Through this analysis, the disproportionately high numbers of women choosing to specialize in, for example, family law can be explained partly by the interaction between organizational structures and processes,

12. See generally Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC’Y 139 (1990).

13. See Linda Dickens, *What HRM Means for Gender Equality*, 8 HUM. RESOURCE MGMT. J. 23 (1998); CATHERINE ITZIN & JANET NEWMAN, GENDER CULTURE AND ORGANIZATIONAL CHANGE: PUTTING THEORY INTO PRACTICE 1–7 (1995).

14. See generally Robin J. Ely & Debra E. Meyerson, *Theories of Gender in Organizations: A New Approach to Organizational Analysis and Change*, 22 RES. ORG. BEHAV. 103 (2000).

15. *Id.* at 115.

16. *Id.*

17. See generally LOTTE BAILYN, *BREAKING THE MOLD: WOMEN, MEN AND TIME IN THE NEW CORPORATE WORLD* (1993).

underlying assumptions about sex-differentiation in parenting roles, and resulting expectations that the “ideal worker,” able to work very long hours, is unlikely to be female. As such, those areas of legal practice, such as mergers and acquisitions, where hours are unpredictable and client demands are high, are likely to be deemed unsuitable for women, and areas such as tax law, where workflows are more predictable and hours more under individual lawyers’ control, become the domain of women and those from other nonnormative groups.¹⁸ In this way, the dominance of the “ideal” unencumbered worker remains intact,¹⁹ and those from nonnormative groups find themselves segmented into practice areas with lesser reward and lower status.²⁰ There are a number of practices within the firm that position women firmly in lower level strata. Key among these is access to mentors and influential business networks and long-hours work cultures.

1. Access to Mentors and Influential Business Networks

As a consequence of the segmentation processes outlined above, those from nonnormative groups find themselves unable to gain access to organizational resources necessary to advance in the global law firm. Key among these is access to well-positioned and influential mentors. Thus, those from nonnormative groups find they are excluded from situations and activities where informal mentoring relationships can develop—relationships their white, male, middle-class colleagues likely have access to and benefit from.²¹

Mentors provide their mentees with essential resources needed to progress in law firms. As Eli Wald indicates, they provide insight into technical issues, offer subject matter expertise, can advocate for their mentee, provide valuable insider knowledge of the firms’ inner-working and political structures,²² and, as key promotion points are reached, they can speak on behalf of their mentee and vouch for their suitability for advancement.²³ The altering of sector realities in the 1990s and 2000s, where intra-firm competition for talented associates and partners has become increasingly fevered, where the notion that “clients belong to the firm” has shifted to one in which clients belong to rainmaking partners. This makes mentorship and business networks even more critical to the development of “partner” skills and conversely makes the absence of

18. Sommerlad, *supra* note 10, at 2492.

19. *Id.*

20. Such assumptions generate a circular process of gender categorization, which in turn sustains “status value” and “gender status beliefs.” Cecilia L. Ridgeway, *Interaction and the Conservation of Gender Inequality: Considering Employment*, 62 AM. SOC. REV. 218, 221–23 (1997).

21. See Gwyned Simpson, *The Plexiglass Ceiling: The Careers of Black Women Lawyers*, 45 CAREER DEV. Q. 173, 184–85 (1996).

22. Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2255–56 (2010).

23. See Paula A. Patton, *Women Lawyers, Their Status, Influence, and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 173, 187–88 (2005).

mentor support and little or no access to business networks an all but insuperable hurdle for women lawyers. As we learn from research in the fields of mentoring and social networks, an effective mentoring relationship is dependent on three main factors: perceived similarity, perceived competence, and personal comfort.²⁴ This is endorsed by Deborah Rhode who points out women and minorities do not fare well on any of the three dimensions and are thus at a disadvantage.²⁵

2. Long Work Hours

For Wald, another key contributor to women's limited progression prospects in law firms is seemingly immutable working conditions.²⁶ Large law firms are widely acknowledged as requiring excessive and inflexible work hours from their members and are unlikely to reward those who seek reduced or flexible schedules. Such practices are frequently attributed to demanding clients, who, given the option, come to expect instant responsiveness and total availability.²⁷

However, as Rhode indicates, inflexible and extended work schedules are not inevitable, rather they are the outcome of choices made in respect of firmwide business models and the prioritization of high utilization and profitability, the raising of salary expectations, and the continuation of implicit assumptions regarding availability based upon the unencumbered man.²⁸ In addition to its economic value, time thus gains symbolic currency; a willingness to prioritize work over family life by submitting to demanding and extended work schedules becomes a proxy for qualities which are far more slippery and harder to quantify, such as commitment, ambition, and reliability under pressure.²⁹

B. Organizational Restructuring in the Professions

There have been radical shifts in the way legal work is done and the employment patterns of contemporary lawyers. David Wilkins observes that the practice of "lawyers spending all or even the majority of their careers within a single [firm]" is all but over,³⁰ and the more likely career

24. Belle Rose Ragins, *Antecedents of Diversified Mentoring Relationships*, 51 J. VOCATIONAL BEHAV. 90, 97 (1997).

25. Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1054 (2011).

26. See Wald, *supra* note 22, at 2256.

27. DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 6 (2001). See generally Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909 (2009) (discussing the nuances of the attorney's duty of loyalty to clients).

28. Deborah L. Rhode, Lecture, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207, 2211 (2002).

29. See Cynthia Fuchs Epstein & Carroll Seron, *The Symbolic Meanings of Professional Time*, in LEGAL PROFESSIONS: WORK, STRUCTURES AND ORGANIZATION, 79-94 (Jerry Van Hoy ed., 2001); Renée M. Landers et al., *Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms*, 86 AM. ECON. REV. 329, 342-46 (1996).

30. David B. Wilkins, *Why Global Law Firms Should Care About Diversity: Five Lessons from the American Experience*, 2 EUR. J.L. REFORM 414, 430 (2000).

model will be one of the “boundaryless career” in which individuals move frequently between employers and gain power, status, and financial reward as a consequence of doing so.³¹ For law firms, boundaryless careers pose a challenge: rather than relying on a system of extended associateship (usually lasting between eight to ten years) before partnership is achieved, and gaining value from the employee after approximately three to four years, career paths need to be shortened and value extracted at an earlier stage. From an employee perspective, there is the need to develop experience earlier in careers as there is the likelihood that the employee will need to convince new employers of their value and the transferability of their knowledge sooner rather than later.

There is evidence that firms are responding with alternative career models, moving away from the traditional up-or-out tournament, to one based on what Marc Galanter and William Henderson have termed the “elastic tournament,” whereby as opportunities for promotion to partner become more limited, career paths are lengthened and up-or-out is either abandoned or significantly limited, enabling the large number of associates required to serve clients needs to remain within the firm without attaining partnership positions.³² In this environment, opportunities for advancement become rarer and access to critical career enhancing levers such as key assignments, mentors, sponsors, and business networks become hotly contested and keenly sought.³³ The likelihood of women receiving career enhancing opportunities or being provided access to these key levers becomes yet more problematic as assumptions are made about their commitment and reliability, particularly if they carry disproportionate responsibility for matters at home.³⁴

That these changes have resulted in a more competitive work environment for anyone entering the legal profession is immutable; that they disproportionately impact women and other nonnormative lawyers is also not in doubt. However, it is worth asking whether this situation was inevitable and thus unavoidable, or whether it is the outcome of choices made in the knowledge that some groups would benefit and others would not. Wald’s analysis is particularly instructive here. In noting that the changes made to practice development are not inevitable, he explains how extending already lengthy working hours, maintaining high salaries whilst simultaneously firing or delaying promotion of existing associates, and choosing not to invest in new technology such that flexible and remote working could be accommodated are all decisions which do not necessarily make economic sense, but do serve the purpose of firmly cementing women

31. THE BOUNDARYLESS CAREER: A NEW EMPLOYMENT PRINCIPLE FOR THE NEW ORGANIZATIONAL ERA (Michael B. Arthur & Denise M. Rousseau eds., 1996).

32. Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1871–72 (2008).

33. *Id.* at 1913–21.

34. *See id.*

and other nonnormative lawyers into the position of “other” within the firm.³⁵

Through the invocation of a “hypercompetitive” work culture, lawyers retain their elite status and are deemed as “near-heroic” servants willing to pursue their clients’ interests on a 24/7 basis. The key point being that alterations to practice realities offered law firms the opportunity to redesign work structures and schedules to suit the needs not just of traditional groups within their ranks who have been successful, i.e., the ideal of the unencumbered white, middle-class man, but offered the opportunity for newer members of the firm with their own particular career needs and alternative trajectories to also forge successful and rewarding careers.³⁶ That large law firms have chosen, almost without exception, to ignore these possibilities in favor of business models based upon a more extreme version of traditional workplace practices indicates the extent to which a single model of success is embedded within law firms and how little appetite there is to see the model change even when the opportunity is presented.

C. Gender Discrimination in Society

Neoclassical labor market theory presumes that the allocation of jobs and resources in a free labor market economy is predicated upon supply and demand. The assumption is that discrimination will not occur as it is irrational and has no place in the functioning of an objective and efficient market system as it builds in additional costs, limits access to talent, and is thus uncompetitive. Where discrimination does occur, it is the market that will eradicate it as competitive pressures of profit maximization will always trump irrationally based decision making—of which discrimination is an example.³⁷ However, persistence of discriminatory labor market practices led neoclassical economists to seek an alternative explanation, which led to the development of human capital theory.³⁸ Through this perspective we find individuals’ position in the labor market is the result of the investment they make in developing their educational qualifications, skills, and experience so they are attractive to employers. Thus, if women “choose” to invest less in their education, training, and experience, it is because they have made a calculation that they are likely to spend more time in the domestic than the public sphere and the investment is likely to yield little return. The theory has proven highly attractive and has gained wide relevance in explaining differential achievement rates of particular groups

35. See generally Wald, *supra* note 22.

36. See *id.*

37. See generally Kenneth J. Arrow, *Some Models of Racial Discrimination in the Labor Force*, in *THE AMERICAN ECONOMY IN BLACK AND WHITE* (Anthony H. Pascal ed., 1971); Michael Reich et al., *Dual Labor Markets: A Theory of Labor Market Segmentation*, 63 *AM. ECON. REV.* 359, 359 (1973).

38. See generally Theodore W. Schultz, *Investments in Human Capital*, 51 *AM. ECON. REV.* 1 (1961).

in society.³⁹ However, the approach suffers from a number of drawbacks, not least of which is that it does not take into account socioeconomic factors which may limit individuals' ability to invest in their human capital.⁴⁰ We thus see that neoclassical approaches tend to exonerate employers from labor market inequalities, with a focus instead on decisions made by individual workers to explain their labor market position. So, if discrimination exists in relation to certain social groups and their position in the labor market, it is a natural outcome of supply-side factors rather than any dysfunction in the labor market. As Veronica Beechey notes, women's lower position in the labor market is attributed to their societally constructed, stereotypical characteristics, such as temperament, nature, or capabilities, rather than the construction of social structures and the underlying mechanisms that maintain them.⁴¹

As Susan McRae posits, women face many constraints as they choose how they will balance market work and family work and what priority they will give to one over the other. In terms of the basis upon which decisions are made, McRae indicates they typically fall into two categories: normative and structural. In the former comes a consideration of women's self-identity, gender relations in the family, and the attitudes of husband/partners.⁴² Into the latter comes issues such as the availability of appropriate jobs and the cost and availability of childcare of a suitable quality.⁴³ In a later article, McRae develops this theme, indicating women's career choices are not "random" or accidental.⁴⁴ It is evident women differ markedly in their attitudes to being mothers and mothering, and this difference is directly linked to their earning capacity.

Other explanations exist for the presence of labor market discrimination, including Marxist and Institutional perspectives, with labor market theories developed to support their key contentions, e.g., the Dual Labor Market Theory proposed by Peter Doeringer and Michael Piore.⁴⁵ However, it is clear these approaches have been eschewed in favor of neoclassical explanations, and within legal firms and the professional services generally, there is undoubtedly a reliance on gendered assumptions of what "women" are like and what "men" are like in the workplace and a preference for neoliberal discourses of meritocracy and human capital development to explain professional success or failure.

39. Geoffrey Wood et al., *Age Discrimination and Working Life: Perspectives and Contestations—A Review of the Contemporary Literature*, 10 INT'L J. MGMT. REVS. 425, 426–27 (2008).

40. DAVID L. COLLINSON ET AL., *MANAGING TO DISCRIMINATE* (1990).

41. See Veronica Beechey, *Women & Employment in Contemporary Britain*, in *WOMEN IN BRITAIN TODAY* 77–130 (Veronica Beechey & Elizabeth Whitelegg eds., 1986).

42. Susan McRae, *Returning to Work After Childbirth: Opportunities and Inequalities*, 9 EUR. SOC. REV. 125, 126–30 (1993).

43. *Id.*

44. Susan McRae, *Constraints and Choices in Mothers' Employment Careers: A Consideration of Hakim's Preference Theory*, 53 BRITISH J. SOC. 317, 332–34 (2003).

45. PETER B. DOERINGER & MICHAEL J. PIRE, *INTERNAL LABOUR MARKETS AND MANPOWER ANALYSIS* (1971).

* * *

In sum, as Wald has cogently argued, the combination of these factors proves ultimately “devastating” for women as they seek to forge their careers in the globalized law firm.⁴⁶ Increased reliance on long hours as a signal of commitment and loyalty to the firm serves to confirm the stereotype of women as under-committed and disloyal when they seek to combine their work and home roles. Anyone seeking to reduce their schedule or inject flexibility into their working lives is immediately viewed as someone who does not “get” how competitive the market is, how important it is to the firm that everyone gives 100 percent of their time and attention to firm matters, and only if everyone does this, will the firm “survive.”⁴⁷ It could be argued, Wald continues, that in some (though misleading) sense the ideology is gender neutral in that as long as 24/7 commitment is given, the rewards will accrue to anyone willing to give it—whether they be male or female. However, this is not the case. The nature of gender stereotyping is that there is an assumption of gender roles, and whether women want to be mothers or not is irrelevant; this wish is inferred on them and decisions are taken based on a stereotypical assumption rather than actual, observed behavior.⁴⁸ The presumption is thus that motherhood and the ability to commit 24/7 to the firm are mutually exclusive, even though technological advancements mean the work of a lawyer can be facilitated at work or at home.⁴⁹

We thus see the prospects for female advancement within the profession are becoming increasingly bleak through a combination of societal, structural, and normative factors. However, we have not seen a decline in the number of women attracted to careers in the law or a decline in law firms’ willingness to hire them. Also evident in recent years is an increasing engagement on the part of law firms with discourses of diversity management alongside the introduction of diversity management practices aimed at continuing the trend of attracting the “brightest” and the best into their ranks and maintaining claims to elite status. What approach to diversity management law firms have taken, what practices they have turned to, and how suited these are to addressing the issues identified above is discussed in the following part.

II. THE APPROACH TO DIVERSITY MANAGEMENT IN LARGE LAW FIRMS

Joanne Braithwaite has noted, in the United Kingdom, business case arguments have been used overwhelmingly to support adoption of diversity

46. See Wald, *supra* note 22, at 2256.

47. Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall As a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 1–2 (2003); Joan C. Williams, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMP. RTS. & EMP. POL’Y J. 287, 287–301 (2003).

48. Joan C. Williams & Elizabeth Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of “Carers” in the Workplace*, 13 DUKE J. GENDER L. & POL’Y 31, 31 (2006).

49. See *id.* at 41.

management approaches within law firms and frame policy choices and objectives.⁵⁰ The Law Society has promoted the approach, as evidenced in their Handbook, Charter, and Protocol.⁵¹ This has also been the case for government, as evidenced by a 2008 speech given by the (then) Secretary of State for Justice who emphasized the diversity-related business advantages for large law firms as they seek to secure international work.⁵²

Joanne Braithwaite further observes that in general terms, business case arguments are used to persuade organizations to voluntarily undertake diversity initiatives by linking workforce diversity to positive organizational factors,⁵³ which include an improvement in recruitment outcomes,⁵⁴ positive impact on employee performance,⁵⁵ reduction of the risk of discrimination-based litigation,⁵⁶ and reduced employee turnover leading to cost savings.⁵⁷ In their review of equality legislation, the U.K. government concluded good practice with respect to diversity management is synonymous with becoming an “employer of choice” and enables organizations to improve their standing with current and future employees and customers alike.⁵⁸

Business case arguments also have been used to demonstrate key mechanisms by which relations with clients can be enhanced. Thus, business case arguments have been deployed to assert a link between improved diversity and the enhanced ability of firms to serve new markets⁵⁹ and provide higher quality service to existing clients.⁶⁰ These features have come to represent the dominant approach to managing equality, described

50. Joanne P. Braithwaite, *Diversity Staff and the Dynamics of Diversity Policy-Making in Large Law Firms*, 13 LEGAL ETHICS 141, 147–50 (2010).

51. See generally LAW SOC’Y, DELIVERING EQUALITY & DIVERSITY: A HANDBOOK FOR SOLICITORS (2004).

52. Jack Straw, Lord Chancellor and Secretary of State for Justice, Address at Launch of Law Society “Markets, Justice and Legal Ethics” Campaign (Mar. 6, 2008).

53. Joanne P. Braithwaite, *The Strategic Use of Demand-Side Diversity Pressure in the Solicitors’ Profession*, 37 J.L. & SOC’Y 442, 451 (2010).

54. SARA RUTHFORD & SUE OLLEREARNSHAW, THE BUSINESS OF DIVERSITY 10–11 (2002).

55. See generally OPPORTUNITY NOW, EQUALITY AND EXCELLENCE: THE BUSINESS CASE (2001). See also CATALYST, THE BOTTOM LINE: CONNECTING CORPORATE PERFORMANCE AND GENDER DIVERSITY 2–3 (2004); EQUAL OPPORTUNITIES COMM’N, GUIDELINES FOR EQUAL OPPORTUNITIES EMPLOYERS (2006).

56. See Linda Dickens, *Walking the Talk? Equality and Diversity in Employment*, in MANAGING HUMAN RESOURCES: PERSONNEL MANAGEMENT IN TRANSITION (Stephen Bach ed., 2005).

57. See CATALYST, *supra* note 55; OPPORTUNITY NOW, *supra* note 55; R.S. KANDOLA & JOHANNA FULLERTON, DIVERSITY IN ACTION: MANAGING THE MOSAIC (1998).

58. DISCRIMINATION LAW REVIEW, DEP’T FOR CMTY. & LOCAL GOV’T, A FRAMEWORK FOR FAIRNESS: PROPOSALS FOR A SINGLE EQUALITY BILL FOR GREAT BRITAIN ¶ 6.1 (2007).

59. David B. Wilkins, *Valuing Diversity: Some Cautionary Lessons from the American Experience*, in MANAGING THE MODERN LAW FIRM 41–42 (Laura Empson ed., 2007); David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 856 n.9 (1998) [hereinafter Wilkins, *Ethical Obligations*].

60. See RUTHFORD & OLLEREARNSHAW, *supra* note 54, at 13.

by Janette Webb as a “market-orientated” conceptualization of the way in which differences can be accommodated.⁶¹

The approach adopted in the legal sector is not dissimilar to that found in the wider business community. In 2006, the Chartered Institute of Personnel and Development commissioned a survey to assess the extent to which employers have understood and taken action in respect of the business case for diversity.⁶² The survey was conducted among U.K. organizations and 285 individuals took part.⁶³ Findings revealed that in respect of key drivers for diversity, the main factors were legal pressures (cited by 68 percent of respondents), recruitment and retention of talent (cited by 64 percent of respondents), corporate social responsibility (cited by 62 percent of respondents), a wish to be seen as an “employer of choice” (cited by 62 percent of respondents), and because it makes business sense (cited by 60 percent of respondents).⁶⁴

A. *Implementing Diversity Management*

Research evidence suggests building a guiding team is the most effective way by which to ensure diversity management achieves key outcomes. In their study of the efficacy and effectiveness of diversity programs across a number of organizations Alexandra Kalev and her colleagues concluded:

Broadly speaking, our findings suggest that although inequality in attainment at work may be rooted in managerial bias and the social isolation of women and minorities, the best hope for remedying it may lie in practices that assign organizational responsibility for change . . . affirmative action plans and diversity staff both centralise authority over and accountability for workforce composition, diversity committees locate authority and accountability in an interdepartmental task force and may work by causing people from different parts of the organisation to take responsibility for pursuing the goal of integration.⁶⁵

Conducting her research in 2008, Joanne Braithwaite found only three of the large law firms in her study had appointed a member of staff with the title of “diversity manager.”⁶⁶ For others in the sample, the task had been assigned to members of the human resources department in addition to their other activities.⁶⁷ Diversity staff tended not to be legally trained, but all had a human resources background.⁶⁸ They were recruited either internally from broader human resources roles or hired externally from other professional services firms in the City where they had previous experience

61. Janette Webb, *The Politics of Equal Opportunity*, 4 GENDER WORK & ORG. 159, 163 (1997).

62. AHU TATLI ET AL., CHARTERED INST. OF PERS. & DEV., DIVERSITY IN BUSINESS: HOW MUCH PROGRESS HAVE EMPLOYERS MADE? FIRST FINDINGS (2006).

63. *Id.* at 2, 8.

64. *Id.* at 3.

65. Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 611 (2006).

66. See Braithwaite, *supra* note 50, at 150–51.

67. *Id.* at 151.

68. *Id.*

in diversity management.⁶⁹ However, those hired internally had no previous diversity experience as the activity was new.⁷⁰ Those hired externally provided their firms with a broader perspective and proven experience, with most external hires commenting that law firms were some way behind their fellow professional service firms.⁷¹

In addition to the creation of diversity roles within law firms, Braithwaite's study indicates a promotion of diversity activity through publication on firms' websites of both their commitment to diversity management and also evidence of their engagement with the diversity community via membership of and affiliations with diversity-related organizations, e.g., Opportunity Now, Stonewall, et cetera.⁷² Diversity committees were also evident in over half the firms.⁷³ These consisted of either partner-only subcommittees of the main board (which drew on information and data generated by working groups) or more broadly constituted committees, with a mixture of partners, associates, diversity staff, and at times, representatives of the non-lawyer workforce.⁷⁴ The remit differed across firms, but their diversity committees had responsibility for working with the firms' main board, producing diversity statements, collecting diversity-related data, and liaising with diversity specialists (where present) to consult internally on prioritization of key issues.⁷⁵

B. Diversity Management Practices in the Large Law Firm

In assessing the approach large law firms have adopted in their diversity management practices, it is evident two main types of intervention dominate. These can be termed demand-side initiatives and supply-side initiatives and each is discussed in turn.

1. Demand-Side Initiatives

For demand-side initiatives, the key policy lever utilized within the legal sector has been the mobilization of client pressure as means of eliciting change. One of the main drivers toward such change is a Law Society initiative, which may typify what Wilkins has termed demand-side diversity pressure.⁷⁶ However, even prior to Law Society intervention, there is evidence that private sector law firm clients had voluntarily opted to engage with the strategic use of demand-side diversity pressure. As Braithwaite notes, Mark Harding, U.K. General Counsel of Barclays, was one of the first to attract media attention when he announced a request for "staff diversity statistics" would be part of the selection process for law firms

69. *Id.*

70. *See id.*

71. *Id.*

72. *Id.* at 153.

73. *Id.*

74. *Id.*

75. *Id.*

76. *See generally* Wilkins, *Ethical Obligations*, *supra* note 59, at 856–58.

retained by the bank.⁷⁷ This announcement gained further significance because at the time it was made, he was chair of the General Counsel 100 Group, a committee of general counsel of FTSE 100 companies.⁷⁸

In 2009, the Law Society launched an initiative which may be viewed as an attempt to firstly endorse demand-side diversity pressures and secondly to formalize them.⁷⁹ The protocol is an entirely voluntary scheme, with the broadly stated aim of facilitating increased “diversity and inclusion” in the solicitors profession. No further detail is provided in respect of how this is to be achieved. The instrument contains two main parts. First, a Charter which invites providers of legal services to sign up to a statement, comprising a list of intentions (for example, to “[s]trive to achieve best practice in our recruitment, retention and career progression practices as employers”⁸⁰). The second part consists of a protocol, to which “purchasers of legal services” (i.e., clients) are invited to become “Protocol Partners.” This requires a simple “commitment . . . to collect[ing] and consider[ing]” standard diversity information from any law firms tendering legal work using a “model questionnaire.”⁸¹ Those signing up to the Protocol on Legal Procurement commit to considering the data in respect of the effectiveness of tendering firms equality policies collected through the protocol questionnaire in their ultimate decision on which firms to retain.⁸²

Braithwaite also found that U.K. City law firms were subject to varying forms of diversity-related pressure from potential clients.⁸³ This usually occurred during the “pitching” process, in which law firms bid for work.⁸⁴ Initially such pressure came from public sector clients arising from their additional statutory duties in this respect under U.K. law.⁸⁵ Their requests were viewed largely as perfunctory and deemed by diversity staff within the firms to have little impact on internal processes.⁸⁶ However, demands became more pressing as some clients required follow-up information once they had retained the firm, and then Braithwaite found some requests impacted directly on law firms’ diversity practices, though this tended to be on an ad hoc basis.⁸⁷ Thus, the example is given of a number of clients requesting the organization of joint activities between the women’s network

77. See Braithwaite, *supra* note 53, at 448–49; David Middleton, *Barclays Ups the Ante on Panel Firm Diversity*, *LAWYER*, Feb. 13, 2006.

78. Middleton, *supra* note 77, at A1.

79. See LAW SOC’Y, *Diversity and Inclusion Charter*, <http://www.lawsociety.org.uk/Advice/Diversity-Inclusion/Diversity-Inclusion-Charter> (last visited Mar. 25, 2015).

80. LAW SOC’Y, *Charter Signatories: Diversity and Inclusion Charter Statement*, <http://www.lawsociety.org.uk/support-services/practice-management/diversity-inclusion-charter/charter-signatories> (last visited Mar. 25, 2015).

81. LAW SOC’Y, *Procurement Protocol*, <http://www.lawsociety.org.uk/support-services/practice-management/procurement-protocol/> (last visited Mar. 25, 2015).

82. *Id.*

83. See Braithwaite, *supra* note 53, at 457.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 458–59.

of the firm and that of the clients'.⁸⁸ The problem for the firm was at the time of asking, they did not have a women's network and so as the participant in the study commented "we had better get one."⁸⁹

2. Supply-Side Initiatives

In respect of supply-side initiatives, the main emphasis has been on activities which are most visible and likely to be widely recognized. In most instances, Braithwaite notes, this has meant a focus on the retention of women lawyers.⁹⁰ For example, Linklaters states on its diversity and inclusion webpage, "a particular challenge is stemming the loss of potential female partnership candidates too early in their careers."⁹¹ A key policy initiative to address this issue has been to establish networks for women employees within firms.⁹² The number of these has increased over the past ten years, though they are not present in all firms.⁹³

An additional response has been coaching and mentoring for those who are parents, or who are returning to the workplace after a career break.⁹⁴ A few firms offered further support in the form of childcare vouchers and emergency childcare cover.⁹⁵ Another lever accessed by firms is the utilization of part-time and flexible working options for fee earners.⁹⁶ The introduction of formal policies supported these approaches and the main provisions provide options for working from home and job sharing.⁹⁷ However, supplementary interviews in Braithwaite's study provided evidence that part-time or flexi-work schedules remain challenging on a day-to-day basis, and a clear view was expressed by participants that uptake of these options likely will negatively impact career progression.⁹⁸

As Rhode notes, these views are not without basis.⁹⁹ Cynthia Fuchs Epstein's study of part-time lawyers revealed only 1 percent are partners.¹⁰⁰ The study showed reduced schedules led to assumptions about lack of commitment, which impacted performance evaluations and promotion outcomes.¹⁰¹ Further disadvantages accruing to those undertaking part-time schedules included reduced opportunities for mentoring relationships and

88. *Id.* at 459.

89. *Id.*

90. *See* Braithwaite, *supra* note 50, at 154.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; *see also* Hilary Sommerlad & Peter Sanderson, *Professionalism, Discrimination, Difference and Choice in Women's Experience in Law Jobs*, in *DISCRIMINATING LAWYERS* 155 (Philip Thomas ed., 2000).

99. Rhode, *supra* note 28, at 2213.

100. CYNTHIA FUCHS EPSTEIN ET AL., *THE PART-TIME PARADOX: TIME, NORMS, PROFESSIONAL LIFE, FAMILY AND GENDER* 5 (1999).

101. *See generally id.*

access to challenging assignments, prerequisites for advancement.¹⁰² Doubtless, reduced schedules work for some, who experience support and respect from colleagues; however, for others the experience is not as positive as they report feelings of frustration, isolation, and marginalization.¹⁰³ “Schedule creep” is also a common issue faced by those working on a reduced-hours basis, as is the view that their time is not respected: “unexpected emergencies” gradually become expected tasks and what was supposed to be a reduced workload becomes full-time with only pay remaining part-time.¹⁰⁴

These findings become further perplexing when it is evident that myths of the disruptive nature of part-time work are found to have little basis in practice. As Joan Williams discusses, persistent myths in relation to part-time working in the law are firstly that “law can’t be practiced part-time” and secondly that “part-timers cost the firm money.”¹⁰⁵ She maintains both these claims can be challenged. For the first, it is clear that any lawyer, whether part-time or full-time, will work for a number of clients simultaneously, thus giving “part” of their time to each.¹⁰⁶ Thus by reducing the number of clients any individual lawyer works with and thus the number of matters they are working on, part-time working becomes a wholly workable option.¹⁰⁷ She further notes that part-time schedules can be thought of in a variety of ways. They can be flexible and fluid and do not have to take the form of a rigid schedule that does not alter week-by-week or day-by-day.¹⁰⁸ These more fluid schedules are available in more cases than is commonly presumed. In the work she undertook with the Project for Attorney Retention,¹⁰⁹ Williams found that for any area it was claimed a part-time schedule would not work (e.g., mergers and acquisitions), there are examples of individuals successfully working on part-time schedules were found.¹¹⁰

Rhode has noted there is little evidence clients have any particular objection to reduced schedules.¹¹¹ For clients the most important factor is responsiveness and there is little to support the contention that part-time

102. SUZANNE NOSSEL & ELIZABETH WESTFALL, PRESUMED EQUAL: WHAT AMERICA’S TOP WOMEN LAWYERS REALLY THINK ABOUT THEIR FIRMS 296 (1998).

103. LINDA BRAY CHANOW, WOMEN’S BAR ASS’N OF D.C. LAWYERS, WORK & FAMILY: A STUDY OF ALTERNATIVE SCHEDULES AT LAW FIRMS IN THE DISTRICT OF COLUMBIA 14–15 (2000); WOMEN’S BAR ASS’N OF MASS., MORE THAN PART-TIME: THE EFFECT OF REDUCED-HOURS ARRANGEMENTS ON THE RETENTION, RECRUITMENT, AND SUCCESS OF WOMEN ATTORNEYS IN LAW FIRMS 7, 28 (2000).

104. DEBORAH L. RHODE, ABA COMM’N ON WOMEN & THE PROFESSION, BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE 24, 35, 40 (2001).

105. Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221, 2225 (2002).

106. *Id.* at 2225–26.

107. *Id.*

108. *Id.*

109. See generally JOAN WILLIAMS & CYNTHIA THOMAS CALVERT, THE PROJECT FOR ATTORNEY RETENTION, BALANCED HOURS: EFFECTIVE PART-TIME POLICIES FOR WASHINGTON LAW FIRMS (2d ed. 2001).

110. See Williams, *supra* note 105, at 2225–26.

111. See Rhode, *supra* note 25, at 1058.

lawyers are unable to provide this.¹¹² For example, she reports in a survey of part-time partners, the majority indicated they did not inform clients of their status and personally took responsibility to ensure their schedules were adapted to fit client needs.¹¹³ Giving the example of accounting, a similarly service-oriented profession with an obvious focus on the bottom line, there is clear evidence of the development of a business model which is capable of offsetting any costs associated with work/family accommodation by increased retention.¹¹⁴ There is little doubt law practices could adopt a similar or adapted model and benefit from higher morale, lower recruitment and training expenses, and less disruption in client relationships.¹¹⁵

III. DO THE SOLUTIONS FIT THE PROBLEM?

In this final part, this Article seeks to make an assessment of whether the approach taken in respect of diversity management within large law firms is capable of addressing the issues they face. As discussed in the first part of the Article, the explanations for women's lack of progress to the senior ranks of the profession are rooted in historic practices emanating from early notions of professionalism, women's position in society, and changes in practice realities, which when combined result in what Wald has termed "devastating" outcomes for women in the profession.¹¹⁶ Paradoxically, at the same time we observe the lack of progress of women in the profession and point to historic societal, cultural, and contextual factors to account for them, there is little doubt that large law firms are engaging with the discourse of diversity management to an extent hitherto unseen. Thus in the second part of the Article an analysis is made of the basis upon which engagement with discourses of diversity management have been undertaken by large law firms and a discussion provided of key mechanisms used by firms to address the issues, namely demand and supply-side diversity pressure. Through this analysis it is apparent there is no lack of activity in relation to diversity management within firms, e.g., signing up to professional codes of practice, issuing policy in respect of key diversity strands, and publicizing commitment on firms' websites and through participation in high-profile diversity management industry events (e.g., Opportunity Now awards ceremonies, etc.).

112. See CYNTHIA CALVERT ET AL., PROJECT FOR ATT'Y RETENTION, REDUCED HOURS, FULL SUCCESS: PART-TIME PARTNERS IN U.S. LAW FIRMS 13 (2009).

113. See Rhode, *supra* note 25, at 1058; Theresa M. Beiner, *Not All Lawyers Are Equal: Difficulties That Plague Women and Women of Color*, 58 SYRACUSE L. REV. 317, 326 (2008) ("[A] survey that tracked client satisfaction with part-time attorneys suggests that part-time status does not hurt client relations.").

114. Deloitte & Touche has been a leader in developing a model that accommodates flexible and part-time schedules without forcing sacrifices in promotion and desirable work. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 493–99 (2001).

115. NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW 11–13 (2010).

116. See generally Wald, *supra* note 22.

However, also not in doubt is that these activities and initiatives have done little to address the issue; namely the lack of women at senior, i.e., partner, position in the profession.¹¹⁷ The figures remain stubbornly low and have hardly shifted in the last twenty years.¹¹⁸ Are we to believe it is because women are under-committed and lack what it takes to achieve partner roles? I would argue this is not the case and contend instead that the explanation lies in the approach adopted and embedded within the very policies and processes designed to address diversity issues. It is my contention that it is the very choices large law firms have made in respect of their approach to diversity management that renders them incapable of addressing their diversity issues and thus these firms are “busy doing nothing,” giving the appearance of addressing the issue but actually seeking only to maintain the status quo. This argument is made on two key grounds. The first looks at the nature of the dominant model of diversity management adopted within the legal profession, at both the level of the professional regulatory body, which in the United Kingdom is the Law Society and the firms themselves. As discussed above, this is the business case approach to diversity management and the extent to which this approach is capable of addressing the issues faced by the profession is assessed. The second argument examines the extent to which policy choices made in the profession at both the regulatory and the firm level are capable of bringing about the transformative change necessary to make progress in respect of diversity management and tackle the deep-rooted issues which form the basis of exclusionary practice.

A. The Business Case: The Right Tool for the Job?

Louise Ashley questions whether diversity management as an approach, positioned as it is in largely business-based arguments, provides the appropriate driver for change.¹¹⁹ Of particular concern is the emphasis within the diversity paradigm on “changing attitudes” rather than a focus on fair outcomes.¹²⁰ Those promoting the view claim it is a method by which “buy-in” can be achieved with a variety of stakeholders who may have been unconvinced by arguments embedded within equal opportunities approaches based on compliance with legislation.¹²¹ However, those critiquing the approach have argued diversity management approaches do little more than reflect existing power relations between management and employees.¹²² The principle of “valuing individual differences” embedded within the approach results in a reframing of relativism in which, because

117. *Id.*

118. *Id.*

119. See generally Louise Ashley, *Making a Difference? The Use (and Abuse) of Diversity Management at the UK's Elite Law Firms*, 24 WORK, EMP. & SOC'Y 711 (2010).

120. *Id.* at 714.

121. See GILL KIRTON & ANNE-MARIE GREENE, *THE DYNAMICS OF MANAGING DIVERSITY* (3d ed. 2010); Sonia Liff, *Diversity and Equal Opportunities: Room for a Constructive Compromise?*, 9 HUM. RESOURCES MGMT. J. 65, 65 (1999).

122. Patrizia Zaroni & Maddy Janssens, *Deconstructing Difference: The Rhetoric of Human Resource Managers Diversity Discourses*, 25 ORG. STUD. 55, 68 (2003).

we are all different, we are all equal in our difference. From this perspective, the necessity to reduce or eradicate discrimination with respect to disadvantaged groups is diminished—as we no longer work at the group but rather the individual level—and the challenges faced by those within these groups are at best underestimated and at worst ignored altogether.¹²³ Thus, business case arguments can be viewed as both economically contingent and vary depending on the focus within particular organizations and their strategic priorities.¹²⁴ There is thus concern that focusing solely on business case arguments and omitting to consider the principles of the equality of opportunity perspective will inevitably result in a denial of the legitimacy of arguments protecting fundamental principles of morality and social justice.¹²⁵

However, the question remains as to the compatibility of these two approaches in respect of action with regard to diversity management. Are morality and social justice-based arguments merely added to business-based arguments to widen their appeal; implying a deeper commitment to the principles of morality reflected in the arguments is absent in organizations opting for the more business case-focused approaches? If this is the case, then for some the very nature of the arguments has been undermined and obscured. Amanda Sinclair and Mike Noon both argue morality-based arguments are ends in themselves and cannot be deployed when based on a contingent argument predicated upon potential organizational benefit.¹²⁶ Noon contends an organizations' commitment to diversity management should emanate from the fact that equal opportunity "is a human right based in moral legitimacy (social justice) rather than economic circumstances."¹²⁷ How committed an organization is to these principles is evidenced by their pursuance of diversity objectives without reference to potential benefit that may accrue to the organization; indeed it is evidenced by the extent to which the organization is willing to continue to work toward these ends even if doing so is economically disadvantageous.¹²⁸ Within this formulation we see a fundamental incompatibility between business interests and social justice objectives. These themes are applied to a legal context by Lisa Webley and Liz Duff who argue there is a clear divide between "those of us who believe that

123. See *supra* note 121.

124. Lizzie Barmes & Sue Ashtiany, *The Diversity Approach to Achieving Equality: Potential and Pitfalls*, 32 *INDUS. L.J.* 274, 278 (2003); Linda Dickens, *Beyond the Business Case: A Three-Pronged Approach to Equality Action*, 9 *HUM. RESOURCE MGMT. J.* 9, 9–11 (1999).

125. Mike Noon, *The Fatal Flaws of Diversity and the Business Case for Ethnic Minorities*, 21 *WORK, EMP. & SOC'Y* 773, 775 (2007).

126. Amanda Sinclair, *Critical Diversity Management Practice in Australia: Romanced or Co-Opted?*, in *HANDBOOK OF WORKPLACE DIVERSITY* 511–30 (Alison M. Konrad et al. eds., 2006); see Noon, *supra* note 125, at 781.

127. Noon, *supra* note 125, at 781.

128. See *id.* at 779–81.

equality of opportunity is a social and moral right” and those who view diversity as merely “a means to . . . short term profit maximization.”¹²⁹

Braithwaite points to widespread criticism within the legal profession regarding the deployment of business case arguments to address issues of inequality.¹³⁰ Key among these are arguments challenging the core contention of business case approaches; diversity is good for business and this is the basis upon which organizations should take action. Clare McGlynn has assessed the empirical failing of this assertion and provides evidence that increased profitability could be produced by both business case and equality initiatives.¹³¹

A further concern raised in relation to the adoption of business case approaches is their inherently unstable and temporary nature. Kate Malleson indicates that pressures on profit margins vary constantly and thus to rely on this as a driver of change will inevitably build instability into any policy choices.¹³² Thus McGlynn argues given the challenges facing women in the profession, it is evident the business case “fails to take into account and confront the complexity of the gendered nature of the reasons behind women’s marginalised status.”¹³³ From this we see that, though it may be possible to showcase “quick wins” in the solicitors’ profession on the basis of the business case, these changes are unlikely to focus on core issues and constantly will remain vulnerable to the vagaries of contrary economic arguments, with little likelihood they will result in any meaningful change.

*B. Everything’s Changing but I Still Feel the Same:
Transformation or Maintenance of the Status Quo?*

Braithwaite notes a key contention made in the literature in respect of diversity management is its potential to transform organizations through a focus on change and a challenging of the status quo.¹³⁴ The aim would be to alter “organisational structures . . . to better accommodate all” providing an appealing and forward-thinking objective that can seamlessly be associated with business case objectives as discussed above.¹³⁵ For example, campaigning organization Opportunity Now, writing about diversity and the financial crisis, asserts “the prize for employers who are

129. Lisa Webley & Liz Duff, *Women Solicitors As a Barometer for Problems Within the Legal Profession—Time to Put Values Before Profits?*, 34 J.L. & Soc’y 374, 399 (2007).

130. See Braithwaite, *supra* note 50, at 152, 156.

131. Clare M.S. McGlynn, *Strategies for Reforming the English Solicitors Profession: An Analysis of the Business Case for Sex Equality*, in *WOMEN IN THE WORLD’S LEGAL PROFESSIONS* 163–67 (Ulrike Schultz & Gisela Shaw eds., 2003).

132. Kate Malleson, *Diversity in the Judiciary: The Case for Positive Action*, 36 J.L. & Soc’y 376, 384 (2009).

133. See McGlynn, *supra* note 131, at 169.

134. See Braithwaite, *supra* note 50, at 148.

135. See *id.* (quoting Linda Dickens, *Walking the Talk? Equality and Diversity in Employment*, in *MANAGING HUMAN RESOURCES: PERSONNEL MANAGEMENT IN TRANSITION* 201 (2005)).

willing to tackle and change the status quo could be huge.”¹³⁶ Braithwaite links this rhetoric to that evident in campaigns within the large law firm sector.¹³⁷ So, for example, in a government report produced by Bridget Prentice, then-Member of Parliament, it is claimed the legal profession will not be “the high quality profession we want it to be unless we increase the diversity of that profession.”¹³⁸ That this has not happened (i.e., an increase in diversity) may indicate the “transformative potential” of diversity and a challenging of the status quo is not actually what law firms are seeking to do with their diversity initiatives.

Indeed, as noted above, in the face of rapidly changing practice realities, we have seen when offered the opportunity to alter work practices, e.g., long hours working, examine and address underlying assumptions about what constitutes effective working, and the chance to amend prevailing business models, law firms have chosen an opposite course. Thus Rhode (as discussed above) has shown expectations of utilization rates have risen as have profitability targets, bolstering the assumption that those within the profession are attracted by an expectation of increasingly high salaries and long hours schedules.¹³⁹ The symbolic currency of time is cemented and a willingness to give time remains the proxy measure of commitment, ambition, and reliability under pressure.¹⁴⁰

Also discussed above, the work of Wald provides a clear analysis of the way in which the outcomes observed in respect of women in the profession, are by no means inevitable but are the consequence of policy choices made and endorsed by the wider legal community.¹⁴¹ Considering many of the issues discussed by Rhode, he also comments policy choices do not necessarily make economic sense, but they do serve the purpose of firmly cementing women and other nonnormative lawyers into the position of “other” within their respective firms and the profession overall. There have been opportunities to change work structures and schedules to suit the needs not just of traditional groups within firms ranks who historically have been successful, i.e., the ideal of the unencumbered white, middle-class man, but also those of newer members coming with their own particular career needs, to forge successful and rewarding careers as well. That large law firms have all but unanimously opted to ignore these possibilities for transformation and an unsettling of the prevailing orthodoxy in favor of business models based upon a more extreme version of their traditional workplace practices, indicates the extent to which a single model of success is embedded within law firms and how little appetite there is to see

136. *See id.* (quotations omitted); Katheryn Hayes Tucker, *Call to Action: Part Two*, DAILY REP., May 22, 2008.

137. *See* Braithwaite, *supra* note 50, at 148.

138. *Id.* (quoting DEP’T FOR CONSTITUTIONAL AFFAIRS, INCREASING DIVERSITY IN THE LEGAL PROFESSION: A REPORT ON GOVERNMENT PROPOSALS 8 (2005)).

139. *See* Rhode, *supra* note 25, at 1074.

140. *See* Epstein & Seron, *supra* note 29, at 79–94. *See generally* Landers et al., *supra* note 29.

141. *See* Wald, *supra* note 22, at 2287.

transformative change and how little substance is evident in diversity efforts adopted.

It could be argued that what we have evidence of is termed by Kim Hoque and Noon an “empty shell” approach to diversity management.¹⁴² This represents an approach to diversity policy that contains nothing of substance or value to those who are the victims of discrimination. To assess whether a diversity or equality policy is likely to have substance will be dependent on the underlying rationale for its introduction. Nick Jewson and his colleagues contend there are four key reasons why organizations adopt formal equal opportunity policies, which are not mutually exclusive.¹⁴³ First, they provide the organization with an “insurance policy” against potential problems, in which case the policy will likely be a statement of legal requirements to guide managerial behavior.¹⁴⁴ Second, organizations institute policies to show it is a responsible employer, cognizant of the need to pursue the spirit of equality as well as the letter of the law.¹⁴⁵ Third, the drive comes from a specific problem the organization is experiencing, e.g., retention of women lawyers in the profession.¹⁴⁶ Fourth, action is undertaken with the expectation that some economic advantage will ensue, e.g., business case arguments for diversity management.¹⁴⁷

We thus see the motivation for the adoption of diversity policies is either as a defense against punitive action in respect of the firm or as a consequence of perceived benefit accruing to the firm, e.g., improved competitive position, positive company image, et cetera. The contention is where firms adopt diversity policy to improve their internal or external image, there is a greater likelihood the policy will constitute little more than an “empty shell.” Conversely, where the driver is to take action in relation to a particular concern, for example, a skills shortage or the current profile of customer-facing staff, the policy is more likely to be substantive in nature.¹⁴⁸ However, what we see in the legal profession is engagement with diversity policy has been undertaken for both reasons: exogenous factors, such as compliance with professional standards and responsiveness to client expectations, as well as endogenous factors, for example, the retention of women in the profession. Counter to expectations, also evident from the previous discussion and analysis, is that the approach to diversity management is the business case, an approach likely to constitute an

142. See generally Kim Hoque & Mike Noon, *Equal Opportunities Policy and Practice in Britain: Evaluating the “Empty Shell,”* 18 WORK, EMP. & SOC’Y 481, 482 (2004).

143. NICK JEWSON ET AL., ETHNIC MINORITY EMP’T RESEARCH CENTRE, UNIVERSITY OF LEICESTER, ETHNIC MONITORING POLICY AND PRACTICE: A STUDY OF EMPLOYERS’ EXPERIENCES (1992).

144. *Id.* at 98.

145. *Id.* at 94.

146. *Id.* at 145–46.

147. *Id.* at 127.

148. See Nick Jewson & David Mason, ‘Race’, *Employment and Equal Opportunities: Towards a Political Economy and an Agenda for the 1990s*, 42 SOC. REV. 591, 607 (1994). See generally Dickens, *supra* note 124.

“empty shell,” whilst satisfying some of the external constituents, i.e., the professional body and clients. Further contrary to expectations, the transformational aspects of a diversity management approach and the potential to address endogenous factors also has been eschewed in favor of a more extreme version of the prevailing business model further evidencing an “empty shell.”

It is thus clear that though willing to engage with the rhetoric and noise of the diversity management perspective and an aim to evidence activity as a proxy for transformation and a challenge to the status quo, large law firms are in fact “busy doing nothing.” The choices made and the action taken are little more than empty shells and empty gestures, and as such the choices do little to assist the victims of disadvantage or to challenge and transform the status quo.