

Beyond Diversity and Inclusion: Understanding and Addressing Ableism, Heterosexism, and Transmisia in the Legal Profession: Comment on Blanck, Hyseni, and Artunkol Wise’s National Study of the Legal Profession

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I. INTRODUCTION

Far too many—if not most—of us in the legal profession who belong to both the disability and LGBTQ+ communities have known informally, through our own experiences and those of others like us, that workplace bias and discrimination on the basis of disability, sexuality, and gender identity is still widespread. The new study by Blanck et al. on diversity and inclusion in the U.S. legal profession provides empirical proof of this phenomenon, which might otherwise be dismissed as being based on anecdotal evidence.¹ Its findings lend credibility to our position that the legal profession must make systemic changes to address workplace ableism, heterosexism, and transmisia.² They also suggest

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¹Peter Blanck, Fitore Hyseni & Fatma Artunkol Wise, *Diversity and Inclusion in the American Legal Profession: Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 47 AM. J.L. & MED. 9, 9 (2021) [hereinafter Blanck, et al., *Discrimination and Bias*]. Blanck et al. also published two earlier reports on this research. Peter Blanck, Ynesse Abdul-Malak, Meera Adya, Fitore Hyseni, Mary Killeen & Fatma Wise, *Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 23 U.D. C. L. REV. 23 (2020) [hereinafter Blanck, et al., *First Phase*]; Peter Blanck, Fitore Hyseni & Fatma Wise, *Diversity and Inclusion in the American Legal Profession: Workplace Accommodations for Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 30 J. OCCUPATIONAL REHABILITATION 537 (2020) [hereinafter Blanck, et al., *Workplace Accommodations*].

²We choose to use the term “transmisia” to refer to systemic and structural oppression targeting transgender people, instead of the more commonly used term “transphobia.” As disabled, queer, and trans advocates, we prefer not to imply that either structural oppression nor interpersonal prejudice and discrimination are a manifestation of or equated with psychosocial disability (as a phobia is an anxiety disability). The suffix “misia” derives from the Greek term for hate or hatred, which more accurately reflects the nature of oppression, including internalized oppression. See also Beasley Library, *What does “misia” mean?*, SIMMONS U. LIBR. (Dec. 15, 2020), <https://simmons.libguides.com/anti-oppression> [<https://perma.cc/L6UA-65HV>] (follow “What does “misia” mean tab under “Some Basics”).

possibilities as to where and how it might start to do so through providing information on who employers discriminate against most often and in what forms.³

At the same time, though, more research is necessary to enable LGBTQ+, disability, and labor rights advocates to make truly data-driven recommendations for how to improve the working lives of queer and disabled legal professionals.⁴ The data in this study informs the reader of what is happening in a general sense, but leaves a lot of room for more in-depth explorations of related issues, such as how experiences of discrimination differ across workplace settings and subsections of the affected communities.⁵ Furthermore, developing effective diversity and inclusion measures requires that researchers analyze why the bias and discrimination they seek to address persists to such a significant extent. Developing an understanding of these reasons depends in turn on examining any underlying, unexamined assumptions researchers themselves may have about the degree of even abstract commitment to the principles of diversity and inclusion within the legal profession.

In this Comment, we will first discuss how the study's authors assume a certain level of commitment to ending workplace discrimination to an extent that is not warranted, and how this assumption impedes a fully effective response to the problem. We go on to propose specific areas for further study, such as bias and lateral oppression against sub-populations within the LGBTQ+ and disability communities; discrimination across different types of organizations or employers; the response of victims of discrimination; and the efficacy of current anti-discrimination measures. Finally, in the absence of data on these particular subjects, we draw upon our knowledge and lived experience to propose short-term steps that employers, law schools, professional associations, and individual legal practitioners can take to begin the process of making the legal profession truly equitable and inclusive.

II. THE PROBLEMS WITH WISHFUL THINKING ABOUT OVERT DISCRIMINATION

The primary flaw in the study at issue is that the authors overstate the progress that the legal profession has made in rooting out structural oppression. In particular, the authors state that “overt forms of discrimination are viewed as unacceptable behavior in the workplace, and such behavior usually leads to consequences for the person(s) who commit it.”⁶ As proof of this statement, the authors point to the existence of anti-discrimination provisions within the Americans with Disabilities Act.⁷

³Blanck, et al., *Discrimination and Bias*, *supra* note 1, at 54 (2021).

⁴We use the terminology of “LGBTQ+” and “queer and trans” throughout this article to reflect different ways that people within these communities describe themselves, though we also recognize that these terms still cannot and do not capture all of the identities or experiences of people whose sexualities, asexualities, and genders diverge from expectations of heterosexuality and binary cisgender identities – especially outside the U.S. and broader Western/Global North context. *See also*, B. BINAHOAN, DECOLONIZING TRANS/GENDER 101, at 32-33 (Biyuti Publ'g 2014); khari jackson & Malcolm Shanks, DECOLONIZING GENDER: A CURRICULUM 6 (2017), <https://www.decolonizinggender.com/the-zine> [<https://perma.cc/38PH-AJVA>]; Josie Raphaelito, Diné (Navajo Nation), Keioshiah Peter, Diné (Navajo Nation); Marcus Red Shirt, Oglala Lakota; Ryan Young, Lac du Flambeau Ojibwe, INDIGENIZING LOVE: A TOOLKIT FOR NATIVE YOUTH TO BUILD INCLUSION 6 (2019), <https://www.healthynativeyouth.org/wp-content/uploads/2019/09/IndigenizingLoveToolkitYouth.pdf> [<https://perma.cc/VR9C-Z2EP>]; Joseph Andoni Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14(2) PUB. CULTURE 361 (2002).

⁵Blanck, et al., *Discrimination and Bias*, *supra* note 1, at 16.

⁶*Id.* at 17.

⁷*Id.*

The results of the study itself reveal that the existence of legal protections is not proof of adequate enforcement, or even widespread support for the law's purpose. While the findings of the study support the position that overt discrimination by itself is less common than either subtle discrimination alone or the combination of both types, it provides no evidence of widespread accountability for acts of overt discrimination, nor even that overt discrimination in all its forms is widely frowned upon.⁸ If anything, the fact that disabled people most often face both subtle and overt discrimination suggests that ongoing (acceptance of) overt discrimination is an open secret within the legal community.

Ignoring this data in favor of the common but evidently unfounded belief that open bigotry is no longer a significant issue comes at the price of misunderstanding the nature and scope of the problem, and of what the legal profession has to do to change it. This misunderstanding may be a significant contributing factor in why diversity and inclusion initiatives have not been as successful as many of us would have liked. If it also carries over into subsequent research efforts, it could prevent scholars from asking the right questions and accurately interpreting the results. While it's uncomfortable to imagine that members of our profession continue to both hold and shamelessly act on harmful and backwards beliefs, confronting that fact honestly is the only way to have any hope of changing it.

III. AREAS FOR FURTHER RESEARCH

A. DISCRIMINATION IN PUBLIC INTEREST SETTINGS

It is critical to ensure that LGBTQ+ legal professionals with disabilities who use our legal training to fight on behalf of our communities do not have to simultaneously confront workplace discrimination at the hands of organizations and people who claim to represent our interests. Therefore, one crucial area for future study is the prevalence and dynamics of ableist, heterosexist, and transmisic discrimination in public interest settings, particularly those that primarily or disproportionately serve queer and disabled people. This category includes nonprofits dedicated to disability and LGBTQ+ advocacy; broader civil rights and legal aid organizations; private civil rights litigation firms; and government agencies tasked with enforcing civil rights protections.

Such research could begin with studies on how often discrimination takes place, how it manifests, and how effectively management responds in public interest and public interest adjacent settings as opposed to in the private sector. Alternately, researchers could take a more open-ended approach of collecting narratives from disabled and queer attorneys about their experiences working in nonprofit organizations and government agencies, and identifying common experiences that could form the basis for more targeted empirical research. It would be particularly interesting to learn the extent to which the reputation of public interest organizations as progressive and inclusive spaces influences marginalized attorneys' ability to recognize workplace bias and discrimination as it is happening, and the legal profession's willingness to believe that it is occurring there.

⁸*Id.* at 16.

B. INTERSECTED EXPERIENCES OF OPPRESSION AMONG LGBTQ+ AND DISABLED LEGAL PROFESSIONALS

Legal professionals who belong to both the LGBTQ+ and disabled communities often face compounded discrimination that cannot necessarily be distinguished as either solely disability-based or solely based on gender or sexuality.⁹ For instance, supervisors or co-workers of an openly trans person with known or perceived psychosocial disabilities might deprive that person of their job responsibilities, micromanage their work, and subject them to repeated comments about their supposed incompetence and unprofessionalism based on appearance, manner of speech, and work style. Those repeated slights, built up over time, may easily constitute a hostile environment, and could lead to that person eventually choosing to leave (in what we might recognize as a constructive firing) to escape the toxic situation. It would be difficult, if not impossible, however, to determine whether the discriminatory conduct was based on the employee's disability, gender identity, or some combination of both.

Many disabled and LGBTQ+ legal professionals are multiply marginalized because of race, class, immigration status, religion, or other aspects of their identities or experiences. Our experiences are not adequately captured in the current study, but future research driven by scholars and advocates with lived experience can begin to identify ways that disabled and LGBTQ+ legal professionals experience discrimination across different marginalized identities and experiences.¹⁰ It would be helpful to have disaggregated and disambiguated data identifying differences in experiences of discrimination between, for instance, Southeast Asian attorneys with disabilities and Indigenous Latinx attorneys with disabilities, or between trans attorneys with physical disabilities and neurodivergent trans attorneys. In particular, it would be helpful to have specific data about the ways that oppressive systems, processes, and policies impact multiply marginalized people on the basis of multiple marginalized identities.

C. LATERAL ABLEISM AND LESS WELL-KNOWN ACCESS NEEDS

Research, scholarship, and advocacy on disability invariably privileges disabled people with the most access to power and resources both as a general rule and within specific disabled communities. Many groups of disabled people remain severely under-represented within the legal profession, in no small part due to lateral ableism and the hierarchy of disability.¹¹ These two concepts refer to the ways in which disabled people often adopt ableist socio-cultural values about other types of disabilities, and treat people with certain types of disabilities as more deserving of rights and recognition than others. For instance, many otherwise neurotypical people with physical disabilities (both congenital and acquired) often situate their claims to personhood by disavowing the

⁹General recommendation No. 33 on women's access to justice, Comm. on the Elimination of Discrimination Against Women., at 3-4, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015), <https://digitallibrary.un.org/record/807253?ln=en> [<https://perma.cc/SZ3N-GQ2P>] ("These obstacles occur in a structural context of discrimination and inequality Grounds for intersecting or compounded discrimination may include ethnicity/race, indigenous or minority status, colour, socio-economic status and/or caste, language, religion or belief, political opinion, natural origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, and being lesbian, bisexual, transgender women or intersex persons. These intersecting factors make it more difficult for women from those groups to gain access to justice.").

¹⁰Blanck, et al., *Discrimination and Bias*, *supra* note 1, at 9.

¹¹NAT'L ASS'N FOR L. PLACEMENT, 2019 REPORT ON DIVERSITY IN U.S. LAW FIRMS 30 (2019), https://www.nalp.org/uploads/2019_DiversityReport.pdf [<https://perma.cc/D7F2-XMAG>].

personhood of people with intellectual or psychosocial disabilities.¹² At the same time, those whose disabilities may be perceived as more readily apparent or obvious may claim more legitimacy within disabled identity than those whose disabilities may be (perceived as) more hidden.¹³

Further research on the experiences of those legal professionals who have disabilities subject to particularly intense ableism, even within disabled communities, is necessary to gain a full understanding of disabled people's experiences. Such groups include (though are certainly not limited to) people with intellectual disabilities, deafblind people, nonspeaking people and people who use alternative and augmentative communication, people who experience psychosis or intense dissociation, people who require 24/7 attendant care because of physical disabilities, and multiply neurodivergent people such as autistic people with ADD and trauma.

All disabled people face the prospect of misunderstanding, refusal of accommodations, and denial of access needs. Nonetheless, those of us whose access needs are harder to explain than asking for access to a ramp or to Braille text (both of which are not necessarily guaranteed or even widely available) often face constant refusal or denial of lesser known or recognized accommodation requests like needing a private office space with a door due to sensory issues, chemical sensitivities, or psychosis, needing assistance with completing routine paperwork due to ADD, traumatic brain injury, or chronic fatigue, or needing a change of lighting because of photosensitive epilepsy, vision processing disabilities, or migraines.¹⁴ Refusal to even recognize that these access needs are legitimate or real can and does lead to sidelining and pushout for disabled legal professionals whose disabilities do not prevent them from doing the work but do require them to do the work differently than nondisabled colleagues.¹⁵

¹²See, e.g., Rebekah Moras, *Feminism, Rape Culture, and Intellectual Disability: Incorporating Sexual Self-Advocacy and Sexual Consent Capacity*, in *EMERGING PERSPECTIVES ON DISABILITY STUDIES*: 189, 191 (Matthew Wappett & Katrina Arndt eds., Palgrave MacMillan, 2013) ("The disability hierarchy places people with physical disabilities (especially disabled white men and veterans) at the top, while people with intellectual disabilities, psychiatric disabilities, and other mental or 'hidden' disabilities are at the bottom. This hierarchy is exemplified in comments such as 'I'm Deaf, not stupid;' 'I'm a woman, not an idiot;' 'I have cerebral palsy, I'm not retarded;' 'I'm Black, not a moron;' 'I use a wheelchair, I'm not an imbecile.' ... This kind of distancing does little to challenge ableist rhetoric that implies people must be independent, strong, competent, and measurably intelligent, before being valued and supported." (internal citations omitted)); see also Kim Sauder, *Fighting My Internalization of the Hierarchy of Disability*, *CRIPPLEDSCHOLAR* (Aug. 23, 2015), <https://crippledscholar.com/2015/08/23/fighting-my-internalization-of-the-hierarchy-of-disability/> [<https://perma.cc/P7NN-9RLQ>] ("[The hierarchy of disability] is a social construct that makes certain kinds of disabilities more acceptable than others. . . . [I]t is all tied into associating disability with negativity but within the framework of the hierarchy, some people make out worse than others. People with intellectual disabilities or who are perceived to have intellectual disabilities are inevitably found near, the bottom.").

¹³See, e.g., s.e. smith, *An Unquiet Mind: Are We Ever Disabled 'Enough' When You Don't See Our Disabilities?*, *CATAPULT* (July 17, 2019), <https://catapult.co/stories/are-we-ever-disabled-enough-when-you-dont-see-our-disabilities-s-e-smith> [<https://perma.cc/CD4N-JDSF>].

¹⁴See generally Christine Vargas, *Select Recent Court Decisions: Disability Law: Substantial Limitations Under the Americans with Disabilities Act – Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 28 AM. J.L. & MED. 124, 126 (2002).

¹⁵STATE BAR OF CAL. COMM. ON LEGAL PROF'LS WITH DISABILITIES, *CHALLENGES TO EMPLOYMENT AND THE PRACTICE OF LAW CONTINUE TO FACE ATTORNEYS WITH DISABILITIES: RESULTS OF A 2003 ONLINE POLL OF CALIFORNIA ATTORNEYS WITH DISABILITIES CONDUCTED BY THE STATE BAR OF CALIFORNIA COMMITTEE ON LEGAL PROFESSIONALS WITH DISABILITIES* 9 (Dec. 4, 2004), http://www.calbar.ca.gov/portals/0/documents/caf/2004_Attorneys-with-Disabilities-Report.pdf [<https://perma.cc/K84S-DAXL>] (finding 24% of California attorneys with disabilities had encountered refusals or resistance to receiving reasonable accommodations by their employers); see also Jason Goitia, *Improving Disability Diversity and Inclusion in the Legal Profession*, L. PRACTICE TODAY (July 12, 2018), <https://www.lawpracticetoday.org/article/improving-disability-diversity-inclusion-legal-profession/> [<https://perma.cc/384A-2DNG>].

D. MARGINALIZED QUEER AND TRANS PEOPLE WITHIN THE LGBTQ+ COMMUNITY

Similarly, not all LGBTQ+ people are represented equally in the legal profession or in research about our lives and experiences. Groups of people within the LGBTQ+ community who face particular marginalization include transfeminine people—especially trans women—and Two Spirit people, asexual and aromantic people, as well as LGBTQ+ people who have done sex work, who have been homeless, who have been incarcerated, or who are living with HIV (which is also a disability). People from all of these communities or who have had all of these experiences can want to and do enter the legal profession.¹⁶ Not surprisingly to us, multiply marginalized people within LGBTQ+ communities, including disabled people, fat people, immigrants, and people of color, face oppression both within and outside the LGBTQ+ community.¹⁷ Researchers should intentionally seek out experiences of hyper-marginalized and multiply-marginalized LGBTQ+ people, including data on actual hiring and retention practices, as well as narratives of discrimination. Otherwise, research will continue to prioritize and privilege the experiences of wealth-privileged, white, abled, thin, and masculine-presenting people within the LGBTQ+ community—groups that are almost certainly the most likely to attain long-term success within the legal profession.

¹⁶Some sex workers are also lawyers. See Nadia Guo, *So Tell Me, Why Can't A Sex Worker Be A Lawyer?* HUFFINGTON POST (Apr. 23, 2019, 11:03 AM), https://www.huffingtonpost.ca/nadia-guo/sex-worker-lawyer_a_23714016/ [<https://perma.cc/BHB7-H3W5>]; Katie Tastrom, *Disabled People Are Better At Sex*, PULP MAG. (May 5, 2020), <https://medium.com/pulpmag/disabled-people-are-better-at-sex-4b18e04e4e2c> [<https://perma.cc/XS8Y-CBA4>]; Laura Terrell, *Des Moines attorney unveils her life as a prostitute*, KCCI DES MOINES (Sept. 5, 2019), <https://www.kcci.com/article/a-des-moines-attorney-unveils-her-life-as-prostitute/28918995> [<https://perma.cc/EQ85-5G6Z>]. Many sex workers are disabled. See Cyrée Jarelle Johnson, *For Disabled Sex Workers, Congress' Anti-Trafficking Legislation Is Life Threatening*, REWIRE NEWS GROUP (July 12, 2018, 10:50 AM), <https://rewirenewsgroup.com/article/2018/07/12/disabled-sex-workers-congress-anti-trafficking-legislation-life-threatening/> [<https://perma.cc/TXS7-22JB>]; Katie Tastrom, *Sex Work is a Disability Issue. So Why Doesn't the Disability Community Recognize That?*, *Rooted in Rts.* (Jan. 4, 2019), <https://rootedinrights.org/sex-work-is-a-disability-issue-so-why-doesnt-the-disability-community-recognize-that/> [<https://perma.cc/35R5-CRSD>]. Some lawyers have also been homeless. See Sean Giggy, *From homeless to law school: This Dallas man is writing his own story*, WTHR (Sept. 1, 2020), <http://web.archive.org/web/20210503182835/https://www.wthr.com/article/features/homeless-law-school-dedman-smu-dallas-kevin-lee-wants-to-be-a-judge-and-fight-for-kids-just-like-him/287-3569494b-32c6-43bf-b965-b9b4aa3244bb>; Terrence McCoy, *The homeless man who went to Harvard Law with John Roberts*, WASH. POST (July 13, 2015), https://www.washingtonpost.com/local/social-issues/the-homeless-man-who-graduated-from-harvard-law-school-with-chief-justice-john-roberts/2015/07/13/63257b5c-20ca-11e5-bf41-c23f5d3face1_story.html [<https://perma.cc/E2A6-LUK9>]; Gina Furia Rubel, *From Homeless to Lawyer: One Woman's Amazing Journey*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/from-homeless-to-lawyer-o_b_560343#:~:text=Nikki%20Johnson-Huston%2C%20Esq.,winning%20young%20attorney%20in%20Philadelphia [<https://perma.cc/ER4N-SSXC>]. Other people who have been incarcerated have become lawyers. See Jenny B. Davis, *Once in prison for life, this New Jersey lawyer's story has inspired an ABC TV series*, ABA J. (June 1, 2020, 1:25 AM), <https://www.abajournal.com/magazine/article/he-was-once-in-prison-for-life-but-now-this-new-jersey-lawyer-story-has-inspired-an-abc-tv-series> [<https://perma.cc/7NXW-E5TD>]; Eoin Higgins, *Tarra Simmons becomes first person formerly convicted of a felony elected to Washington State Legislature*, APPEAL (Nov. 4, 2020), <https://theappeal.org/tarra-simmons-washington-state-legislature/> [<https://perma.cc/HVF9-UY4G>]; Ari Melber, *Jarrett Adams' unlikely path from prison to lawyer*, MSNBC (Oct. 11, 2015, 9:34 AM), <https://www.msnbc.com/msnbc/jarrett-adams-unlikely-path-prison-lawyer-msna700351> [<https://perma.cc/LD84-FEXT>].

¹⁷See Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, HARV. C.R.-C.L. L. REV. 51, 84 (2013); Justine E. Egner, *An Intersectional Examination of Disability and LGBTQ+ Identities in Virtual Spaces* (Apr. 2018), (unpublished Ph.D. dissertation, University of South Florida) (on file with University of South Florida Scholar Commons).

E. COMPLICITY AND CONCEALMENT

Toxic workplace cultures are just as essential to the pervasiveness of workplace bias and discrimination as individual bigots and bullies.¹⁸ Therefore, researchers should also explore management and institutional complicity in workplace bias and discrimination. Relevant subjects could include how many complaints employers typically receive before disciplining or terminating individual employees who engage in discrimination, and what factors impact how quickly and robustly they respond. At the same time, it may also be useful to collect narratives from people and organizations accused of multiple instances of workplace discrimination to identify patterns of concealment and self-justification.

A related issue to examine is how often attorneys with disabilities and LGBTQ+ attorneys report discrimination against them, both internally and to outside bodies. This could in turn lead to further explorations on the subject of under-reporting, such as which populations tend to refrain from reporting discrimination and what factors make marginalized employees more or less likely to come forward about their experiences.

F. EFFECTIVENESS OF EXISTING ANTI-DISCRIMINATION AND EQUITY POLICIES

Finally, researchers must consider the actual impact and effectiveness of extant practices in the field of diversity, inclusion, and equity, including anti-discrimination policies. Have creation of ombudsperson's offices, chief diversity, equity, and inclusion executive officer positions, state anti-discrimination commissions, public or private bias incident reporting systems, or mandated diversity, cultural sensitivity, or awareness training programs actually led to *any* material changes in conditions for people who are most impacted by systems of oppression? In our own conversations with disabled friends and colleagues, it's common wisdom that there is usually no point to filing any formal complaints about employment discrimination—whether with a state attorney general's office or with an Equal Employment Opportunity office—because we do not typically expect an investigation, let alone a robust one that comes with consequences for wrongdoers. Many of us are focused much more on basic survival, including maintaining our ability to be perceived as hireable and not troublesome, so that we can pay the bills and stay alive, than we are on the remote possibility of securing a favorable administrative or judicial finding after being actually or constructively fired.

Future research could examine whether and to what extent disabled and LGBTQ+ employees' perceptions of their workplace's climate, infrastructure, and culture have changed after implementation of these types of equity and diversity-focused policies. Where research shows that such policies have not necessarily resulted in improved experiences, researchers could align with directly impacted community members to identify what policy and programmatic changes, if any, could have greater or longer-term positive effects. Such research will be useful regardless of whether it shows that such policies have worsened conditions, such as by leading to increased harassment or ostracism of marginalized people, made no significant changes to the working environment, or have significantly improved marginalized people's experiences.

¹⁸See Lisa M. Bergersen & Claire E. Hartley, *Knock It Off! Harassment & Bullying in the Workplace*, 93 WIS. LAW. 22, 23-25 (2020).

IV. IMAGINING A BETTER, FREER, MORE JUST FUTURE

Even if researchers were to explore each of the areas that we have outlined in brief in this Comment, however, we know that the path to a better, freer, and more just future for queer, trans, and disabled people cannot rely solely on policy change or reform. We are marginalized legal professionals working within systems that were created and expanded in large part to justify—among other atrocities—land theft and occupation, genocide of Indigenous and Native peoples, chattel enslavement of Black people, and subjugation, criminalization, and incarceration of many other marginalized populations across the United States.¹⁹ Therefore, we know that the law cannot claim to be about justice, nor will it bring about justice. A future where ableism, heterosexism, and transmisia no longer exists is a future that our current legal system and jurisprudential histories cannot contemplate, because ableism, heterosexism, and transmisia are woven deeply into the law.²⁰ One need only look to the institution of guardianship, the entrenchment of subminimum wage, the legal history of the definitions of marriage and personhood, and the ever-expanding legal mechanisms of mass criminalization and mass incarceration.²¹ Thus, such systems of oppression also inevitably pervade the legal academy and the legal profession.

The legal academy, as it is, requires adherence to strict standards of performance, achievement, and excellence that are in turn rooted in deeply ableist, classist, and racist expectations. For instance, students must complete a certain quantity of coursework within a compressed time period, while achieving certain grades, participating in certain prescribed activities, and demonstrating sufficient intellectual capacity in rigid examinations.²² These expectations do not account for the high variability of marginalized students' experiences, such as childcare and outside work responsibilities, disabilities that cause chronic pain and cognitive fatigue, constant trauma from racial terror and stress, or survival of abusive familial and intimate partner relationships, all of which can

¹⁹See Evelyn Nakano Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 SOC. RACE & ETHNICITY 54, 54, 62-67, 70 (2014), <https://www.asanet.org/sites/default/files/attach/journals/jan15srefeature.pdf> [<https://perma.cc/LS4M-FQ3N>]; Jess L. Cowing, *Occupied Land is an Access Issue: Interventions in Feminist Disability Studies and Narratives of Indigenous Activism*, 17 J. FEMINIST SCHOLARSHIP 9 (2020), <https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1163&context=jfs> [<https://perma.cc/46MJ-JRXH>]; Talila A. Lewis, *Stolen Bodies, Criminalized Minds & Diagnosed Dissent: The Racist, Classist, Ableist Trappings Of The Prison Industrial Complex*, Feb. 19, 2019, <https://www.youtube.com/watch?v=zpY4v10jqXY> [<https://perma.cc/63C2-TMSJ>] (Longmore Lecture in Disability Studies given at San Francisco State Univ.).

²⁰See Elaine Craig, *Trans-Phobia and the Relational Production of Gender*, 18 HASTINGS WOMEN'S L.J. 137, 140 (2007); Paul Harpur, *From Universal Exclusion to Universal Equality: Regulating Ableism in a Digital Age*, 40 N. KY. L. REV. 529, 529, 533-535 (2013); Stephanie M. Wildman, *Privilege in the Workplace: The Missing Element in Antidiscrimination Law*, 4 TEX. J. WOMEN & LAW. 171, 175-177 (1995) ("Heterosexual white women are often unconscious of our sexual orientation and race privileges and the ways in which we perpetuate heterosexism and racism even while we are fighting sexism.").

²¹See e.g. Gabriel Arkes, *Marriage and Mass Incarceration*, 37 N.Y.U. REV. L. & SOC. CHANGE 13, (2013) (finding a high number of transgender people have been incarcerated and finding "same-sex" marriage "does not encompass realities of trans people whose gender identity does not fit within a binary or is considered invalid by government agencies or courts."); Peter Blanck, Helen A. Schartz & Kevin M. Schartz, *Labor Force Participation and Income of Individuals with Disabilities in Sheltered and Competitive Employment: Cross-Sectional and Longitudinal Analyses of Seven States during the 1980s and 1990s*, 44 WM. & MARY L. REV. 1029, 1035, 1093 (2003); Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 FORDHAM URB. L. J. 927, 946 (1994).

²²See generally AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021 (ABA Publ'g 2020) (listing requirements of students at accredited law schools); NAT'L CONFERENCE BAR EXAM'RS & AM. BAR ASS'N., COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (Judith A. Gundersen & Claire J. Guback eds. 2020) (listing requirements of bar admission).

significantly impact ability to complete coursework at a specific pace, in a specific time-frame, and to a specific degree of excellence.²³

Success in the legal profession post-graduation, in turn, compels the ability to perform and function in rigidly structured interview processes, professional networking receptions, and intensely hierarchical workplaces in both public interest and corporate settings. Travel for networking events and interviews even within the same locality, social communication in white- and wealth-privileged environments, and elitist expectations for prestigious clerkship, summer associate, and fellowship programs all systematically and disproportionately exclude aspiring attorneys who are disabled, negatively racialized, queer or trans, or low-income.²⁴

Our aim must therefore be not to simply make adjustments to the work environment to allow more disabled and LGBTQ+ people to work within the system more or less as it is already, but rather, to create a legal profession and community that considers the needs of all of its members. In particular, the legal profession must dispense with a model of education, training, and early career mentorship that fails to support its most marginalized members—many of whom also come from the same communities as the people most in need of legal assistance and advocacy, and least able to receive it. Ultimately, the jurisprudential traditions that govern our profession as it is now must change from the roots on upward. It is not enough simply to seek to reform the system. We must replace it with one that is actually responsive and accountable to the people who have been harmed the most by the system as it is, and who have the most to lose from any changes to come. Justice requires nothing less.

V. RECOMMENDATIONS

Making this vision a reality will depend on research that allows for the development of effective solutions, along with the political will necessary throughout the legal community to implement such broad systemic changes. Unfortunately, there is no

²³See AM. BAR ASS'N, *supra* note 22; NAT'L CONFERENCE BAR EXAM'RS & AM. BAR ASS'N, *supra* note 22. See also Anthony Abraham Jack, *I Was a Low-Income College Student. Classes Weren't the Hard Part*. N.Y. TIMES MAG. (Sep. 10, 2019), <https://www.nytimes.com/interactive/2019/09/10/magazine/college-inequality.html> [<https://perma.cc/2E8V-ZWUN>] (discussing difficulties that low-income students and students of color in higher education).

²⁴See e.g., ERIC CHUNG ET AL., YALE L. SCH. & NAT'L ASIAN PACIFIC AM. BAR ASS'N, A PORTRAIT OF ASIAN AMERICANS IN THE LAW 39 (2017), https://static1.squarespace.com/static/59556778e58c62c7db3f84/t/596cf0638419c2e5a0dc5766/1500311662008/170716_PortraitProject_Single Pages.pdf [<https://perma.cc/7SHW-D96U>] (“Asian Americans do not obtain judicial clerkships in numbers comparable to their enrollment at highly ranked schools, and they are significantly underrepresented in the partner and leadership ranks of law firms. These selection processes—clerkships and law firm promotion—involve not only objective measures of ability, but also access to mentorship and subjective criteria such as likability, gravitas, leadership potential, and other opaque or amorphous factors....”); Elizabeth B. Cooper, *The Appearance of Professionalism*, 71 FLA. L. REV. 1, 3-6 (2019) (discussing how women, people of color, and LGBTQ people face many barriers in the legal profession, including dominant expectations of appearance in the legal workplace and implicit biases); Austin Howard, *Networking Away the American Dream: How Reinterpreting Title VII Can Reduce Employer Reliance on Exclusive Networks in Hiring and Broaden Access to Professional Opportunity*, 41 CARDOZO L. REV. 721, 722 (“[E]mployment opportunities that applicants have access to are often directly tied to the socioeconomic make-up of the networks they are born into.”); Jacqueline M. O’Byrant & Katharine Traylor Schaffzin, *First-Generation Students in Law School: A Proven Success Model*, 70 ARK. L. REV. 913, 931-35, 947 (2018) (discussing barriers faced by first generation students, who are more likely to be low-income and students of color, before and throughout law school); E. Ann Puckett, *How Potential Employers Approach Diversity: A Survey of Law Students in Georgia*, 69 U. PITT L. REV. 509, 519 (2008) (discussing law students’ fear of disadvantages accompanied with disability disclosure in interviews and lower likelihood of job offers among students with disabilities).

indication that discrimination will wait for research to catch up, or that the sort of measures that the profession has already tried will suddenly become more effective in the meantime.

In the interim, therefore, we as members of the disability and LGBTQ+ communities as well as the legal profession make the following recommendations for how to more effectively respond to structural oppression in the workplace:

I. EMPLOYERS MUST DEVELOP A BROADER UNDERSTANDING OF WHAT WORKPLACE DIVERSITY, INCLUSION, AND ACCESSIBILITY MEAN

Employers, and more specifically recruitment and human resources staff, need to be clear on the fact that true diversity and inclusion require ongoing effort. An individual employer or manager should therefore engage in their own research, if on a smaller scale than the authors of this study. This effort is especially crucial for staff at nonprofit agencies that specifically or disproportionately serve members of the same communities they are trying to recruit from, as their knowledge or ignorance will also affect how well their organization can serve their client base.

Research can include educating oneself on specific types of disabilities and relevant accommodations as well as universal design practices. Human resources and diversity professionals should also take the time to learn more about the communities they are seeking to recruit from, and especially about the experiences (in the workplace and more generally) of people living at the intersection of multiple forms of structural oppression. Organizations can and should pay members of the affected communities for professional consultations where possible. There is also a wealth of free material available online in the form of countless people's personal accounts, webinars, and community discussions on various social media platforms.²⁵

2. ATTORNEYS AT ALL LEVELS OF SENIORITY MUST DEMONSTRATE SOLIDARITY WITH OTHER MARGINALIZED ATTORNEYS, INCLUDING ACROSS COMMUNITIES

Unfortunately, within every marginalized community, there are internal hierarchies that we can easily fall into upholding despite ourselves. Within the disability community, for instance, conventionally attractive people with physical or sensory disabilities enjoy a higher status than neurodivergent people, particularly those with highly stigmatized conditions such as bipolar disorder or psychosis as discussed earlier.²⁶

²⁵See e.g., Lydia X. Z. Brown, *Laboring for Disability Justice & Liberation: Resources*, AUTISTIC HOYA, <https://autistichoya.net/resources/> [<https://perma.cc/Z5B3-5B2V>]; The Abolition & Disability Justice Collective, <https://abolitionanddisabilityjustice.com/> [<https://perma.cc/J6GN-PA8L>]; HEARD, THE REVOLUTION MUST BE ACCESSIBLE: TIPS & ADVICE FOR ORGANIZERS: A GUIDE FOR BUILDING ACCESS-CENTERED ONLINE MOVEMENT EDUCATION (2020), <https://www.canva.com/design/DAEN6OvXkyE/ztfCgflk4Kv0557rP554A/view?>

[<https://perma.cc/8P8P-HC8Z>]; Sins Invalid, *Curriculum*, <https://www.sinsinvalid.org/curriculum> [<https://perma.cc/8XNJ-E88Q>]; Health Justice Commons, *Training and Course Overviews*, <https://www.healthjusticecommons.org/training-and-course-overviews-1> [<https://perma.cc/4K4Y-XBAQ>]; Fireweed Collective, <https://fireweedcollective.org/> [<https://perma.cc/F6TS-FHAG>] (includes publications, webinar offerings, and crisis toolkit); Dustin P. Gibson, *Offerings*, <https://www.dustinpigibson.com/offerings> [<https://perma.cc/43PT-AQMY>]; Lee, "How to be an Ally to Disabled & Neurodiverse Folks in Activist & Academic Communities," ACCESS CULTURE, Jul. 6, 2012, <https://accessculture.wordpress.com/2012/07/06/how-to-be-an-ally-to-disabled-neurodiverse-folks-in-activist-academic-communities/> [<https://perma.cc/392T-CR9C>]; Critical Design Lab, <https://www.mapping-access.com/> [<https://perma.cc/3586-F2QK>]; Movement for Access, Safety & Survivors: The MASS Collaboration, SUPERVISORY GUIDES: CREATING A TRAUMA-INFORMED AND DISABILITY INCLUSIVE WORKPLACE (2016), <https://barcc.org/information/resources/providers> [<https://perma.cc/KG5P-4KRF>].

²⁶See sources discussed *supra* note 12.

Similarly, a distressing phenomenon within the LGBTQ+ community is for more privileged members to disavow subsections of the community, specifically those that fall in the categories following the “LG” part of the acronym (in decreasing order of recognition and acceptance).²⁷ This is to say nothing of the antagonism between entirely different marginalized populations, including between the disability community and LGBTQ+ community as a whole.

It is no surprise, then, that many people whose identities leave them with only conditional acceptance amongst their colleagues attempt to safeguard or improve their status by perpetuating these divisions and internal hierarchies.²⁸ Counterintuitively in the context of our current, competitive culture, though, our position as individuals can only begin to feel less precarious if we challenge this dynamic to ensure that no type of person is inherently inadequate or unworthy of respect and inclusion. Effective resistance to division and disavowal can be as direct as standing up for colleagues facing discrimination and as everyday as refusing to make efforts to “pass” as able-bodied, neurotypical, straight, or cisgender.

3. LAW SCHOOLS, AFFINITY GROUPS, AND MENTORS MUST PROMOTE SELF-ADVOCACY RATHER THAN RESPECTABILITY AMONG ATTORNEYS FROM MARGINALIZED COMMUNITIES

At the same time that legal professionals and organizations may recognize that structural oppression is a problem in a general sense, many still make the mistake of encouraging individual disabled, queer, or otherwise marginalized attorneys to accept or ignore rather than challenge discriminatory beliefs and practices. People and organizations with power will rarely, if ever, make the effort and sacrifice necessary to fix widespread problems that are beneficial, or even just comfortably familiar to them, no matter how much those with less attempt to fit in and appease them.²⁹ Therefore, teachers, senior attorneys, and professional associations should make a practice of helping younger

²⁷See e.g., Raquel S. Craney et al., *Bisexual Women’s Discriminatory Experiences and Psychological Distress: Exploring the Roles and Coping and LGBTQ Community Connectedness*, 5 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 324, 326 (2018) (discussing discrimination and exclusion of bisexual people from both gay and lesbian and heterosexual communities and lack of connectedness to LGBTQ community); Susan B. Marine & Z. Nicolazzo, *Names That Matter: Exploring the Tensions of Campus LGBTQ Centers and Trans* Inclusion*, 7 J. DIVERSITY HIGHER EDUC. 265, 266 (2014) (“[M]any have argued the movement for LGBTQ rights in the United States has been exclusively focused on the concerns of gay and (to a lesser extent) lesbian people”); George Johnson, “White gay privilege exists all year, but it is particularly hurtful during Pride,” NBC, Jun. 30, 2019, <https://www.nbcnews.com/think/opinion/white-gay-privilege-exists-all-year-it-particularly-hurtful-during-ncna1024961> [<https://perma.cc/3Q8M-UWDY>]; Meredith Talusan, “45 Years After Stonewall, the LGBT Movement Has a Transphobia Problem,” AM. PROSPECT, Jun. 26, 2014, <https://prospect.org/power/45-years-stonewall-lgbt-movement-transphobia-problem/> [<https://perma.cc/62M7-W45W>].

²⁸See Erik Bleich et al., *Leveraging Identities: The Strategic Manipulation of Social Hierarchies for Political Gain*, 48 THEORY & SOC’Y, 511, 516-18 (2021) (discussing how strategic leveraging is used in politics to form social distance among groups by offering political gains and elevation to some at the cost of separation from and stigmatization of another group); Lydia X. Z. Brown, *Letters to the Revolution* (2017) <http://www.letterstotherevolution.com/lydia-x-z-brown> [<https://perma.cc/7ZRV-6WVK>] (“One pattern I recognize is the constant practice of disavowal. We learn that we may only lay claim to our own humanity by doing so at the expense of someone else. [...] Always trying to gain power at the expense of someone else, to move the fences separating worthy/unworthy, desirable/undesirable, normal/defective a few inches over – still keeping someone else outside – instead of tearing down the walls.”).

²⁹See Tema Okun, *White Supremacy Culture*, DISMANTLING RACISM: A WORKBOOK FOR SOCIAL CHANGE GROUPS (2001) https://www.dismantlingracism.org/uploads/4/3/5/7/43579015/okun_-_white_sup_culture.pdf [<https://perma.cc/PCK9-J6NX>]; Lilia M. Cortina, *Unseen Injustice: Incivility as Modern Discrimination in Organizations*, 33 ACAD. MGMT. REV. 55, 58-64 (2008) (discussing factors that fuel discrimination, particularly among those who hold power).

attorneys self-advocate, even where the current norms of respectability and professionalism would require the contrary.

4. INSTITUTIONS WITHIN THE LEGAL PROFESSION MUST USE THEIR INFLUENCE TO END THE CULTURE OF SILENCE AROUND WORKPLACE DISCRIMINATION

Organizational leaders all too often do not live up to the responsibilities of their positions by failing to hold employees accountable for creating a hostile workplace, sometimes even after repeated instances of discrimination. The widespread practice of buying the silence of victims through nondisclosure agreements, or simply through the threat of harming their reputation, further covers up, and therefore enables, workplace discrimination.³⁰ If queer and disabled attorneys are lucky enough to learn about long-standing patterns of discrimination at a given organization in advance of working there, it is generally only through private conversations with people who have experienced it firsthand and wish to remain anonymous.³¹

As long as employers shield their institutional reputations by protecting workplace abusers at the expense of their victims, other institutions within the legal profession must stand up for its most vulnerable members. This can include providing training and advocacy to attorneys on how to avoid effectively coercive gag clauses in cases involving discrimination.³² It could also involve such institutions deliberately but confidentially collecting information about marginalized attorneys' experiences with local and large nationwide employers.³³ From there, they could put pressure on employers with known histories of discrimination to change by refusing to allow them to participate in events such as recruitment fairs or trainings, effectively excluding them from the legal community, until they remedy the source of the problem.

³⁰See Blanck, et al., *Workplace Accommodations*, *supra* note 1, at 540; Natalie Dugan, #TimesUp on Individual Litigation Reform: Combatting Sexual Harassment through Employee-Driven Action and Private Regulation, 53 COLUM. J.L. & SOC. PROBS. 247, 248 (2020); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 929-931 (2006).

³¹Many marginalized people fear to speak openly about discrimination due to concerns about workplace retaliation, which accounted for forty-two percent of discrimination complaints in 2013. Romella Janene El Kharzazi et al., *Retaliation—Making it Personal*, U.S. EQUAL EMP. OPP. COMM., <https://www.eeoc.gov/retaliation-making-it-personal> [<https://perma.cc/3Q7Y-Y3EV>].

³²See e.g., *Your Rights: Non-Disclosure Agreements (NDAs)*; WORKPLACE FAIRNESS, <https://www.workplacefairness.org/nondisclosure-agreements> [<https://perma.cc/J83N-9WLA>].

³³See generally Blanck, et al., *First Phase*, *supra* note 1.