

The Paradox of Diversity and Inclusion

by

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“What gets measured, gets improved.” Peter Drucker.

Business guru Peter Drucker has argued businesses cannot improve without measuring performance. In the realm of diversity and inclusion, some would argue we cannot advance the cause of diversity and inclusion without measuring our return on investment (ROI). But what should we measure? What return are we trying to achieve? What are we assuming by what we measure?

In the 1930s and 1940s, the Harvard University Business School embraced the concept of guiding business strategies with a quantitative “management by the numbers.” A young contemporary of Peter Drucker, Robert S. McNamara, was an eager disciple. At the age of 24, McNamara became the youngest assistant professor at the Harvard Business School and then went on to use these quantitative principles to vastly improve logistical efficiency and mission planning in the Army Air Corps during World War II. In 1946, he and his “Whiz Kids” team joined and turned around a floundering Ford Motor Co. with this same rational discipline. At a time when most auto manufacturers believed “safety does not sell,” McNamara justified the installation of padded dashboards, collapsing steering wheels, tempered and laminated glass, seatbelts, and other safety features by calculating the potential aggregate costs to Ford of human deaths and how that cost could be reduced by these new safety features. In 1961, after President John F. Kennedy appointed him as Secretary of Defense, McNamara used this same “management by the numbers” approach in the prosecution of the Vietnam War under Presidents Kennedy and Johnson and counted dead bodies as the measure of the war’s progress.

Later in life, however, McNamara reassessed, met with his Vietnam War counterparts, and tempered his earlier devotion to “management by the numbers.” As described by Phil Rosenzweig in his essay, “Robert S. McNamara and the Evolution of Modern Management,” (December 2010), <https://hbr.org/2010/12/robert-s-mcnamara-and-the-evolution-of-modern-management> (as found on March 6, 2019), McNamara returned to Harvard with a more humble perspective:

In 2005, months before his 89th Birthday, McNamara returned to Harvard Business School and spoke with students on the subject of decision making. Among the lessons he stressed: That for all its power, rationality alone will not save us. That humans may be well-intentioned but are not all-knowing. That we must seek to empathize with our enemies, rather than demonize them, not only to understand them but also to probe whether our assumptions are correct.

By 2005, McNamara had seen how his North Vietnamese body counts misled and blinded him from the shared human motivations of all sides of the war. These callous statistics and the dead body images on the nightly news inflamed opponents, citizens, and the world and did not advance McNamara's goal of peace. By labeling the North Vietnamese the "enemy," he could not see the similarities of the North Vietnamese's unyielding struggle to rid their country of the United States to our own Patrick Henry's anti-British revolutionary declaration, "give me liberty or give me death." Nor could he appreciate that the body counts were as irrelevant to the North Vietnamese as the loss of more than 2% of our country's population in our own civil war. The reduction of the North Vietnamese to a caricature of evil allowed our soldiers to kill but prevented them from seeing the common humanity, hopes, fears, courage, hate, and grit that naturally arises in all of us when our friends, comrades, and loved ones are killed on or off the battlefield.

Even in the automotive arena, McNamara saw how his devotion to rationing resources by the numbers looked heartless ("profits over people") to consumers and jurors when Ford was hit with a \$128 million verdict in a Pinto fuel tank fire case in 1978. McNamara assumed that the dollar amount an auto maker spends on safety should be proportional to the dollar value of the lives saved. At Ford, he took government estimates on the value of life and calculated how much Ford should spend on safety to match the value of the lives saved by each safety feature. He never appreciated how cold-hearted investments in safety based on a theoretical price of life would appear to a family who lost a loved one or to a jury deciding whether Ford should have spent a few cents more to make its cars safe.

It is easy to measure. But it is hard to know what to measure and why.

Let's start with why. Why should lawyers and law firms in the business of law care about diversity and inclusion? Some might say clients are requiring diversity and inclusion and therefore we must embrace it to maintain our inflow of legal business. Some might say it is necessary to attract and retain the best and brightest lawyers in this diverse competitive marketplace. Some might say reflecting what America looks like will improve perspectives and problem-solving. Some might say that diversity and inclusion are the morally right things to do and therefore should be a necessary part of every lawyers' and law firms' goals.

In each instance, we could find a metric that would measure our investment and success in achieving these goals. Client generation. Revenues. Headcounts. Retention. Client reviews. Awards and recognitions.

But like McNamara, we would be blinded by our assumptions.

Diversity and inclusion is not like revenues and profits. It is not a number. It is about trust. Can we be different and still trust each other as members of the same team? Or are we limited to seeing the stigma of each other's labels and assuming we can never be trusted friends or colleagues?

We humans are tribal by nature. We find similarities to identify with our tribe. At the same time, we use differences to distinguish our group from other groups. Race. Ethnicity. Gender.

Education. Age. School. Team. Place. Citizenship. Political party. Wealth. Job. We instantly label people and assume they all have certain attributes based on that label. We see difference not only to distance ourselves from “others” but also to reinforce our identity with our own tribe. Letting down our barriers and inviting “others” to be a part of our tribe, risks losing our identity and losing our tribe. So long as we view “others” as not part of our tribe – “diverse” – we cannot embrace them as part of our tribe – “inclusion.”

This is our challenge. Diversity and inclusion are contradictions. Paradoxically, as lawyers, we bear the special responsibility of both disrupting and keeping our society and all of its contradictory micro-tribes together under a rule of law. To embrace the rule of law envisions everyone is on the same team. All of us equally subordinate to a consistent set of team rules and not subject to disparate treatment based on the whims, biases, or selfish motives of the more powerful among us.

Under a rule of law, we lawyers use commonly held beliefs and principles to justify the creation of power and to move the powerful to new perspectives.

As advocates, we give voice to those who are different or think differently. We mend tears in our social fabric and lower swords by reframing and proposing paths forward that align with the values, constitution, laws, and agreements that we hold in common. In doing so, we create new acceptable norms, new accommodations, and a new trust derived from our shared beliefs.

As transactional lawyers, we similarly use the parties’ shared past, shared goals, and shared vision to create new agreements and common foundations from which the parties can trust each other to take future risks together.

As mediators, arbitrators, and judges, we help parties see past labels, step beyond their entrenched battle lines, and view themselves as part of a common heritage and system of rules and conventions that can be balanced in an agreed or more agreeable manner from this day forward.

We lawyers are fundamentally agreement makers. On the litigation side, we agree with our opponents and settle or get plea bargains in 98% of the cases filed and even in the 2% we try, we seek agreements with the judge or jury. On the transactional and regulatory side, we openly seek agreements to smoothly plan for future risks and benefits.

Agreements require mutual trust. Every new idea, new plan, and new challenge starts with one person. It never grows beyond that one person unless trusted by another. Small group ideas never become majority ideas unless trusted by the larger majority. In each step, the mutual trust grows from the parties’ common foundations. In his book, “The Rules of Influence: Winning When You’re in the Minority,” Professor William D. Crano describes this common foundation in terms of belonging to the same social, legal, or moral cultural stream and erasing our “otherness.” “For the minority to influence the majority, it must persuade the majority that ‘we’re all in this together, we are part of the larger group.’ This is the first and most critical rule of minority influence.” We cannot change hearts and minds – and build bridges between people – if we are “others.”

Our strength as lawyers lies in our training to see more than one perspective. We reframe. We redefine. We reclassify. We reexamine assumptions to create new combinations and perspectives that includes all of us in a future derived from what we have in common.

For us, diversity and inclusion are at the heart of what we do and what our fellow citizens expect of us. We recognize that a single unified perspective is not the goal of a democratic society. Our strength and our growth as a society lies in our perpetual differences and conflicts. New ideas. New levels of respect. New balances of power. New appreciations of difference and commonality. In a healthy democratic republic, conflict is essential. But like the symbiotic concepts of diversity and inclusion, the conflict will be counter-productive to the collective interests of the group unless it is tethered to the common principles and foundational beliefs of the group.

Our fellow citizens expect us to see beyond labels. The rule of law is the antithesis of a rule of power that changes the rules according to how the powerful among us arbitrarily label certain members of the group. Under the rule of law, we believe no one tribe within our society has a monopoly on defining justice. The rule of law assumes we are all part of the same tribe and that the same rules should apply to all of us in equal measure.

Peace, safety, and the rule of law are neither absolute nor permanent. Each is a relative feeling of trust. It is a feeling of whether we view each other as being on the same team, responsible to each other, and willing to be vulnerable to each other. Warriors can pave the way to peace, safety, and the rule of law but their unchecked conquering power is the direct opposite of a safe, peaceful, and rule of law democracy.

We feel at peace when we do not think we need to arm ourselves and physically protect ourselves from our neighbors and designated “enemies.”

We feel safe when we do not think we must test every carton of milk before we drink it and can trust the farmers, the milk producers, the wholesalers, the local markets, and local proprietors who provide that milk to us for purchase.

We feel protected by the rule of law when we can see and understand the rules, can speak and be heard, and can feel respected and treated the same by the people enforcing the law on the street, by the courts, and by the legislative and executive bodies creating the laws.

It is a feeling, not an immutable fact or number. It is a feeling of power and control and not a feeling of fear. It is a feeling in the present and not in the past. It is feeling that is relative, changeable, and dependent upon the circumstances of the moment.

It is a feeling that can change over time. In different wars, Britain, Japan, Germany, and Italy were once our mortal enemies and now are our trusted friends. China and Russia were once our allies and trusted comrades in arms and are now our suspect enemies.

During World War II, Japanese were so distrusted that they had to be removed from the West Coast and held in prison camps in inland United States. Now they are U.S. Senators and leaders in our government and respected trading partners.

The difference in each instance is trust. When we believe we are on the same team, with common goals, we can trust each other in ways that enemies never can. How we characterize and view each other profoundly changes our feelings of trust.

When President Abraham Lincoln faced a divided country he devoted both of his inaugural addresses to reinforcing and underscoring what both sides had in common. In his first inaugural address, he appealed to the notion that we can disagree and still be friends:

“I am loathe to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.”

In his second inaugural address he reiterated a compassion for all sides and their common task of rebuilding lives, again, as members of the same team with common goals and aspirations:

“With malice toward none, with charity for all, with firmness in the right as God give us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.”

So what should we measure and why?

Diversity and inclusion is about trust. The more curious we are about those with whom we disagree, the less we view them as “enemies” and “others” with whom we can never associate. The more empathetic we are, the more we can appreciate the perspective of others and their overarching common humanity despite our simple labels and categorizations of different sub-tribes within our group. The more we realize that nothing remains the same and everything evolves from the day we are born to the day we die, the more we can give space to change and appreciate that each of us cannot remain immutably unchanged. The more we listen (and not tell), the more vulnerable we are to hearing what we might not want to hear. But it is through this exchange that we build the trust and empathy we need to embrace each other as members of the same team.

This is scary. No one wants to be vulnerable to losing our identity, our tribe, our beliefs, our biases. No one wants to believe they could be wrong or wants to hear others telling them they are wrong. Everyone wants to believe there are islands of beliefs and principles they can anchor themselves to that cannot change in a sea of constant change. Still, our willingness to trust and be vulnerable is the real test and measure of the diversity and inclusion. We cannot trust and cannot build trust unless we have the courage to be vulnerable and to extend our empathy and

compassion to those beyond the walls of our own tribe, with no guarantee of any positive return. Reinforcing those walls and protecting ourselves against vulnerability and disappointment will never build trust. To tear down those walls, we must acknowledge their existence and boldly and curiously step beyond those protective walls to embrace “enemies” and “others” as part of one team – our team. In doing so, we give others the opportunity to reciprocate with courage and kindness. We cannot dictate to others to do what we are unwilling to do ourselves. As scary as it may be, someone must begin the process of listening without judgment and risking the possibility that our perspective may change. The comfortable feeling of peace, safety, and the rule of law cannot exist without allowing enemies to become friends.

To the extent we can openly disagree and still be friends that is the true measure of diversity and inclusion. It is about trust. It is about being on the same team. And it is about seeing beyond labels and appreciating what we have in common. As Abraham Lincoln once said: “The best way to destroy an enemy is to make him a friend.”

Erase The Lines . . . We're All In This Together

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Great attorneys unite. They do not divide. Yet in our current culture, the role of lawyers within – and their value to – society has changed so that too often we are only adversaries rather than mediators or consensus builders. If we are able to build ties across lines of difference, this can benefit our clients, our profession, our society and ourselves. Here, Kanazawa explains just how that could happen and why we ought to try to do it.

I. Introduction

The changing perception of lawyers is challenging our place in society. From the lofty perch of “guardians of the law,”¹ lawyers have fallen to a point where only twenty-one percent of the public believes lawyers, as a profession, have high or very high honesty and ethics (by comparison, more than eighty-five percent of the public thinks nurses, as a profession, have high or very high honesty and ethics).²

It was not always this way, and it need not continue this way.

In 1952, the media accused Senator Richard Nixon of using campaign funds for personal purposes, and Nixon was struggling to retain his position as the Vice Presidential candidate on the Dwight D. Eisenhower Republican Presidential ticket. To regain his credibility with the American people, Senator Nixon went on television and delivered his famous “Checkers Speech” in which he justified his actions by relying, in part, on a legal review of his expenses by a law firm, Gibson Dunn & Crutcher.³

1. The change in the perception of lawyers and their role in society is not just external. It is internal as well. The change is reflected in the evolving Preamble to the American Bar Association’s Model Rules of Professional Responsibility. The 1908 Preamble to the ABA Canons of Professional Ethics (last modified in 1963) emphasizes the role of lawyers in providing stability to the courts and democratic self-government by dispensing justice in a manner that gives the public “absolute confidence in the integrity and impartiality of its administration.” The 1908 Preamble also notes that the “maintenance of justice pure and unsullied . . . cannot be so maintained unless the conduct and motives of the members of our profession are such as to merit the approval of all just men.” CANONS OF PROFESSIONAL ETHICS 1 (AM. BAR ASS’N 1908), http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf (last visited September 25, 2016). There is no mention of clients in the 1908 Preamble. Similarly, the 1969 Preamble to the ABA Model Code of Professional Responsibility emphasized the role of lawyers in protecting the rule of law. “Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system.” MODEL CODE OF PROF’L RESPONSIBILITY 6 (AM. BAR ASS’N 1980), <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf> (last visited September 25, 2016). Again, there is no mention of clients. By contrast, the current Preamble to the Model Rules of Professional Conduct emphasizes a lawyer’s representation of clients and diminishes a lawyer’s role in maintaining justice to that of a public citizen. The current Preamble begins with the sentence, “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” The concept of a lawyer playing “a vital role in the preservation of society” which “requires an understanding by lawyers of their relationship to our legal system” does not appear until the thirteenth paragraph of the 13 paragraph current Preamble. MODEL RULES OF PROFESSIONAL CONDUCT 3 (AM. BAR ASS’N 1983), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Aug. 9, 2016). Our own vision of our role has changed from primarily playing “a vital role in the preservation of society” to primarily “a representative of clients.”

2. See *Honesty/Ethics in Professions*, GALLUP (Dec. 6, 2015), <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx>.

3. See Richard M. Nixon “Checkers Speech,” The History Place: Great Speeches Collection, <http://www.historyplace.com/speeches/nixon-checkers.htm> (last visited Aug. 9, 2016).



As a society, we have changed. We live among a divided citizenry at war with each other.

In 1954, Boston attorney Joseph Nye Welch, in televised hearings, stopped the rabid anti-communist crusade of Senator Joseph McCarthy with his impromptu defense of a young lawyer (Fred Fisher) who worked for Welch's firm and had once been a member of the National Law Guild. Welch's simple words caused the audience to applaud and turned public opinion against Senator McCarthy: "Until this moment, Senator, I think I never really gauged your cruelty or your recklessness [...] Let us not assassinate this lad further, Senator. You have done enough. Have you no sense of decency, sir? At long last, have you left no sense of decency?"⁴

Today, can you imagine any politician calling on a lawyer to regain his credibility with his or her voters? Can you imagine any lawyer having the gravitas to stop a crusading Senator with an impromptu defense of another lawyer in the middle of Senate hearing?

Indeed, in 2015, when New Jersey Governor Chris Christie retained Gibson Dunn & Crutcher to investigate and clear Governor Christie of any wrongdoing in the George Washington Bridge lane-closing scandal, the \$8 million spent on the law firm and its "unorthodox approach" of overwriting witness interview notes resulted in a judge slamming the investigation for its "opacity and gamesmanship."⁵ The law firm's involvement gave Governor Christie no net gain in credibility before his constituents.

As a society, we have changed. We live among a divided citizenry at war with each other. We identify with our own silo communities and see other silo communities as dangerous to our nation. A recent Pew Research poll found our nation more divided than ever—ninety-two percent of Republicans are politically to the right of the median Democrat and ninety-four percent of Democrats are politically to the left of the median Republican; twenty-seven percent of Democrats and thirty-six percent of Republicans view the other party as a "threat to the Nation's well-being."⁶ We do not just disagree. We completely distrust the other side and consider them our enemy and our country's enemy.

On college campuses, there is an increasing tendency to listen only to those with whom we agree and to not tolerate those with whom we disagree.⁷ We live in different worlds yet demand that the world conform to our vision of the world.

4. *McCarthy-Welch Exchange ("Have You No Sense of Decency")*, American Rhetoric: Top 100 Speeches, <http://www.americanrhetoric.com/speeches/welch-mccarthy.html> (last visited Aug. 9, 2016).

5. Kate Zernike, *Judge Faults Firm's Failure to Keep Notes in Christie Bridge Investigation*, N.Y. TIMES, Dec. 16, 2015, http://www.nytimes.com/2015/12/17/nyregion/judge-faults-firms-failure-to-keep-notes-in-christie-bridge-investigation.html?_r=0.

6. *Political Polarization in the American Public*, Pew Research Center (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

7. See Catherine Rampell, *Liberal Intolerance is on the Rise on America's College Campuses*, WASH. POST (Feb. 11, 2016), https://www.washingtonpost.com/opinions/liberal-but-not-tolerant-on-the-nations-college-campuses/2016/02/11/0f79e8e8-d101-11e5-88cd-753e80cd29ad_story.html; see also Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC (Sept., 2015), <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>.

II. Public Perception

The public's view of our profession also has rightfully changed.

In the early 1970s, the Watergate scandal shattered public faith in the role of lawyers as “guardians of the law” and vital to the preservation of society. In an effort to reelect a Republican President, twenty-one lawyers, including the President of the United States, planned and later tried to cover-up a criminal break-in of the Democratic National Headquarters. These lawyers willfully broke the law rather than uphold the rule of law and shook the entire nation into demanding higher ethics from lawyers.⁸

In 1977, the U.S. Supreme Court's decision to open the door to lawyer advertising bolstered the image of self-interested greed among lawyers.⁹ Lawyers were now free to be merchants in the business of law and could advertise their partisan prowess for clients—rather than their role in upholding the rule of law. This simultaneously gave rise to the unique phenomenon of lawyer jokes in the United States and the empirically unsupported perception that lawyers are all greedy.¹⁰

The broadly-televised OJ Simpson case in the 1990's underscored a related perception that justice was for sale and the perception that those who could afford justice could purchase it, again undermining the view of lawyers as upholding the rule of law.¹¹

Atticus Finch in the popular 1960 book and 1962 movie *To Kill a Mockingbird* epitomized the positive image of lawyers, and these events and others tarnished that image.

What we do as lawyers has not changed. We are agreement-makers. We cross “enemy” lines and draft agreements that create mental constructs, which help our clients and others work cooperatively together in the present and future. We work with legislators and regulators to agree on societal rules and apply those rules in a manner that smooths the path for future development and growth. In litigation, we find ways to mend seemingly intractable tears and somehow seal agreements in ninety-eight percent of the cases filed.¹² In the two percent of cases we take to trial, we present evidence and arguments to encourage the trier of fact to see the picture of justice in our heads and agree with our version of the story. Indeed, the entire litigation process is an agreement to a process by which we can all—winners and losers—finally put a dispute behind us. We are agreement-makers. This has not changed.¹³

8. See Victor Li, *Watergate's Lasting Legacy is to Legal Ethics Reform, Says John Dean*, ABA JOURNAL (Mar. 31, 2014), http://www.abajournal.com/news/article/John_Dean_tells_Techshow_audience_how_Watergate_led_to_legal_ethics_reform/; see also *On-Demand CLE Comes to Minnesota*, HENNEPIN LAWYER (Dec. 31, 2014) (noting that mandatory CLE began in Minnesota in response to the concern about lawyer ethics in the wake of Watergate).

9. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

10. See Debra Cassens Weiss, *1980s-era Lawyer Jokes Were Unique to U.S., Sociologist Says*, ABA JOURNAL (Mar. 28, 2014), http://www.abajournal.com/news/article/1980s-era_lawyer_jokes_were_unique_to_us_sociologist_says/; see also Alex Beam, *Greed on Trial*, THE ATLANTIC (June, 2004), <http://www.theatlantic.com/magazine/archive/2004/06/greed-on-trial/302957/>; see also Paul F. Teich, *Are Lawyers Truly Greedy? An Analysis of Relevant Empirical Evidence*, 19 TEX. WESLYAN L. REV. 837 (2013).

11. See Michael Holtzman, *Is Justice for Sale?*, AVVOSTORIES (Nov. 4, 2015), <http://stories.avvo.com/money/is-justice-for-sale.html>; see also Sara Sternberg Greene, *Why Don't the Poor Trust Justice? Blame O.J. Simpson*, NEWSWEEK (Feb. 12, 2016), <http://www.newsweek.com/why-dont-poor-trust-justice-blame-oj-simpson-426072>.

12. See Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, A.B.A. LITIGATION ONLINE (2004), http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf.

13. Proponents of “procedural justice” use empirical studies to argue that people do not follow the law because of any “carrots or sticks” incentives but rather because they believe it is legitimate. This is more than simply being properly enacted according to the applicable rules. It also means having a dispute resolution system that gives complainants an opportunity to voice their complaint; processes disputes through a transparent and objective process; treats litigants with respect; and is staffed by people who are sincere. When these elements are present, empirical studies worldwide indicate that parties are satisfied and can move forward from disputes of the past, even when the decision is against them. See generally TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006). The lawyers' traditional role of upholding the rule of law consistently promoted this legitimacy. But, with the current emphasis on representing clients, the lawyer's role has been distorted into “winning” for their client without regard to the “procedural justice” that would assure litigants will trust and be satisfied with the outcome of our dispute resolution system.

What has changed is how we view ourselves. We have bought into the myth that justice is for sale and we are in the business of law. Telling ourselves and others that we are warriors and team champions fighting for our clients detracts from our central role as agreement-makers. Warriors are not agreement-makers. Sports team captains are not agreement-makers. They are by definition dedicated to defeating the opposition. They draw hard lines between themselves and their enemies. They strategize to undercut and exploit the weaknesses of their opponents. They train to intimidate and show no mercy for any who stand in their way. They are focused on their own goals and are hostile to the goals of the opposition. They selfishly want to win at the expense of the opposition.

It is difficult to trust someone who is selfishly dedicated to defeating you. You are constantly on guard and trying to figure out how they are outmaneuvering or cheating you. Consumers perceive used car salesmen, as merchants, as selfishly dedicated to defeating them. They just want to sell you a car to move their inventory and make money. They do not care if the car suits your needs or fits your budget. They just want your money. Warriors are noble for risking their own lives but are no different in their one-sided objectives.

By contrast, we trust, are open to, and are moved by those who appear to be acting selflessly.

Jerry Buss, the former owner of the Los Angeles Lakers NBA basketball franchise, put together ten NBA championship teams and fielded championship contender teams in almost every year that the Los Angeles Lakers were not the NBA champion. At his funeral, one of his business partners, Frank Mariani, revealed how he did it. Jerry would look at every deal from all sides. If the deal was not fair to all sides, he would not do it. In fact, in one deal, he agreed to the transaction and decided at the last minute that it wasn't quite fair, so he threw in an additional player in the trade to make it fair.¹⁴ As you can imagine, people who did business with Jerry Buss were probably more open and less guarded in doing deals with him. Selflessly thinking of others is disarming.

The movie *Invictus* dramatizes how Nelson Mandela understood the persuasive and uniting power of selflessly being a little above the fray when he became President of South Africa. After twenty-seven years of hard labor and isolation in prison under the apartheid South African government, revenge would be an understandable reaction when the government released Mandela and when South Africa elected him President. Instead, Mandela embraced the white Afrikaans sport of rugby and rallied the nation to support South Africa's rugby team at the 1995 Rugby World Cup, even though the majority of the country (and his primary constituency) was black, considered rugby a symbol of the apartheid past, and would normally root for teams opposed to the all-white (except for one black) South African Springboks team. Crossing lines that previously divided his country and personally punished him, Mandela worked with the white Springboks captain, François Pienaar, to have the white Springboks team train and befriend black South African youth across the country. By doing so, the black youth and white Springboks team began to identify with each other and erase the lines that separated them. In the final game of the 1995 Rugby World Cup, Mandela personally showed his identification with the team and their primary supporters, by wearing the green Springboks cap and shirt when he walked onto the field, as the President of the host country, for the final match. Eighty percent of the spectators in attendance were white South African supporters of the Springboks team. Rather than simply reversing the power balance between whites and blacks, Mandela erased the dividing lines by reaching across and embracing the white community through a sports and national lens that saw all South Africans as one.

This is what great attorneys do; they unite rather than divide. They put together complicated deals that address and enhance all parties' wants and needs. They listen and embrace the ideas of others, much like

14. See Ross Pickering, *VIDEO: Dr. Buss Memorial in Full, Featuring Speeches from Kobe, Shaq, Magic, Kareem, Phil, Riley, West, and More*, Lakerholicz.com, <http://lakerholicz.com/video-dr-buss-memorial-in-full-featuring-speeches-from-kobe-shaq-magic-kareem-phil-riley-west-and-more/2013/02/22> (last visited Aug. 9, 2016).



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improv artists adept at taking over with a “yes and . . .” attitude that helps move everyone forward.¹⁵ Even at trial, they try desperately to understand the trier of fact so that the pictures they paint and the colors they choose to illustrate their story will resonate with their deciding audience. Great attorneys seek common ground and an agreement, not division.

This is our essential contribution to society. We remind people of what we have in common. Whether it is the rules, laws, private agreements, or the social norms and conventions developed through common law, lawyers use what we have in common to fashion new agreements or put old disputes to rest. Our power lies not in our weapons or wealth but in our words and the degree to which our words help our fellow citizens see commonality and agree.

We are not scientists. We do not have the luxury of time to find some evolving “truth.” Our fellow citizens cannot wait for years of research and experimentation to move forward. They need an agreement now. They need lawyers who can cross lines, listen to the opposition, build trust, and creatively shape agreements that will allow us to cooperate and put disputes behind us now.

Building trust is foundational.

Every new idea begins as a minority perspective: that the earth is not flat; that sanitation prevents disease; that women and people of color should have the right to vote; that a certain look or style is beautiful; and we should treat people as equals. All of these ideas began with just a handful of believers. The majority eventually accepted some of these ideas. Why? Professor William Crano has devoted his professional life to exploring this question—“how the weak influence the strong, how the minority changes the majority”—and has found:

To be effective, the weaker group must establish a link with the group in power. This is critical because the majority must accept the outsiders as part of itself, as a part of the in-group, before it will give them a fair hearing. A minority that fails to be accepted as the in-group is unlikely to have much chance of moving the larger group. For the minority to influence the majority, it must persuade the majority that “we’re all in this together, we are part of the larger group.” This is the first and most critical rule of minority influence.¹⁶

We trust those who are like ourselves—people with whom we perceive share our values and principles.

Our greatest statesmen, leaders, and lawyers help us to see commonality where it might not be obvious, and they find ways to unite us with common values and common principles that build trust and empathy between people seemingly at odds with each other.

At the beginning of World War II, we experienced two diametrically opposite approaches to dealing with people in the United States that looked like our enemy, Japan. On the West Coast, West Coast Area Commander General John L. DeWitt declared, “A Jap is a Jap [...] There is no way to determine their

15. See KELLY LEONARD & TOM YORTON, *LESSONS FROM THE SECOND CITY: YES, AND: HOW IMPROVISATION REVERSES ‘NO, BUT’ THINKING AND IMPROVES CREATIVITY AND COLLABORATION* (2015).

16. See WILLIAM CRANO, *THE RULES OF INFLUENCE: WINNING WHEN YOU’RE IN THE MINORITY* 55-56 (2012).



We owe the public more. Our oath of office is not simply a license to earn money in the business of law. By pledging to uphold the constitution and the rule of law, we joined a profession dedicated to keeping our society together by reminding our fellow citizens of values and principles we hold in common.

loyalty.” With this sentiment, General DeWitt lobbied for and used President Roosevelt’s Executive Order 9066 to round up and intern 120,000 people of Japanese descent (two-thirds of whom were American-born U.S. citizens) in the Western States. All things Japanese and anything that could remotely be used for espionage or sabotage were confiscated and destroyed. With usually only a day’s notice to pack a single suitcase for the internment, most of the Japanese lost everything they owned to scavengers and opportunists who paid, at best, pennies on the dollar for the property and businesses of the soon to be incarcerated Japanese. To General DeWitt, the battle line he drew was appropriate. The Japanese’s losses of liberty and property were only fitting for these people who looked like the enemy.¹⁷

In Hawaii, Military Governor General Delos Emmons drew a different line. He declared, “We must distinguish between loyalty and disloyalty among our people,” and risked his career by defying the President and refusing to intern the 140,000 Japanese in Hawaii (except for around 1,000 potential enemy sympathizers). He believed trust built trust and set in motion the creation of a nearly all-Japanese 100th Battalion and 442nd Combat Regimental Team, which would fiercely battle throughout Europe and became the most decorated military unit in U.S. history. To General Emmons, the line was loyalty to the United States regardless of how one looked.¹⁸

The lines that DeWitt and Emmons drew affected what they saw. Both Generals used the same intelligence to justify their actions. There were rumors but no documented instances of espionage and sabotage by the Japanese. General DeWitt (and Attorney General and later Governor and U.S. Supreme Court Justice Earl Warren) used this absence of espionage and sabotage as proof that it was coming and therefore the internment was necessary. General Emmons offered the same facts as proof that the Japanese were loyal and that the United States could trust them.¹⁹ The difference was simply where they chose to see the lines that divide people.

17. See generally Densho, <http://www.densho.org/> (last visited Aug. 9, 2016); see also *The Untold Story: Internment of Japanese Americans in Hawaii*, <http://hawaiiinternment.org/untold-story/untold-story> (last visited Aug. 9, 2016); RICHARD REEVES, *INFAMY: THE SHOCKING STORY OF THE JAPANESE INTERMENT IN WORLD WAR II* (2015); John DeWitt, Densho, http://encyclopedia.densho.org/John_DeWitt/ (last visited Mar. 25, 2016).

18. See generally TOM COFFMAN, *HOW HAWAII CHANGED AMERICA* (2014); see also *Facts About the 442nd*, 442nd Regimental Combat Team, <http://www.the442.org/442ndfacts.html> (last visited Aug. 9, 2016); Education Center, 100th Infantry Battalion Veterans, <http://www.100thbattalion.org/> (last visited Aug. 9, 2016); Densho Encyclopedia *Delos Emmons*, http://encyclopedia.densho.org/Delos_Emmons/ (last visited Aug. 9, 2016).

19. See CRANO, *supra* note 16; see also COFFMAN, *supra* note 18.

On April 4, 1968, Robert Kennedy, then a U.S. Senator running for the Democratic Presidential nomination, landed in Indianapolis, Indiana, for a campaign stop and learned that a white man had shot and killed Dr. Martin Luther King, Jr. Although his campaign warned him not to make an appearance in a black neighborhood, Kennedy proceeded directly from the airport to that black neighborhood and stood on the back of a flat-bed truck to inform the unaware black audience of what he had just learned. He acknowledged that a white person had shot and killed Dr. King and said, “you could be filled with bitterness, and with hatred, and a desire for revenge. We can move in that direction as a country, in greater polarization [...] filled with hatred toward one another. Or we can make an effort, as Martin Luther King did, to understand, to comprehend, and replace that violence, that stain of bloodshed that has spread across our land, with an effort to understand, compassion, and love. For those of you who are black and are tempted to [...] be filled with hatred and mistrust of such an act, against all white people, I would only say that I can also feel in my own heart the same kind of feeling. I had a member of my family killed [...] he was killed by a white man.”²⁰

In one of the most remarkable impromptu speeches of all time, Bobby Kennedy created a common bond with all in attendance that cut through the more obvious black and white lines presented. He identified with his audience and brought them to a higher plane that united all in the memory of the love and compassion exhibited by Dr. Martin Luther King, Jr. and his own brother John F. Kennedy. This act of statesmanship—of bringing people together rather than dividing them—resulted in calm and no rioting in Indianapolis.²¹

As lawyers, when we choose to see ourselves as warriors dedicated to winning for our clients rather than more detached agreement-makers dedicated to justice for all, there are consequences. As warriors, we draw hard lines between our friends and enemies. As warriors, we are partisans and are indistinguishable from the divided world we live in. As warriors, we promote the interests of our side at the expense of those who disagree. As warriors, we do not trust the other side and do not expect the other side to trust us. As warriors, we are skeptical of our opponent’s honesty and ethics and expect our opponent to be similarly skeptical of our honesty and ethics. We both want to win. And by our partisanship, we both have diminished credibility with each other and with any third party.

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To be more, we need to be more than warriors. We need to be more than cheerleaders or team captains hailing the righteousness of our own team and taunting the illegitimacy of our enemies. To create real social change, we need to persuade those with whom we disagree. But they will not let down their guard or hear what we are saying if they and ourselves perceive us as warriors from an opposing side dedicated to defeating them. When we draw lines that include some but not all of us—e.g., Japs, Muslims, Christians, blacks, whites, poor, rich—we divide into teams with no empathy or trust for any other team but our own. We can and must do better. When non-Japanese stand up for Japanese, when blacks stand up for whites, when whites stand up for blacks, and when the powerful stand up for the weak, they reframe how we see each other and set the foundation for real change. They erase the lines and remind us that we are all in this together.

20. See Robert F. Kennedy, *Remarks on the Assassination of Martin Luther King, Jr.*, AMERICAN RHETORIC: TOP 100 SPEECHES, <http://www.americanrhetoric.com/speeches/rfkonmlkdeath.html> (last visited Aug. 9, 2016).

21. Will Higgins, *April 4, 1968: How RFK Saved Indianapolis*, INDYSTAR, Apr. 2, 2015, <http://www.indystar.com/story/life/2015/04/02/april-rfk-saved-indianapolis/70817218/>.